COOK *vs.* COOK ET AL.

In this case a number of slaves came to the husband by marriage, and he afterwards conveyed them by deed of gift, to his children by a former wife, reserving to himself the use of the slaves during his life. After his death, the wife filed a bill to set aside the deed of gift to his children, and

for dower in the slaves, alleging that the deed was made by connivance of the parties, to defraud her of dower in the slaves: HELD, that by the marriage the husband acquired an absolute title to the slaves, with full power to dispose of them; that the dower right of the wife did not attach until the death of the husband, and hence she having no vested right in the slaves at the time the conveyance was made, was not in a condition to take advantage of the alleged fraud for the purpose of setting it aside, and obtaining dower in the slaves.

One who would set aside a deed as fraudulent, must show that he has legal existing rights, that they are affected by such fraudulent contract, and that the contract is in fact fraudulent.

Held, however, upon all the facts of the case, that it did not appear that the husband conveyed the slaves to his children to defraud the wife of dower, her dower being ample in his other property.

Appeal from the Chancery side of the Hempstead Circuit Court.

This was a bill for dower filed by Mary G. Cook, against Robert T. Cook, Francis Hopkins and wife Mildred E., William F. Campbell and wife Sarah E., Francis A. Cook, Edwin R. Cook, James O. Cook, Laura J. Cook, James F. Johnson, Eliza Walker and Augusta Johnson, and determined in the Hempstead Circuit Court before the Hon. JOHN QUILLIN, chancellor, in May, 1850.

Complainant alleged that she married William Cook in Virginia, in September, 1838, being then a widow. That in that State Cook always lived, to the time of his death.

That when she married him she owned a large property—a cotton plantation, stock, &c., in Sevier county, Arkansas, including——slaves.

That on the marriage, she gave him in money $8,000, and a carriage and horses worth $1,500.

That he used the plantation, slaves, and personal property during his life, and disposed of the money, carriage, and horses.

That before and after their marriage, Cook gave to his children by a former marriage (the defendants) large amounts of his own money and property.

That on the 5th September, 1845, prevailed upon by his children, the defendants, who were prompted by ill-will towards her, with

a fraudulent intent and design to deprive her of her just rights in the property owned by her before the marriage, her husband made a deed gift, in consideration of natural love and affection to such children, by which he conveyed to his son, R. T. Cook, and son-in-law, Francis Hopkins, in trust equally for all seven children, fifteen negroes, then on the farm in Sevier county, Arkansas, reserving to himself their use and services during his lifetime; and on the 24th November, 1845, on the same inducement and for the same purpose, another deed conveying the same negroes on the same trusts, and with the same reservation, to them and another son as trustees.

That all these slaves came from her, being hers at the marriage.

That the deed was fraudulent, a shift and device, *a will in disguise,* and without valuable consideration.

That the deeds were recorded, but the negroes were not delivered, but all remained in his possession until his death.

That he died May 5th, 1847, leaving a will; by which, after loaning certain property to her during her natural life, (including her own land,) and which property was not nearly a third part of his estate, he gave the whole of his property to his children.

That by the law of Virginia she was allowed to elect, by deed, and take dower, within a year after the death, which she did.

That the executors renounced, administration was granted, and all debts paid, and dower was assigned to her of the property in Virginia; but the amount is inadequate to maintain her in her former condition of life without extravagance, and leaves her in comparative dependance.

That the defendants have divided the negroes; states the value of the negroes.

The dower assigned to her is not stated any more specifically than as above.

The will leaves her, for life, three negro men, three negro women and a small girl over eleven years old: the land in Sevier county, horses, &c., or instead of this land and stock, a house and lot in Virginia, beds, &c., carriage and horses.

After demurrer overruled, the defendants answered:

The answer admits that complainant owned the land in Sevier county, 160 acres, of which 50 or 60 were in cultivation, with a small amount of stock, &c.

That the father gave, before his marriage, one negro man, and other property, in all worth $1,800, to his daughter Mildred.

To his daughter Sarah, after marriage, three slaves, and other property, worth in all $1,800.

To his son Robert, after marriage, four slaves, worth $2,500.

Denies that she gave her husband $8,000. Says it was $2,411-.71, and a carriage, horses and driver, worth together $700 or $800.

Denies all agency of the children in procuring the deed of trust.

That the second deed was made, because Robert, one of the trustees, refused to act under the first, it being made in his absence.

