

GAINES AS ADR. vs. BRIGGS ET AL.

A father, by deed of gift, gave to each of his sons and daughters, and to their heirs forever, a slave, with a proviso that if either of them died without heirs, his or her slave should be equally divided among the survivors. One of the daughters married, and her husband died possessed of her slave and increase. Held that the deed of gift vested the slave absolutely in the daughter; on her marriage the property vested in the husband; and on his death, the title passed to his administrator, subject to the dower of the widow. *Moody vs. Walker*, 3 Ark. R. 147, cited.

In trover by the administrator for such slaves, the defendant cannot justify a taking and conversion, by showing that intestate had mortgaged the property to a third person.

Nor will it avail him, that he discharged the mortgage, and took an assignment to himself subsequent to his trespass.

In trover, it is no defence that defendant acted under the employment of another, who was himself a trespasser.

Trover is a concurrent remedy with trespass.

Writ of Error to the Yell Circuit Court.

This was an action of trover, brought by James F. Gaines, as administrator of Gazway Haynes, deceased, against Malissa Haynes, James Briggs, and James Gault, and determined in the Yell circuit court, at the September Term, 1847, before the Hon. WM. W. FLOYD, judge.

The declaration alleged that on the 20th February, 1846, Gazway Haynes was possessed of three slaves, Rose, and her two children, Franklin and Sinda, of his own property, in Scott county, and that on that day he died so possessed of said slaves. That after his death, the said slaves came to the possession of defendants by finding; and afterwards plaintiff was duly appointed administrator of deceased by the probate court of Scott county, and as such became entitled to the slaves, but though he had demanded them of defendants they had refused to surrender them, &c.

The action was discontinued as to Malissa Haynes, at the return term, for want of service of process.

The other defendants pleaded not guilty, the cause was submitted to a jury, and they returned a verdict for defendants. Pending the trial, the plaintiff took a bill of exceptions, from which it appears:

To maintain the action, plaintiff read to the jury his letters of administration upon the estate of Gazway Haynes, granted by the probate court of Scott county, 4th March, 1846, in due form of law. Also, an order of the probate court of Scott county, reciting that Gaines had made it appear to the court that the personal property of his intestate was insufficient to pay his debts; that he died possessed of certain slaves (the slaves mentioned in the declaration) which had been run out of the county, and probably out of the State, and authorizing Gaines to take the necessary steps to get possession of said slaves, and hold them subject to the further order of the court. This order was made 14th April, 1846, (before the institution of this suit.)

Plaintiff proved by Thos. L. George, that prior to the year 1834, Gazway Haynes intermarried with Malissa George, in the State of South Carolina, who was in possession of the slave, Rose, mentioned in the declaration. That about the year 1834, they moved to Arkansas, bringing Rose with them. That the children of Rose, Franklin and Sinda, were born after they moved to this State, and Gazway Haynes continued in possession of Rose and her said children until he died, in January, 1846, in Scott county. That a short time after the death of Gazway Haynes, John Briggs, a minor son of the defendant, James Briggs, brought the wagon and team of his father to Scott county, and moved the said Malissa Haynes, widow of deceased, together with said negroes to Yell county, taking some other personal property and household effects belonging to the estate with them.

Said John Briggs testified that, at the request of Mrs. Haynes, his father sent him with the wagon and team to move her from Scott to Yell county, and that he moved her, with the negroes,

&c., as stated by the last witness. They stayed at his father's house one night on the route, and next morning proceeded to Danville, Yell county, where witness left them. Witness recollected no direction given him by his father, but to move Mrs. Haynes as above stated. Witness thought the negroes belonged to her.

William Porter, testified that a short time after Mrs. Haynes arrived at Danville, he saw said slaves at the residence of defendant, James Gault, where they remained for a month or two, and that afterwards Gault told him he had taken the negroes out of the State and sold them.

Defendants admitted to the jury, that Gault had so taken the slaves off, and sold them.

