inquest in this cause, some contrariety of opinion prevails among the judges; but the defendants in error have made a preliminary question, which, if decided in their favor, will terminate the present suit. The declaration in ejectment is dated on the 22d of May 1831, and the judgment was rendered on the 14th of January 1832. The plaintiff in ejectment counts on a demise made by Amos Binney, on the 1st day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which is subsequent to the demise on which the plaintiff counts. Though the demise is a fiction, the plaintiff must count on one, which, if real, would support his action.

We find in the record an entry that the declaration is amended, by adding a demise from J. K. Smith, one from the heirs of Amos Cloud, and another from John Way. These counts, however, do not appear, and the court would feel great difficulty in framing them. If this difficulty could be overcome, the abstract shows that J. K. Smith conveyed all his title on the 17th of May 1828, before this action was commenced. It also shows that the title of Amos Cloud's heirs was conveyed from them by deeds bearing date in 1816 and 1819. Had these additional counts been filed, neither of the lessors possessed any title, when this ejectment was brought, or when it was tried. The case, therefore, could not have been aided by counts on demises from them.

The counsel for the defendants have insisted, that if the cause cannot be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as will bring before this court those *questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, [*219 which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require. But if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it. (6 Cranch 268.) We cannot, with propriety, reverse a decision which conforms to law, and remand a cause for further proceedings. The judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be and the same is hereby affirmed, with costs.

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*James McCutchen and others, Appellants, *v.* James Marshall [*220
and others.

Slavery.

Patrick McCutchen, of Tennessee, died in 1810, having previously made his last will and testament; by which will, among other things, he bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, naming them, should, at the death of his wife, be liberated from slavery, and be for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife; and those were to be subject to the control of his brother and brother-in-law, until they were of age, at which period they were to be set free; as to Rose, one of the slaves, the testator declared, that she and her children, after the death of his wife, should be liberated from slavery, and for

ever and entirely set free. Two of the slaves, Eliza and Cynthia, had children born after the death of the testator, and before the death of the wife; nothing was said in his will as to the children of Eliza and Cynthia. After the decease of the wife, the heirs of the testator claimed all the slaves, and their increase, as liable to be distributed to and among the next of kin of the testator; alleging, that by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any direction therein; that if the law does authorize emancipation, they are still slaves until the period for emancipation; and that the increase, born after the death of the testator, and before their mothers were actually set free, were slaves, and as such were liable to be distributed. The laws of Tennessee fully authorize the emancipation of slaves, in the manner provided by the last will and testament of Patrick McCutchen.

As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper; as between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially, so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted.

It is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother; if, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that there children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time; if the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their *freedom, on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, goes very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves; that it is only a conditional manumission, and until the contingency happens, upon which the freedom is to take effect, they remain, to all intents and purposes, absolute slaves. The court do not mean to disturb this principle; the children of Eliza and Cynthia must, therefore, be considered slaves.

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Appeal from the Circuit Court for the district of West Tennessee. In the circuit court, the appellants, James McCutchen and others, citizens of Missouri, Kentucky, Ohio and Mississippi, complainants, filed a bill against James Marshall and others, citizens of the state of Tennessee, defendants.

The bill stated, that some time in the year 1812, one Patrick McCutchen, at that time, and for many years before, a citizen of Williamson county, in the state of Tennessee, departed this life. Previous to his death, the said Patrick McCutchen made and published his last will and testament, which was, after his death, proved before the court of pleas and quarter sessions of said county, of Williamson, and established and admitted to record in said county, as his last will and testament. A copy of said last will and testament was annexed to the bill. The whole of the persons nominated in the will as executors and executrix, qualified as such, and took upon themselves the burden of executing the same. Of the said executors, Samuel McCutchen and Hannah McCutchen were dead, leaving James Marshall the sole surviving executor of the will. Patrick McCutchen, the testator, departed this life without issue; and Hannah McCutchen, the widow of the said Patrick, although she intermarried, after the death of the said Patrick, with one James Price, also died without issue. By the provisions of the will, said Hannah McCutchen, the widow of the said Patrick, only held under it a life-estate in such portion of the property of the said Patrick as was therein devised and bequeathed to her, which estate had, consequently,

terminated by her death. The bill charged, that they, together with the defendants to this bill, except the defendant James Marshall, were the legal heirs and distributees of the said Patrick McCutchen, deceased. The said Patrick also left as his distributees and heirs-at-law, the defendant, James McCutchen, brother of said Patrick, and *Alexander and William Buchanan, children of a deceased sister of Patrick, but who resided [*222 without the jurisdiction of the court, and were, therefore, not made parties to the bill.

The will of the said Patrick McCutchen, after giving certain legacies to his relatives, devised "to his wife Hannah, during her natural life, the tract of land on which the testator lived, together with all the residue of his personal property, of every kind, including the slaves, which shall remain after the payment of his debts, and the legacies afterwards, to be used as she may think proper; the slaves, nevertheless, to be subject to the arrangement to be made in a subsequent article of the testament." The sixth article of the will was in these terms.