Admits that the slaves so conveyed came to Cook by the complainant, and all except two remained on the farm in Sevier county until his death.

Denies all fraudulent intent, or that the deeds were wills in disguise.

Denies that all the debts of the estate have been paid.

States her dower assigned in Virginia to have been—Personal property, $571.53; nine slaves, appraised at $2,225; in money, $50; the interest of $5,371.16, proceeds of real estate; money out of proceeds of two slaves, $300.

And in Arkansas, 13 bales of cotton, worth $325; of proceed of personal estate, $291.53; proceeds of lands, $50.

That she is entitled to dower in 35 shares of turnpike stock, of nominal value of $3,500; 6 shares academy stock, worth $300; one-seventh of 5,000 acres of land in Virginia; 300 acres of land in Mississippi, and 1,080 acres in Hempstead county, Arkansas.

Denies that the dower is inadequate. States that the negroes in the deeds of gift were appraised to, and worth $6,300.

The other averments of the bill were admitted. The complainant filed replication, and the case was heard on the bill, an-

swers, exhibits, and replication, without evidence, and the bill was dismissed for want of equity.

The deeds of gift referred to in the bill, and exhibited, are similar in form. The first is as follows:

Know all men by these presents, that I, William Cook, of Liberty, Bedford county, Virginia, for and in consideration of the natural love and affection which I have to, and for my children, *to wit:* Robert T. Cook, and Mildred E. Hopkins, of Sevier county, Arkansas; Sarah E. Campbell of Hopkinsville, Christian county, Kentucky; Francis A. Cook, Edwin R. Cook, James O. Cook and Laura J. Cook, of Liberty, Bedford county, Virginia; and for divers good causes me thereunto moving, and for the further consideration of ten dollars in hand paid by Robert S. Cook and Francis Hopkins, of Sevier county, Arkansas, the receipt whereof I do hereby acknowledge, have and do by these presents give, grant, bargain, sell, convey and confirm in and to said Robert T. Cook and Thomas Hopkins aforesaid, their heirs, &c. forever, for my above named children in equal portions and their heirs respectively forever, the following negro slaves, now in Sevier county, Arkansas, on my plantations therein, *to wit:* [*naming them,*] and the future increase of the females thereof forever; hereby reserving to myself the use, services and heirs, &c., of all said slaves and their increase during my natural life, and, with that, reserve to myself, then equally divided by suitable commissioners between my said seven children, and then I hereby convey the right and title in and to the whole of said slaves and the future increase of the females thereof, to said Robert T. Cook and Francis Hopkins, as trustees and the survivor of them, their heirs, &c., for the benefit of my said above named seven children and their and each of their heirs respectively forever in equal shares, hereby confirming to said trustees, and the survivor of them and the heirs, &c., of said survivor in trust as aforesaid, the right and title in and to said slaves (with the reservation of use and benefit of their labor and services to myself during my natural life) forever against the claim of all and every other person or per-

sons. Witness my hand seal, this 5th day of September, 1845.

WM. COOK, [SEAL.]

The deed was acknowledged in Bedford county, Virgina, on the day it bears date, and filed for registration in the Recorder's office of Sevier county, Arkansas, 2d October, 1845.

WATKINS & CURRAN for the appellant, contended that the instrument conveying the property in this case, though called a deed, was a testamentary disposition of property, and in effect a will; and courts will look to the substance and not to the form of the instrument. The true rule is that an instrument in any form, the purposes of which are not to take place until after the death of the party making it, is a will. *Shergold v. Shergold, Prerog.* 1714. *Thorold v. Thorold,* 1 *Phillim.* 1. *Milledge v. Lomar,* 4 *Desaus. Rep.* 617. 1 *Williams on Ex'rs, p.* 59. *Manly v. Lakin,* 1 *Hagg.* 130. *Henderson v. Fairbridge,* 1 *Russ.* 497. *Hixon v. Hixon,* 1 *Ch. Case* 248. The distinction between a will and all other instruments of conveyance is that the former takes effect after the death of the grantor. A writing in the form of a deed has been held a good will. *Hichson v. Witham,* (*Finch.* 95.) *Rigden v. Vallier,* (2 *Ves.* 252;) so also in the form of an indenture (*Dyer* 166, 2 *Lean.* 159;) in the form of articles of agreement, (*Greene v. Pronde,* 1 *Mod.* 117;) in the form of a letter, (*Haberfield v. Browning,* 4 *Ves. Jr.* 200 *note*;) so in the form of a deed of gift to take effect after death. *Ballard v. Slade,* (2 *Law Reports, N. C.* 596. *Shergold v. Shergold,* 2 *Ves.* 349. *Harbergman v. Vincent,* 2 *Ves. Jr.* 205. Where the intention is that it shall not operate before death, it is then testamentary. *Allixin's Ex'r Exr's v. Allison* 4 *Hawks N. C. Rep.* 149. *Thayer v. Thayer,* 14 *Vermont Rep.* 107, where the facts are almost the same as in the case before the court. This principle was otherwise ruled in the case of *Lightfoots' Ex'r. v. Colgin and wife,* 5 *Munf.* 49, but that case is overruled by the case of *Ruth v. Owen,* 2 *Rand. Rep.* 507.

