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With compliments of

S. J. Kirkpatrick.

In the Supreme Court of Appeals.

MORRISS, TRUSTEE, &c., v. GARLAND'S ADM'R, &c.

NOTE OF APPELLEES' COUNSEL.

ON RE-HEARING.

LEGAL PROPOSITIONS.

1. Election to take and taking under a decree certain specific bonds, stocks and money, decreed to be delivered and paid in "full satisfaction" of legacy, will operate as a waiver of all error in said decree, and estop the legatee from seeking by appeal to recover other satisfaction thereof, differing in amount and kind from that decreed.

2. A report of commissioners appointed by decree to select, allot and assign the bonds and stocks which are to constitute the subject-matter of a legacy, made January 4th, and filed February 24, 1864, and acted on by the administrator, if not objected to before November, 1874, and then because the results of war had, subsequently to report, destroyed part of the stocks, should be treated as binding and valid, though never previously confirmed.

3. A decree, in a suit to administer an estate, directing one moiety of a legacy to be paid, and which was accordingly paid, to a party claimed not to be entitled, made in 1863, cannot be appealed in October, 1879. Such appeal is barred by statute, and by the laches of the parties.

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ON RE-HEARING.

We will discuss the questions involved in the case in the reverse of their chronological order. They are as follows:

I. What is the effect of Appellants' having accepted the bonds, coupons, certificates, and payment of the money decreed to them in November, 1878, on their appeal?

II. What was the meaning and effect of the report made January 9th, 1864, by Commissioners McDaniel, Meem and Spence?

III. What was the effect of the decree of November, 1863, and the failure to appeal therefrom till October, 1879?

We premise by calling attention to the fact that no position taken by us renders it at all necessary to discuss or question the first three causes of error assigned in the Appellants' petition for appeal. For the purposes of our argument we may freely admit—

1st. That the legacy described in the 5th clause of Samuel Garland's will is not a specific legacy;

2d. That the widow's renunciation of the will did not entitle her to any specific property, and

3d. That the widow's acceptance, without objection, of the stock and bonds allotted under the 5th clause of the will did not preclude the Appellants from excepting to the report of the Commissioners who made such allotment.

These points may be exactly as the Appellants insist, and yet they amount to nothing in the consideration and decision of this case. We, therefore, ask that all these matters may be dismissed from the view of the Court, and that only the material issues may be examined and passed on. We have stated these essential questions above and proceed to examine them:

I. What was the effect on this appeal of the appellants' having voluntarily accepted the bonds, certificates, coupons and money decreed to them by the decree here appealed from?

This is the most important question involved in this cause. It is one, to some extent, of the first impression in this Court. We have been able, after very diligent search, to find no case any where which is exactly similar to this. Never before, we venture to assert, did any party to a suit, after taking under a decree like this, seek to have it reversed by appeal. The decree first described very minutely the various bonds, certificates, coupons and money to which the Appellants were entitled, then ordered their delivery and payment to the Appellants, and finally added, "which bonds, certificates, coupons,

and money are to be received by the said trustee [C. Y. Morriss] in full satisfaction of all claims of his wife, Paulina B., and her children, under the 5th clause of the will of Samuel Garland, Sr., deceased, in to fifty thousand dollars in bonds and stocks given by the said clause to the testator's wife for life, with remainder to the said Paulina B. Morriss and her children, and are to be held by the said Charles Y. Morriss in trust for the sole and separate use of his said wife and her children, free from his debts and control, except as trustee as aforesaid. But before the said Charles Y. Morriss shall be entitled to enforce this decree, he shall execute before the clerk of this court and file in the papers a refunding bond, with sufficient personal security, in the penalty of $45,000, payable to John P. Slaughter, administrator, &c."

This decree was resisted by Garland's administrator. At his instance the Court added to it, as follows: "And the Plaintiff desiring to apply for an appeal, the execution of this decree is suspended for eight days." In two weeks after this period expired—on the 2d of February, 1878—the Appellants proceeded to settle the decree with the administrator. The receipt for bonds, certificates and coupons delivered and money paid, pursuant to said decree, is before the Court, though not copied with the record. By this act the Appellants released all errors in the decrees now complained of. They are thereby estopped from seeking to disturb said decrees. They have thus made a deliberate election and "binding decision in favor of a good and sufficient consideration," which they cannot escape consistently with good faith.

Every attempt at such escape is opposed by the well-established principles of equity. These statements are so plainly true—so consistent with common sense and the ordinary rules of their character—as to need no support in the way of illustration, argument or authority. But we will now proceed to show that they are established by a long line of decisions, which go far beyond the position which we occupy; so that, if these decisions establish their principle, ours is established a fortiori.

Bigelow, in his work on Estoppel, ch. 20, p. 578, says: "A party cannot occupy inconsistent positions, and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights and of the facts, determines his election and works an estoppel." This general statement of the doctrine he illustrates by many cases, and closes his discussion with the statement that "one who accepts the benefit of a judgment will not thereafter be permitted to plead error upon it."