"It is my will and desire, that my negro man slave named Jack, aged about twenty-four years; also my negro man slave named Ben, aged about nineteen years; also my negro woman slave named Rose, aged about twenty-six years, together with what children she may hereafter have, if any, before the death of my wife Hannah; also my negro girl slave named Eliza, aged about eleven years; also my negro girl slave named Cynthia, aged about seven years; also my negro boy slave named Thomas, aged about four years; also my negro girl slave named Harriet, aged about two years; also my negro girl slave named Maria, aged about two months; the four last-mentioned slaves being the children of the above-mentioned Rose, shall all and each, at the time of the death of my beloved wife Hannah, to whom they are given during her natural life, as mentioned in the third article, be liberated from slavery, and for ever and entirely set free; provided, those who are not now of age or shall not have arrived at the age of twenty-one years at the happening of the death of my beloved wife Hannah, shall be subject to the following disposition, viz.: Eliza shall be at the control and under the direction of my brother, Samuel McCutchen, until her arrival at the age of twenty-one years, and then be set free; Cynthia, Ben, Thomas, Harriet and Maria shall be at the control and under the direction of James Marshall, my wife's brother, until they shall each, respectively, arrive at the age of twenty-one years; at which time or times, they are to be each, respectively, liberated and for ever set free."

*The bill charged, that the slaves mentioned in the will, and owned [*223 by the testator, with their increase, were liable to be distributed to the complainants and the defendants, Marshall excepted, as his legal representatives; but that James Marshall refused to distribute them, or any of them, and denied that they were any part of the estate by him to be distributed, alleging that by the terms of the will they were to be set free at the times specified in the will. That the said James Marshall did present a petition to the county court of Williamson county, praying the court to set free a certain number of the said slaves, to wit, Jack, Ben, Thomas, Eliza and Cynthia; and the court, supposing they had power to do so, granted the prayer of the petition, and declared them free; which proceedings the bill charged were *coram non judice* and void, as the court had no power to

set the said negroes free, unless the testator had, in his lifetime, presented a petition for the purpose. The bill further charged, they were advised, that by the laws of the state of Tennessee, slaves could not be set free by last will and testament, or by any directions therein; and that, consequently, all the said slaves, with their increase, were liable to be distributed among the legal representatives of the testator. That if the law authorized a testator to direct his slaves to be set free, by a given period, or at their arriving at a particular age, yet they were still slaves until that period arrived; and that all their increase, born after the death of the testator, but before they were actually set free, were slaves, and as such were liable to distribution. The bill prayed for an account of the hire of the slaves, and for their distribution, and for an injunction, &c.

The defendant, James Marshall, executor of the last will and testament of Patrick McCutchen, demurred to the bill, and the circuit court sustained the demurrer, and ordered the bill to be dismissed. The complainants appealed to this court.

The case was submitted to the court, on printed arguments, by *Benton*, with whom were *Washington* and *Yerger*, for the appellants; and *White*, for the appellees.

The counsel for the *appellants* first referred the court to the following
*224] extract from the will: *"I give and bequeath to my beloved wife Hannah, during her natural life, the tract of land on which I now live, together with all its appurtenances, and the residue of the slaves—the slaves subject to an arrangement to be made in a subsequent article of this testament."

They said, that the slaves, in a subsequent part of the will, he directs to be set free, at the time of the death of his wife Hannah, to whom he had given them for life. In enumerating his slaves he says, that "Rose and such children as she shall have before his wife dies, shall be set free." In relation to the rest of his female slaves, he directs them to be set free, but says nothing of their children.

1. In the case of *Hope* v. *Johnson*, 2 Yerg. 123, it was decided by the supreme court of this state, that where a testator directs that his slaves shall be set free, his executors can have them set free, upon petition, in the same manner as the deceased could in his lifetime. If this case be the law, it is probable, that all the slaves who were directed to be set free at the death of Mrs. McCutchen, would be entitled to their freedom; but still a question arises, as to the children who were born before that period.

Mrs. McCutchen had but a life-estate; the slaves, after her death, belonged to the distributees of McCutchen, until they are set free. The will does not of itself operate as a gift of freedom; the assent of the state must be had, before they can be free; this may never be given. It is settled in this state, that the increase of slaves, born during the continuance of a particular life-estate, does not belong to the tenant for life. *Glasgow* v. *Flowers*, and *Timms* v. *Potter*, 1 Hayw. 234; *Preston* v. *McGaughey*, Cooke 113. It was the early doctrine of the courts, that a limitation of chattels for life, gave the absolute interest, but that notion is now exploded; and, consequently, where slaves are given for life, with remainder over, the first legatee takes only the specific interest given, and the right of absolute pro-

perty rests in the remainder-man. The cases above cited, and 2 Roper on Legacies 351. So, where there is a devise for life alone, the *property, after life-interest, vests in the distributees. *Reith* v. *Seymour*, [*225 4 Russ. 263. In this case, then, there was a devise for life, of the slaves, with a reversion or vested interest in the distributees of McCutchen—subject, however, to be divested by the court, upon petition, setting them free. That it is a vested interest, subject to be divested, is proved by the case of *Doe* v. *Martin*, 4 T. R. 39.

The next question is, what is the condition of children born after a time has been fixed for their mother to obtain her freedom, but before the time arrives, and before she is actually free? In this case, it would seem, that the testator only intended that his then slaves should be free, and not their issue, except Rose's, because he expressly says that Rose shall be free, at the death of his wife, and all her children born before that period. But in speaking of the other female slaves, he directs them to be set free, but says nothing of their issue. But independent of this, the law is clear, that the issue must follow the condition of the mother. In McCutchen's will, the slaves were not free; they had only a right to future freedom, and that depending upon a contingency, to wit, whether the county court would grant the petition. Until the period arrives when they are to become free, they remain slaves; if they die before that time, they die slaves; they are in fact slaves; but entitled to be set free in future.

