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1. *Bailey v. Poindexter's Ex'r, 55 Va. 132*

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Bailey v. Poindexter's Ex'r

Supreme Court of Virginia

January, 1858

No Number in Original

Reporter
55 Va. 132 *; 1858 Va. LEXIS 54 **; 14 Gratt. 132

Bailey & als. v. Poindexter's Ex'or.

Disposition: [1]** Judgment reversed.

Core Terms

slaves, emancipated, election, the will, slavery, bequest, manumission, questions, confer, rights, deed, supposed, loaned, wishes, legal capacity, civil rights, declare, void, intention of a testator, conditionally, distinctly, ascertain, manumit, assent, futuro, cases, policy of the law, twelve month, prescribed, provisions

Case Summary

Procedural Posture
Appellant individuals challenged a judgment of the trial court (Virginia), which declared that slaves and their increase be free at the death of the life tenant based upon a provision in a will.

Overview
The individuals challenged a decision which declared that slaves be freed at the death of a life tenant. The declaration occurred based upon a provision in a will that allowed the slaves to choose freedom to continued enslavement. On appeal, the court reversed and remanded, holding that it was for the master to determine whether to continue to treat his slaves as property, as chattels, or, in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed Negroes of the state were assigned. The court held that the testator could not impart to his slaves, as such, for any period, the rights of freed men and could not endow, with powers of such import as were claimed here. The court found that the provisions of the will respecting the manumission of the slaves, were not such as were authorized by law and were void.

Outcome
The court reversed an order of the trial court that ordered that slaves be freed after the death of the life tenant.

LexisNexis® Headnotes

Constitutional Law > Involuntary Servitude

HN1[] **Constitutional Law, Involuntary Servitude**

Slavery always imports an obligation of perpetual service, which only the consent of the master can dissolve. And the property of the slave is absolutely the property of his master, the slave himself being the subject of property, and as such saleable and transmissible at the will of the master.

Constitutional Law > Involuntary Servitude

HN2[] **Constitutional Law, Involuntary Servitude**

It is for the master to determine whether to continue to treat his slaves as property, as chattels, or, in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed Negroes of the state are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freedmen.

Constitutional Law > Involuntary Servitude

HN3[⬇] **Constitutional Law, Involuntary Servitude**

A master contemplating the manumission of his slaves might, no doubt, first ascertain their wishes on the subject, and if he pleased, then proceed to shape his course accordingly; and it could form no objection to a deed or will emancipating them, should it appear on the face of the instrument that the act of manumission is in conformity with their choice.

Headnotes/Summary

Headnotes

Wills -- Emancipation -- Dependent on Slave's Election -- Effect. * -- Testator provides in his will that the slaves loaned his wife for life, shall have their choice of being emancipated or sold publicly. Their emancipation is made by the will to depend upon their election to be free: And as slaves have no legal capacity to choose, the provision is void and of no effect.

[2]**

Syllabus

This was a bill filed in April 1854 in the Circuit court of New Kent, by Richmond T. Lacy, executor of John L. Poindexter, to obtain a construction of the will of Poindexter, and directions for the guidance of the executor. The heirs and devisees of Poindexter, and persons claiming under them, were the defendants in the suit. The difficulty in the construction of the will related to the provisions in relation to his slaves. The will was made in November 1835, and was admitted to probate in December of the same year. By the first clause of the will the testator gives to his nephew Jaqueline L. Poindexter the testator's interest in the tract of land on which said Jaqueline then lived; also a tract called Cedar Lane at the death of the testator's wife; and testator's negro woman Louisa and her children, Sarah, Martha and Barbary and their increase, also testator's Ratler filly, his new saddle and bridle, and his wearing apparel (except his watch), to him and his heirs forever. By the second clause he lent to his wife during her natural life or widowhood, his plantation Cedar Lane, and all the remainder of his property, after the payment of his just debts, and the legacies **[**3]** named in the will. He then directs his wife to pay, out of the property given to her, certain annuities during her life, amounting to ninety dollars, *and some other small sums. He also charged her with hiring out his servant Aaron to whomsoever he might choose to live with, and to pay to him at the end of every year all the money arising from his hire. He then left legacies, to be paid at the death of his wife; one to Ann Lewis Howle of one thousand five hundred dollars, and one to G. Bryan of five hundred dollars. And then comes the three following clauses:

"The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish that they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy their freedom; and if there should not be enough of the perishable property loaned my wife to pay off the legacies to Ann Lewis Howle and Georgianna Bryan, they are to be hired until a sufficient sum is raised to pay

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* **Wills -- Emancipation -- Dependent on Slave's Election -- Effect.** -- Slaves have no legal capacity to elect between freedom and slavery; and where it appears to have been the intention of the testator that the manumission is to depend on the election of the slaves, the bequest is void. This proposition laid down by the principal case was approved and followed in *Williamson v. Coalter, 14 Gratt. 394*; and both of these cases were cited in *Shue v. Turk, 15 Gratt. 256*, as authorizing the proposition.

But, in both the principal case and *Williamson v. Coalter, 14 Gratt. 394*, Moncure, J., dissented in a strong opinion in which Judge Samuel concurred.

And in Jones v. Jones, 92 Va. 590, 24 S.E. Rep. 255, it was said: "It is claimed that the true construction of the language used was to give Bob his right to elect to be free or to remain in slavery. And not being able as a slave, under the decisions in the cases of *Bailey v. Poindexter, 14 Gratt. 132*, and *Williamson v. Coalter, 14 Gratt. 394*, to make such election, the provisions of the will were inoperative, and he continued to be a slave. We do not think that this case presents the same question that was decided in those cases, but, if it did, we would not consider those decisions as precluding us from a re-examination of that question, since they are in conflict with the prior decisions of this court during a period of more than fifty years; were decided by a bare majority of the court, two judges dissenting in each case, and are so contrary to reason and to justice that we would hesitate long before we would hold that a slave could not elect to be free when that right was given him by his owner."

Contracts -- Slaves. -- In *Woodland v. Newhalls, 31 F. 434*, the principal case and *Stevenson v. Singleton, 1 Leigh 72*, were cited as holding that contracts to which a slave is a party are null and void.

the deficiency. If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly, and the money arising be equally **[**4]** divided between my sister Eliza Marshall, the children or heirs of my brother Carter B. Poindexter, my nephews William C. Howle and Daniel P. Howle, and my niece Nancy Bailey."

"If my wife should marry again, it is my wish she should have only one-third of the property loaned her, and the other two-thirds to be disposed of in the same manner as directed in the event of her death."

"If any of the servants loaned my wife should be refractory or hard to manage, I wish my executor to dispose of such at public sale, and the money arising to be funded or loaned out at six per centum per annum, and my wife to have the interest of it during her life, and at her death to go to the heirs of the personal property loaned her above mentioned."

On the same day on which the will was written, the following codicil was added: "I wish it understood that in the event of my negroes loaned to my *wife being emancipated at her death, and not sold for the benefit of my sister," &c., &c., the persons mentioned in a previous clause, "that my nephew Jaquelin L. Poindexter shall pay the sum of one thousand dollars, to be equally divided between them; and that I give him my plantation Cedar Lane **[**5]** on that condition."

The bill stated that the executor had delivered to the widow personal and perishable property appraised at one thousand one hundred and forty-six dollars and five cents, and twenty slaves, of whom several had died, and, between the death of the testator and that of the widow, thirteen slaves had been born. That the widow was dead, and that no part of the property put into her possession, except the slaves, had been returned to the executor or accounted for, and that he only received the slaves.

The bill was taken for confessed as to all the defendants; and the cause came on to be heard in November 1855, when the court held that the negroes whereof the testator died possessed, were by the terms of the emancipating clause in his will contained, absolutely free at the death of the life tenant, and that it was not proper or necessary to put said slaves to their election. And also that the issue of the females born after his death and in the lifetime of his widow, were also free at the death of the life tenant, said issue being embraced by the general terms of the emancipating clause of said will. And certain accounts were ordered which need not be stated. **[**6]** From this decree, the defendants applied to this court for an appeal, which was allowed.

The case was argued at great length, in writing, by Gregory, Pierce, John Howard and Robertson, for the appellants, and by Branch, Crump and Patton, for the appellees. The reporter has found it impossible to combine in one all the arguments on a side; and equally impossible to insert all of them. He is indebted *to Mr. Howard for the note of his argument; and has selected that of Mr. Patton on the part of the appellees, because it is the last which will appear from him; and Judge Robertson's, because it was in reply to Mr. Patton.

John Howard, for the appellants, having examined the question as to the true construction of the will, and insisted that the bequest of freedom to the slaves was made dependent upon their election to become free, then proceeded as follows to consider what is the legal status of the negro slave, and whether he has the right and legal capacity to make such an election:

African slavery, as it exists in Virginia and the southern states, is an institution sui generis. It is often compared to the Feudal villenage and the Roman servitude. It most resembles the **[**7]** last; but it is different from both. *Commonwealth v. Turner, 5 Rand. 678*; *Neal v. Farmer, 9 Ga. 555, 579*. And no illustrations or analogies drawn from those sources can elucidate its legal character or relations. Ibid. In discussing legal questions growing out of these relations, the remark of *Tucker, J., in Elder v. Elder's Ex'r, 4 Leigh 252*, may be generalized; and it may be said with perfect truth that there is an absence of all authority or analogy upon the subject, so far as any system of jurisprudence is concerned, except our own. The legal character and nature of the slavery in this state must be decided, therefore, from positive law. What law? The constitutional and statute law. For, whatever doubts may be entertained of the correctness of the decision, since the judgment of Lord Mansfield in Somersett's Case, 20 Howell's State Trials, p. 1, it has been regarded as settled, that African slavery is unknown to the common law of England, and therefore unknown to that law as introduced into the colony, now the state of Virginia. And it was upon *this ground that the general court decided in *Turner's Case, 5 Rand. 678*, that an indictment could not be sustained against a master **[**8]** for malicious, cruel and excessive beating of his own slave, there being no statute upon the subject. In regard, therefore, to his civil rights and relations, the slave is that which the constitutional and statute law makes him. He is that, in legal contemplation, and nothing more. He is

unknown to the law, in that respect, except in the ita lex scripta est. What then is the ***civil status*** of the slave, as shown by the constitutional and statute law? I contend that by that law, and from the necessary nature of slavery as it exists thereunder -- de natura legis et ex necessitate rei -- the slave has no civil rights and no legal capacity whatever. Recognized rights on the part of the governed imply civil duties on the part of the government, for rights and duties are correlative terms. Jus obligatio sunt correlata. If the slave has recognized civil rights, the state protects, and is bound to protect, those rights, and the obligation is to the slave. Recognized civil rights also imply civil remedies to enforce them, for without these, rights are nothing; and hence the universal maxim of the law, that there is no legal right without a legal remedy. Civil remedies are the legal sanction and **[**9]** muniment of civil rights, their best criterion and only safeguard. If the slave has civil rights, he must have civil remedies which attach to him as a slave.

Now, all civil rights may be reduced to three principal or primary articles -- the right of personal liberty, the right of personal security, and the right of private property. 1 Black. Com. 129, 130. But which of these civil rights has the slave, that the state recognizes on her part any obligation to the slave, to enforce, or does enforce? And what legal remedy has the slave, as such, to enforce it? Save the privilege given him by statute, in the single and exceptional *case of a suit for freedom, in what manner can a slave assert any legal right, plead, or be impleaded? Has he magna charta or habeas corpus? Where are his constitutional guarantees? To ask these questions, is to answer them.

"In a state of slavery (says St. George Tucker, a strong friend of the slave, speaking of the institution as it exists among us), the right of personal liberty and the right of private property are wholly abolished; the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that **[**10]** state, either of acquiring or holding to his own use." 2 Tuck. Com. on Black., App. p. 54. And as to personal security, the protection of life and limb, given him by the law (for he cannot claim or command it as a right), that but perpetuates his existence and market value in a state of slavery, a state of absolute negation of all legal right and capacity.

A learned juridical writer of much philosophic accuracy of thought has well said, "Chattel slavery may exist under restrictions by municipal law on the power of the master, in view of the interests of society, without vesting the rights of a legal person in the slave. Savigny. Heub. R.R., B. 11, C. 2, § 65. The person held in slavery may continue to have the character of property in the eye of the law, in states wherein, under the influence of public opinion or other moral causes, protection is in practice insured to the slave as a natural person, unknown to other communities wherein the law upon which the relation rests is the same in judicial apprehension." Hurd's Topics of Jurisprudence connected with conditions of Freedom and Bondage, p. 42. Law, indeed, as to the slave, is only a compact between his rulers, with which **[**11]** he has nothing to do, and to which he is utterly unknown. So far from having civil rights, he is but the object of the civil rights of others.

*By the constitution of the United States, slaves are recognized as property; and though in the apportionment of representation and of direct taxation, they are included under the designation of "three-fifths of all other persons," yet their rights as persons are utterly ignored. *Dred Scott v. Sandford, 60 U.S. 393, 414*; 3 Madison Papers, tit. Slaves. And that congress has passed no law, and has no authority to pass any law, touching the rights and relations of Virginia masters in and to their slaves as property, except to recognize, protect and enforce those rights and relations as they exist under the state constitution and laws, need scarcely be stated to this court, whose decisions have illustrated its jealous fealty to the supremacy of state sovereignty, in all matters within the circle of its peculiar and exclusive jurisdiction.

By the constitution of Virginia slaves are expressly recognized as property, and not at all as persons having civil rights in any respect whatever. Art. iv, § 22, 23.

And now, looking to the statute **[**12]** law of the state, we find that from the earliest period, so far as their ***civil status*** is concerned, slaves are always spoken of and treated, in the numerous acts of the house of burgesses and the general assembly, as mere property. It is a curious fact, that there is no statute directly reducing negroes into slavery. "In 1620 (says Captain Smith) a Dutch ship of ware brought us 20 niggers" for sale; they were bought by the colonists; and that was the origin of African slavery in Virginia. They were first regarded as personal chattels, were bought and sold, and held like any other personal estate; were subject to the payment of debts, and went to the executor or administrator like any other personalty. Then, for a long time, in particular cases, such as descents, &c., they were made real estate, and passed to the heir at law. 3 Hen. Stat. 333,

Oct. 1705; 4 *Hen. Stat. 222, *Feb. 1727; 2 Va. 1, 7*, Ibid. 68-70; *2 Hen. & M. 69*; *6 Munf. 191, 200*. They continued to be such real estate during the whole period of the revolution, and down to 1792, when, by Rev. Code, ch. 103, it was enacted, that "all negro and mulatto slaves, in all courts of judicature in this commonwealth, shall be held, taken **[**13]** and adjudged to be personal estate." This was re-enacted by 1 Rev. Code, p. 431, 1819; and by Code of Va. p. 458, 1849, it is summarily said, "Slaves shall be deemed personal estate."