The following cases will present the subject in all its aspects. We have grouped the decisions according to States, beginning with those of New York:

Radway v. Graham, (1857.) 4. Abbott's Pr. Rep. 1st series, 468.

In this case an order appealed from was granted on payment of cost. The Appellant received from the defendant the costs as awarded to be paid. It does not appear whether the appeal was taken before or after such payment. The Court said this was immaterial. "The receipt of the costs must be regarded as a waiver of the appeal, if received after appeal taken, and of the right to appeal if received before the appeal was taken. If the party to the action proceed upon an order made in the cause, or accept any benefit or advantage under it, he will be precluded from asking its review."

We also refer to the cases of Atkinson v. Manks, 1 Cowan, at p. 709; Brooks v. Hunt, 17 Johnson, at p. 487; McElwaine v. Willis, 9 Wend., at p. 553; Thurman v. Fisks, 30 How.; Tussing v. Hart, 33 N. Y. Sp. Ct., 157; Lewis v. Irving Ins. Co., 15 Abb. Pr. R., 140, note; Layton v. Land, 19 Abb. Pr. R., 320,

Glackin v. Zeller, 52 Barb., 147.

The court in this case said, at page 152: "It is a rule well established, and upon the wisest and soundest principles of justice, that a party who obtains a benefit of an order or judgment in a cause, and accepts or receives the advantage shall be afterwards precluded from asking that the order, or judgment, be reviewed, or from denying the authority which granted it."

Bennett v. Van Syckel, 18 N. Y., 481, (Court of Appeals.) (1859.)

By the judgment in this case the defendant was declared to hold a lease for the use of the Plaintiff; was required to assign, on being indemnified against his personal covenants, and receiving from the Plaintiff the rent and taxes already paid. The defendant accepted the benefit of these provisions in his favor, and then appealed, insisting that the two portions of the judgment—that accepted by him and that sought to be reversed—were separate and independent—Judge Comstock pronouncing the unanimous opinion of the court that they were dependent, that one part could not be reversed without reversing the other, and closed the opinion with these declarations: "And it results that the defendant could not both proceed to enforce such portions as were in his favor, and appeal from those which were against him. The right to proceed on the judgment and enjoy its fruits, and the right of appeal were not concurrent; on the contrary, were totally inconsistent. An election to take one of these courses was, therefore, a renunciation of the other."

Knapp v. Brown, 45 N. Y., 207, (1871.)

Judge Grover, delivering the unanimous opinion of the Court, said "the issuing of an execution by the Appellant, upon the judgment rendered in his favor, and the collection of the money thereby, and appropriating the same to his own use by him, was inconsistent with, and a waiver of, his right further to prosecute the appeal." By the former he enforced the judgment as a valid judgment, and secured to himself the fruits thereof, as such. By the latter he seeks wholly to reverse said judgment and the judgment therein. These acts, it is obvious, are wholly inconsistent, the one with the other, and upon principle, it is clear that the same party cannot pursue both. But it is not necessary to examine the question upon principle, it having been conclusively settled by this Court." (Bennett v. Van Syckel, supra.)

The following cases were decided by the highest court of Pennsylvania:

Smith v. Jack, (1841.) 2 Watts & Sergt., 101.

This was an action of ejectment to recover 125 acres of land. The plaintiff recovered a verdict for three-fifths of the land only, and costs. The plaintiff excepted to opinion of the Court and appealed. While the

appeal was pending the plaintiff sued out execution for his costs, which were paid and collected by plaintiff.

The appellee admitted the error in the opinion of the Court below, but moved the Court to dismiss the appeal on the ground that the appellee had collected his costs. The Supreme Court of Pennsylvania dismissed the appeal, saying: "It seems inconsistent that a party should proceed on his judgment as it is good and available, while he is contending in another tribunal that it is erroneous, and ought to be reversed.

Ellery v. Clark, (1851.) 18 Penna. St. R. 6 Harris, 148.

In this case the Court, approving Smith v. Jack, supra, says: "The party who accepts of a judgment in the court below, and carries it into execution by the process of the Court to satisfaction, would not receive relief from this Court, if he should bring up the judgment by writ of error, and on the allegation that it was originally erroneous."

Hall v. Lacy, (1860.) 37 Pa. St. R., 367.

This case was similar to that of Smith v. Jack. Dismissing the appeal, the Court said (Justice Strong delivering the opinion of the Court): "We cannot undertake to review this record. The plaintiff's in error, recovered a verdict in the Court below on 25th August, 1857, and judgment was entered on verdict six days afterwards. Then, A writ of habere facias possessionem with a fi. fa. for costs was then issued. The costs were collected and the possession delivered. After this it is too late for plaintiffs to complain of the judgment. They have acquiesced in it for years, and they have taken its fruits. In Smith v. Jack it was held that the suing out of a fi. fa. and the collection of costs upon a judgment in ejectment, is inconsistent with the prosecution of a writ of error by the same party which, under such circumstances, will be dismissed on motion of defendant in error. A very similar decision was rendered in Ellery v. Clark. The ground of these decisions is that suing out an execution and enforcing a judgment is an election to take it as rendered, and inconsistent with any assignment of errors."