Suppose, a man devises, that if A. is elected president, his female slave B. shall be free—she has a child born, and after its birth, A. is elected—is not the child a slave, although its mother, after that event has happened, is free? Was it not born, whilst the mother was a slave? Surely, it was. Most of our rules (except statutory provisions) are derived from the civil law. By the civil law, the issue of slaves entitled to future liberty, or entitled to it at a fixed time, or upon a contingency, if born before the period arrives or the contingency happens, are slaves. See authorities collected in Judge GREEN's opinion, 2 Rand. 241–2. In Virginia, the question in the case of *Maria* v. *Surbaugh*, the case above alluded to in 2 Randolph, has been very learnedly *investigated, and it was decided that the issue [*226 were slaves. In Kentucky, the same principle has been established. 2 Bibb 298. So, in Louisiana. *Cato* v. *Dorgenny's Heirs*, 8 Mart. 218. So, in Maryland. 6 Har. & Johns. 16.

At the same time those negroes were born, to whom did they belong? Not to the tenant for life, that is clear. Not to their mothers, for they were slaves at the time, and could hold no property. They must have belonged to the distributees, because their mothers did; subject only to have their interest divested, upon the happening of a contingency. At the instant they were born, they were born the property of the distributees. This property cannot be divested, because the will authorizing a divestiture only applies to their mothers.

But the case of *Hope* v. *Johnson* is not admitted to be law. According to the laws of Tennessee, no man can emancipate his slaves by will. The acts of 1777, ch. 6; 1779, ch. 12; 1788, ch. 20; and 1801, ch. 27, all declare, that no slave shall be emancipated, except for meritorious services, to be adjudged of by the county court. These acts, in their details, prescribe the method of proceeding in cases of emancipation; require security to be given

that the slave to be manumitted shall not become a public charge; and provide for the sale of the slave, when the master suffers him to go at large, or attempts to free him, without complying with the directions of the law. Emancipation, therefore, cannot take place, consistently with these acts, by mere testamentary regulation.

It would, at first view, seem to be strange, that a man could not renounce any right possessed by him. But slaves are a species of property, the right to which the policy of society forbids to be relinquished, without the sanction of the public authorities. Their assent, in the present instance, was not given during the lifetime of the testator; and as soon as he died, the situation of the property was so altered, that it could not be given without the precedent application of the succeeding owners. The declaration, therefore, which is contained in the will under which these negroes claim their freedom, amounts to nothing more than an expression of a wish or intention
*227] on the part of the testator, *that they should be free; but no act of manumission was consummated by the will.

To counteract this position, the case of *Hope* v. *Johnson*, decided by the supreme court of Tennessee, will probably be cited. That case, when properly understood, so far as it contains anything touching the present controversy, is an authority for McCutchen. The will of David Beattie was as follows—"I will and bequeath that the plantation I now live on, be sold at public or private sale, to the best advantage, and the proceeds thereof laid out in lands in the Indiana territory, as well situated as can be procured, and the right thereof vested in my negroes, which I now own, to wit, London, George, &c., each and all of whom I give their entire freedom, and the settling of them on the above-named lands, under the direction of my executor." Robert Johnson was the executor. Mrs. Hope, the sister of Beattie, and his only heir-at-law, filed a bill against the executor, to enjoin him from executing that part of the will which related to the sale of the land and investment of the proceeds, upon the ground of its being a void devise, as the negroes could not be emancipated by will, and as they were the objects of the devise in question. The direct object of the bill was not to prevent the emancipation of the slaves, but that matter was incidentally involved in the question growing out of the devise of the land. Mrs. Hope set up no claim to the negroes in her bill; she was willing that they might be just as free as the testator wished them to be; she only contended for the land, that having descended from her father. The case came on before the court, in the first instance, upon a motion by the executor to dissolve the injunction. Whyte, Judge, delivered a very able, elaborate and learned opinion in support of the injunction, and of the grounds assumed in the bill. Haywood and Emmerson, Judges, without either dissolving the injunction, or refusing to do (and that was the issue which they were called upon to decide), made the collateral order, that the injunction should be held up twelve months longer, to give the executor an opportunity of procuring the emancipation of the slaves, by any means by which it could be accomplished. Previous to the date of this very order, an application had been, unsuccessfully, made by the executor to the county court of David-
*228] son, to have said negroes emancipated. *It cannot escape the observation of the supreme court of the United States, that had said negroes been then (at the time of moving for the dissolution of the injunc-

tion) actually free, or that had they been then capable of taking by devise, the executor would have been entitled to an unconditional dissolution of the injunction. The course taken by Judges HAYWOOD and EMMERSON, therefore, unprecedented as it was, proves, however, that until there was a complete emancipation of the negroes, they could not be devisees, and also that they were not *ipso facto* emancipated by the will. These are the reasons which have authorized us to say, that the case of *Hope* v. *Johnson*, so far as it has any bearing upon this case, operates in favor of the appellants.