Arnold testified that, after the negroes were removed to Yell county, plaintiff, Gaines, asked Gault to surrender them, and he promised to keep them until Gaines should come or send for them.

Duncan testified that, when young Briggs moved Mrs. Haynes and negroes to Danville, he left them at Gault's house.

Parks testified that, some time before the death of Haynes, he advanced him about \$122, to discharge a mortgage which one McConnell held upon said negroes, and took a deed of trust from Haynes upon the negroes to secure the re-payment of the loan. After the death of Haynes, witness went to defendant Gault, to endeavor to secure his money, Gault referred him to Mrs. Haynes, but she said she had not the money. Gault then told him not to be in haste to pursue the negroes in the hands of those to whom they had been sold out of the State, and probably the matter would be arranged. Afterwards Gault sent him the money, through an agent. In conversations with Gault and Mrs. Haynes, witness understood them both to say that the proceeds of the sale of the negroes were in the hands of Gault. On payment of the money, witness assigned his deed of trust to Gault.

William Briggs testified that, Mrs. Haynes went to defendant

James Briggs, and requested him to move her from Scott to Yell county, and he accordingly sent his son John with the wagon and team and removed her. The family knew at the time that Haynes was dead, and defendant, James Briggs, knew that said negroes were in the possession of Haynes during his lifetime. Some one mentioned to James Briggs that he had gotten into a difficulty about removing the negroes from Scott county, and he replied that he had done what he did ignorantly, and without intention to injure any one.

Defendants then introduced the following testimony:

After proving the execution thereof by Joseph Gault, a subscribing witness, defendants read in evidence to the jury the following instrument:

“SOUTH CAROLINA, Union District.

Know all men by these presents, that I, Thomas George, for divers good causes me hereunto moving, do give to Thomas Jefferson George, Malissa George, Susan George and Andrew Jackson George, the following property, *to wit*: to Thomas Jefferson, one negro boy named Dick—to *Malissa*, two negro girls, named *Rose* and *Harritt*—to Susan George, one negro girl named *Milly*—to Andrew Jackson, one negro boy named *Allen*—to the said Thomas Jefferson George, Andrew Jackson George, Susan George, and Malissa George, (children of my wife *Ibby*) and their heirs forever; and in case that either of them should die without heirs, then I give their negro or negroes to be equally divided between the survivors: to have and to hold the said negroes, *Dick*, *Rose*, *Harritt*, *Milly*, and *Allen*, and their respective increase to the aforesaid Thomas Jefferson George, Malissa George, Susan George and Andrew Jackson George, as above specified, from myself and every other person whatsoever. In witness whereof, I hereunto set my hand and seal, this 10th January, 1827.

THOMAS GEORGE, [SEAL.]”

Signed and acknowledged in the presence of
W. W. E. MORELAND,
JOSEPH GAULT.”

Defendants proved, by the said subscribing witness, Gault, that the negro woman *Rose*, named in the declaration, was the same referred to in the above deed of gift. That Malissa George, mentioned in said deed, is the same Malissa Haynes, mentioned frequently above. That she intermarried with said Gazway Haynes, in South Carolina, and they lived together many years in Arkansas, with said negroes in possession. Plaintiff objected to the reading of the above deed in evidence, but the court overruled the objection.

Defendants then read in evidence (plaintiff objecting) the trust deed, and assignment thereof to defendant Gault, referred to by the witness Parks.

The deed bears date 31st March, 1845; recites that Haynes was indebted to Parks in the sum of \$122.62, by note then due, and conveys the negroes in question to Parks in trust; that upon repayment of the money within twelve months, the deed was to be void, and he was to re-convey the slaves to Haynes; but, on failure to pay the money, a trustee, named in the deed, was to sell the slaves, or so many of them as might be necessary, for cash, to the highest bidder, after giving a prescribed notice of the sale, and, out of the proceeds, pay the debt, interest, and expenses, and pay the balance, if any, to Haynes.

