My attention has been particularly requested, to some adventitious objections growing out of the subsequent conduct or condition of the parties.—

1. The objection of the length of time & implied acquiescence can not be sustained, on any principle, in either of the alternatives above presented. Mrs Lee must be held to have gained the possession as trustee in equity: and is accountable accordingly. Length of time runs not to convert a trust into beneficial interest: and for stronger instances of acquiescence by cestui que trusts, in the misapplication of the trust, have been held as of no account in Equity.

2. As to the notion, that Mrs Lee's children must renounce the provisions in their father's will, before they can claim, as against his representatives, the benefit of the trust created by their grandfather's will: I see no possibility of making out a case for such an election. The character of devisee is entirely consistent with that of creditor. It is true, when a testator undertakes to devise away property belonging to another, the true owner, claiming as devisee under the same will, is generally put to election; either to abide by the integral will; or to renounce at the benefit of it. But I do not understand that Mr. Lee in his actual will, has specifically devised, or given away, eo nomine, any of the property supposed to be covered by the trust.—

Signed W. Jones

Washington 3 Mar 1824

1444

In the case of Mr. Diggs's will — I cannot comply with the gentlemen's request of the parties for some expression of my opinion so far only, as to give my first impressions, accompanied by a few remarks very hastily put together, amid other pressing engagements. It is entirely out of my power, at this time, to make any research or critical examination of authorities, or to deduce the reasons which have formed those impressions.—

I have been from the first, strongly inclined to the opinion, which all I have since read & thought on the subject tends to confirm, that the estates given by the testator to his daughter Mrs Lee, in the event of her son S. D. Lee's death, under age & unmarried, must be taken as devised in one of two ways. viz —

1st strictly in trust for the benefit of her other children.—

It can not be denied, I take it for granted, that the terms of the devise are competent, per se to create such a trust, and would, in general, produce that effect. Take the case simpliciter, as a devise by A. to B. "in order that B. may the better be enabled to provide for C." and is it to be doubted that C. would take a direct & beneficial interest under the devise? and what interest could he take, that would come to B. any thing more than a mere trust? Then it remains only to be ~~asserted~~ ascertained whether any contrary intent is to be collected from the context, or inferred from the relative condition of the devisor & devisee, or from extrinsic evidence: so as to repel the presumption of such a trust.— 1st As to the context I think it corroborates, rather than impairs the force of the presumption. One portion of his estate (being land) is given to his daughter, singly; and without control or qualification: another portion (being personal property) is given to her & her husband jointly: the residue is given to the eldest son of that daughter; — and upon his death, under age & unmarried, is devised over for the benefit of the brothers & sisters of that grandson, who was the primary object of the Testators benevolence. Thus has he plainly declared what portion of his estate shall be for the immediate use & at the disposal of his daughter or her husband: and what for the main tenance & advancement of her children.

MdHS 1974 [1303-1444]