The executor, taking advantage of the hint afforded by the aforesaid anomalous order of Judges HAYWOOD and EMMERSON, applied to the legislature, and obtained the passage of a special law, having no reference to any body in the world but him, Robert Johnson, and to no other case of emancipation but that of Beattie's negroes; nor pretending to lay down any general rule upon the subject, or to legislate beyond that particular case: whereby the said executor was authorized and empowered to prefer a petition to any county or circuit court, other than that of Davidson, for the emancipation of said negroes; and said law further enacted, that the sentence or decree of such court, when made, should be valid, and should entitle the negroes to their freedom. In pursuance of that law, by which the legislature assumed omnipotence, an application was subsequently made to the circuit court of Sumner county, and the judge of that court sustained the constitutionality of a statute which undertook to divest private vested rights. After the decree of Sumner circuit court was obtained, under the circumstances and in the manner aforesaid, establishing the freedom of Beattie's negroes, the counsel of the executor, not relying altogether upon the validity of the decree, entered into a written agreement with the counsel of Mrs. Hope, whereby it was admitted, that the negroes were free, and should be so considered, whatever the supreme court might determine in relation to the land. In this agreement, the counsel of Mrs. Hope were certainly overreached, as it precluded any discussion as to the legal condition of the negroes, before said decree of *Sumner circuit court, and by virtue of it. The object of Mrs. Hope, in sanctioning said agreement of her counsel, was merely to waive any claim to the negroes as property, and to go exclusively for the recovery of the land. But, by admitting that said negroes had been emancipated by the decree, or were so at any rate, the necessary implication arose, that they were capable of being so emancipated, notwithstanding the legal rights of Mrs. Hope, as attaching to them from the situation in which they were left at Beattie's death; and the conclusion, that the emancipation of them not having been effected in the testator's lifetime, they belonged to the executor as assets, and afterwards went to the distributee was entirely repelled. In this state of the case, it was brought to a final hearing, and the bill dismissed, WHYTE, Judge, still dissenting; and the strength of the argument in favor of the executor, was rested upon the fact that the negroes were then free, if not by the decree, by the said written agreement. [*229

It will be seen from the particular phraseology of Beattie's will, that his land was not devised to his negroes; but the direction was, to his executor, to sell it, and invest the proceeds in the purchase of other land in Indiana, and to invest his negroes with the title to that, and settle them upon it. If it can be considered as a devise of the land to the executor, as

a trustee, it was well enough, provided the trust was of such a nature as could be executed. If, however, *cestui que trust* was incapable of taking, the devise to the executor was just as void as if he himself had been under such a disability. In this case, the negroes not having been freed by the will of Beattie, they descended as property, contemporaneously with the origin of the devise of the land to the executor, in trust for them ; and, consequently, there was no *cestui que trust* that could be recognised as such, for whose benefit the trust could be executed, or which could sustain the devise in trust. *Baptist Association* v. *Hart*, 4 Wheat. 1.

To avoid the operation of the principle last adverted to, the counsel for the executor contended, that the portion of Beattie's will, above quoted, amounted to an executory devise of the land in favor of the negroes. And that if the object of an executory devise have not a natural existence, or have no civil capacity, at the death of the devisor, but should afterwards
*230] *acquire it ; that the devise is good, if the contingency upon which it is to take effect, happen within proper time. The general principle here stated, is undoubtedly true ; but it is very much qualified in its application to the case of *Hope* v. *Johnson*. To give it effect, the object of such a devise must be capable in its own nature of coming into existence, or of acquiring the requisite faculties to take, independently of the conflicting and inconsistent rights of other persons to the subject of the executory devise ; and it must actually come into existence, and acquire the faculties, before such adverse rights accrue. As, for example, an executory devise to an unborn child is good, provided the child be born before the devise is to take effect. But if it be not born at the time the devise is to take effect, although, had it been born, it would have taken the property ; yet, not being then born, the property will go in a different direction ; and having once gone in that direction, it cannot afterwards be recalled, notwithstanding the child designated as the executory devise, should be subsequently born. Again, if a person attainted is an executory devisee, the devise will take effect, provided the attainder be reversed, before the time appointed for that purpose. But suppose, the attainder be not reversed, until after the arival of the time, and the property in the meantime should be cast upon another, in that case, it is very manifest, that the right of that other to it would be good, and the subsequent reversal of the attainder could make no difference. Applying the principle thus explained to the case of *Hope* v. *Johnson*, and it will be seen, that, although there might have been an executory devise of the land to the executor, as the negroes were the executory devisees, who were slaves, and as such went as property to the distributees, before they were emancipated (if ever they were emancipated at all), they could not, therefore, take the land, or its proceeds, by virtue of such subsequent emancipation ; and, indeed, that they were not, and could not, be endowed with the capacity to take. To get over this difficulty, Johnson's counsel founded himself upon the agreement and admission of Mrs. Hope, that the negroes had been emancipated by virtue of the decree of Sumner circuit court ; and from that fact, he declared their capacity to take and hold land, as executory devisees.

*Whether the direction contained in Beattie's will relative to the
*231] disposition of his land, does amount to an executory devise of it, which may well be doubted, it is foreign to my present purpose to inquire.

implication, according to the terms of the said act of 1829, slaves cannot *ipso facto* be freed by will. That they are to receive their freedom, by an act to be performed after the death of the testator. Then, what was the legal condition of the slaves in controversy, *eo instanti* that the testator died? They were undoubtedly slaves still. And if so, they were the property of some person, inasmuch as the title to them could not be in abeyance. That person must have been the distributee, subject to the right of the executor to them, as assets for the payment of debts. They were not needed as assets, as the attempt to emancipate them shows. Then, how have the distributees been divested of their property? It is said, by this act of the executor, done after the death of the testator, and the order of the county court made thereon; to which the distributee was neither a party nor a privy, and concerning which he had no notice whatever. Now, it is humbly apprehended, that the gift of freedom to slaves must proceed *from the owner, with the sanction of the court; and that it can, by no possibility, be derived from one who is not the owner, although he may sustain the character of a court, or of an executor! And it is apprehended further, that it was not competent for the court and the executor to divest the distributee of his property, without affording him any opportunity whatever to prevent it.