Looking at these acts, it is safe to say that the law regards a negro slave, so far as his ***civil status*** is concerned, as purely and absolutely mere property, to be bought and sold, and pass and descend as a tract of land, a horse or an ox. From this it necessarily follows, that the condition of the negro in slavery is that of absolute civil incapacity, or rather that of an absolute negation of civil existence. Being but mere property himself, he is incapable of owning property of any kind, or of making any legal contract by which property of any kind can be acquired or held. Nor can he do any civil legal act by which the property of others can be lawfully divested or alienated, or the relations of property be in any wise legally changed or affected. In regard to property, and the legal relations of property, he is emphatically and absolutely unknown to the law, except as the subject of property owned by another. And so the courts have uniformly held. The Supreme court of North Carolina, in a recent **[**14]** case, has well expressed the law, in the southern states, upon this point: "Under our system of law, a slave can make no contract. In the nature of things he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract; he has no legal mind. He is the property of his master, and all the proceeds of his labor *belong to his owner. If property is devised or given to him, the devise or bequest is void, and the personalty given either belongs to the giver or becomes the property of the owner. A slave has no legal status in our courts, except as a criminal or as a witness in certain cases. In the southern states the policy of our laws in keeping slaves within their proper sphere, has run through all the legislation of which their acts are the subject matter." And the court then decided, that "Contracts made by slaves are void; and if a slave executes his note or bond, and a free man is the security upon it, the note or bond is void, and the security is not liable." *Batten v. Faulk, 49 N.C. 233*.

In Virginia the statutes are numerous in which the legal incapacity of slaves to make contracts is clearly declared or implied, **[**15]** and the policy of keeping them in their "proper sphere" of absolute civil non-entity, distinctly enforced by various penalties inflicted upon all persons trading or dealing with them. Oct. 1705, ch. 39, § 15, 3 Hen. Stat. 450; Nov. 1753, ch. 7, 6 Hen. Stat. 359; 1785, 12 Hen. Stat. 183; 1792, Rev. Code, ch. 103; 1819, 1 Rev. Code, ch. 111; 1849, Code of Va. p. 460. And this court has expressly decided, in the case of an executory contract of emancipation, that even upon the full payment by the slave to the master of the contract price for his freedom, the slave cannot enforce a specific execution of the contract. *Sawney v. Carter, 6 Rand. 173*.

In *Stevenson v. Singleton, 1 Leigh 72*, another case of a contract by a master with his slave for his emancipation, Cabell, J., delivering the opinion of a full court, says, "In the case of *Sawney v. Carter, 6 Rand. 173*, this court refused, on great consideration, to enforce a promise by a master to emancipate his slave. It is impossible to distinguish that case from this. This court proceeded upon the principle that it is not competent *to a court of chancery to enforce a contract between master and slave, even though the contract should **[**16]** be fully complied with on the part of the slave."

It is easy to see that these decisions are founded not less upon grounds of paramount public policy than upon sound legal principles. If legal rights be conceded the slave, the courts would become a constant forum for settling disputes between master and slave; from which would arise a state of things utterly incompatible with the proper subordination of the slave; nay, with the existence of slavery in the community. Nor, indeed, from the relation between master and slave, can any contract, by or with a slave, acting for himself, have any possible legal validity whatever. For the parties to every valid contract must be free agents; they must have an "agreeing mind;" but as the will of the slave is under subjection to that of the master, the requisite independence and freedom to make the contract or not, does not exist. A still further and stronger reason is, that since the slave himself, and all the acquisitions of the slave, belong to the master, a contract by the master with his slave, is but a contract by the master with his own property concerning his own property. Nor is it any answer to say that, with the consent of the owner, **[**17]** the slave is competent to contract with third persons; for the slave in such case is but the agent of the master, whose will and control appear in every such permitted act of the slave. The acts of the slave, indeed, are but the acts of the master, if authorized or ratified by him: otherwise, they are of no legal validity or effect.

And so emphatically is this true, that the slave cannot act as the agent of any other person than his master. *State v. Hart, 4 Ired. 246*.

There have been similar decisions to the above effect, in all the southern states, in which the legal relations between master and slave have been brought *under adjudication. That a promise or declaration made to a slave, or for his benefit, cannot be enforced in a court of law or equity; that a slave cannot sue or be sued (the exceptional case of a suit for freedom being provided for by statute, or proceeding upon the legal fiction that he is free, and is therefore entitled to relief from bondage); that he cannot own or acquire property of any kind in any way; that he can make no valid contract of any sort -- not even that of marriage; that, in fine, he has no civil rights whatever; that his civil rights of **[**18]** every character are transferred to his master; that law as to him is only a compact between his rulers, and the questions which concern him are matters between them. See Beall v. Joseph, Harden 51; The State v. Samuel, 2 Dev. & Batt. 177; *Hall v. Dolly Mullen, 5 H. & J. 190*; Susan v. David Wells, 3 Brev. 11; *Bland v. Dowling, 9 G. & J. 19*; Gist v. Toohey, 31 S.C. L. 424; State, use of Clements, v. Van Lear & als., *5 Md. 91*; Malinda and Sarah v. Gardner et als., *24 Ala. 719*; *Smith v. State, 9 Ala. 990*; Bynum v. Bostick, 4 S.C. Eq. 266; Cunningham v. Cunningham, Cam. & Nr. 353; *Girod v. Lewis, 6 Mart. 559*; *Brandon v. Planters and Merchants' Bank of Huntsville, 1 Stew. 320*; Lucy and Mark, 4 Monr. 167; Emerson v. Howland, 1 Mason C.C. 45; *Graves v. Allan, 52 Ky. 190*; Lenoir v. Sylvester, 1 Bail. 632; Ex parte Boylston, 33 S.C. L. 41; State v. Boom, Taylor 105; State v. Mann, 2 Dev. & Batt. Law 579; *Fable v. Brown's Ex'or, 2 Hill 378*; *Neal v. Farmer, 9 Ga. 555*; *Dred Scott v. Sandford, 60 U.S. 393, 407, 475*.

These decisions are legal conclusions flowing naturally and necessarily from **[**19]** the one clear, simple, fundamental idea of chattel slavery. That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is *not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave, -- legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action -- implies a palpable contradiction in terms.

In delivering the judgment of the Supreme court in Dred Scott v. Sanford, Chief Justice Taney states, in the clearest manner, the true light and condition in which the African race was esteemed and held at the time of the foundation of our state and federal governments, and historically and philosophically accounts for the existing legal and political relations between the white man and the negro. See *60 U.S. 393, 407-14*.

An application of the foregoing principles and decisions ought, as it seems to me, to settle this case. In a bequest to slaves of a mere election **[**20]** between freedom and slavery, we have seen that there is no absolute, but only a conditional emancipation; that the election of the slaves to become free, is a necessary condition precedent to the accruing of their freedom; and therefore, that on their will and pleasure, on their choice or volition, is made to depend their future legal status. Recurring then to the direct question to be decided -- Are slaves endowed with the civil right or legal capacity to choose between freedom and slavery? Can they emancipate themselves by their own volition? Can they divest the property of others in themselves, by any legal act of their own? But if it has been shown that the slave has no civil rights whatever; that he has no ***civil status***; that he can do no legal, civil act; that he has no legal mind, will or discretion; that he has absolutely no existence in the eye of the civil jurisprudence, except as a chattel, the subject of property, and *the object of the civil rights of others; with what reason can it be contended that he has the civil right and legal capacity to divest the property of others in himself; or to do that great, transcendent act of supreme civil dignity and sovereign power, the **[**21]** transformation of himself from a thing into a person, from a chattel to a man, clothed with all the high attributes of a citizen, which attach to his race? And if his master, the maker of the laws, endowed with all civil rights and plenary civil capacity, cannot emancipate him except by deed or will, executed in solemn form, can he emancipate himself by the simple expression of his pleasure to be free? Or, on the other hand, if the law requires (Sess. Acts 1855-6, p. 37) that in order to enslave himself, if free, a negro must go through regular prescribed forms in a high court of justice, with all the safeguards of judicial protection around him, shall it be said that he can enslave himself forever, perchance by the mere light volition of a moment, the utterance of a word, or the nodding of his head? Where is the legal consistency in such anomalies and contradictions as these? How can they be reconciled with the established legal incapacity of the slave, or with either the spirit or the letter, or the purposes and policy of the emancipation laws?

Nor is it possible to escape the force of these views, by saying that in electing to become free, there is no exercise on the part of **[**22]** the slave of any civil right or capacity, but the mere performance of a condition, which, however unwise or absurd, the testator had a right to impose as a condition precedent to the emancipation; for this is but to change the form, without affecting the substance of the difficulty; which then only resolves itself into the identical original enquiry, What civil right or legal capacity has the slave to perform, or claim to perform, a condition, the performance of which is to operate his enfranchisement? *The answer is, that he has no civil rights or legal capacity at all, and therefore none to perform the required condition. Change or turn the question as you may, this fundamental and impregnable obstacle arises, which no ingenuity can evade, and no fertility of hypothesis alter or affect. The act of election involves the exercise of civil rights and legal capacity; and an emancipation made dependent upon the exercise of civil rights or legal capacity by the slave, is necessarily void ab ovo. The event can never happen upon which the freedom is to accrue; and the case comes clearly within the principle of the decisions cited and approved in *Taylor v. Cullins, 12 Gratt. 394*; which decisions **[**23]** themselves are but illustrations of the ancient, general and cardinal rule in respect to grants or bequests upon conditions precedent, that, until the condition is performed, the estate or right cannot vest, and if impossible to be performed at the time of its creation, the estate or right can never vest at all, but is originally void. Co. Litt. 206; 2 Bl. Comm. 157; 1 Lom. Dig. 273, § 16.

Nor has the master any just ground of complaint against this result, as tending to abridge his rights in respect to his slaves. The power to emancipate is not unlimited. Before the act of 1787, emancipation was absolutely prohibited, except by consent of the governor and council first had and obtained. That act authorized and permitted emancipation in the mode thereby prescribed, to wit: by deed or will. That act is the law of this case. It empowers the master to manumit his slave by deed or will; but it must be his own complete act; he cannot authorize and empower the slave to manumit himself or not, according to his will and pleasure. And so, in principle and substance, this court has decided; for it has held that "emancipation is the conjoint act of the master and the law, with which the **[**24]** slave has nothing to do." * *Wood v. Humphreys, 12 Gratt. 333*. And as on the one hand, "he cannot refuse freedom when conferred upon him" -- (ibid.) -- e converso, he cannot elect to take or decline it, when it is left to his option.

But it is said, that though slaves are chattels, and are incapable of forming any legal contract, or doing other legal civil act, yet that they are not mere chattels, that they are human, sentient, moral and intellectual beings; that as such, they are dealt with by the law; and therefore, that they ought to be held capable of an election between freedom and slavery. And a class of cases has been cited, at first blush giving countenance to this view. Thus, in *Bean v. Summers, 13 Gratt. 404*, cited by Mr. Crump, occurs this remark of Moncure, J., delivering the opinion of the court: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities." Now it is to be observed in this discussion, that the true enquiry is, not what is the moral and intellectual character or capacity of the negro race, or for what qualities or habits slaves are generally acquired or esteemed, but what is **[**25]** the relation they sustain to the law of the land? And by reference to the case cited, it will be seen that the remark of the judge, above quoted, had no allusion whatever to the civil relations or status of the slave, but on the contrary referred to his moral and intellectual qualities as affecting his peculiar value as an article of property. The question was, whether a court of equity will decree the specific execution of a contract for the sale or delivery of slaves at the suit of the purchaser, without any allegation or proof of peculiar value; and in dealing with this question, the court looked to the character of the slave as an article of property, and to his moral and intellectual qualities as calculated to engender sentiments of friendship, affection and esteem on the part of the master towards *the slave, which might invest the slave with such special and peculiar value, in the eye of the master, as that adequate compensation for the loss of the slave could not be had at law in an action for damages. All the South Carolina decisions cited in the opinion of the court, proceed upon the same ground. See particularly Young v. Burton, 1 McMul. Eq. 255. And they decide, as the **[**26]** Court of appeals decided in this case, that a master may very well attach such a special and peculiar value to his slave on account of his personal qualities, as that no jury could give adequate compensation for his loss. The court say: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities. Therefore damages at law, which are measured by the ordinary market value of the subject, will not generally afford adequate compensation for the breach of a contract for the sale of slaves. There is at least as much reason for enforcing the specific execution of such a contract as a contract for the sale of real estate. The only difference between the two cases

seems to be this, that while in the latter specific execution will always be enforced if the contract be unobjectionable, and the suit be brought in due time, it will not in the former, if the slaves were purchased as merchandise, without reference to their peculiar value to the purchaser, or that the plaintiff is a mere mortgagee or other incumbrancer; in which case, as the slaves are to be sold at all events, damage at law assessed according to their market **[**27]** value, would be adequate compensation." The reasoning of the court plainly shows that it regarded the slave merely as an article of property, to which his qualities or habits, or to which peculiar circumstances might attach a special value, just as special value is attached to real estate from natural causes; and to argue thence that a negro slave was adjudged or recognized by that case to *be endowed with the social and civil attributes of a white man, would be about as logical as to argue that real estate was adjudged or recognized to be endowed with the same attributes, because such is its character as property, and such the peculiar associations and feelings with which it is invested and regarded by mankind, that the law will enforce the specific execution of a contract for its purchase or sale.

In *Boyce v. Anderson, 27 U.S. 150*, cited by the same counsel, Judge Marshall said, "A slave has volition, and has feelings which cannot be entirely disregarded." But look at the case. It was an action of damages to recover the value of slaves lost by the negligence of the captain and commandants of a steam boat, as common carriers. The Supreme court held that the law regulating **[**28]** the responsibility of common carriers, did not apply to the case, because the carrier has not, and could not have, the same control over slaves that he has over inanimate matter; that in the nature of things a slave resembled a passenger, and not a package of goods. The same might have been said of an apprentice, or other person bound to service. And the chief justice, in delivering the opinion of the court, referred to the fact, that though there are no slaves in England, there are persons in whose service another has a temporary interest; but that the responsibility of a carrier, for injury which such person might sustain, has never been placed on the same principle with his responsibility for a bale of goods. But surely, in deciding that point, the English courts had no reference to the ***civil status*** of the persons so held to service; nor did the Supreme court in this case have any reference to the ***civil status*** of the slave. It considered the qualities, habits and character of the slave, as affecting his character as an article of transportation. "A slave (says the judge) has volition, and has feelings which cannot be entirely disregarded. These *properties cannot be overlooked in **[**29]** conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of treatment cannot be adopted, unless stipulated for by contract. But left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over a common package," &c. And therefore the carrier was not held to as high a degree of responsibility in the transportation of slaves, as in the transportation of a common package. The same principle, it is presumed, would apply, sub modo, to dogs, cattle, wild animals, &c. over which "the carrier has not and cannot have the same absolute control as over a common package." It might be good logic, but it would be bad law, to say that therefore dogs, horses, cattle and animals, ferae naturae, were recognized, as something more, in legal contemplation, than mere property. It is alike bad logic and bad law to say that, by this case, slaves are recognized as any thing more. In the discussion of legal propositions, nothing is more dangerous than to adduce the incidental remarks, dicta or allusions of judges, **[**30]** applicable enough, or excusable, in the cases in which they occur, to elucidate points of an utterly different character arising in an utterly different connection, and embracing relations and consequences to which the judges in the cases cited had no reference, and which they could not possibly, by any logical association of ideas, have had in mind.

