

**Mccutchen Vs. Marshall**

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**Court :** US Supreme Court

**Decided On :** 1834

**Appeal No. :** 33 U.S. 220

**Appellant :** Mccutchen

**Respondent :** Marshall

**Judgement :**

McCutchen v. Marshall - 33 U.S. 220 (1834)

U.S. Supreme Court McCutchen v. Marshall, 33 U.S. 8 Pet. 220 220 (1834)

**McCutchen v. Marshall**

**33 U.S. (8 Pet.) 220**

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED*

*STATES FOR THE DISTRICT OF WEST TENNESSEE*

## **SYLLABUS**

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 forever 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 forever 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 his 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, 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 were slaves, and as such were liable to be distributed.

By the court: "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 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

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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 does not mean to disturb this principle. The children of Eliza and Cynthia must therefore be considered slaves.

In the circuit Court of West Tennessee, 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 states that sometime 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 executor and executrix qualified as such and took upon themselves the burden of executing the same. Of the said executors, Samuel McCutchen and Hannah McCutchen are 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 has consequently terminated by her death. The bill charges that they, together with the defendants to this bill, except the defendant James Marshall, are 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, a brother of said Patrick, and

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Alexander and William Buchanan, children of a deceased sister of said Patrick, but who resides without the jurisdiction of the court, and are therefore not made parties to the bill.

The will of the said Patrick McCutchen, after giving certain legacies to his relatives, devises

"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 is 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 forever 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 forever set free. "

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The bill charges that the slaves mentioned in the will and owned by the testator, with their increase, are liable to be distributed to the complainants and the defendants, Marshall excepted, as his legal representatives, but that James Marshall refuses to distribute them or any of them, and denies that they are any part of the estate by him to be distributed, alleging that by the terms of the will they are 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 it had power to do so, granted the prayer of the petition and declared them free, which proceedings the bill charges 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 charges they are advised that by the laws of the State of Tennessee slaves cannot be set free by last will and testament or by any directions therein, and that consequently all the said slaves, with their increase,

are 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 are still slaves until that period arrives, and that all their increase, born after the death of the testator but before they were actually set free, are slaves, and as such are liable to distribution.

The bill prays 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.

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MR. JUSTICE THOMPSON 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 sometime in the year 1812, having shortly before, in the same year, made his last will and testament, which, after his death, had been duly proved and

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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 forever 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

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State of Tennessee to manumit such slaves by his last will and testament. To this bill there is a 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 of 1777, ch. 6, sec. 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, sec. 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 anyone except the owner of the slaves. And it is argued on the part

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of the appellants that no such 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 *Hope v. Johnson*, 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 its opinion, said

"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 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 decision in the case of *Hope v. Executor of Beattie*, 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. Executor of Beattie* 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 forever 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

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widow, are to be considered. 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 their children are slaves also. If this were 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. Cook's Reports 131, 381; 2 Randolph 228; 1 Haywood 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.

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In the first place, it is left entirely uncertain which of 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 forever 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

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on which I now live, 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 mentioned in the fifth article; otherwise the codicil would not be what it professes 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 the said circuit court in this cause be and the same is hereby affirmed with costs.

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