The following cases were decided by the Supreme Court of Appeals of the State of Illinois:

Morgan v. Ladd, (1845). 2 Gillman, 414.

This was a suit in equity. The defendant admitted in his answer he owed the plaintiff $92.54, and paid the same into court. As his defence the defendant succeeded. The plaintiff appealed. To the appeal the defendant pleaded as release of error that the plaintiff, before appealing, had accepted the $92.54 from the clerk. The plaintiff replied that before appealing he had tendered back to the Clerk the money, but the Clerk refused to receive it, and offered to pay the amount into that court.

The Court held the replication bad and the plea good; that the acceptance of the money operated as a release of errors, and said: "We are disposed to adhere strictly to the rule laid down in Thomas v. Negus v. Robbins, that a party who voluntarily receives the benefit of a decree shall not be allowed afterwards to allege that it was erroneous. The errors are released by his voluntary act; when thus waived, he cannot again assert them.

Thomas v. Negus, &c., (1845). 2 Gillman, 700.

This is a strong case. It was also in equity. In it, also, the money in controversy was paid into court. After decree one of the parties collected the money decreed him. After his death his administrator appealed on a point which he insisted was not involved in the act of receiving the money. The Court deciding the case said: "The receipt of the money by Duncan, under the circumstances of the case, necessarily operated as a release of errors. By accepting the decree he acquiesced in and approved it. A party ought not to receive the benefit of a decree and complain that it is erroneous. If dissatisfied with it, he should abstain from doing any act which may change the situation, or affect the right of the parties in the event of its reversal." "Here the party received the rents voluntarily, and he cannot protect himself by saying he was not required to accept them by the decree of the Court." How pertinent is all this in the case at bar!

Ruckman v. Alicoat, (1867.) 44 Ill., 183.

In this case a discharged attorney collected the money decreed, without authority. The Court held, in such case the rule did not apply, but stated the rule thus: "If is settled doctrine of this Court that a party recovering a judgment or decree, accepts the benefits thereof voluntarily, and knowing the facts, he is estopped to afterwards reverse the judgment or decree on error; that the acceptance operates as and may be pleaded as a release of errors."

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Holt v. Rees, (1867.) 46 Ill., 181.

This was a chancery suit. A less amount than he claimed was decreed to Clapp. It was paid to the clerk, and Clapp afterwards received it. This receipt was pleaded in the Appellate Court as a release of errors.

Very much the same defence was made to this plea as is made to us here, viz: That the amount decreed to Clapp was not sued for. The Court following and approving Thomas v. Negus, and Morgan v. Ladd, said: "But although the amount allowed him upon his bonds may be less than he was entitled to, still, so far as the decree directed the payment of any sum of money to him, to that extent it was beneficial, and what the Court decided in the above cited case was, that a party cannot avail himself of that portion of a decree which is favorable to him and secure its fruits, and then reverse, in an Appellate Court, any section as militates against him. Counsel object to the binding authority of these decisions, because made by a divided Court, but we fully concur in the opinion of the majority." * * * * "We are clearly of opinion that a party cannot accept money directed to be paid him by a decree, and then ask a reversal on the ground that it did not give him enough. His acceptance was a ratification."

From the Supreme Court of Iowa we have the following cases:

Miss. & Mo. R. R. Co. v. Byington, 14 Iowa, 572.

Jurors having returned their assessment of damages to appellants' lands by defendant company, the amount of their award was paid to the sheriff, and accepted and receipted for by appellant. The appellee moved the Court to dismiss the appeal on the ground that the appellant was barred by accepting the damages.

It was contended that as the statute gave either party the right to appeal and gave the company the right to go on with their construction on paying the damages assessed, the usual rule did not apply to this case.

The Court held that the statute did not change the rule, saying: "We think it a correct rule of law and well settled by the authorities that a party cannot accept the benefit of an adjudication, and yet allege it to be erroneous."

Borgallhous v. F. & M. Ins. Co., &c., 36 Iowa, 250.

In this case, the Court approving and citing the last case, applied its principles to the case of a defendant who voluntarily paid a judgment against him in the Court below, saying: "The obvious reason of this decision is that the party's act estops him from objecting to the judgment, having acquiesced in its performance or discharge by the other party. The same principle will cut off the right of a party defendant after paying a judgment to appeal therefrom." (And so, after J. S. Slaughter paid the decree to Morriss, trustee, he could not appeal; the estoppel was mutual and complete.)