But the learned counsel need not have cited these authorities to prove that negro slaves have intelligence, feelings and volition. As late indeed as 1782, a doubt was publicly expressed in the British parliament, as to whether an African negro has a soul. And many philosophic speculations have been indulged in *regard to his claim to be considered of the same origin and genus as ourselves. But common observation teaches that our slaves, in some cases, have a very high degree of intellect and moral sense, and all of them have, in these latter times, a strong enough will of their own, which needs no invigoration or activity from a bestowal upon them of civil rights and legal capacity incompatible with their condition as slaves. The moral and intellectual qualities of our slaves, in fact, as in the case of Roman and allother slaves, **[**31]** enter largely into the elements of their value; it is because they have intelligence, a sense of right and wrong, and volition, that they are such useful instruments, as Aristotle calls them in domestic and social life. And it is the pride and pleasure of many families in Virginia to cultivate the intellectual, moral and religious faculties and feelings of

their slaves to as high a degree as circumstances will admit.

But all this has nothing to do with the question under consideration. The court is not sitting as an ethnological society, to ascertain and determine the peculiar natural or acquired characteristics of the negro race; nor as a committee to investigate the elements and extent of the value of slaves. The enquiry is, What is the legal status of the slave under our laws? Has he any legal volition, the exercise of which can change his legal condition, or affect the legal rights of the white race? If so, where is the statute which gives it? Where is the decision which defines its character and extent, or sanctions the legality, and prescribes the limits of its exercise? No statute can be found; and the absence of all authority is sufficiently illustrated by the citation **[**32]** of such cases as Summers v. Bean, and Boyce v. Anderson.

A much more plausible argument or illustration might have been drawn from a more direct and practical source. It might be said that the criminal code of *Virginia recognizes slaves as responsible beings, and affixes penalties to the commission of crime by them; and that therefore the law of the land thus admits them to be endowed with intelligence, free will, and a moral sense -- the same qualities or capacities which are requisite for rational choice between freedom and slavery. But even this will not bear examination. For, by recurring to the true issue, we see that the enquiry is, not as to whether a negro slave can commit a crime and will be punished for it, but what is his ***civil status***. A married woman may commit a crime and will be punished for it, though she has no power to make a contract, and her civil being is absolutely merged in that of her husband. Her civil relations are very different things from the relation she sustains to the criminal law. The commission of a crime implies intelligence, free will, and a moral sense; but these do not fix the ***civil status***, or necessarily affect it in any manner. Idiots, lunatics **[**33]** and infants of tender years have all a fixed ***civil status***, and fixed civil relations to property. They may inherit or be inherited from. They may be the objects of devises or bequests, though they cannot devise and bequeath. They may and do hold thousands of slaves, who, considered as natural persons, are endowed with some sort of intelligence, free will and moral sense; yet the slaves, though thus endowed, cannot inherit or be inherited from; they cannot be the objects of devises or bequests, nor can they devise or bequeath, nor can they hold or acquire property in any manner of any kind. The ***civil status***, therefore, is one thing; the criminal status is another and very different thing. The ***civil status*** has reference to property and all its relations; the power of holding it, using it, controlling it, acquiring it, and parting with it. The criminal status has reference to the moral relations between man and man. An individual may have a very high *position in the one scale, and none at all in the other. An idiot may hold property, but is incapable of committing crime. A slave may commit crime, but is incapable of holding property. The two things are distinct and different, and have **[**34]** no necessary legal or logical connection the one with the other. In ascertaining the criminal status or capacity of a party charged with crime, no reference need be had to his civil abilities or disabilities. In ascertaining the ***civil status*** or capacity of a party who attempts to do a legal civil act, no reference need be had to his responsibilities at the bar of the criminal courts. We must, therefore, look to the civil jurisprudence for the ***civil status*** of the slave, and to the criminal jurisprudence for his criminal status. And in looking to the civil jurisprudence for the ***civil status*** of the slave, we have seen that the slave, as such, has no civil capacity or existence whatever.

But it is contended that the capacity of a slave to elect between freedom and slavery, is res adjudicata, and citation is made to *Pleasants v. Pleasants, 2 Call 319*, and to *Elder v. Elder's Ex'r, 4 Leigh 252*.

Now, in regard to Pleasants v. Pleasants, it is sufficient to observe that the direct question raised in this case does not appear either to have been mooted or suggested by the bar, nor to have been considered or at all alluded to by the court. Nor indeed was there any just reason why **[**35]** it should have been argued or considered. For the wills of both John and Jonathan Pleasants conferred an absolute emancipation, when the laws of the country would permit it, and the slaves arrived at thirty years of age. For though John Pleasants, in the first clause of his will, apparently bestows a mere election, yet he immediately adds, in explanation, "I say all my slaves to be free at the age of thirty years," &c. Such is Judge Green's view of this will, when citing it in a subsequent case. * *Maria v. Surbaugh, 2 Rand. 228*. And the two wills were considered identical, and construed together by this court. The whole case shows that both court and counsel regarded the slaves as absolutely emancipated, upon the conditions above mentioned, and therefore no question arose or could arise as to the legal right or capacity to elect. Certainly nothing is said in the argument about the right of election; nothing in the opinions of any of the judges; and no provision is made in the decree, giving the slaves an opportunity for an

election; which certainly would have been done, if it had been considered that any thing was to be done by them to complete their emancipation. The decree proceeds **[**36]** upon the supposition of an absolute emancipation of the slaves when thirty years of age, and the laws would permit it; and "decides, that though if the testator had devised them upon condition that the devisees should emancipate them immediately, the condition being unlawful, would have been void, and the property vested; yet, that the condition that they should become free when the law would permit it, was not." The truth is, the great question in that elaborately argued and considered case, turned upon the doctrine of perpetuities and executory limitations, and not upon what is the ***civil status*** of the slave, or what constitutes or amounts to emancipation in a will. And that case decides nothing at all in reference to the main point in this.

So likewise in regard to Elder v. Elder. The question as to the civil capacity of a slave to emancipate himself, by electing to become free, does not appear to have been suggested by counsel, nor considered by the court. There was a question raised as to the necessity of the choice being made within a given time (twelve months), but no allusion is any where made in the case as to the enquiry whether the slaves had any legal right or capacity **[**37]** to elect at all. This *question was, in fact, passed over sub silentio, as it well might, nay, certainly ought to have been; for, so far from having been raised for adjudication by the pleadings, the plaintiff's bill proceeded upon the concession of such legal right and capacity, and claimed the slaves upon the ground that the stipulated time for making the election had passed, and claimed Mingo, indeed, upon the ground that he had elected, within the given time, to remain a slave -- (see abstract of the bill and answer, p. 253 of the reported case); and by "consent of parties" in the court below, it was referred by the chancellor to commissioners to ascertain the choice of the slaves. By all which it appears, that in no shape or form was the question mooted by counsel or passed upon by the court below, and that in fact it could not have been passed upon, as it was not suggested by the pleadings, and the decree was entered as a consent decree. And as the point was not passed upon by the court below, of course it could not be the subject of revision in the Court of appeals. Even if this court had elaborately considered and decided it, the one way or the other, the decision would have **[**38]** been clearly extrajudicial, and of no binding effect in subsequent cases. But this court did not consider or decide the point at all, nor did it consider or decide any thing in reference to the ***civil status*** or capacity of the slave. Much stress will be laid upon certain expressions which fell from the judges who sat in the case; but a careful analysis of the opinions delivered will show that they all proceed upon the concession of the capacity of the slaves to make the election, which was certainly right in that case, for the reasons above stated. And it will further be seen that the two main questions argued and decided were, first, Whether sending the slaves to Liberia was a legal mode of emancipation; to which question the expressions above alluded to wholly referred -- (see especially *the first clause of Judge Tucker's opinion, and of Judge Cabell's and Judge Carr's); and secondly, Whether time was of the essence of the condition on which they should be sent to Liberia, that condition, i. e. their choosing to go, being tacitly assumed as legal and valid, as above shown. Elder v. Elder, on this point, is the law of that case, and none other. The most, in any possible view, which **[**39]** can be contended for is, that the point was decided by implication, sub silentio, without argument or consideration; in which event, it would not be binding authority even if decided by a full court, which was not the case. Great questions like this, affecting state policy not less than large private interests, ought never to be determined without thorough discussion and careful consideration; and it is not too much to ask or expect of this court, a full court of five judges, untrammeled by loose phrases or obiter intimations in supposed decisions upon points not argued and not under adjudication, to take into serious deliberation the novel but highly important question now for the first time distinctly presented, upon full argument, for its authoritative judgment.

Still another view of this will leads to the conclusion that it is void. Supposing it legally possible for the slaves to make an election, until election is made they certainly are not free, but remain in a state of slavery, with the power at any time to leave it. In what sort of condition is that? It is not freedom, because the choice of freedom has not been made. It is not slavery, because that implies the right and **[**40]** power of coercion on the part of the master, while the moment that coercion is applied, the subject of it may defeat and defy the authority of its application by electing to be free. That is, the negroes may enjoy all the benefits and advantages of the condition of slavery without the necessity of compulsory labor, or the fear of salutary punishment for indolence or insubordination. *And this state of things is to exist for an indefinite time, as no limit is prescribed in the will as the period of possible election. An intermediate and anomalous condition like this is fully covered by the rule, and the reason of the rule,

established in Rucker's adm'r v. *Gilbert, 3 Leigh 8*, and Wynn & als. v. Carrell & als., *2 Gratt. 227*.

Mr. Howard then entered into an elaborate review of the history and the policy of the emancipation laws and of the laws in pari materia. He contended, that since the earlier decisions of this court favoring freedom to the slave, there had been a radical revolution in the legislation and policy of the state in respect to the institution of slavery; that that institution was now consolidated and fortified by the organic and statute law, and that its protection **[**41]** and perpetuation was a chief part of the public policy of Virginia and of all the southern states; that the maxims of the civil and common law in favorem libertatis, arose from a state of things, and were applied to a class of persons, utterly different from those before us; that those maxims had no just application to our negro slaves; and that it was the duty of the courts of the commonwealth, in cases of doubtful emancipation, to favor and perpetuate slavery, instead of following the suggestions of a false philanthropy in aiding its destruction. But it is impossible to present here even an outline of this part of the argument, as the point is not considered in the opinion of the majority of the court.

Patton, for Poindexter's executors, after discussing some minor points, proceeded as follows:

Are the slaves loaned to the wife of the testator entitled to their freedom, subject to the charges on them imposed by the will? This is the principal and most material question.

There has been a good deal of discussion by the *counsel, of the question, whether the slaves were absolutely free at the death of the tenant for life. I shall not engage in that discussion. I am willing **[**42]** to concede for the purposes of this argument; and indeed candor compels me to say, that in my opinion it is true, they were not free at the death of the widow. Certainly they are not to be discharged from the liability to be hired out to meet the charges on them prescribed by the will. And I do not think they were entitled to freedom unless they on being put to their election choose to be free. I am willing that the will shall be construed exactly as if the testator had said in terms, "I am indifferent, so far as my own wishes go (though I have no doubt he wished them to be free), whether my slaves are emancipated or not; but I wish them to have their choice of being free; and if they wish to be emancipated, I direct my executors to emancipate them, after raising from their hires enough to pay certain charges, and to raise a fund to defray their expenses to a land of freedom. If they do not choose to be emancipated, I direct them to be sold publicly." I maintain on authority, reason and analogy, such is the fair interpretation of the will; and that the negroes are entitled to their freedom on the terms (and only on the terms) thus prescribed by the will.

As to the first proposition, **[**43]** I might say, as was said in *Elder v. Elder, 4 Leigh 252*, by Judge Carr, "It is just as clear as any form of words could make it, that he intended his slaves should be emancipated if they chose to be, instead of to remain in slavery;" and by Judge Cabell, "The intention of the testator to emancipate his slaves is too evident to require argument." Judge Tucker says, "Of the intention (of the testator to emancipate) I think there can be no reasonable doubt."

Now in that case, as in this, there was no express *emancipation. In that case it was inferred from the direction to send them to Liberia, a free state, if they chose to go; in this, if they choose to be free, they are to be hired to raise a fund to carry them "to a land of freedom." In this (making the case stronger than Elder v. Elder), it is not matter of inference, but it is expressly declared they shall have their choice of being emancipated or not. If any thing less than a clear, distinct, express emancipation by will, will be sufficient, this testator has shown the intention to emancipate if the slave desired it. It would be a useless waste of time to cite authorities to prove, that to show an intention to give an estate **[**44]** or emancipate a slave, express words are not necessary; but any words which show the intention, have the same legal effect as if that intention was expressed. It is not necessary to depend merely on the authority of Elder v. Elder; though certainly none higher, more venerable, or more entitled to respect, can be found, than the solemn, deliberate, well considered judgment of this court in the time of Carr, Cabell, Brooke and Tucker. If the judicial judgment of such a tribunal, formed with deliberation, and after argument by some of the most eminent lawyers in the state, upon a will in every essential particular like the one before us; a decision which was probably before the testator when he wrote this will; or before the person who wrote it for him, is not sufficient to settle the law of this case, I know nothing better calculated to destroy confidence in the administration of justice, or to unsettle and impair the rights of property or the security of liberty or life.

Presuming then that the court will have no difficulty in saying that the testator intended that his negroes should be emancipated by his executors if they made choice of

freedom; and that such intention being ascertained **[**45]** from the will, it is the same thing as if he had said so in so many words, I need say nothing more *in answer to the idea on the other side, that the will does no more than bequeath, that the slaves shall have the choice of saying whether they wish to be free or not. Of course if the testator intended nothing more, giving them their choice would be idle nonsense; their expression of it mere wind; the offering it to them, cruel and absurd mockery. When we find however that the true interpretation of the will is, that the testator has devised that if they express their choice to be free, then they shall be emancipated, we find that the whole argument on the other side has been built upon a false hypothesis, and every thing said in support of it becomes "idle wind," because wholly irrelevant to the question.

A great deal of labor and learning have been employed to prove that the legal status of a slave is that of a personal chattel; that he is mere property; that he can do no legal civil act, can make no contract, &c.: and all this for the purpose of showing that he cannot make himself free by his own choice; that he can have no effectual will on the subject, and cannot be invested **[**46]** with any power of emancipating himself. Whilst all this is true -- at least to a great extent -- for the purposes of the argument it is rendered wholly futile by the fact, that he is not in the case in question allowed to emancipate himself. The negroes in this case do not make themselves free, or continue slaves by their own choice. They are emancipated not by any choice of their own, or by any act of their own, but by the will of their master, who has a right by the law to emancipate them. They are free not because he has given them power to emancipate themselves (which it is conceded he cannot do), but because he has the right and has in effect declared that they shall be emancipated. They are property, and so far as concerns the right of emancipation, nothing but property. And it is because they are property and *subject to the absolute power of the master to emancipate them or not, that when by his will he in terms or effect declares they shall be emancipated they are entitled to the freedom he confers on them by virtue of his power, not theirs; by his lawful act, not theirs. The executor emancipates them, not because they have any authority over him; not because their choice **[**47]** gives them the right to be free; but because their master and his testator has required them to be emancipated, on making their election.