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If it were competent for a testator to free his slaves by will, it would be a most alarming doctrine to creditors. To prevent such a prejudice to creditors, no act of assembly has ever gone so far as to prescribe that it might be done; and I presume that no court, of common prudence, would permit an executor to do it, under any circumstances, until he first adduced proof that the creditors were all satisfied, and his administration completed. If then slaves directed to be set free by a testator, could be considered as property for any purpose, after his death, they must be subject to all the incidents of property; and would, consequently, go to the distributee, after the satisfaction of creditors. The case of *Hope* v. *Johnson* is very imperfectly reported. This is a true and full history of it.

White, for the appellees, contended:—That the laws of Tennessee do not prohibit the emancipation of slaves by last will and testament, and that the executors are authorized to observe the directions of the will, if the sovereign power, through the medium of their legislature, or the judicial tribunals, assent to such emancipation. The next of kin have no vested interest to be affected by such acts of the legislature, or decisions of any tribunal in whom jurisdiction is reposed.

The act of North Carolina of 1777, ch. 6, § 2, which was in force in Tennessee, provided, "that no negro or mulatto shall hereafter be set free, except for meritorious services, to be adjudged of and allowed by the county court, and license first had and obtained thereupon." The act of the legislature of Tennessee of 1801, ch. 27, § 1, repealed and modified the former law, and allowed owners of slaves to petition the county court, in all cases, not restricting their power to the case where meritorious services were performed. By the act of 1801, if *the court, upon examining the reasons set forth in the petition, are of opinion, that acceding to the same would be consistent with the interest and policy of the state, the chairman thereof reports on the petition. Under the restrictions of that law, slaves

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can be emancipated. By the act of 1829, ch. 29, in force on the 26th November 1830, when the present bill was filed, it was made the duty of an executor, where a testator had by his will directed any slaves to be set free, to petition the county court accordingly, and if the executor refused, the slaves were authorized to file a bill for their freedom. Upon what ground can the argument be supported, that the directions of a testator to emancipate his slaves are void, and that the executor holds them in trust for the next of kin? It must be, because there is a positive law forbidding such a mode of emancipation. No such law exists. The act of 1777, it is true, provided, that no slave should be emancipated, but for meritorious services, and the county court was the tribunal to adjudge whether those services had been performed. To adjudge between whom? The master and the state. The act of 1801 leaves out the restriction, and gives the county court general powers, because the legislature had been harassed by the frequent applications for emancipation.

The question arising in this cause has been decided in the supreme court of errors and appeals, in the state of Tennessee, in the case of *Anne Hope* v. *Robert Johnson*, executor of the will of David Beattie, which was finally decided in January 1826, and a copy of the record in that cause, and the opinion of the court, is submitted for the inspection of this honorable court. In that case, the testator had given his slaves their freedom, and the bill was filed by the next of kin and heir-at-law, stating that the devises directing the emancipation of the negroes, and the purchasing of lands, were void, and an injunction was granted to prevent the removal of the negroes. The case first came on to be heard on the 4th September 1821, and the supreme court ordered that the executor, or any other of those appointed in said will, who might take upon themselves the execution thereof, should be allowed twelve months from that time, to procure the emancipation of said slaves, by any legal means whatever. In January 1826, the cause was finally heard, and the court, in the decree, pronounced *that the devises and bequests [*235 in the will were legal and valid, and that thereby the executors had full power and authority to procure the emancipation of the negroes, and to sell and dispose of real estate for the use of the negroes. In their opinion, the court says, "that no particular mode of emancipation is specified by either the act of 1777, ch. 6, or of 1801, ch. 27. As between the master and the slave, the intent and volition of the master to emancipate may be made known by any species of instrument that will completely evince it, and then nothing more is wanted, but the assent of the state, expressed by its organ, the court, which may show its determination, by reporting on the petition and certifying the same, and by causing both the petition and report to be filed amongst the records of the court. The mind and desire of the owner may be as well expressed by will, as by deed or any other instrument; and when it is made known by his will, the duty of his executor is, to use such legal means as may be effectual for the completion of his purpose." No decision adverse to this has been made by the supreme court of Tennessee, and the principles established by that decision are believed to be conclusive, in favor of an affirmance of the decree of the circuit court.

The only other case in Tennessee known to the counsel of the defendants, where the power of emancipation by will is alluded to, is the case of *McCutchin* v. *Price*, 3 Hayw. 212. The court says, that "a testator may

I have now gone through the analysis which I intended, of the case of *Hope* v. *Johnson;* and I have but one or two observations more to make concerning it. It will probably be cited by the opposite counsel as a decision upon a statute of a state, by its own tribunal; and he may, in that view, claim for it a particular weight upon the supreme court of the United States. How far is it a decision or exposition of a state statute? Only so far as to settle that slaves cannot be emancipated by will. And so far, as I have before stated, it is an authority for McCutchen. But so far as it respects executory devises, or devises in trust, it is a decision, founded on the general principles of the common law, and is no more to be regarded by the supreme court of the United States, than would be the decision of any other tribunal equally respectable.