The assignment of the deed of trust by Parks to defendant, Gault, bears date 1st June, 1846.

Haynes testified, that he saw the negroes in Danville, and heard defendant, Briggs, forewarn Mrs. Haynes not to remove them—his language was, "I forewarn you, Mrs. Haynes, not to remove said negroes." Witness heard Briggs give no reason for so doing.

Defendants admitted that the negroes started from Yell county on their way out of the State, as stated by the witnesses, on the 1st April, 1846.

The above is the substance of all the evidence set out in the bill of exceptions deemed material to a proper understanding of the points decided by this court.

The plaintiff moved the court to instruct the jury as follows:

"1st. It is the duty of the court to construe the deed of gift from George to Malissa George, and to determine whether any, and what estate, was vested thereby in said Malissa."

"2d. If the jury believe from the evidence, that, after said deed was executed, said slave, *Rose*, was given up to said Malissa before marriage, and was in her possession at marriage, in pursuance of said deed; and after marriage with Gazway Haynes, the negro and her descendants came into the possession of said Haynes, and remained in his possession many years in this State; then and in that case, upon the said marriage, and upon the said Gazway reducing said negroes into his possession, all right in said negroes before marriage vested in said Malissa, was invested in said Gazway, so far as creditors of said Gazway were concerned, except only the widow's claim to dower, and that upon Gazway's death, said Malissa surviving him and still living, the said negroes or the right and estate acquired therein by marriage, *to wit*: the entire right acquired by Malissa under the deed aforesaid, except her claim to dower, was and is subject to administration as belonging to said Gazway's estate as other similar property, and is subject to the payment of said Gazway's debts."

"3d. Upon Gazway's death, in possession of said negroes as supposed in last instruction, Gaines, as administrator to his estate, had the right to take the proper steps to reduce said negroes to possession, and to administer upon the same as other similar property, if necessary to pay the debts of the estate, and that the probate court of Scott county is the proper judge of that necessity, being the court from which the letters were issued to said Gaines."

"4th. That under the deed of gift last mentioned, after said Malissa intermarried with said Gazway, and the latter reduced the said negroes to possession, the creditors of said Gazway had a right to treat said negroes, as against said Malissa, as the property of said Gazway, to the same extent as any other

negroes belonging to said Gazway, even although he had bought and paid for them with his own money, saving in each case the widow's right of dower."

"5th. That under the deed of gift aforesaid, if the jury find from the evidence, that the negroes sued for were in possession of said Malissa before marriage, and upon her marriage were reduced to possession by her husband, Gazway, after the death of her husband in insolvent circumstances, the said Malissa had no right but to dower in or to the said negroes."

"6th. That a woman, upon marriage, and her husband reducing her personal property to his possession, has no right in or to his property, as against creditors, except such rights as the law may give her to dower in her husband's estate."

"7th. That the deed of gift by Thomas George to Malissa, his daughter, now Malissa Haynes, if valid, vested in her full and absolute and unqualified property in and to the said negro *Rose*, without limitation or restriction, before marriage, and upon the marriage of said Malissa to Gazway Haynes and reducing the negroes to possession, the like absolute property vested in Gazway so far as creditors are concerned, subject only to the widow's claim to dower."

"8th. That the deed executed by Gazway Haynes to Parks, read in evidence to the jury, is a mere mortgage, and if the jury believe from the evidence, that Gazway Haynes retained possession of the property mortgaged until the time of and at his death, and the same never was in possession of said Parks, said Gazway's administrator had a right to the possession and administration upon said property upon the same terms and in the same manner as other property of the same kind."

"9th. That the assignment of said deed of trust to defendant Gault, read in evidence to the jury, if made after the death of said Gazway, did not authorize said Gault to seize the said property, remove it from the State, and sell it."

"10th. That if the jury believe from the evidence, that said Gault took off and sold said negroes, and had the proceeds

thereof in his hands before said assignment of said deed of trust was made, the said assignment would not free him from responsibility for said negroes in this action."