The Ind. Dist. of Altoona v. The Dist. Tp. of Delaware. 44 Iowa, 201.

The plaintiff having recovered judgment, against the defendant, received payment. He afterwards appealed. On motion, the Court dismissed the appeal, holding, after approving the two cases above cited, that: "In principle there is no difference between those cases and the one at bar; the only difference being that in the last case the defendant paid the amount of the judgment appealed from, and in this the plaintiff received and accepted the amount of the judgment appealed from. The fact that, in former, a new or re-trial might be necessary if the case was reversed, and not, in the latter case, makes no difference. Nor is the opinion in Borgallhous v. Ins. Co. placed on that ground; but it is expressly held that by payment of the judgment all errors

were waived. Why should not the same rule prevail where the other party has received and accepted the amount of such judgment? The rule must, under the circumstances, be reciprocal."

The Supreme Court of Alabama holds the same doctrine, as will be seen by the following cases:

Hall v. Hrabowski. 9 Ala., 278.

Where a plaintiff who had obtained judgment below sued out a writ of error to this Court to reverse it, and, while the cause was pending on appeal, sued out execution upon his judgment and collected the money, and the fact not being brought to the notice of the Court of Appeals till after its judgment had been pronounced reversing and remanding the case, an order was made directing that the certificate of this Court should not issue until the debt, interest, and costs below were refunded to the defendant.

Bradford v. Bush. 10 Ala. 374.

Same facts and rulings as in last case.

Shivaler v. Martin. 54 Ala. 354.

This was an action at law upon an attachment bond for the recovery of a large sum of money, in which the appellant obtained a judgment for $5.00 and costs exceeding $900.00. Execution issued for damages and costs. While the execution was in the sheriff's hands, appellant's counsel told him orally not to make the amount of damages, because he intended to appeal, but gave him no written instructions by indorsement on the writ or otherwise. All was paid. Afterwards appeal was taken, and on motion to dismiss the appeal, because payment of the judgment had been coerced by appellant, the Court held (dismissing the appeal): "It is well settled as a practice of this Court that if a judgment be rendered in favor of a party in the lower court, especially in an action at law, and he coerces or receives payment of the amount thereof, he will not be permitted to maintain an appeal from the same judgment to set it aside in this Court." * * * * "Appellant cannot be permitted to coerce satisfaction of such a judgment from his adversaries, and then appeal to this Court to reverse and vacate it as erroneous."

The following case shows that the same principle is regarded as established by the Supreme Court of Indiana:

Garner v. Garner, 38 Ind. Rep., 139.

This was an appeal from decree for divorce and alimony. The Appellant having married after his divorce, appealed from the decree so far as alimony was involved. The Court said: "The question whether appellant can prosecute his appeal after having married, we have been furnished with no authority. After a limited search for a precedent we have found such authority as leads us to believe that the appeal cannot in such case be prosecuted. It seems to be the law that a party cannot be relieved from a judgment of divorce after he has used and availed himself of the privileges of the judgment. Having

availed himself of the benefits of the decree or judgment he must bear its burdens. This is, we presume, on the principle of estoppel."

In addition to the foregoing authorities, we refer the Court to an elaborate and learned note of the editor of the American Decisions, attached to the case of Clark v. Ostrum &c., vol. 13, p. 546, in which all the above-cited cases are test reviewed, and from which those stated by us; and we again call attention to the fact that if any of these cases are rightly decided, then the point we contend for in the case under argument is, a fortiori,

correct. Indeed, we venture to assert that no case like this one was ever brought into a Court of Appeals. We venture to challenge our adversaries to produce one other case, in which a party who had voluntarily taken the benefit of a decree like this, had the hardihood afterwards to come into court and say "it is true I have taken not a substitute, given me by the Court below, for my claim; it is true that substitute differed, not only in amount, but in kind, from my claim; it is true that, according and enjoying the substitute, to ask that my claim, my whole claim, be now given to me." If any such case can be found, our adversaries will also find that it was scouted as an attempt to trifle with the courts.

The record in this case, and its history while pending below, show that after the decree of November 25, 1875, (Rec. pp. 78-81) was rendered, the trustee, Morriss, abandoned all other claims under the 5th clause of Mr. Garland's will than that given him by that decree. From the date of that decree he prosecuted his rights as there defined, and showed consistently his purpose to do, what he finally did, accept what the Court decreed, and thereby abandoned all other inconsistent claim or benefit under Mr. Garland's will. After the decree of 1875 he twice referred to a Master, to state the account in accordance with that decree. The taking of these accounts was pressed by the counsel for the Appellants. To both, the Appellees excepted, earnestly resisting the view of the Court by which the exceptions here declared entitled to receive, as of the first day of January, 1864, one-half of the stocks and bonds allotted by Commissioners Spence, Meem and McDaniel, under the fifth clause of Mr. Garland's will. The Appellants filed no exception to either report, but pressed the Court to carry out the decree in favor of Morriss, trustee. When, in accordance with these reports, the Court, on the 20th November, 1877, made the decree brought up on appeal, the administrator of Garland evidently expected to appeal. At his instance the execution of the decree was suspended for sixty days. But, for some reason, he determined to comply with the terms of the decree, and so took no appeal. But so soon as the period of suspension expired, we again find the Appellants pressing for the execution of that decree, and in a few days afterwards had a settlement with Garland's administrator, who turned over to them between $12,000 and $13,000 in bonds, certificates, coupons and money, taking the receipt, now in the hands of the Court, which states that these bonds, certificates, coupons and money, were paid and received in pursuance of said decree. After getting all these benefits from said decree into possession, we find another long and strange period of seeming acquiescence and satisfaction; for no