By the laws of Tennessee, and the practice under them, petitions for emancipation are always preferred by the owners of slaves, who are desirous of conferring on them freedom; and the only object of such petitions is, to obtain the public sanction, and give the requisite guarantee that the slaves, if superannuated, shall not become a charge to the community. And the county court, which is the public organ for this purpose, has to judge of the policy and propriety, in a moral point of view, of increasing the number of this species of population. Such being the case, there is no necessity for the service of process on any one; the very party to be affected by the decision, to wit, the owner of slaves, being the petitioner and in court. But in the proceeding before Sumner circuit court, under the special statute before referred to, Robert Johnson, the executor of Beattie, was the petitioner; and Mrs. Hope, the distributee, to whom the negroes really belonged, was not cited to defend the petition, nor required by the law to be notified in any way; nor was she in court, and the act of the court upon the petition was wholly *ex parte.*

Hope v. *Johnson* is, moreover, a solitary decision, of a very important character, which has not been generally acquiesced in. And as a proof that it has not been considered as sustaining *the principle determined by it, the act of 1829, ch. 29, was passed; for the provisions [*232
of which there would have been no necessity, if the law had been as attempted to be settled in that case. That act merely carries out the principle of *Hope* v. *Johnson*, by making it the duty of an executor, where the will of a testator directs his slaves so be set free, to prefer a petition to the court for that purpose; and gives the court power, "if it shall appear to them, that the slaves ought of right to be set free," so to order it; he giving bond and security as required by former acts. It further provides, that if the executor fails or omits to prefer such petition, any person may file a bill in equity, as the friend of the negroes, for the same purpose. The act further contemplates, that if the petition is filed, it must be done in the county court; in which case, it requires no notice to the distributee. And although the act is silent as to the process or manner of proceeding, in case the *prochein ami* of the negroes should file a bill in equity; yet, it is to be presumed, that it was intended, that the proceeding there was to be after the manner of that court. Upon this act, and his petition to the county court under it, Marshall, the executor of McCutchen, founds himself, in addition to the authority of the case of *Hope* v. *Johnson.*

The answer to that view of the case is simply this. That by inevitable

direct that the executor shall endeavor to procure the emancipation of his slaves; and if the executor can do so, then all claims founded upon the legal impossibility of doing so vanish."

It is true, that in North Carolina, it has been decided, in the case of *Haywood* v. *Craven*, 2 N. C. Law Repos. 557, and some other cases, that a devise to emancipate slaves is void. But these decisions are not applicable to the state of things in Tennessee, for in North Carolina they have no law similar to the act of Tennessee of 1801, ch. 27, § 1, before mentioned. Their decisions are founded upon the acts of 1741, ch. 24, § 56, and 1777, ch. 6, § 2; and their courts say, that such devises are repugnant to positive provisions by statutes which have pointed out one method only, in which slaves
*236] can be liberated, and that in one case only, to *wit, for meritorious services. Such is not the law of Tennessee, and therefore, the decisions in North Carolina have no application.

It is the settled law of Tennessee, that the issue of a female slave follows the condition of the mother. The case of *Timms* v. *Potter*, 1 Hayw. 234; *Craig* v. *Estes*, Cooke 381; *Preston* v. *McGaughey*, Ibid. 113, establish, that the issue belong to the remainder-man, and not to the tenant for life. These cases have never been disputed. If then the children were born of mothers who were not absolutely slaves, but only for a limited period, having a right to their freedom, if the executor could procure the assent of the legislature, or of the sovereign power; does it not follow, that the children are entitled also to the privilege of freedom? What was the situation of the mother, at the time of the birth of the child? The executors were required to procure her emancipation, at the death of the wife of the testator. She was not a slave, in the usual meaning of the word, she was entitled to freedom, unless that right was refused from principles of public policy, and a court of equity will not prevent the executor from complying with the direction of the testator, upon the application of next of kin who had no vested interest at the time of the death of the testator.

2. But suppose the directions for emancipation are void, are the complainants entitled to sustain this bill? By the codicil to the will, Elizabeth Larkins is made sole residuary legatee of the personal property, which should remain at the death of his wife. Then, the executor, if he could not legally emancipate the slaves, would hold them in trust for the residuary legatee, and not for the next of kin. Slaves are personal property by the laws of Tennessee.

Thompson, Justice, delivered the opinion of the court.—This case comes up by appeal from the decree of the circuit court of the United States for the district of West Tennessee, by which the bill of the complainants was dismissed. The bill states, that Patrick McCutchen, a citizen of the state of Tennessee, departed this life, some time in the year 1812, having shortly before, in the same year, made his last will and testament, which, after his
*237] death, had been duly proved and *recorded. By which will, the testator among other things, bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, specifying them by name, should, at the death of his wife, be liberated from slavery, and for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife. And

those were to be subject to the control, and under the direction of his brother and brother-in-law, until they were of age; at which period they were to be liberated. Samuel McCutchen, James Marshall, and his wife Hannah, were made executors, and all qualified. Patrick McCutchen died without issue; his widow had the possession of the slaves during her life; and James Marshall is the only surviving executor. The bill further states, that the complainants and the defendants, except James Marshall and two others, who are not made parties, because they reside out of the jurisdiction of the court, are the distributees and next of kin to the testator, and that the slaves and their increase are liable to be distributed to and among the complainants and the other next of kin; and that the executor, James Marshall, refuses to distribute them, because the will directs their emancipation. And that he has actually presented a petition to the county court of Williamson, and procured the emancipation of some of them. And the bill charges, that the county court had no power to emancipate upon the application of an executor; that, by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any directions therein; that if the law does authorize emancipation, that they are still slaves until the period for emancipation; and that the increase born after the death of the testator, and before their mothers were actually set free, are slaves, and as such, liable to be distributed. The bill then states the names of the several children, born after the death of the testator; and prays an account of hire, and the distribution of all the slaves and their increase; and an injunction to prevent the executor from proceeding to establish the freedom of the negroes, or removing them beyond the jurisdiction of the court, and also for general relief.