PIKE, contra, contended that as the deed was not revocable by

the grantor, it could not be "a will in disguise," and cited and relied upon the cases of *Lightfoot's Ex'r. v. Colgin,* 5 *Munf.* 42. *Stewart v. Steward,* 5 *Conn.* 317. *Holmes v. Holmes,* 3 *Paige* 363.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was instituted to set aside certain deeds of trust alleged to have been made in fraud of the rights of the complainant, and to allow her dower in the estate so conveyed.

To entitle the complainant to recover, it is indispensably necessary, not only to allege and prove that such fraud was in fact perpetrated, but it is also equally necessary to show that the complainant had a vested interest in the estate so conveyed; for, although the parties to the deed may have entered into it with the purpose and intent to defraud, yet, unless the rights of the complainant were affected thereby, she should not be heard to complain. In the case of *Lightfoot's Ex'rs v. Calgin & wife,* 5 *Munf. Rep.* 71, a question of this kind was presented under circumstances much resembling the one before us. Judge ROANE, in delivering his opinion, said, "Admitting this deed to be clearly fraudulent, does it not cease to be so quoad the appellees, if they have no interest to entitle them to impeach it? Must there not be two parties before a deed can be considered and set aside as fraudulent, the party defrauding and the party defrauded, and can the last exist unless he has a vested interest? It is held that by common law, a person having a debt due him, or a right or title to a thing, might avoid a fraudulent conveyance made to deceive or defraud him of that right or debt; but it is said that if the conveyance was precedent to the right or debt, there was no way to set it aside, and again it is held that he who hath a right, title, interest, debt or demand *mere puisne,* shall not avoid a fraudulent gift or estate precedent by the common law. It is by these principles of the common law that the case before us is to be tested; for the statutes made in aid thereof only apply to creditors and purchasers."

And this court held in the case of *Meux v. Anthony et al.,* 6 *Eng.* 411, that one who would set aside a deed as fraudulent,

must show that he has legal existing rights, that they are affected by such fraudulent contract, and that the contract is in fact fraudulent, citing 1 *Mun.* 196, *ib.* 281, 4 *ib.* 581. 2 *J. R.* 283, 4 *ib.* 671, 682, 687.

So that we may safely say that it is not sufficient that there are remote, possible, contingent rights, which may be affected by the transfer; but there must also be existing vested rights or interest in the property conveyed.

The estate conveyed by deed in this case was slaves which came to the grantor by marriage with the complainant. There can be no doubt but that the husband's title to the slaves thus acquired was as absolute and perfect as if held by purchase, and consequently his right to sell them the same. The wife had no other or greater interest in them than in any other slaves owned by the husband. And here the inquiry arises, what was that interest? Is it possible that an unqualified, unlimited estate can exist in one, and another or lesser estate exist in another at the same time? Unquestionably not, for the former covers every interest, and there is none left to be held. The complainant therefore had no vested present interest in the slaves. The interest which she claims is a dower interest, not existing, yet dormant during the life of the husband, as in the case of real estate, but dower in such property as he may be possessed of at the time of his death. Place this shadow of title upon the most favorable grounds then, and it is a right dependent upon a contingency, that is, if the husband should die possessed of the property the law will confer an interest. Under this view of the case, fully sustained by the authorities already cited, we have no hesitation in saying that even if these deeds were affected with fraud, the complainant had no such existing vested rights in the property as to entitle her to be heard upon an application to set them aside.