It is true that the testator has chosen to make the power and duty of the executor in carrying into effect his will, that the slaves should be emancipated, to depend on the previous ascertainment of the wishes of the slaves themselves. But that does not prevent the emancipation being the act of the testator. If the will is to be construed as directing the emancipation, and the emancipation is by the will of the testator, how is it possible that the validity of the act of emancipation can be affected by the considerations or causes which induced the testator to emancipate his own slaves. It is, I presume, a matter of no importance how insufficient, or even how absurd or ridiculous may be the causes which influenced him, or the events on which he makes the emancipation to depend: His intention to emancipate would be none the less effectual, and the emancipation none the less his act.

If a testator by his will declared during the late presidential election, If Fremont is not elected president of the United States, then I wish all my slaves **[**48]** to be free: Or, If I make a crop of one hundred bushels of potatoes, I wish all my slaves to be emancipated: Or, If my wife's cat kittens between this and Christmas, I will all my slaves to be free; otherwise not: In all these cases, I presume, if the wills were admitted to probate, the right to freedom, on the happening of the event, would be clear; and would *be ineffectual if they did not happen. Yet it would hardly be contended, that Buchanan by defeating Fremont; the potatoes; or the cat by having her litter in the time prescribed, had emancipated the slaves; or that the bequest was void because one man cannot emancipate another man's slaves; because potatoes are merely property; or a cat has no legal status, and cannot do any legal civil act!!! And yet it might be with as much reason so argued. I mean to treat the learned and ingenious argument on the other side with all respect: but it seems to me they are fairly exposed to this reductio ad absurdum.

Nor does the exercise of this power in the mode pursued by this will, involve any inconsistency with the analogies of the law: but the contrary. Nothing is more common, nor more unquestionably valid, than for the owner of property **[**49]** to make his disposition of it by deed or will, depend on the choice or discretion of others: and even on the discretion and choice of others whose legal status is such as to disable them from disposing of their own property by deed or will, or from making a valid contract. A man may provide by deed or will, that his estate may be given as a particular person, though an infant or a married woman, may appoint by deed or will. He makes the choice of the infant or the married woman determine the destination of his own property. But this right of choice does not create a right

of property in the donee of the power; nor is it inconsistent with the disability of the donee of the power, whether an infant or married woman, to dispose of their own property, or make contracts binding themselves. The appointees in such cases derive their estate not from the donee of the power, but from the grantor of the power. It is his estate that is given, not theirs. In like manner the giving the choice to slaves for the purpose of enabling the owner to determine whether he will emancipate *them, confers on them no power to do any civil act, no capacity to make themselves free or slaves. Their expressed wish **[**50]** to be free is the reason which induces the master to emancipate them.

Still it is argued that there is something in the peculiar character of slavery, in the legal status of slaves, in their incapacity to do any civil act, or some thing else in the policy of the law, which forbids a man to give them the choice whether they wish to be free or not. I am at a loss to understand what public policy is opposed to his doing so. If a man desirous of giving freedom to his slaves, unwilling to exercise his unquestioned power of emancipating them whether they wish it or not, were to call them up and consult them about it, and decide according to their wishes expressed to himself, who could complain? Would not every body say that he was not only authorized to do so, but that it was a most humane and considerate course of proceeding? If he were to make a deed of emancipation in which he recited that he had offered to his slaves their choice of freedom; that some of them had declined it, but that others had expressed a choice of freedom; and that in compliance with their wishes he had proceeded to execute this deed of emancipation: Does any body suppose that the deed would be invalidated thereby? **[**51]** or whatever difference of opinion there might be as to the wisdom of permitting the wishes of his negroes to guide his action, that public policy would be opposed to his course? There can be but one answer to these questions.

An owner of a slave has just as absolute a power of emancipation by will as he has by deed. His power and control over his property continues after his death, as fully as it did before; so far as he exercises that power by last will and testament. And surely he may invest his executor with the power of emancipation; and declare the same terms and conditions on which *they shall be emancipated by the executor as he might have imposed on himself. If he may lawfully suffer his own act of emancipation to be determined by ascertaining the choice of his negroes in his lifetime, why may he not emancipate them subject to their choice, to be ascertained after his death?

I trust I have already shown that the legal validity of the act is not questionable on the ground that he thereby invests a slave with a power in or control over his emancipation inconsistent with his civil incapacity. Is there any thing inconsistent with the status of slavery in a moral point **[**52]** of view, in his wishes being consulted as a guide to his owner in deciding whether he will emancipate him. It is a great mistake to suppose that a slave is a mere chattel: that in regarding the master's legal or moral powers, rights and duties in respect to him, he is property and nothing but property. The whole civil as well as criminal law is full of rules and statutes recognizing a slave as a rational, moral and accountable human being, endowed with the feelings, passions and affections of human nature; capable of having both wishes and opinions respecting his own welfare; though restrained both by civil and criminal law, from expressing them in forms prohibited or condemned by the law. But subject to the rules growing out of a condition of slavery, or specific restrictions, there is nothing to prevent a slave from expressing a wish to have his freedom. He may unquestionably do so in response to the enquiry of his master; and has not, nor assumes, nor is invested thereby with any civil right, or exercises any civil act by doing so.

Slaves may be and frequently are enabled by their masters to do civil acts binding on their masters. They are not infrequently, indeed constantly, **[**53]** authorized to act as agents of their owners in making contracts for their masters, and even for themselves by *his authority. They are daily invested with the custody and safe-keeping of their master's property, and even with the sale of produce, the collection of money, &c. &c. In short, the value of slaves would be very much impaired to their owners if they were incapable of doing any civil act even by the authority, or as agents of their masters.

An illustration or two will serve to show that slaves may be invested with the right of choice in respect to themselves; and that their masters may be bound by the exercise of their choice when authorized to choose for themselves. Nothing is more common than for masters, in deference to the feelings of their slaves, to send them out for hire, with written authority to choose to whom they will be hired for a year; and for the price he is willing to take. Can the master be compelled to hire him to whoever will give the price, or is the contract with the person chosen by the slave void because he cannot be invested with the right to choose his hirer, or because

authorized by the master to make the selection?

I send my servant to **[**54]** a merchant tailor, with authority in writing to buy for himself a suit of clothes of any fashion or quality he chooses: Cannot I invest him with such a choice, and would I not be bound to pay for the clothes he bought?

There is nothing then in the status of a slave which prevents a master from giving him a right to make a choice even in respect to matters affecting his own comfort, or feelings or even caprice. And of all things there is the least objection to his being consulted about and allowed to choose whether he wishes to be free or not. The law gives the master the absolute and unqualified discretion to emancipate. He alone is to judge of the sufficiency of the reasons for emancipation. And in the eye of reason, and looking to the humane and patriarchal nature of the institution, *and the affectionate relations it creates between masters and their slaves, nothing can be more natural, and in accordance with its civilizing and humanizing tendencies, than that a master should not voluntarily, and still less that he should be required by law, when he breaks up their relations by emancipation, to do so without regard to the wishes of the slaves; and thus force them into freedom **[**55]** against their will or without consulting them. To talk about this being required by the policy of law, now when the statute has provided that a negro after being emancipated may come into court, and be made a slave on his own choice, is it seems to me both bold and desperate.

I feel that I owe an apology to the court for so protracted a discussion of this question, especially after the able arguments of Messrs. Branch and Crump, both representing the slaves. Some of these views, however, have not been anticipated by them, or at least have been presented now in a new aspect, and may possibly be acceptable to the court. The very elaborate arguments on the other side called for an extended reply, and the argument of Mr. Howard, which has been filed since those of Messrs. Branch and Crump, presented the argument on the other side in a somewhat new form, to which it was proper therefore that I should reply.

There is another reason for an apology for treating the question so gravely on principle; and that is, that the question is res adjudicata; and ought to be considered as not open for argument in this court; if it were doubtful as an original proposition. The cases of *Pleasants **[**56]** v. Pleasants, 2 Call 319*, and the case of Elder v. Elder's ex'or, *4 Leigh 252*, especially the latter, is a direct adjudication on the very question, and in every aspect of the argument. I will not occupy the time of the court in showing that the distinctions between the two cases relied on by the other *side, do not exist, or that if they are distinctions they make no difference in principle.

In Pleasants v. Pleasants, it may be said the question, as to making emancipation depend on the choice of the slave, was not directly made and argued. But it is scarcely less authoritative for that reason. The right of the slaves to freedom was earnestly and zealously controverted both by Wickham and Randolph. If they who were seeking every possible and plausible ground of argument, did not resist the right on the ground that a choice was given to the slaves, it must have been because those eminent lawyers, one of them perhaps the ablest and the most astute lawyer the state ever had, were satisfied there was no force in such an objection.

In Elder v. Elder's ex'or, it is evident that the identical arguments relied on here, were urged by the counsel in that case; and certainly were considered **[**57]** by the court, and decided. Numerous cases have occurred since probably of the same sort, which have been executed in conformity to the case of Elder v. Elder, in submission to its authority. Numerous cases have since been adjudged by this court, in which Elder v. Elder has been cited; and no intimation has been given by the court, of its being regarded as not authority, or as open to review. It ought to be regarded no longer as an open question.

Counsel: Robertson, for the appellant, in reply:

My associates have furnished elaborate arguments fully answering those presented by the opening counsel for the appellees. I shall endeavor to confine myself to the closing argument of Mr. Patton on the same side. My purpose is to avoid as far as practicable general and abstract discussions touching the civil condition or status of slaves, or the evils or benefits of negro slavery, and to argue the points which arise *in this particular case, in reference to the rights of the parties concerned, under the law and policy of Virginia.

Mr. Patton discusses four questions:

The two first relate to errors conceded or rather affirmed by him to exist in the decree appealed from; one **[**58]** in emancipating, inadvertently no doubt, the slaves bequeathed to J. L. Poindexter; the other in refusing an account of certain property willed by the testator to his widow for life. It is enough to say, that I concur with Mr.

Patton on both points, and ask that the decree may be so far reversed.

I may add here a further ground for reversal, namely, that the decree confers on the slaves absolute and unconditional freedom. In doing this it violates the express provision of the will which makes the freedom or continued slavery of the negroes to depend on their own wishes or preference. It is unsustained by precedent; and if the case of Elder v. Elder, relied on by the appellees, be law, it is in direct conflict with that case. Indeed this error also seems admitted by Mr. Patton.

The third question argued by Mr. Patton is, Are the slaves loaned to the wife entitled to freedom subject to the charges of the will? This, as he says, is the main question before the court.

I do not understand Messrs. Gregory and Pierce to contend (as Mr. Patton supposes) that the testator intended to give nothing more than a mere right of choice. Doubtless he intended that they should enjoy the **[**59]** full benefit of their choice. All that my associates or myself contend for is, that they cannot lawfully make the choice or election which the testator intended.

To allow a slave to be free at his election, my associates contend, is to allow him to free himself. Mr. Patton denies this, and insists that in the case before *us, the slaves do not make themselves free, nor continue slaves by their own choice: they are emancipated, he says, not by their own act, but by the will of their master: they are free, not because he has given them power to emancipate themselves (which it is conceded he cannot do), but because he has the right, and has in effect declared, that they shall be emancipated. I give the argument of Mr. Patton entire. It is merely a verbal criticism. It is impossible to deny upon his own concessions, that the election of the slaves--the act of the slaves--is (upon his supposition that such an act is lawful) if not the sole condition, at least an indispensable condition to their freedom. Mr. Patton had told us previously that the slaves are entitled to freedom on the terms, and only upon the terms, prescribed by the will. They are not freed then, or emancipated by the **[**60]** will, standing alone; not freed or emancipated (again to quote his language), "unless they, on being put to their election, choose to be free." They could not certainly be free, we admit, but for the will of the testator; but it is equally true, upon the arguments and concessions of Mr. Patton, and I may add upon every sound principle of construction, they cannot be freed, unless they choose to accept the boon. It may therefore be well said, that it does depend upon their own act whether they shall be free or continue slaves. Their choice, their will, the will and choice of slaves, durante servitute, is in that view an indispensable element to make them free, in concurrence with the will of the testator himself.

In the same strain Mr. Patton repeats that the executor emancipates them (the slaves) not because they have any authority, not because their choice gives them the right to be free, but because the testator has required them to be emancipated, on making their election. This is indeed labor in vain. The slaves *cannot be free unless they make choice of freedom:they cannot be continued in slavery unless they make choice of slavery. Their choice is the indispensable condition **[**61]** which is to make them free, or continue them in slavery; and yet they are not made free or continued as slaves by reason of their choice. Would they be free, if they do not choose freedom? No. Mr. Patton admits it. Could they be continued as slaves but for their choice to be slaves? No. Mr. Patton does not pretend it. Yet it is the will alone, he would have it, that makes them free or slaves. Not so. It is the will undoubtedly in part; but it is also, in part, the performance of the condition precedent, by the objects of the testator's bounty, which in this, as in all other cases of precedent conditions, is essential and indispensable to confer and complete the title. The title is incomplete--ineffectual -- unless and until this condition shall be performed--performed by the slaves. There must be, as already said, the concurrence of the will of the slaves (the will of slaves to make themselves free) with the will of their master. We do not deny that the will of the testator was necessary to entitle them to freedom; but we do insist that the will in this case is not sufficient alone to make them free, without their own consent--their own act.

Still further to justify this very **[**62]** subtle criticism, Mr. Patton goes on to say, that it is a matter of no importance how insufficient or ridiculous may be the causes assigned for emancipating slaves; and he tells us, by way of illustration, if a testator should make the freedom of his slaves to depend on the election of Fremont as president; on his (the testator's) making one hundred bushels of potatoes; or on his wife's cat kittening before Christmas -- that in all these cases, the condition would be good and effectual.

Be it so. There is nothing unlawful, so far as I *perceive, ridiculous as they may be, in any one of these conditions. Even a cat, I presume, may lawfully have kittens. The law of God and nature allows it; and there is no clause in the constitution, or special statute, known to me, which forbids it.

But mark how dexterously Mr. Patton has shifted his ground. It is not the absurdity of the condition in this case, to which my associates or myself alone chiefly object, absurd as it is, but its illegality: the imposition of a condition to be performed by slaves, whereby they are to acquire or surrender, according to their own discretion and choice, a right or privilege -- a condition at variance **[**63]** with the law and policy of the state, and utterly incompatible with the status of slavery; because it supposes in slaves, while slaves, the attributes and capacities of freemen. The illustrations given by Mr. Patton, are all instances of conditions lawful in themselves, and he asks that the same rule shall be applied to an unlawful condition as to a lawful one.

To make this more clear: The condition he puts that slaves should be free if Fremont should be elected, would have been perfectly lawful, and the emancipation effectual. But suppose the condition had been that the slaves should vote, and have their votes recorded, in Virginia, in favor of Fremont. Then the condition would have been against law and public policy; and it being a precedent condition, no title could ever arise. And this distinction is clearly illustrated by the case of Pleasants v. Pleasants. The slaves there were to be free on condition the legislature should by law permit them to live in the state as free persons: for they might have been freed by being sent out of the state at once. *Moses v. Denegree, 6 Rand. 561*. It seems to have been conceded on all hands, that had the will given them freedom on condition **[**64]** that they should remain in the state (the law then forbidding *such emancipation), the condition would have been void. So in the case put -- a condition that the slaves should be free if they would vote for Fremont, would, as the law then was, and now is, have been incapable of being performed, being contrary to the law of the state. But a condition that they should be free in future on voting, &c., whenever the law might authorize slaves to vote, might, provided such law should be passed, be entirely lawful and effectual. And the illustrations of Mr. Patton, so far from showing the absurdity of the argument of my associates, only serve to render more visible the error of his own.