This statement of the allegations in the bill, thus far, is all that is necessary for the purpose of raising the material questions in the case, viz., the right of the owner of slaves in the *state of Tennessee, to manumit such slaves by his last will and testament. To this bill, there is a [*238 demurrer by the executor, Marshall, for want of parties, and also because there is no equity in the bill. The other defendants not having appeared, the bill is taken for confessed by them, and set for hearing *ex parte*. The demurrer admits the facts stated in the bill, and the question already mentioned is raised for the consideration of the court.

As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper. As between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially, so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted. It becomes necessary, therefore, to inquire what legislative provision has been made in the state of Tennessee on this subject; and it will be found, that the legislature has been gradually relaxing the restrictions upon the right of manumission. By the act of North Carolina, 1777, ch. 6, § 2, which was in force in Tennessee, it is declared, that no negro or mulatto shall hereafter be set free, except for meritorious services, to be adjudged of, and allowed by the county court. The act of Tennessee of 1801, ch. 27, § 1, modified the former law, and allowed the owners of

slaves to petition the county court in all cases; setting forth the intention and motive for such emancipation, without any restriction as to meritorious services. And if the county court, upon examining the reasons set forth in the petition, shall be of opinion, that acceding to the same would be consistent with the interest and policy of the state, they are authorized to allow the manumission, under the provisions therein prescribed, to guard against the slave, so manumitted, becoming a public charge for maintenance.

This act does not, in terms, extend the right of application to the county court for the manumission of slaves, to any one, except the *owner* of the slaves. And it is argued, on the part *of the appellants, that no such *239] application can be made by executors; and that the declaration and direction in the will of Patrick McCutchen, in relation to the manumission of his slaves, amounts to no more than an expression of a wish on the part of the testator, that his slaves should be free; but did not amount to a manumission, or confer any authority on the executor to consummate the manumission, by application to the county court. And the power of the county court to manumit on the application of the executor, is denied; and their proceedings in the present case, alleged to be entirely void.

This question came under the consideration of the court of appeals in the state of Tennessee, in the case of *Anne Hope* v. *Robert Johnson*, executor of David Beattie, decided in January 1826. In that case, Beattie, by his will, directed certain parts of his property to be sold, and the proceeds thereof to be laid out in lands in the Indiana territory; the right to which he vested in the negroes he then owned, naming them. "Each and all of whom I give their entire freedom, and the settling of them on the above lands, under the direction of my executor." The bill was filed by the next of kin and heir-at-law; alleging, that the direction, with respect to the manumission of the slaves, and the purchase of the land, was void. The court decided, that the devises and bequests in the bill, were legal and valid; and that thereby the executor had full power and authority to procure the manumission of the slaves; and to sell and dispose of the estate for their use, according to the directions in the will. The court, in pronouncing their opinion, say, "that no particular mode of emancipation is specified, either by the act, of 1777 or of 1801. As between the master and the slave, the intent and volition of the master to emancipate, may be made known by any species of instrument that will completely evince it; and then nothing more is wanted but the assent of the state, expressed by its organ, the court; which may show its determination by reporting on the petition, and certifying the same; and by causing both the petition and the report to be filed among the records of the court. The mind and desire of the owner may be as well expressed by will, as by deed or any other instrument; and when it is made known by his will, the *duty of his executor is, to *240] use such legal means as may be effectual for the completion of his purpose."

This is a judicial interpretation by the highest court in the state, of one of its own statutes, which has always been held by this court as conclusive; especially, if such interpretation has not been called in question in its own tribunals, and no case has been referred to, tending in any measure to shake this decision. And indeed, it is very much strengthened, if not absolutely confirmed, by the subsequent act of 1829, ch. 29, by which it is made the

duty of an executor, or administrator with the will annexed, where a testator had, by his will, directed any slaves to be set free, to petition the county court accordingly, and if the executor or administrator shall fail or refuse to do so, the slaves are authorized to file a bill for their freedom, under certain regulations pointed out by the statute. (Digest. Ten. Laws 327, where all the laws are collected.)

This act having been passed since the death of the testator in the case now before us, and since the manumission by the county court of Williamson county (as is presumed, though that time does not appear in the record), may not ratify and confirm the manumissions, in the present case. Yet having been passed since the decisions in the case of *Hope* v. *Johnson*, it may well be considered a legislative sanction of the construction which had been given by the court of appeals to the act of 1801. At all events, the decision in the case of *Hope* v. *Johnson*, must be considered as settling the construction of the act of 1801, and authorizing the executor to petition the court for the manumission of the slaves, and justifying the proceedings of the court thereupon.