"11th. That if the jury believe from the evidence, that the said Gault paid off the said mortgage out of the proceeds of said negroes, without authority from the legal representatives of Gazway Haynes, deceased, he is responsible to such legal representatives for the entire value of said negroes."

"12th. That after the death of a person in a county where he resides, and where his slaves or personal property are at the time, if such property is removed from such county before any administration granted upon the estate, all persons, knowing of the death and to whom the property belongs, engaged in such removal, are responsible to the legal representatives of such estate."

"13th. That if the jury believe from the evidence, that James Briggs sent his son, with wagon and team, to remove Mrs. Haynes and property from Scott to Yell county, knowing, at the time, of the death of Gazway Haynes, and that the property to be removed, and actually removed by his son, was in possession of said Gazway long before and at the time of his death, said James Briggs is responsible to the legal representative of said estate for the value of the property removed, if not returned or surrendered"—[*Qualification*]"—"but that if they believe from the evidence, that James Briggs, in removing the property sued for, acted as a mere carrier, at the instance and request of Mrs. Haynes, and with no intention of converting the property to his own use, or with the intent to exercise any right of ownership over said property, but in good faith, and that at the time of the removal of said property, the said Malissa Haynes was in peaceable and quiet possession, and that said Briggs in no wise consented, aided or counseled the removal of said property, said Briggs is not responsible."

The court gave the 1st, 9th, 10th, 11th, 12th and 13th instruction, with the addition to the 13th, following the word *qualifica-*

non in brackets, to which qualification plaintiff objected, and excepted. The court refused the 2d, 3d, 4th, 5th, 6th, 7th and 8th, and plaintiff excepted. Plaintiff brought error.

E. CUMMINS, for plaintiff.

BERTRAND, contra.

OLDHAM, J. The deed of gift from Thomas George to his daughter, Mrs. Haynes, conveyed the absolute property in the slave mentioned. There is not an expression contained in the deed which will warrant the conclusion that the grantor intended to convey a life estate with remainder over to the heirs.

The words, "her heirs forever," used in the deed, so far from limiting the title of the grantee to a life estate, are, at common law, essential to the creation of a fee simple estate in lands; a deed without these words would convey but a life estate. All the questions that can arise upon the construction of the deed of gift under consideration, were fully settled by this court in *Moody vs. Walker*, 3 Ark. R. 147.

Mrs. Haynes, while sole, had the absolute title to the slave, and upon her marriage the property, upon being reduced to his possession, vested in the husband, and upon his death the title vested in the administrator by law, subject to the marital rights of the widow. The *second, third, fourth, fifth, sixth and seventh* instructions are correct in point of law, and should have been given to the jury by the court. The deed of trust executed by Haynes in his life time to Parks, to secure the payment of the money specified therein, tended neither directly nor indirectly to prove the defendants not guilty of the trover and conversion charged in the declaration. The deed, it is true, created a lien upon the slaves, but it specified the manner in which the lien was to be enforced. Because one man may have a mortgage or deed of trust upon my property, it does not justify another in depriving me of the possession of the property and

in selling it for his own use. A subsequent discharge of the lien by the trespasser will not protect him from the consequences of the trespass. It might be a good defence against the mortgagee in an action brought by him for the deprivation of his lien by the illegal removal of the mortgaged property. The deed of trust was therefore improperly admitted as evidence, and having been admitted the eighth instruction was erroneously refused.

The qualification under which the thirteenth instruction was given is not according to law. In *Stephens vs. Elwall*, 4 M. & S. 259; Lord ELLENBOROUGH said, "By law a person is guilty of conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under the authority of another, who himself had no authority to dispose of it." See, also, *Perkins vs. Smith*, 1 Will. 328. Trover is a concurrent remedy with trespass. 1 Arch. Pr. 451.

It is no defence to a trespasser that he acted under the direction of one who is himself a trespasser. Reversed.