Leaving his illustrations, the learned counsel falls back on the "analogies of the law," forgetting that in his only authority, it is expressly said, and very truly, by Judge Tucker, that no analogy whatever can be found. The instances of analogy to which the counsel refers, most forcibly illustrate the truth of Judge Tucker's remark, and demonstrate the fallacy of Mr. Patton's argument.

Infants, it is said, may execute powers requiring choice of objects, and discretion. But if so, not all infants **[**65]** can do this; not infants of very tender years; not infants at the breast; certainly not those in ventre sa mere.

Married women too may do the same. Ita lex. But married women may have sound legal discretion in the eye of the law, not only to do this, but many other acts requiring such discretion. They may take estates by deed or will. So may infants even in ventre sa mere, or idiots, or lunatics. They are all free persons, though under partial or temporary disabilities. To reason in favor of similar powers, rights or capacities in slaves, on the ground of analogy, is to plunge at once into a labyrinth of error.

If the illustration is of any avail to Mr. Patton, it must be by showing that these powers, &c., may exist *in slaves. Does he believe this? Does he seriously think a slave can execute a power of appointment, whereby an estate is to vest under the will of a donor, because such a power may be executed by a feme covert or an infant? Surely not; no more than he can make a contract, or, as even an idiot or lunatic may do, take a devise or legacy. And why? The want of legal capacity -- of legal discretion -- is an insuperable bar to the performance by a slave of any act **[**66]** whatever, requiring discretion, consent or choice, whereby he is to secure to others or acquire for himself any estate, right or privilege whatever. So perfect is this barrier, that he cannot even for a moment take by gift or devise so much interest in property as will give to his owner the right to claim it. It would really be a novel doctrine, but will be assuredly the next step, if Mr. Patton's arguments prevail, to hold that powers of appointment may be executed by slaves, or other acts lawfully done by them to vest property or rights in themselves and others.

But at last Mr. Patton more directly approaches the question on which this case essentially depends, namely, whether an election can be lawfully made by slaves to determine finally their own future status or destiny as slaves or freemen. Giving them their choice, to enable the owner to determine whether he will emancipate them, confers on them (says Mr. P.) no power to do any civil act; no capacity to make themselves free or slaves. Their expressed wish to be free is the reason which inducesthe master to emancipate them.

This is the position, and then comes another illustration: "If a man were to call them up and **[**67]** consult them about it (their emancipation), and decide according to their wishes expressed to himself, who could complain?" No one, I admit without hesitation. The thing being decided, the act of emancipation carried *into effect,

which is the case supposed, the slaves would be free, notwithstanding he may have made their freedom depend upon their own wishes. I go further: It matters not, as already said, how absurd the reason, nor how unlawful the act on which the freedom may have been granted; if it were carnal connection with a white woman, or for assaulting a white man, the grant being consummated, would be effectual, and the title to freedom a vested right. We do not deny that if this testator had actually emancipated his slaves, because they had expressed a wish to him to be free, or because they had said or done any other thing whatever, reasonable or absurd, lawful or unlawful, they would have been free. But he has not said this. His language cannot be tortured into any such meaning. The act which, if they can be free, can alone make them so, remains yet to be done. The emancipation is not consummated, and cannot be, unless they choose it. It is in vain to say that this choice, **[**68]** this consent or election, is not a civil act. What else is it? If a grant of an estate or privilege of any kind were made to a free person on condition that he would elect a trade or profession, or serve in the navy or army for two years; or a power to appoint by deed, &c., among legatees, &c., would not the election and the designation be civil acts? A slave owner might say to his slave, Put your cross mark to this deed or contract and you shall be free, and free him accordingly. But if he were to say in a deed, contract or will, my slave shall be free doing or performing any civil act in futuro, executing a deed or contract, or power of appointment, &c., the gift would be nugatory: It could never be enforced or perfected, because the acts themselves are, as already said, precedent conditions, incompatible with the condition or status of the slave, and such as presuppose him already endowed with the legal capacity of a freeman.

*Having argued that a deed actually made, whereby a slave owner emancipates his slave in compliance with the slave's wish -- which we concede, being done, could not be undone -- Mr. Patton advances a step further: An owner of a slave, he says, has just **[**69]** as absolute power to emancipate by will as by deed; and surely he may invest his executor with the power of emancipation on the same terms, &c., as he might have imposed upon himself. "If he may lawfully suffer his own act of emancipation to be determined by ascertaining the choice of his negroes in his lifetime, why may he not emancipate them subject to their choice to be ascertained after his death?" This is quite ingenious, but utterly fallacious: It has already been answered. An owner may consummate an emancipation in his lifetime upon any consideration he pleases, or without any reason or consideration whatever but his mere will or whim; and the act being consummated, will be effectual; but an emancipation to take effect upon any consideration or condition to arise or be performed by a slave in futuro, will not be valid if the condition be unlawful or cannot be performed. Thus, a man by will or deed may liberate his slave because he has children by a white woman; but he cannot by his will authorize his executor to liberate him on condition that he shall at a future day have such children.

He may give his slave freedom by a deed in his lifetime or by will; or may give the **[**70]** slave over to a third person, on condition that his wife's cat may have kittens or the slave herself may have a male child before that time. This parturition of the cat or of the slave is, in the course of nature, unprohibited by law, and in no way counter to public policy. But he can confer no such right on the slave, or on the third person, dependent upon the future choice, volition or election of the slave, because such acts are civil acts, inconsistent *with the state of slavery and the law and policy of the state.

A man may call up his sons, and say to them, you shall have between you, Tom, Dick and Harry, as "Old Tom" shall desire, choose, or appoint: and on learning that desire, may consummate the gift by a deed on that express ground. But he cannot by his contract make a valid disposition of this kind to take effect in futuro. He cannot impose (as Mr. P. has it) any such terms binding on himself in futuro, or make a title to slaves or property of any kind dependent on the will or desire of a slave. In other words, he cannot confer on slaves the power of election or appointment, by word, deed or will, unless that new doctrine shall be now established, as it must be, if **[**71]** Mr. Patton's views shall be sustained by this court.

To say that giving slaves their choice between freedom and slavery confers on them no power to do any civil act, is a contradiction in terms -- simply a denial of a matter of fact. To give them their choice (if legal) is to give them the power and right to choose -- to exercise their will and discretion -- the will and discretion of slaves -- and to make that will a rule for the court, and the lawful foundation of divesting the property of others, and vesting new rights and privileges in themselves. What is a civil act, if an election -- an election whereby the persons electing renounce a benefit or secure to themselves new rights and privileges, be not so regarded? a right and power, in the case before us, of fixing their future destiny, and that of their offspring: of elevating themselves from the condition of chattels to that of freemen: a right which imposes upon an

executor, and upon the courts of the country, the duty of consulting with slaves and of being governed by their will. It is a legal solecism to speak of such election or renunciation as any thing short of civil acts -- civil acts of the highest character.

*Mr. **[**72]** Patton misleads himself, in speaking of terms and conditions imposed by a master on himself in his lifetime, in relation to the emancipation of his slaves. A master might say to "Old Tom," that shall be your cabin during life. Your sons Tom, Dick and Harry shall live with you and work for you as long as you choose; and Old Tom might be permitted to enjoy these privileges as long as his master lived. But they would impose upon the master no obligation. He might recall or revoke them at pleasure. And if he should by his will give Old Tom permission to occupy the cabin, or to enjoy the society or services of the sons so long as he might choose, or to send them to Liberia, or go there himself, if he or they should choose, the bequests would all, in a legal sense, be nullities; provisions addressing themselves to the humane discretion of the executor, heir or devisee, but incapable of enforcement by or for the objects of the testator's bounty. Clearly the slave children could not be free by reason of the election or choice of a slave father: andyet the election must be as effectual to free them as to free himself; to free one slave as to free any other.

As bearing directly on these **[**73]** propositions, I refer to the case of *Sawney v. Carter, 6 Rand. 173*; and as still more apposite, that of Skrine v. Walker, 3 South Car. Equ. R. 262; and *Stevenson v. Singleton, 1 Leigh 72*.

It is true, that slaves are not mere chattels; but they are mere chattels in a legal sense, except, so far as the law may have given them legal rights, or subjected them, or others on their account, to legal responsibilities for their acts. Beyond that, slavery is an insurmountable barrier. The law makes them responsible for crimes; the law gives them the civil right of instituting suits for freedom; but none can believe for a moment that a slave could sue his owner or any free person whatever, but for the express permission *of the statute. It is a right juris positivi only.

Mr. Patton says, they may be enabled by their masters to do civil acts binding on their masters. They may be his agents in making contracts; in having the custody of property, selling produce, collecting money, &c. Doubtless they may do all this: that is to say, they may do all that slaves are authorized by law or recognized usage to do in and about the business of their masters. These acts confer or constitute rights **[**74]** and obligations in the masters, but give no rights or privileges to the slaves. Indeed, slaves would be but of little value if most of these duties and services might not be performed by them. The ploughman must have charge of his plough and team: the herdsman of the cattle, &c.: the marketman or woman must sell the vegetables, &c., and receive the money if directed by the owner. It may be that the owner may be made liable for their acts when by his authority or usage he has induced others to trust to them on the ground of fraud. Upon the same principle that he might be liable if he were habitually to send a well-trained and sagacious dog with a basket to bring him meat from the butcher. Would that be in a legal sense a civil act of the dog? Or do any of the mechanical or menial duties enumerated by Mr. P. rise to the dignity of a civil act, or bear the remotest resemblance to a deliberate election, by which a slave is to acquire or renounce a right for himself, or secure or destroy one in third persons?

To show the utter inconclusiveness of all these, and all similar "illustrations" of Mr. Patton, suppose the testator to will that his slaves after his death should be allowed **[**75]** to have the custody of property, make contracts, buy and sell, &c., for themselves or for their future owners. Could the will in these respects be executed or enforced? Surely not: and why? Simply *because such acts, however authorized or tolerated by the actual though revocable permission or acquiescence of the owner in his lifetime, are so contrary to the status of slavery, the rights of ownership in slave property, the public policy and laws of the state, that no court could give effect to any executory contract or disposition of the kind. It would be to create that prohibited intermediary state; that rejected anomaly of slaves possessing rights and exercising privileges exclusively pertaining to free persons. See *Wynn v. Carrell, 2 Gratt. 227*; *Smith v. Betty, 11 Gratt. 752*; *Wood v. Humphreys, 12 Gratt. 333*; Adams & als. v. Gilliam & als., 1 Pat. & Heath 161; *Rucker v. Gilbert, 3 Leigh 8*; Escheator v. Dangerfield, 8 Rich. S. C. Equ. R. 96.

After an elaborate argument on this question of election, Mr. Patton apologizes for discussing it at all, inasmuch as it is, he says, res adjudicata. He refers to *Pleasants v. Pleasants, 2 Call 319*, and especially to *Elder v. Elder, 4 Leigh **[**76]** 252*.

The sole reference to the question of election in Pleasants v. Pleasants, is an expression in the will of John Pleasants, that all his slaves shall be free if they choose it when they arrive at thirty, &c. But this is

followed by an immediate declaration by way of explanation, "I say, &c., to be free at the age of thirty years," leaving out the qualifying expression, "if they choose it;" which doubtless was thrown in currente calamo, rather than as a condition or requirement of any distinct and formal election by the slaves. It was evidently regarded in this light, and as wholly unimportant, by the heir and executor who filed the bill; by all the counsel on both sides; by the defendants who opposed the emancipation; and by the whole court; for it is not once adverted to, either in the bill, or answer, or arguments, or opinions. If it had been regarded as a formal preliminary condition, it must *have been noticed; and the court must either have dispensed with its performance, or pointed out the manner in which the election should be made. And yet notwithstanding their failure to do so, and the utter silence of the parties, their counsel and the court, to notice the question **[**77]** in any way, this case is referred to, as adjudicating it so authoritatively as to preclude all discussion.

I will suggest, as a sufficient reason why this question was not raised or noticed, the expressions in the will of Jonathan Pleasants, declaring that the slaves should be free at thirty, and adding, "or at least such as will accept thereof, or as his trustees, &c., might think fitted for freedom," &c., the condition was in the disjunctive, and was fully performed by the trustees in suing on behalf of the slaves. But be this as it may, it is enough to say that the point in question was neither decided nor so much as noticed by the court.

As to the case of Elder v. Elder, I remark:

First. That it is the only case in Virginia in which the question before us has been directly in the view of the court.

Secondly. That the opinions of the court, as before said, were uncalled for -- mere obiter dicta. The executor and residuary legatee were both parties to the suit -- the latter indeed the plaintiff. They consented that the slaves should have their election; and the order was made at their instance.

Mr. Patton speaks of the case as one argued by eminent counsel. **[**78]** The arguments of the counsel are not reported. It is evident they mainly relied on other grounds, namely, the intention inferrible from sending them to Liberia; the fact of an election to remain slaves -- that this election was not made in twelve months -- the condition of the issue -- the ability of the Colonization society to pay the expense of transportation -- *the hires -- refunding bonds, &c. It does not appear that the question as to the lawfulness of the election was touched, or at least seriously argued by counsel.

Thirdly. The opinions and decree are not those of a full court, and being pronounced ex re nata, and unsupported by law or precedent, cannot be so far regarded obligatory as to preclude this court from a full consideration of the questions before it.

There is one circumstance in which the will before us is very peculiar, and differs from that in Elder v. Elder.

It does not merely present the alternative of liberty or slavery. The slaves are to have their choice whether they will be emancipatedor sold publicly. The testator adds, "If they prefer being sold, and remaining here in slavery, it is my wish they be sold publicly, and the money equally divided," **[**79]** &c.

Now, their right is as perfect to choose the one alternative as the other. Suppose they reject the first and accept the last: They choose to be sold publicly. But suppose there are no debts, and the legatees all concur, with the assent of the executor, in a wish to divide the slaves in kind. In an ordinary case, this would be their clear right. Could that right be intercepted or controlled by the choice or election of the slaves, who declare they prefer being sold publicly? They might urge that the legatees were hard masters and mistresses; or meant to sell them privately to hard masters; and that this was the very reason which induced the testator to require, if they preferred being sold, that they should be sold publicly. Surely their will, their choice, could not stand in the way of any disposition or alienation, consistent with the lawful rights of the legatees, had no such choice been given to or made by the slaves. Yet there is no more reason why their choice should not decide the mode of *disposition under the last alternative than under the first.

But this is not the only difficulty to be encountered by attempting to confer on slaves this civil privilege of election. **[**80]** Let us enquire into the manner in which the privilege is to be exercised.

A number of slaves of both sexes, and of all ages and conditions, are to elect whether they prefer being emancipated, or sold publicly as slaves.

At what age is the right to attach? Is there to be a distinction between adults and minors? There is no such thing as lawful age to be predicated of slaves. The condition of a slave of twenty-two is precisely the same as that of one of nineteen.

If those under the age of twenty-one are to elect, is there to be a fixed and certain age prescribed by the court? or is it to depend upon the mental capacity of the

slave? If a certain age, what is it to be? If to depend on adequate capacity, how and by whom is that capacity to be ascertained? If by commissioners, shall their judgment be conclusive, or will it be open to objection?