appeal was taken till October, 1879, nearly two years after this decree was entered. Why this delay? Why allow the administration of this estate to go on, every year drawing its settlement nearer and nearer to a close, and allow a matter involving $30,000 or $40,000 to remain in this--to say the very least—most equivocal position? It looks to us as if this appeal was an after-thought. But whether so or not, we insist that this course of conduct, the insisting on the decree of 1875 for two years, the acceptance of satisfaction of the decree of November, 1877, and the long delay in taking an appeal when every possible motive urged and every consideration of fair dealing required promptness in taking it, [struck through text: which these facts] make out a case against this appeal which no amount of sophistry can vindicate or excuse.

It has been suggested, by way of reply to all this, first, that the Court had no power to give Morriss, trustee, any substitute for his claim under the 5th clause of Garland's will, and that the effort to do so was void from the beginning; second, that the trustee, Morriss, had no right, or even power, to receive a substituted satisfaction for what the will gave him; and, thirdly, that a receipt by Morriss, trustee, of what the decrees

gave him is not inconsistent with the demand made here, inasmuch as the former is much less than the latter, and a receipt for part of a thing is not inconsistent with demanding the whole.

These suggestions need little notice at our hands. To the first, we say that the whole matter involved was in the hands of a Court of competent, of plenary jurisdiction. Its decrees, adjudicating all questions raised, are binding on all the parties before the Court till appealed from and properly corrected. If the Court erred, the error should have been appealed from, and till appealed, it was irrevocable. To the second we reply that Morriss was the trustee appointed by Garland's will. He was the head and father of the estate que trusts, and all power was vested in his hands to represent and bind all who were interested, and that when he, after exhaustive litigation, accepted what was decreed to him by a court of plenary jurisdiction in full of all his rights and demands, no other person could deny his power to accept what was thus decreed. To the third suggestion we reply that the fact stated is not true. This is not a case where the thing decreed and the thing demanded are related as a part to the whole. The two things are different, both in amount and in kind. One was a remnant of specific, designated and allotted stocks and bonds; the other was $50,000 in value of stocks and bonds yet to be selected. One was given in presenti, the other was asked as a thing to be possessed in futuro. But again, the decree in question forever and finally answers this suggestion, for it declares, in terms which no mind can misunderstand, that the things given are to be received and treated as a substitute for the things demanded—that the payment and receipt of these things should be "in full satisfaction" of the things demanded.

We might well rest our discussion here; for it seems to us that the conclusion which we have reached is one to which this Court is clearly and inevitably shut up; but we will now proceed to discuss the 2d point in the commencement of this note—

II. What was the meaning and effect of the report made January 9th, 1864, by Commissioners McDaniel, Meem and Spence?

Before discussing this question it is proper we should notice a statement made in the written opinion of this Court, delivered in December last, to-wit: "It is true that report was filed on the 24th February, 1864, and was not excepted to until the 6th November, 1874; but it is also true that the report disappeared for some time after it was so filed, having been, in all likelihood, burned during the confusion incident to the war, and that so soon as it came to light and the Appellants had learned of its existence they excepted to it."

This, as we have stated in the petition for a rehearing, is a mistake. There is no indication whatever in the record that said report was ever misplaced for a day after it was placed in the record on the 24th February, 1864. If such had been the fact, the attention of the court below would have been called to it in the exceptions endorsed thereon. (See Print. Rec., p. 33). On the contrary, in these exceptions, they described the report as "dated 9th January, 1864, and returned 24th February, 1864," and do not intimate, in any way, that it had ever been lost. Can any one believe that Judge Wingfield would have been allowed to pass on these exceptions to consider them on the ground, mainly, that they had been unreasonably delayed, without their making it to appear, as their excuse for this delay, that the report had been mislaid, and "that so soon as it came to light and Appellants learned of its existence they excepted to it?" It is impossible. The truth is, this report was never lost or mislaid. It has been in the record, so far as we have any reason to believe, from the 24th February, 1864, to this day.