We are, however, by no means prepared to say that the facts in this case show it to be fraudulent. It is quite evident that much importance has been attached to the fact that the slaves conveyed by the husband came to him by marriage with the

wife, and that his after disposition of them was esteemed an infringement of the rights of the wife. Such, we have shown, is not the case. Her rights were no greater in these slaves than in any others owned by the husband, whether held by purchase or otherwise. Nor is there the hardship in this rule by which the husband acquires title to the personal property of the wife by marriage, which is supposed to exist; for whilst the husband acquires title to the personal property, he becomes liable for the wife's debts, and she at the same time acquires a life estate in dower to all of his lands then held, or which may be thereafter acquired. So, that whether the one or the other is the gainer in a pecuniary point of view, (if that should be considered an inducement for its consummation) must depend upon their circumstances respectively at the time the marriage is consummated.

In this instance, so far as we may infer from the facts presented, the wife was certainly gainer. Her estate at that time consisted of 160 acres of land and about $10,000 worth of personal property. The husband, estimating his property at its supposed value at his death, owned about 10,000 acres of land, several improved town lots and about $10,000 worth of personal property. It will at once be seen that at any fair ordinary value of this property, the wife's dower would equal, if not exceed, the whole amount of estate which the husband acquired by marriage; and it is quite evident that she has actually received for dower more than the whole value of the slaves so conveyed. It is true that there is no data from which a certain estimate may be made, but enough appears to render it altogether probable that no injustice has been done her; but, on the contrary, that considering her age and the fact that she had no children to provide for, she has quite an ample estate to sustain the most respectable position in society, which it is presumed a lady of her advanced age could desire to occupy.

Looking, then, beyond the circumstances of the parties to inducements for perpetrating a fraud upon the rights of the wife, there is no evidence of ill feeling or disrespect between the husband and wife; on the contrary, so far as we may infer from the

facts before us, the most perfect harmony and good feeling existed. The deeds were made several years before the husband's death. It was altogether natural and proper that the father, in advanced life, should provide for his children. The amount given, in view of the number of children, and the amount of estate was quite reasonable, and the fact that the property was in Arkansas, the residence of part of his children and remote from his own, at once suggests the propriety as a matter of convenience of selecting it in preference to other property. These circumstances are susceptible of a construction favorable to the honest intentions of the grantor, and should be so considered in the absence of countervailing circumstances connected with them. Of this class there is one which does not well harmonize with the avowed intent of the grantor. It is in the reservation of the use of the slaves during his life. This is not altogether reconcilable with the idea that he desired to advance the interest of his children, a portion of whom may well be supposed to desire the use of the property, and the residue of the children too young to take charge of it. In this respect, the deed partakes of the nature of a will. It suspends the use of the property until the death of the donor. Ill health, advanced age, dislike to the wife, the amount conveyed and other like circumstances, when connected with this reservation of the property until death, would have gone far to fix upon the husband the design to substitute this instrument for a will; but such is not the case in this instance. On the contrary, with the exception of this reservation of use in the deed, the facts are all reconcilable with the general avowed purpose of the deed, and must be so considered by us. Wherefore we are of opinion that the evidence is not sufficient to sustain the allegation of fraud.

Had this, however, been otherwise, and a fixed and avowed determination on the part of the husband to defeat the widow's right to dower, there is not wanting high authority for sustaining the validity of the deed. In the case of *Lightfoot's Ex. v. Calgin and wife,* above cited, it appears that Lightfoot, being the owner of a large estate, of advanced age, in bad health, and only a

few months before his death, became displeased with his wife, and took counsel as to the most effectual means of placing his property beyond her reach after his death, and thereupon in pursuance of such counsel, conveyed by deed in trust for the benefit of his children by a former wife, 75 slaves, and all of his other personal estate including money and debts, reserving to himself the possession and use thereof during his life. In this case it will be seen that the motives, the declarations, the circumstances and the act, all tended to fix upon the grantor the intention to cut off the widow, yet the court of appeals of Virginia, after a thorough investigation of the subject, held the deed valid.

It is unnecessary, in the case before us, to press the inquiry further, or to decide whether a deed evidently intended to take the place of a will manifestly unjust to the wife should or not be set aside. It is sufficient to say that such is not the state of case before us.

The decision of the Hempstead Circuit Court must in all things be affirmed.