Who is to elect for infants of very tender years -- at the breast perhaps? Is the court to stand in a parental relation to infant negroes; make them wards of court; appoint for them guardians, or prochein amies? Or will the court say, as was done in Elder v. Elder (by consent), that the mothers shall choose, not for the infants **[**81]** at nurse merely, but for all under twenty-one? And the fate of the slaves, and it may be of intelligent young slaves not quite one and twenty, and if females, that of all their future progeny, decided perhaps by a drunken, superannuated, or ignorant and reckless mother, who might be swayed either way for a bottle of whisky? If we are to be governed by analogy, why not leave the election for young slaves to their fathers instead of their mothers? Why shall *not the husband choose both for his children and his wife -- their mother?

It may be said the relation of husband and wife does not exist. Very true, in a legal sense; but there is that relation nominally, and analogy may as properly be resorted to as to this relation as analogies from age, there being no legal age, or analogies from the equitable jurisdiction of the chancery courts over infants, lunatics, guardians, &c.

If these analogies are to govern the case, suppose slavery be elected by the minors, or some one or more persons appointed to elect for them; and when they come of age, they raise the question that it was manifestly to their injury; or that the election was made or procured by fraud and imposition: May **[**82]** the truth and justice of the case be enquired into? or must they and their posterity forever be held in bondage under an election so procured? In cases of free infants, they are allowed until of age to elect. Ward v. Baugh, 4 Ves. R. 623. As to the adult slaves themselves, is it not every way probable, that many among them may be utterly incapable of making a sound and discreet decision?

And if any one be appointed, or the court itself shall undertake to decide this question, and exercise for the slaves what was intended to be a personal privilege in each and every one of them, where is the authority under the law of the land, under any adjudicated case, or under the will of this testator, to assume that power? The power on the one hand to condemn to perpetual slavery, or on the other to perpetual exile -- the necessary consequence of emancipation. If the courts should undertake to do this, or authorize any one to do it for any one of the slaves of whatever age, they do not, of a certainty, execute the will of the testator, but make one for him.

It is absolutely certain that the testator meant his *slaves should choose for themselves. Their freedom or public sale was to be **[**83]** as they might prefer -- not as might be forced upon them by any one else. Each was to have his or her own wish. Who can wish for them? No such power is vested in courts, nor commissioners, nor guardians, nor prochein amies, nor mothers, nor fathers, either by statute, or by the common law. Suppose there be infants of tender age without mothers or known fathers: who then is to wish for them? their grand mothers or grand fathers? perhaps in their dotage. Who are to choose or wish for idiots, if any, or lunatics, or doting old men and women? Say they are held incapable one or all, to judge for themselves, and that commissioners shall be appointed to choose for them: Does not the court know, and must they not act with discretion upon that state of facts -- that our community hold different opinions as to the condition of slavery -- some holding the slavery of the African race as the greatest of blessings, and freedom the direst curse that could be inflicted on them; and others the reverse. Which class should a court select or recommend? It is not unfrequent, where commissioners are to be appointed in a case, to select the counsel on both sides. Perhaps there could be no fairer mode. Take **[**84]** the counsel then in this case. Now turn to their arguments, and perhaps well known opinions. They must of course be guided by their own judgment and discretion as to what is for the benefit of the slaves, and not the wishes of the slaves; for if their wishes were to govern, it would be idle and absurd to appoint commissioners to act for them. Say at least they must decide for the very young, or very old; idiots, lunatics, &c.

What might be the anticipated result? Why, that two would choose for them the blessing or curse of slavery, and the other two the blessing or curse of *liberty. I will not trace the question further, in calculating what might be the views of the court, or any umpire authorized to decide. Is it not most indisputable that this testator never would have entrusted to the court itself, or any others, to impose upon his slaves either the condition of slavery here, or freedom in exile, against their wishes, when he declined or refused to make choice for them himself? And must not the court recognize, in the difficulty and delicacy of allowing this privilege to slaves, so incompatible with their legal, moral and intellectual condition, or transferring it, against **[**85]** or without their consent, and against the intention of the testator, to

others, who might designedly or unintentionally consign them and their posterity forever to misery -- an unanswerable argument against the privilege or power itself?

To what stress was the court not driven in Elder v. Elder, when it entrusted this delicate power of deciding for infants, at random, to their slave mothers; and attempted to throw some guard around ignorant slaves, by an unprecedented order of privy examination; an order to examine slaves, and consult them -- men and women -- privily and apart from those having the ownership or custody of them: to exclude the owners and possessors from access to their own slaves. To what further extent is the law-making authority of the court to be carried to put in practice these new doctrines? And of what avail is this privy examination? The influence has perhaps been previously exerted. Their minds have been impressed by abolitionists perhaps on the one side, or interested claimants on the other. They have been menaced, frightened out of their propriety, by the terrors of the lash, at home; the dread of misery and starvation abroad; or poisoned by indulgence **[**86]** in whisky, and promise of more, till their wits, if any they had, are unsettled.

*Or the moment after the privy examination, they beg permission, from the same causes, to retract their consent.

It is a wise and just rule, that before parties entitled to an election, especially infants and persons of infirm minds, or liable to undue influences, shall be required to make it, that they should be well apprised of their rights, and the consequences of that election. Who is to instruct these ignorant slaves, to make them understand the benefits or evils of different plans for their future condition and residence? They are to be sent to a land where they can enjoy freedom. What land is that? Will the counsel name it? or commissioners? or the court? or shall the slaves go it blind? These are not fanciful obstacles. They are real difficulties which may or must arise in this or other cases, and which the court must therefore consider.

Finally. There being a devise over in this case, the condition precedent must be strictly performed; and if this cannot be, the devisees over cannot be deprived of their interest. It is an ineffectual, inoperative condition; and such conditions are **[**87]** regarded in law precisely as if no condition whatever was prescribed. *Moses v. Denigree, 6 Rand. 561*.

On the fourth question -- that relative to the condition of the slaves born during the life estate -- Robertson referred to a review of the authorities presented by him on the first argument of this cause. He contended that the question was conclusively settled by the case of Maria v. Surbaugh, as far back as 1824 (*2 Rand. 282*), which had been repeatedly recognized, and even as late as the recent case of Cullins v. Taylor, May 1855 (*12 Gratt. 394*): That the case of Lucy v. Cheminant, and other cases seemingly opposed to that of Maria v. Surbaugh, were founded on a shadowy distinction between wills, wherein the mothers were mentioned by name, and those in which the names *were omitted: That in the case at bar the phrase was, "the negroes loaned my wife, at her death I wish to have their choice," &c.: And they being "all the remainder" of his slaves, after taking out such as were otherwise disposed of by the will, the effect and intention must be held to be the same, as if he had added their names -- on the principle, id certum est quod certum reddi potest: That the only purpose **[**88]** of adding the names would be to designate the slaves intended; and any other sufficient designation would answer the same purpose: That the case, therefore, in effect fell directly within the very deliberate and emphatic opinion pronounced by Judge Green in the case of Maria v. Surbaugh.

He further suggested, that in Lucy v. Cheminant, the court were probably misled by the petition to suppose that the mothers were not designated by name, though their names, he thought, were to be found in the will exhibited in the record.

Upon the whole I submit that the decree, exclusive of errors on minor points, is erroneous:

First, in decreeing freedom to the issue born during the life tenancy.

And secondly, in declaring any of the slaves free, unless they could lawfully make, and should actually have made their election so to be.

Judges: DANIEL, J. MONCURE, J., concurring. ALLEN, P., and LEE, J., concurred in the opinion of Daniel, J. SAMUEL, J., concurred in the opinion of Moncure, J.

Opinion by: DANIEL

Opinion

[*186] There does not seem to me to be any serious doubt as to the intention of the testator in respect to the emancipation of his slaves.

The language of the main clause in **[**89]** the will bearing on the subject is as follows: "The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy freedom; and if there should **[*187]** not be enough of the perishable property loaned my wife to pay off the legacies to Ann Lewis Howle and Georgianna Bryan, they are to be hired until a sufficient sum is raised to pay the deficiency. If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly, and the money arising be equally divided between my sister Eliza Marshall, the children or heirs of my brother Carter B. Poindexter, my nephews William C. Howle and Daniel P. Howle, and my niece Nancy Bailey."

Here it seems to me is a plain and unambiguous tender by the testator to his slaves, of an election, at the death of his wife, to be emancipated or to be sold publicly as slaves. If they prefer to be emancipated, it is his will that after being hired out till the sums mentioned are raised, they shall enjoy their freedom. If, on the other hand, they prefer **[**90]** to remain in slavery, then it is his will that they remain slaves.

This view of the character of the bequest is not as I conceive affected by the subsequent clause of the will relating to the slaves. The office of that clause is, to empower the executors to sell such of them as should be refractory, and, by consequence, to exclude them from the benefits of the previous provisions in favor of all the slaves loaned to the testator's wife. This exception to the bequest does not serve in any manner to declare or explain the nature of the bequest.

The codicil to the will does, however, I think, aid in showing that the idea of an election, by his slaves, with its consequences, was distinctly and prominently presented to the mind of the testator whilst engaged in planning and setting out the scheme of his will. For reading the codicil and the clause in the will respecting the emancipation of the slaves, together, we see that the testator, after tendering to the slaves, in plain terms, the option of being emancipated or sold publicly, proceeds not only to point out distinctly **[*188]** what is to be the effect of their election, in each of its aspects, on their own condition, but makes **[**91]** the measure and shape of bequests, to other objects of his bounty, dependent upon it. In case the slaves prefer to remain in slavery, they are to be sold, and the proceeds divided between the sister and certain of the nieces and nephews of the testator. On the other hand, if they prefer to be emancipated, the consequent disappointment of the legatees just mentioned, is to be compensated by a pecuniary legacy of a thousand dollars to be paid them by Jaqueline L. Poindexter, another of the testator's nephews, and obviously one of the most favored objects of his testamentary regard.

With these views of the will before me, I cannot undertake to say that there would not be as plain a violation of the testator's intentions in forcing emancipation and its consequences on his slaves, against their election to remain here in slavery, as there would be in withholding freedom from them, on their expressing a preference to be emancipated.

Looking to the subject matter of the bequest, it is true we may conjecture that it was probably the expectation of the testator that many, perhaps most of the slaves, would elect to be emancipated; yet when we see that no provision is made in the will for the **[**92]** support of any of them in the strange land to which, in case of their emancipation, they were to be transported, we may as fairly suppose that it was in the contemplation of the testator that there would be some of them, especially of the aged and infirm, who would prefer to remain in their present condition.

In this aspect of the case, what warrant have we for declaring that an election by the slaves to be emancipated is not at all essential to their receiving their freedom under the will of the testator? It is conceded that the effect of such a decision would be to work an absolute emancipation of all the slaves, **[*189]** in spite of a choice to the contrary by any or all of them; it being admitted by the counsel, who recommends this course to us, that in such a state of things the clause in respect to the election of the slaves to remain in slavery would be wholly void and inoperative. The will would, then (according to his view of it), of itself confer the franchise, and no act of the negroes would be allowed to defeat their manumission, or to operate their disfranchisement.

We cannot adopt the course recommended, without running counter to the plain and express directions of the testator. **[**93]** The whole tenor of his will shows that he intended the manumission of the slaves to depend on the performance by them of the precedent condition of electing to be emancipated. We have no authority for regarding this condition as mere surplusage, and declaring the slaves absolutely emancipated. If the condition is legal and possible, we are bound, in carrying out the testator's intentions, to allow to the slaves an opportunity to perform it. If, on the

other hand, we find it to be illegal or impossible, we are equally bound to declare the bequest, dependent on its performance, void.

It is not competent for us, supposing the condition to be illegal or impossible, to pronounce, as the will of the testator, what we may conjecture he would have directed in respect to his slaves, had he foreseen the difficulties which now present themselves. Nor did we pursue any such course in the case of *Osborne v. Taylor, 12 Gratt. 117*. The slaves there were declared to be absolutely and unconditionally free, not because of any belief or conjecture on the part of the court that such would have been the testator's will had he known of the illegality of the condition which he sought to annex to the bequest **[**94]** of their freedom; but because, having by a distinct clause declared them to be free, he could not then confer on them the capacity **[*190]** of electing to disfranchise themselves, and assume a condition of qualified slavery.

On the supposition that an election in this case by the slaves to be emancipated, is illegal or impossible, the two cases, instead of calling for the same judicial result, furnish marked illustrations of the directly opposite legal effects of conditions precedent and conditions subsequent. There the election by the slaves to assume a state of qualified slavery, was essential to the defeat or destruction of the bequest of freedom; whilst here the election by the slaves to be emancipated is essential to give any force or validity whatever to the bequest. We are thus led necessarily to the enquiry, whether the condition precedent in this case be legal and possible, or otherwise.

Is the condition one which the slaves have the legal capacity to perform?

To answer the question, it is essential to institute a brief enquiry as to the true condition here of the class of persons to which they belong.

Chancellor Kent, in the second volume of his Commentaries, at page 253, in **[**95]** speaking of the laws of the southern states on the subject of domestic slavery, says, "They are doubtless as just and as mild as i deemed by those governments to be compatible with the public safety, or with the existence of that species of property; and yet in contemplation of their laws, slaves are considered, in some respects, as things or property, rather than persons, and are vendible as personal estate. They cannot take property by descent or purchase, and all they find and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors for the payment of debts, and cannot be emancipated by will or otherwise, to the prejudice of creditors. Their condition is more analogous to that of the slaves of the ancients than to **[*191]** that of the villeins of feudal times, both in respect to the degradation of the slaves, and the full dominion and power of the master."

In the case of Emerson v. Howland, 1 Mason C.C. 45, which was a suit brought by a master to recover wages for a mariner slave who by his own consent had been discharged from service, Judge Story, in delivering an opinion sustaining **[**96]** the action, uses the following language: "The slave could not consent to be discharged. The contract was entered into by the owner, in Virginia, and must be construed with reference to the lex loci contractus. In Virginia slavery is expressly recognized, and the rights founded upon it are incorporated into the whole system of the laws of that state. The owner of the slave has the most complete and perfect property in him. The slave may be sold or devised or pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract, and the perpetual right to his services belongs exclusively to the master."

Judge Tucker, in his notes to his edition of Blackstone, vol. 2, p. 145, after defining social rights to be such as appertain to every individual in a state of society, without regard to the form or nature of the government in which he resides, proceeds to say that they include all those privileges which are supposed to be tacitly stipulated for, by the very act of association, such as the right of protection from injury, or of redress for the same, by such an action, and the right of acquiring, holding **[**97]** and transmitting property; that in all civilized nations all free persons, whether citizens or aliens; males or females; infants or adults; white or black, of sound mind, or idiots and lunatics, have their respective social rights according to the customs, laws and usages of the country. "Slaves only (he continues), where slavery is tolerated by the laws, are **[*192]** excluded from social rights. Society deprives them of personal liberty, and abolishes their right to property; and in some countries even annihilates all their other natural rights."