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The Appellants, of all the parties to this suit, were most interested in this report. They were present and participated in the decree of November, 1863, by which the commissioners who made this report were appointed. They saw then that the duty assigned them was expected to be performed at an early day, and they knew the report of these commissioners would, unless objected to, fix and determine forever what stocks and bonds were to pass under the 5th clause of the will. It was, therefore, their duty to look after this report, to see that it did them no injustice, and to have it confirmed if satisfactory or rectified if

objectionable. If they failed to do this, and allowed the report to remain without objection for nearly eleven years; if, meanwhile, it was acted on and so was regarded as a fact accomplished in the administration of this estate, could these Appellants, at so late a day, come forward and say those bonds and stocks have perished in the wrecks of war, and the work of selecting and allotting the stocks in question must be done over again? Is that fair? Is it just? Will any Court of Equity thus reward unexcused laches? Will it give bounties to the dilatory and take these bounties from widows and orphans, who have done no wrong?

And so we say that the effect of this report, coupled with the long acquiescence or failure to object to it on the part of the Appellants is just the same as it would have been had the Court, at the next term succeeding its date, approved it with the full knowledge of all parties affected by it. It fixed and determined forever what particular stocks and bonds passed to the parties entitled under the 5th clause of Mr. Garland's will. If afterwards, those stocks appreciated, the increase belonged to those parties; if they diminished in value or perished, they must bear the loss. No one can fail to observe that the Court and these commissioners sought to select the most valuable of all Mr. Garland's stocks and bonds. It is proved that they did so, according to the best light then before them. David E. Spence, who had been a private banker before the war, who says that during the war he had kept fully posted, from time to time, as well posted in regard to stocks and bonds as his experience and intelligence in those changeable times would allow, says, in reference to this report:

"The report referred to of date the 9th January, 1864, is wholly in my handwriting, signed by myself and Messrs. McDaniel and Meem. These commissioners met in my office, and I well recollect (independent of anything that may appear upon the face of the paper) that I suggested, and the other commissioners united and agreed with me on the suggestion, that in setting aside, for the widow, for her life, under the will, $50,000 in value of stocks belonging to the estate of the testator, Sam'l Garland, deceased, that we should, under all the circumstances of the case, select stocks such as we, in our opinion, esteemed to be of the most safe and solid value. We did this, I am sure, to the best of our judgment at the time. * * * I have no doubt but that we had a full knowledge of all the stocks held by Sam'l Garland's estate, out of which we had to make the election and selection of the $50,000."

C. M. Blackford, a witness introduced by the Appellants, and who had been a director of the Citizens Savings Bank, testifies in regard to the stock of that bank, "There was no stock then in this part of the world which stood so high, selling in the early part of 1861 at about $150, per share." * * * * * ["(was not stockholder in the [Merchants] Bank before the war, but its stock stood very high in public esteem, and as it was managed by Chas. R. Slaughter, Sam'l McCorkle, Jos. Wilson, and such men, it maintained itself during the war as well as any bank, and after all the losses incident to the war, was able to pay its note-holders in full, and a dividend to its stockholders of 20 per cent., I think." * * * * ["The Bank of the Commonwealth] was established just before the war by a number of very rich men in Richmond and other cities, with a large

capital. It had a very firm set of officers, and was regarded as A No. 1 stock before the war."

All who knew the Commissioners, McDaniel, Meem and Spence, will agree that no better or wiser commission could have been selected.

The decree, under which they acted, they were most careful in its instructions. It required the administrator to "exhibit before the commissioners all the stocks and securities in his hands belonging to said estate, and a list of the same." It ordered the commissioners to "select and set apart from all the stocks and securities, real estate and other debts, belonging to the estate of S. Garland, Sr., deceased, the most valuable of said stocks and securities to the amount of $50,000, according to the face value." It is also worthy of notice that his bank stocks were then his favorite stocks. By the 10th, 11th, 12th, 14th and 15th clauses of his will, he made specific bequests of various railroad bonds, while he refers to his bank stocks only in the 5th clause, "I will and direct my executors to set apart $50,000 worth at par value of MY BANK and other paying stocks and corporate bonds, paying at least six per cent. per annum," &c. They were then, and till the close of the war, continued to be his best stocks. In July, 1862, (printed Rec., p. 89) the semi-annual dividend on the Savings Bank stock was $8 per share. In January, '63, it was $10; on the Merchants Bank stock $5, and on the Bank of Commerce stock $8 per share. In July, '63, the C. S. Bank stock paid $30; the Bank of Commerce $10; the Merchants' Bank $10. In January 1864, (just before this report of Commissioners) the C. S. Bank paid $35, the Bank of Commerce $10, and the Merchants Bank $25 per share. In July the C. S. Bank stock paid $50; the Bank of Commerce $10, and the Merchants Bank $25 per share.

All these facts go to show that, according to the lights before these commissioners, in January, '64, they selected and allotted as the stocks which were to pass under the 5th clause of Mr. Garland's will, the best, the most valuable, and those, then regarded as the most solid of all belonging to the estate.