This construction of the act of 1801, puts at rest the claims of the appellants to all the slaves, except the children of the females, which were born after the death of the testator, and before the death of his widow, to whom all his slaves were bequeathed, during her natural life. And this class includes the children of Eliza and Cynthia only. For, with respect to Rose and her children, the testator declares, that upon the death of his wife, they shall be liberated from slavery, and for ever and entirely set free. The question then arises, how the children of Eliza and Cynthia, born during the continuance of the life-estate of the *widow, are to be considered. It [*241] is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother. If, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that their children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time. If the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their freedom on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, go very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves. That it is only a conditional manumission, and that, until the contingency happens, upon which the freedom is to take effect, they remain, to all intents and purposes, absolute slaves. And we do not mean to disturb that principle. Cooke 131, 381; 2 Rand. 228; 1 Hayw. 234. The children of Eliza and Cynthia must, therefore, be considered slaves; and the question arises, whether the allegations in the bill are sufficient to call upon the executor to account for their wages, or to restrain him from taking any measures to establish their freedom.

The bill charges, that Pleasant and ten others, naming them, the children of Cynthia and Eliza (or perhaps Rose), were all born after the death of the

said Patrick, and before the time arrived, when, by the directions of the said will, they were to be set free; and that they are (if no others) to be distributed among the representatives of the said Patrick; and prays, that the executor, James Marshall, may be compelled to distribute said slaves among the complainants, and account for their hire in the proportions to which they are entitled. We think these allegations are too vague and uncertain to call upon the executor to account, in any manner, for those children. *In the first place, it is left entirely uncertain, which of *242] the persons named are the children of Eliza or Cynthia. They are alleged to be the children of Eliza and Cynthia (or perhaps Rose), that is, perhaps the children of Rose. Now, if they, or any of them, are the children of Rose, such children are expressly manumitted by the will. In the next place, it is not alleged, which of them are the children of Eliza, and which of Cynthia. And by the will, a special and different disposition is made of these two. The testator directs, that Eliza shall be at the control and under the direction of his brother, Samuel McCutchen, until her arrival at the age of twenty-one years, and then to be set free. And that Cynthia shall be at the control and under the direction of James Marshall, until she arrives at the age of twenty-one years, when she shall be liberated and for ever set free. The bill does not charge the appellee with having the possession or control of these children; or that he has received any wages for, or on account of them. Nor, under the various dispositions of these slaves, by the will of Patrick McCutchen, will the law charge the surviving executor with a breach of trust or neglect of duty, in not taking the charge and management of these children. If they are slaves, and the complainants have a right to them, they have an adequate remedy at law, to assist and enforce that right.

But it is contended on the part of the appellee, that, independent of all other considerations, the appellants have no right to these slaves, or any part of them—for, by the codicil to the will, Elizabeth Larkins is made sole residuary legatee of the personal property which should remain at the death of the testator's wife; and that slaves in Tennessee, being personal property, the executor holds them in trust for the residuary legatee, and not for the next of kin. We do not, however, think this is the true construction of the codicil. It professes to explain one of the articles in the will, but not to make a different disposition of the property mentioned in that article. The article referred to, is the fifth, which in the will reads thus: "I will and bequeath to the said Patrick McCutchen, fourth son of my brother, Samuel McCutchen, and to Elizabeth Larkins, daughter of John Larkins, by his first wife, Margaret, jointly and equally, the land *on which I now live, *243] with all its appurtenances, together with all the residue of my personal property (slaves excepted) which shall remain after payment of my just debts, &c., to take effect at the death of my beloved wife," &c. The codicil reads thus: "Whereas, some doubts may be entertained respecting the construction of the fifth article, and as I find upon review of the subject, I have not expressed my meaning with sufficient perspicuity, I declare this to be my will and meaning of the said fifth article; Patrick McCutchen, named in that article, is to be the joint legatee with Elizabeth Larkins, of the land only, and Elizabeth Larkins sole residuary legatee of the personal property which shall remain at the death of my wife." The personal property referred to in the codicil, must mean the same personal property men-

tioned in the fifth article, otherwise, the codicil would not be what it professed to be, explanatory of that article, but would be a different disposition of the property. The codicil must, therefore, be read with the same exception of the slaves as is contained in the fifth article. And that the testator did not intend to include any slaves in this codicil is very evident, because by the will, at the death of his wife, all his slaves were to be manumitted; so that there could be no slaves to pass under the residuary clause in the will, or the codicil.

But upon the other grounds stated in this opinion, we think the bill contains no equity which entitles the appellants to relief. And the decree of the circuit court dismissing the bill, is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of this said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Sidney Gregg by N. B. Craig, her committee, Plaintiff in error, [*244
v. The Lessee of Gabriel Sayre and wife.

Statute of limitations.—Bills of exception.—Concurrent jurisdiction in cases of fraud.

The 8th section of the statute of limitations of Pennsylvania fixes the limitation of twenty-one years as taking away the right of entry on lands; and the 9th section provides, that if any person or persons, having such right or title, be, or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years after attaining full age, &c. The defendant in error was born in 1791, and was twenty-one years of age in 1812; an interest in the property, for which this ejectment was brought, descended to her in 1799; the title of the plaintiff in error commenced on the 13th April 1805, under deeds adverse to the title of the defendant in error, and all others holding possession of the property under the same; on the 13th April 1826, twenty-one years prescribed by the statute of limitations for a right of entry against her possession, expired; and the bar was complete at that time, as more than ten years had run from the time the defendant in error became of full age; this suit was not commenced until May 1830.

This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience.

It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character.

Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud, where it is more likely to have been done through a good than a bad motive, fraud should never be presumed.[1]

Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and when they received their deeds, had no knowledge of it, but accepted the same in

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[1] Fraud is not to be presumed, without satisfactory proof of its existence; which cannot be affirmed, where a proper motive exists, which might as readily have been the operating motive, as one that was fraudulent. Bear's Estate, 60 Penn. St. 430.