And in his Appendix to the same volume, p. 55, after remarking that the Roman lawyers look upon those only as persons who are free, putting slaves into the rank of goods and chattels, he says, that the policy of our

legislature seems conformable to that idea. And he proceeds, ***HN1***[⬆] "Slavery (says Hargrave) always imports an obligation of perpetual service, which only the consent of the master can dissolve." And "the property of the slave is absolutely the property of his master, the slave himself being the subject of property, and as such saleable and transmissible at the will of the master."

To the like effect are the remarks of Chancellor Dessausseure **[**98]** in the case of Bynum v. Bostick, 4 S.C. Eq. 266. He there expresses the opinion that the condition of the slaves in this country is analogous to that of the slaves of the ancient Greeks and Romans, and not that of the villeins of feudal times. That by the civil law which, in that regard, is the law of this country, they are incapable of taking property by descent or purchase. And that they are generally considered not as persons, but things.

In the case of Girod v. Lewis, 6 Martin 559, it is asserted that slaves have no legal capacity to assent to any contract: that whilst with the consent of the master they had the moral power to enter into such a connection as that of marriage, the marriage, whilst they remain in a state of slavery, could be productive of no civil effect, because slaves are deprived of all civil rights. And in *Graves v. Allan, 52 Ky. 190*, it is declared that whilst they may, with the assent of their masters, have the physical use and enjoyment of property, they are incapable of becoming the **[*193]** legal owners thereof; and that any devise to them except that of freedom, is void. See also *Roberson v. Roberson's Ex'rs, 21 Ala. 273*; *Neal v. Farmer, 9 Ga. **[**99]** 555*; Skrine v. Walker, 24 S.C. Eq. 262; *Thomas v. Palmer, 54 N.C. 249*; *Dred Scott v. Sandford, 60 U.S. 393, 407, 475*.

The general principles declared and illustrated by these authorities, have been fully recognized by this court, whenever it has had occasion to make any express declaration of opinion respecting them. The law empowering masters to manumit their slaves by deed or will, it is true, has on various occasions been most liberally interpreted in favor of the latter. Yet the court has uniformly refused to recognize any capacity in the slave to contract with his master for his manumission. *Sawney v. Carter, 6 Rand. 173*; *Stevenson v. Singleton, 1 Leigh 72*. And has also repeatedly denied the validity of bequests in which it has been sought by masters to clothe their slaves, whilst remaining in a state of slavery, with certain privileges and immunities, such as being allowed to remain in the service of particular persons, and receive wages for their labor, or to live on certain lands, working them, and enjoying the profits, freed from all obligation to render service to persons under whose care and protection they were left. As in *Rucker's Adm'r v. Gilbert, **[**100]** 3 Leigh 8*; *Wynn v. Carrell, 2 Gratt. 227*: and Smith's adm'r v. *Betty, 11 Gratt. 752*.

It is argued, however, that the precise question under consideration has been decided by this court in the case of *Pleasants v. Pleasants, 2 Call 319*, and *Elder v. Elder's Ex'r, 4 Leigh 252*.

It is true, that in each of the wills of John and Jonathan Pleasants, out of which the controversy in the first mentioned of these cases arose, expressions are used, which, if taken alone, would indicate a desire on the part of the testators that the wishes of **[*194]** the slaves should be consulted in respect to their manumission. But when we look to the general tenor and leading purposes of the two instruments, it is left extremely doubtful whether either of the testators designed that the operation of the bequests should depend in any measure on the choice of the slaves. No such question seems to have been presented by the pleadings; nor does there appear to be, either in the extended arguments of counsel, or in the opinions of the judges (delivered at much length), or in the decree of the court, any reference whatever to the option of the slaves. Any authority to be deduced from the case, as bearing **[**101]** on the question in hand, would, therefore, necessarily be the result of presumption or conjecture, and entitled, I think, to little if any weight.

In the case of Elder v. Elder's Ex'or (it must be admitted), the will, to be construed and executed, does, in all its features disclosing a purpose on the part of the testator to leave the manumission of his slaves to their election, bear a very close resemblance to the will in the present case. The case, however, as an authority, is, I think, obviously open to some of the same criticisms that apply to Pleasants v. Pleasants. For it does not appear from the abstract of the bill, that the complainant raised any question as to the capacity of the slaves to make an election; the gravamen of his allegations being, that the slaves, conditionally emancipated by the will, had never elected to go to Liberia; but that on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would not go to Liberia, and preferred to remain in Virginia in slavery; and that they had remained here for nearly two years since the testator's death: nearly a year beyond the expiration of the period within which **[**102]** they were, by the terms of the will, to make their election. It will be seen, too, that, during the progress of

the cause in **[*195]** the court below, the complainant consented to an order of the chancellor appointing commissioners to examine the slaves, and to ascertain from each individual, and report to the court, whether they were, severally, willing to go to Liberia.

Of the arguments of the counsel, in this court, we have no report, and we are therefore without the means of ascertaining, except from intimations thrown out by the members of the court in the course of their several opinions, on what grounds it was sought to reverse the action of the chancellor. I think, however, that it may be fairly deduced from the opinions of the judges, that the stress of the case was on the questions, whether the testator could emancipate his slaves by directing them to be sent to Liberia, and whether, according to a fair interpretation of the will, the slaves were bound to make their election within twelve months after the decease of the testator. It was to these questions that the court mainly addressed their attention and remarks. I have failed to discover any observation in any one of the opinions **[**103]** of the judges, from which to raise the inference that the distinct question of a want of legal capacity in the slaves to make an election at all, was a matter of discussion before this court. In the state and shape in which the controversy apparently stood before this court, it might perhaps be going too far to say that the question could not have arisen. But in view of the circumstances which I have adverted to, it seems obvious to remark that for this court to have decided the case adversely to the negroes, on the ground that they had no legal capacity to make an election, would have been, to place itself seemingly in the ungracious attitude of being astute to set up an objection to the claim of freedom, which the appellant was not insisting on, and which, from his bill, as well as from his **[*196]** course in the court below, he did not appear disposed to raise.

From these considerations, whilst there are remarks in the opinions of some of the judges showing that there did not appear to them to be any thing illegal or impossible in the condition of an election by the slaves, the decision as an authority would yet seem to me to come far short of occupying the position on which it would have **[**104]** stood had it appeared that the question had been distinctly presented to, and adjudged by, the court.

Therefore, whilst entertaining the highest regard and veneration for the great learning, ability and general worth of the judges who decided that case, I cannot recognize the decision as imposing, on the exercise of our own judgments, those restraints which could result properly alone from a decision in which the question appeared to have been fully considered and unequivocally adjudged.

Nor do I think we should be deterred from a free examination of the question by apprehensions, lest, in the event of our coming to a conclusion at variance with the supposed authority of that case, we might inflict possible injury on fiduciaries and their securities, in instances where (it is suggested), relying on such authority, executors and administrators may have assented to like bequests. For I do not think that the case has ever been regarded by the profession as an authority, on the force of which the definitive settlement of the question could be safely predicated. Indeed, in the present case the Circuit court has so far disregarded the authority of Elder v. Elder as to declare **[**105]** the negroes free, without first instituting the proceedings that were had, in that case, to ascertain their choice; and their own counsel, in the argument here, have widely differed among themselves in respect to **[*197]** the necessity or propriety of any such proceedings. And I should suppose that the instances (if any) are extremely rare in which executors, acting under wills with such peculiar features, have failed to protect themselves, by seeking the advice of the courts, before committing themselves to the hazardous and irremediable step of assenting to the bequests of freedom.

Under these circumstances, I have conceived it to be my duty to regard the question as one to be tested by the general and well acknowledged principles pertaining to the subject, and not as one controlled by the influence of a special adjudication.

And when we so treat the question, it seems to me that there can be no longer any serious difficulty as to its proper solution.

When we assent to the general proposition, as I think we must do, that our slaves have no civil or social rights; that they have no legal capacity to make, discharge or assent to contracts; that though a master enter into the form of an agreement **[**106]** with his slave to manumit him, and the slave proceed fully to perform all required of him in the agreement, he is without remedy in case the master refuse to comply with his part of the agreement; and that a slave cannot take any thing under a decree or will except his freedom; we are led necessarily to the conclusion that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his

manumission.

Any testamentary effort of a master to clothe his slave with such a power, is an effort to accomplish a legal impossibility.

No man can create a new species of property unknown to the law. No man is allowed to introduce anomalies into the ranks under which the population of the state is ranged and classified by its constitution **[*198]** and laws. *HN2*[] It is for the master to determine whether to continue to treat his slaves as property, as chattels, or, in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed negroes of the state are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freedmen. He **[**107]** cannot endow, with powers of such import as are claimed for the slaves here, persons whose status or condition, in legal definition and intendment, exists in the denial to them of the attributes of any social or civil capacity whatever.

No conflict with these views is exhibited, by showing that the master may make his slave his agent, and bind himself to others by his acts. The only analogy between the position of a slave and that of a freeman employed in a like capacity is to be found in the fact that the slave and the freeman are both, for the occasion, the mere creatures of the master, and in the further fact that the power given is, in either case, revocable at his pleasure.

The resemblance between the condition of the slave and freeman, for the time, grows not out of the fact that the master has invested the slave, or recognized him as invested, with the characteristic powers of a free person, but out of the fact that the freeman has chosen to subject his own conduct and actions, for the occasion, to the will and control of another.

The agency of the slave, in truth, instead of affording any argument in behalf of the existence of his social or civil rights, is but an instance **[**108]** or illustration of the complete dominion of the master; of his entire control over all the powers and faculties of his slave; and of his right, consequently, to use him as an instrument or medium through which to make or execute contracts with third persons.

HN3[] A master contemplating the manumission of his slaves might, no doubt, first ascertain their wishes on **[*199]** the subject, and if he pleased, then proceed to shape his course accordingly; and it could form no objection to a deed or will emancipating them, should it appear on the face of the instrument that the act of manumission was in conformity with their choice. But by establishing this proposition, the counsel for the appellees do not, it seems to me, reach any ground on which to found an argument in favor of the validity of the bequest in this case. In the case supposed, the act of emancipation is executed, complete and ended. It neither adds to, nor detracts from, its force that the master, in the execution of the instrument, consulted the wishes of the slaves. The operation of the instrument, there, is in no wise dependent on any thing that the slaves have done or are to do in the matter. But in the case before us, the operation **[**109]** of the will, as an instrument of emancipation, is made to depend on the choice of the slaves. In the case supposed, the master has fully manumitted his slaves. In the case before us, the master has endeavored to clothe his slaves with the uncontrollable and irrevocable power of determining for themselves whether they shall be manumitted. And in so doing, he has, I think, essayed the vain attempt to reconcile obvious and inherent contradictions.

In considering whether the legislature, in authorizing a master to manumit his slaves by will, could have contemplated, as valid instruments of emancipation, wills such as the one before us, a view of the many serious difficulties which, from obvious considerations, would most probably grow out of and attend the whole subject of an election by slaves, especially by such of them as might be laboring under the disabilities of infancy, idiocy or lunacy, furnishes to my mind a strong argument in favor of the negative of the proposition. It is difficult to suppose, in the opposite view, that the legislature would not have anticipated such difficulties, and made provisions for the regulation of the subject, instead of embarking the chancery **[**110]** **[*200]** courts, without guide, upon a new and extensive jurisdiction, which would needs be fruitful in litigation of the most perplexing, if not mischievous character.

On the whole, it seems to me that the provisions of the will respecting the manumission of the slaves, are not such as are authorized by law and are void, and consequently that the Circuit court erred in declaring the slaves and their increase to be free at the death of the life tenant.

In the absence of any proof or statement showing specifically the several kinds and descriptions of personal and perishable property which it is alleged were received by Mrs. Poindexter, and not returned or accounted for at her death, it would, I think, be premature to attempt to prescribe the rules by which to measure the extent of the accountability of her

representative for such property, inasmuch as the rules which would apply to certain articles of such property, might not be properly applicable to others.

The views which I have expressed in regard to the bequest respecting the manumission of the slaves, leads to questions which thence arise between the next of kin and some of the legatees of the testator. But as none of these questions **[**111]** are distinctly and specifically raised in the bill, as it does not clearly appear that all the parties who may have an interest in these questions are now before the court, and as the case must necessarily go back, it seems to me it would be most proper to refer these questions also to the Circuit court, where all who have an interest in the subject, if not already before the court, can be made parties, and allowed an opportunity of presenting to the court more distinctly the several questions bearing on their respective interests.

Concur by: MONCURE

Concur

MONCURE, J. I think the bequest contained in the will of John L. Poindexter, that the negroes loaned to **[*201]** his wife for life should at her death "have their choice of being emancipated or sold publicly," is a valid bequest, and emancipated them in futuro, upon a condition precedent.

Whether a master should have power to emancipate his slave or not, is a question which addresses itself to the legislative, and not the judicial department of the government. It was answered by the legislature by the act of 1782, giving the right to emancipate by will or by deed. That act, substantially, has ever since remained, and yet remains, in full force; **[**112]** modified only by the act of 1806, requiring slaves thereafter emancipated to leave the state.

That a master may emancipate his slaves, to take effect in futuro; as for instance, after the death of his wife; has been repeatedly adjudged by this court, and may now be considered as the settled law of the land.

That a master may emancipate his slaves upon a condition precedent, if there be nothing unlawful in the condition, is a proposition which will not be denied: as for instance, if his wife die without issue living at her death. This would not only be a lawful, but a reasonable condition, having for its object a provision for the issue, but for which the emancipation would be absolute. But no condition however unreasonable or even capricious would, on that account merely, be unlawful.

A master may emancipate his slaves against their consent. Why may he not make such consent the condition of emancipation? There seems to be nothing in the policy of the law which forbids his doing so. He may certainly, in his lifetime, consult the wishes of his slaves, and emancipate them or not accordingly. Why may he not direct his executor to consult their wishes, and emancipate them or not accordingly? **[**113]** Is not the one as much opposed to the policy of the law as the other? the consultation by **[*202]** the master, as much as the consultation by the executor?

It may be said that one is an executed, and the other an executory act of emancipation. But both are, in fact, executed acts. Both of them, so to speak, convey an estate or interest--a right to freedom; the one an absolute, the other a conditional right. The latter is as much an executed act as if the condition were wholly independent of the wishes of the slaves.

If the slaves were wholly incapable of making a discreet choice, and could merely guess what was best for them, there would be nothing in that incapacity which would make the condition unlawful. As before stated, a condition is not unlawful, merely because unreasonable or even capricious.

But slaves have some capacity to choose, though it may, generally, be very weak and imperfect. They are responsible for their criminal acts; and may incur, and have to suffer the heaviest penalty of the law. The moment they become free they are legally capable, without any increase of intelligence, of making contracts, buying and selling property, and doing other acts which require the exercise **[**114]** of mental faculties. And as the law now is, they may, by their own choice, return again to slavery. Slaves have certainly feelings and wishes which the master may be willing to consult in regard to their emancipation. To do so, is not to create that middle state between slavery and freedom, which is unlawful. It is merely to propound a question to a slave requiring a categorical answer. If he wishes to be free, he is made a freeman in an instant; but is made so by the act of his master, whether that act be executed before or after the expression of his wish; provided it be executed according to law. There is not a particle of time intervening between his slavery and his freedom; and so no particle of time in which he occupies a state between the two.