And can any one doubt that the Appellants, in person or through their able and vigilant counsel, knew that this allotment had been made, and knew that it was the very best that could be made? Can it be supposed that a trustee, as shrewd and eager as this one, represented from the first by able and diligent counsel, could have left a matter involving $50,000 to shift for itself, or be cared for by those only having antagonistic interests, or no substantial interest at all? The will of S. Garland put the matter of this selection and allotment in the fore-front of the administration of his estate. It was one of the very first things that he had attended to; and after the renunciation of the will by the widow, the trustee, Morriss, his wife and children, were the parties most interested and concerned to look after this selection and

allotment of stocks. We find they were prompt to employ independent counsel, and filed answers insisting on their right to elect the $50,000 as a preferred legacy, and pleading the statute of limitations against the claim as alleged as a debt or advancement charged to Mrs. Morriss on the books of the testator. And yet, it is pretended that these parties, forgetful or inattentive whatever to the matter in which they were chiefly interested, and that the report of commissioners appointed to pass on the matter of selection of the stocks and bonds was made without their knowledge, and was not noticed by them till November, 1874!! We think every candid mind will pronounce this claim preposterous.

And just here we beg to call attention to the fact that Messrs. Mosby & Brown

were not the original counsel for Morriss, trustee. He was represented in beginning, and for many years afterwards, by John O. L. Goggin, Esq., and we are informed by Mr. Brown that he did not come into the year 1872.

And then, when, in November, 1874, Messrs. Mosby & Brown filed their exceptions to the report of Commissioners McDaniel, Spence and Meem, why did they object, and what were their objections?

Do they pretend that they or their client, or his former counsel, did not, from and after the 24th of February, 1864, know that this report had been made and filed in the case? Did they insinuate that their objections to it had been delayed because the report had been lost or mislaid? Not a word of that sort! In the court below, Mr. Brown, who seems to have have been specially charged with the duty of the questions growing out of this report, prepared a printed note of argument, in which he sets forth the reasons which had prompted him to file the exceptions to this report, and, by implication, at least, explains why he had not filed them sooner. In that note Mr. Brown, under the head of "The Report of Commissioners Filed the 24th January, 1864," said:

"We regard the decree of November, 1863, and the report filed the 24th January, 1864, as not designed to execute in any respect the 5th clause of the will, but we supposed that Gen. Early, who was not then counsel in the case, might regard the $50,000 of debts and securities mentioned in the same $50,000 of stocks and corporate bonds contemplated in the 5th clause, and on the 6th November, 1874, we excepted to the report if it affected the interest of Mrs. Morriss and her children for these causes, &c."

So it would seem that, according to Mr. Brown's view, there was never any need for Appellants excepting to this report, and that it was only made in abundant caution, because Garland's administrator was then represented by Gen. Early, who, as a fresh counsel, was not acquainted with the previous history of the case. Yet here again we find no hint that the report had ever been lost for a day!!

Now read the exceptions which were filed and which are found on p. 33 of the printed Record.

The first exception is that the Appellants had no notice of the making of this report.

And what of that? Did the will require the executor to give any notice if he performed this duty? Did the decree, which delegated its performance to Commissioners McDaniel, Meem and Spence, require any notice? None whatever. And we assert that it is not according to the customs of our courts ever to require that such commissioners should give notice of their action. We do not believe any such custom can be found in which such an exception was ever sustained. Nor, if made, was sustained by any Virginia court. Note well the form of this exception: "These parties had no notice when the commissioners proposed to act, and had no opportunity of having their interests 'presented before them." They do say that they did not know after they acted that after the report was made, they had done so, and what they had done; nor that, after the report was made. Not a word of this kind! Only that they had "no notice of the time when the commissioners proposed to act!"

The counsel for Appellants seek to liken this report and its effects to reports of accounts made by Masters in Chancery. But these cases are entirely different, and the practice peculiar to our State in regard to them is entirely different. And yet, even the case of a Master's report, which had been returned for more than six years, and after the cause had been heard, and the argument concluded, and the opinion of the Court pro-

nounced, and then the party against whom the opinion was expressed excepted to the report for want of notice, it was held that the exception should be disregarded.—(Miller v. Holcombe, 9 Grat., 665.)

So here, when this report had been made and reported in February, 1864, when it had been acted on by parties interested and had remained for nearly eleven years without question, the objection, that it was made without notice, was simply preposterous!

The second and third objections to the report were for matters ex post facto. They objected because the bank stocks had perished by the results of the war. Here again, we insist, the objection is one which ought not to be respected, for it is not made in good faith to others interested. The selection made had been promptly reported; it had been acted on by the administrator, by Mrs. Garland, and the representative of the residuary legatees. All this without objection on the part of Morriss, trustee. To allow him, after ten years of waste and wreck, to come and claim that another selection was to be made, and that it should be made, not out of the stocks and bonds owned by Sam'l Garland at his death, but out of the savings and survivals and the ruins and the destructions of war, is most inequitable and unjust. It is, we again assert, to offer a premium for laches, and to reward the slothful at the expense of the diligent. The selection, when made, was most generous in every respect to the Appellants. If they be allowed the privilege of a second allotment and that allotment is to be made out of stocks and bonds which have lived through more than twenty years, and all the losses of those twenty years are full on all his rights and interests as residuary legatees, then we solemnly protest that equity has become oppression and injustice!