[*203] The dominion of a master over his slaves (as over his other property) may be exercised not only by an act which is to operate during his life, but by an act which is not to operate till after his death; and that dominion embraces the power of emancipation. He may emancipate them by deed or by will--in presenti or in futuro--absolutely or conditionally. If he attempt to violate the policy of the law, by creating a mixed state **[**115]** of slavery and freedom, his act will be void: or if he violate a rule of law, by annexing to a gift of the slaves a condition which is repugnant to the gift, the condition will be void. And his act of emancipation, whether absolute or conditional, in presenti or in futuro, by deed or by will, is in subordination to the claims of creditors, and to the obligation of the master to indemnify the community against the expense of slaves likely to become chargeable.

His legatees, certainly, cannot complain of his act or the manner in which he has seen fit to exercise it. They can claim only what he has chosen to give them; and cannot complain that he has given them his slaves only on condition that they prefer to remain in slavery. It was his to give them absolutely or conditionally; and it is theirs to refuse or accept them as given. There is nothing in the policy of the law which requires them to claim the slaves against his will. They certainly may, if they choose, give effect to it. Why should they not be compelled, if need be, to do so? Why should they be permitted, contrary to the general rule, to claim under and against the will? The intention of the testator, if lawful, must prevail. **[**116]** It is a law to all who claim under his will. They must do all they can to give effect to it.

It is argued, that slaves have no civil rights or legal capacity, and cannot therefore elect between freedom and slavery, though authorized to do so by their master. The premises of this argument are certainly true, **[*204]** at least as a general rule, but the conclusion is, I think, unsound. The fallacy of the argument (if I may be allowed to say so) consists in supposing that to make such an election would be to exercise a civil right or capacity. It is admitted that slaves are capable of receiving freedom, if conferred in the mode prescribed by law. It must also be admitted that it may be conferred conditionally. It was so conferred in the cases of *Pleasants v. Pleasants, 2 Call 319*; *Elder v. Elder's Ex'r, 4 Leigh 252*; *Dawson v. Dawson's Ex'r, 10 Leigh 602*, and Hepburn, &c., v. Dundas, &c., *13 Gratt. 219*. The right to confer it absolutely, which the law expressly gives, includes the right to confer it conditionally. The only question is, Whether such condition may be the willingness of the slave to receive his freedom. Why may it not? Slaves emancipated absolutely, still have an election between **[**117]** freedom and slavery. They may become slaves again under the provisions in the Code, p. 466, § 1, and p. 746, § 26; or under the act of February 18, 1856, Sess. Acts, p. 37. Why may not the master give them such an election directly, instead of giving it to them indirectly, by first making them free? Why should he be compelled to lose his property in such of his slaves as prefer to remain so, in order that he may give freedom to such as prefer it? It is said that a slave emancipated by an election given him by his master, would become free by his own act, and not by the act of his master. But this is not so. A slave can become free only by the act of his master; and the act must be done in a certain prescribed mode. When the act has been done in that mode, it may be made to depend on the willingness of the slave as well as upon any other condition. And whether made to depend on that or any other condition, it is the act of the master, and not the happening or performance of the condition which confers the right to freedom. **[*205]** The agency by which the condition is performed, is constituted by the master; and such performance is thus, in effect, his own act. There is nothing in the relation **[**118]** of master and slave, nor in the condition of slavery, which can prevent a master from adopting the agency of his slave for such a purpose. He can do so on the same principle on which it is admitted he may make his slave his agent for other purposes. Certainly nothing is better settled than that a slave cannot make a valid contract, even for his own freedom; and cannot enforce the execution of a promise of his master, even though it be to confer freedom upon him, and though the consideration on which it was made has been fully performed on the part of the slave. But it is equally well settled that a slave may avail himself of an act of emancipation duly executed by his master, whether such emancipation be absolute or conditional.

But if it can properly be said, that to make such an election would be to exercise a civil right or capacity, it would be as a mere incident to a capacity which is expressly given by law. A slave, as before stated, is certainly capable of receiving his freedom. And, if it be conferred in the mode prescribed by law; that is, by deed or will duly executed and recorded, he may propound such deed or will for probate, and may appeal from a sentence against him. **[**119]** He may sue in forma pauperis for his freedom, and may resort to a court of equity for relief when he has no adequate remedy at law. It is as competent for a slave emancipated on condition that he elects to be free, to

make such election, as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom. Such right of election is incident, as such remedies are incident, to the legal capacity of the slave to receive his freedom.

[*206] If this were a new question, therefore, and especially if it be conceded, as it now must be, that emancipations in futuro are lawful, I would think the condition lawful and the emancipation valid in this case.

But I regard the question as res adjudicata. Elder v. Elder, I think, has decided it. I would feel myself bound by that decision, even if I doubted its soundness. It is a case of the highest authority, having been argued by very able counsel, and having been decided by a unanimous court of four of our ablest judges, Tucker, Brooke, Cabell and Carr, Judge Green being absent from sickness. It was decided in 1833, a quarter of a century ago, and has ever since been regarded **[**120]** as a binding authority. On the faith of it counsel have advised, testators have made their wills, courts have construed them, and executors have carried them into effect. To disregard it now, and decide otherwise, may be attended with the greatest evils. The same reasons which are said to require us to disregard that case, seem equally to require us to disregard all the cases which decide that emancipations in futuro are lawful; and thus the whole law would be unsettled in regard to the emancipation of slaves.

But it is said that the question was not raised nor decided in Elder v. Elder; that the order in that case appointing "commissioners to examine privily and impartially all the slaves of the testator's estate, and to ascertain from each and report to the court, whether he or she was willing to go to Liberia," was made by consent of parties; and therefore that the question is not res adjudicata. The bill which was filed by the residuary legatee, alleged that the slaves conditionally emancipated by the will had never elected to go to Liberia; but that, on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would **[**121]** not go to Liberia, and preferred to remain in Virginia in slavery; **[*207]** and that they had remained here for near two years since the testator's death. The executor, in his answer, stated that the other personal estate of the testator being inadequate to the payment of his debts, he had hired out the slaves for that purpose, and had not yet given them their election, though he had explained their rights to them, and did not doubt that when they should be allowed to make their election, they would prefer to go to Liberia. In this state of the pleadings the consent order was made. The commissioners reported that all of the slaves except one preferred to accept their freedom and go to Liberia; and the court decreed accordingly. The argument of the case in this court is not reported; and we can only infer what it was from the opinions of the judges. It is reasonable to infer that among the points argued, were those which were decided. It was decided, among other things, that such of the slaves as preferred to go to Liberia were effectually emancipated; and that it was unnecessary, to perfect their title to freedom, that they should elect to go within twelve months after the testator's death, **[**122]** provided they made such election when it was offered to them; or that the Colonization society should agree to defray the expenses of sending them; provided any person should agree to do so. It appears from the opinion of President Tucker, that these points were argued by counsel. It cannot be said with propriety that they did not arise in the case; or that it was improper for the court to decide them; or that the fact that the order before mentioned was by consent, affected the decision. If the slaves really had been unwilling to go to Liberia, as the bill alleged, a report of that fact by the commissioners would have put an end to the case; and therefore the plaintiff consented to an order appointing commissioners to ascertain the fact; but he did not intend thereby to waive any right he might **[*208]** have to the slaves, even though they might be willing to go to Liberia. Nor did the order have that effect. Carr, J., said, "In the construction of wills, we are to find out the meaning, the intention, the will of the testator; and unless that violates some principle of law, it must be carried into execution. He thought the intention plain in the case, and that it did not violate any principle **[**123]** of law. Cabell, J., said, "The intention of the testator to emancipate his slaves, is too evident to require argument; and it is equally clear that there is nothing illegal in the mode which he has adopted for the execution of that intention. Slaves may be emancipated by deed or will, at the pleasure of their owners; but they forfeit their freedom, unless they remove, within twelve months, beyond the limits of the commonwealth. It can therefore be no objection to the emancipation in this case, that the testator has directed it on the condition of their willingness to go to Liberia." Brooke, J., concurred. Tucker, P., said, "The first questions in this case turn upon the intention of the testator, and the legality of that intention. Of the intention, I think there can be no reasonable doubt." "As little doubt exists of the legality of this intention. The slaves were not to be free until they should be sent to Liberia; and they were not to be

sent there against their consent. It is not perceived that there is any thing in the policy of the law, as there certainly is not in its statutory provisions, which forbids an emancipation by transportation to a free colony." None of the judges seem **[**124]** to have had any doubt upon the question, whether the conditional emancipation of the slaves was valid. Their decision of that question seems to be in accordance with the construction which has uniformly been put upon the act of 1782, and acquiesced in ever since its passage.

In *Pleasants v. Pleasants, 2 Call 319*, the wills of John and Jonathan Pleasants, which were the subjects **[*209]** of controversy, were made before the passage of that act, when it was not lawful to emancipate slaves in this state; and the case was decided shortly thereafter. The will of John was, that his slaves should be free if they chose it, when they arrived at the age of thirty years, and the laws of the land would admit them to be set free without their being transported out of the country, &c. The will of Jonathan was, that whenever the laws of the country would admit absolute freedom to them, his slaves should, on their coming to the age of thirty years, become free, or at least such as would accept their freedom. The court, consisting of Judges Pendleton, Carrington and Roane, unanimously held that the slaves were entitled to their freedom. Nothing was said in the case about the right of election **[**125]** given to the slaves. The great question was, Whether the doctrine of perpetuities and executory limitations applied to the case; and whether, according to that doctrine, the bequest of freedom was limited on a contingency too remote? It did not occur to the counsel or the court that an election between freedom and slavery could be given to slaves under the act of 1782. If it had, it is incredible that the objection would not have been taken or suggested by some of them. It is said, that the objection was not taken because the emancipation was considered to be absolute. It can hardly be supposed that the counsel for the claimants of the slaves would have admitted, without a question, that the emancipation was absolute, if it had been considered that its validity depended upon that. An order to take the election of the slaves was doubtless not applied for, because it was known that all would elect their freedom; especially as, by the act of 1782, they were not required to leave the state. I regard Pleasants v. Pleasants as a case of great importance on the question under consideration. It involved a large amount of property, **[*210]** and the freedom of a great many negroes. It was argued by **[**126]** very able lawyers, and decided by very eminent judges, who had the best opportunity of knowing the meaning and policy of the act; and it may almost be considered as a contemporaneous exposition thereof. No subsequent decision of this court has impaired the authority of the case; nor has the doctrine settled by it been changed by subsequent legislation; though there have since been several general revisions of our laws, and two conventions to amend our constitution.

That case was followed by Elder v. Elder, in which the question of the right of election was more distinctly presented by the will, and raised by the pleadings and proceedings, and in which, as we have seen, the most confident opinions were expressed by the judges in affirmance of the right.

Elder v. Elder, in its turn, was followed by Dawson v. Dawson's Ex'r, &c., *10 Leigh 602*, in which the testator directed all his slaves to be emancipated and sent to a country where slavery is not tolerated, if, within twelve months, they should elect to be emancipated on these terms; otherwise to be sold. It was tacitly conceded by all parties in the case, and by the court below and this court, that the right of election existed. The **[**127]** matter directly in controversy was the right to the Bell-Air tract of land, which by the codicil was given to "Benjamin Dawson, for the equitable support and maintenance of the slave population thereon." Benjamin Dawson claimed under the codicil an absolute estate in the land and slaves thereon. The court below decided that the codicil gave him only the use thereof, in trust for the support and maintenance of the slaves during the interval of twelve months or longer, which might elapse between the death of the testator and the election of the slaves; but that nevertheless, as the slaves were not yet freedmen, **[*211]** and would not be until they so elected, they therefore had no capacity to enforce against Dawson the trustee any accountability over and above their maintenance; and he was entitled to all the profits beyond, discharged of the trust, namely, the use of the Bell-Air estate until the slaves thereon should make their election. This court, consisting of Tucker, Brooke and Cabell, unanimously affirmed the decree. In doing so, they must have affirmed the validity of the conditional emancipation of the slaves; for otherwise the trust created for their support would have been void, and **[**128]** Benjamin Dawson could have had no interest in the Bell-Air estate. The most that can be said against the authority of the case is, that the question as to the validity of such an emancipation was not directly raised. The plain reason why it was not is, that neither the parties nor the counsel nor the court seem to have entertained any doubt upon the question. And this shows how uniform and universal has been the opinion

which has prevailed upon the subject.

The principle thus recognized, affirmed and acted on in Elder v. Elder's Ex'or, and Dawson v. Dawson's Ex'or, has never since been questioned in this court, nor changed by legislation; though there have since been, besides many annual sessions of the legislature, one general revision of our laws, and one session of a convention to amend the constitution.

If public opinion has undergone any change as to the policy or propriety of authorizing masters to emancipate their slaves, or to emancipate them in futuro or upon condition, such change must develop itself in the action of the legislature, and not of the courts, whose business it is jus dicere, non jus dare, to expound the law as it is written and settled, and not as it ought **[**129]** to be, or as it may be supposed that public opinion would have it to be.

[*212] There are certainly difficulties surrounding the subject of emancipations depending upon the choice of slaves. Who are to choose for such as are of too tender years to choose for themselves? is a question which it is difficult to answer; at least, to give an answer which will apply to all cases, or even as a general rule. But these difficulties are not of themselves sufficient to prevent the court from administering the law, if it can possibly do so. They were overcome in Elder v. Elder, and may be, perhaps, in most cases. There is nothing to indicate that they cannot be overcome in this case, as they were in that. If in any case they cannot be overcome, the intention, of course, must fail of effect. But whenever they can, they ought to be overcome; ut res magis valeat quam pereat. Whenever the law authorizes an act to be done, and a party bona fide endeavor to do the act according to law, the court should endeavor to effectuate his intentions.

The will in this case was written in November 1835, two or three years after the decision of Elder v. Elder, and probably with that case before the draftsman, **[**130]** or in his mind. But for that case, the testatory might have emancipated the slaves absolutely. He was willing to do so, but did not wish to force freedom upon them against their will, and therefore gave them their choice, as that case decided he might lawfully do. Ought we now to frustrate his will, and award the slaves unconditionally to those to whom he gave them only on condition that the slaves reject the boon of freedom which he offers them? I think not.

I am also of opinion that the increase of the slaves born during the life of the testator's wife, are entitled to the benefit of the bequest. All the residue of his property, including negroes, is loaned to the wife for life. The issue of these negroes born during her life, are part of his property and part of the negroes loaned **[*213]** to her for life. The choice of being emancipated or sold is given to "the negroes loaned his wife, at her death," embracing of course, I think, the said issue. This construction seems to be sustained by many decisions of this court, which I need not cite.

I do not think that the clause directing his executor to sell any of the slaves loaned his wife, if they should prove refractory or hard to manage, **[**131]** affects the case in regard to such of the slaves as remained unsold at her death. This clause was inserted for the benefit of the wife, and to insure the good conduct of the slaves. Any of them might have been sold for misconduct during her life, and such would of course have been excluded from the number of those to whom the choice was to be offered at her death. But as to those who then remained unsold, the clause had performed its function, and they stood as if it had not been inserted in the will.

In regard to the other questions involved in this case, I concur with the majority of the court.

ALLEN, P., and LEE, J., concurred in the opinion of Daniel, J.

SAMUEL, J., concurred in the opinion of Moncure, J.

Judgment reversed.

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