Again, we here invoke the ground first taken above, viz: that the Appellants are estopped from objecting to the selection by commissioners of the stocks of the banks, by their receipting from the administrator of $8,978.46 the proceeds of these stocks. By examining Commissioner Manson's first and second reports it will be seen that of the $6,102.12, decreed to Appellants November, 1877, and paid to them 2d February, 1878, the sum of $3,978.46 came from these same bank stocks. The Appellants collected this money, knowing that it was the proceeds of this bank stock; and yet they are here asking this Court to set aside the allotment of this stock to them! They have voluntarily received all the stock ever yielded, and yet object that these stocks should now be charged to their account. Can audacity and greed further go?

This Court has decided, as we verily believe was right, that under the 5th clause of S. Garland's will the Appellants were entitled to nothing, until Mrs. Garland's death. She still lives and yet live many years. If, as we have endeavored to demonstrate, the effect of the decree of November, 1863, of the report of Commissioners McDaniel, Spence and Meem, and the subsequent failure to object to that report for nearly eleven years, during which time that report was acted on, was to fix and set apart the particular stocks and bonds which passed under the 5th clause of the will, then all that the Appellants had a right to claim under the 5th clause of the will, was what remains of the bank stocks and railroad bonds after paying the report of January 9th, 1864. The court below said that one-half of these stocks were forfeited lost to the Appellants by Mrs. Garland's renunciation of the will. This court says this was error; that the Appellants being nothing by the renunciation, and are entitled to receive, at Mrs. Garland's death, the whole amount of the legacy given in the 5th clause of said will. Now, if this error of the Court below is corrected here, and if, as we have shown, that legacy now consists of the $12,000 railroad bonds, and

the $3,600 realized from the bank stocks, then all the Appellants are justly entitled to is the sum of these two amounts, viz:

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$15,600, and to this, only at the death of Mrs. Garland, and yet they received, as of the 1st day of January, 1878, as follows:

In stocks, certificates and coupons..... $7,740.00

In money..... 6,430.35

$14,170.35

Adding interest to date, we have:—

8 per cent on bonds, etc., $7,740, 6 years..... 3,715.20

Interest on $6,430.35, 6 years..... 2,314.80

_____

Total, as of to-day..... $20,200.35

Deduct true amount of legacy..... 15,600.00

_____

Over paid, if Mrs. G. died to-day..... $4,600.11

In other words, the Appellants have to-day in their possession and enjoyment $20,200, when they are only entitled to $15,600 at such time as Mrs. Garland may die! This, let it be again observed, is on the hypothesis that the Court below erred in holding that Mrs. Garland's renunciation of the will worked the loss to Mrs. Morriss of one-half of the legacy under the 5th clause of the will. Correct that error; give Mrs. Morriss' trustee every dollar of that legacy, and yet we see that she has in hand $4,600 more than the whole legacy is worth.

We have not thought it necessary to notice Mr. Brown's strange fancy, that possibly the decree of November, 1863, and the report of 9th January, 1864, had no reference whatever to the 5th clause of

Mr. Garland's will. No unbiased man can read the will, the pleadings in this cause, the decree of November, 1863, and the report of Commissioners McDaniel, Spence and Meem, and fail to see that the $50,000 of the face value of the stocks and bonds named in all these, is one and the same thing! The idea that they were not the same was born, we apprehend, of the stress in which Mr. Brown found himself when, in 1874, he tried the Herculean and inequitable task of ripping up transactions which everybody else had regarded and treated as finally adjudicated more than ten years before that.

We now proceed to discuss briefly our 3d question:

III. What is the meaning and effect of the decree of November, 1863?

By the proceedings in the lower court the question was distinctly raised as to the effect of the renunciation of the will by Mrs. Garland on the $50,000 legacy. It was contended by the residuary legatees that the whole of it passed into the residuum, and that any compensation to Mrs. Morriss must be shared by the specific legacies. It was contended by the Appellants here that the whole of $50,000 passed to the residuary legatees during Mrs. Garland's life, then to Mrs. Morriss and her children, and they urged that Ch. 116, Sec. 13, of the Code of 1860, operated to save the remainderman from any loss caused by the abandonment of the life tenant. Per contra, it was insisted that this provision of the Code operated only and necessarily in cases involving real property, and could not operate here to save to the Appellants their interest under the 5th clause of the will. The decree of November, 1863, did not pass on this question, but it did declare and decide that one-half of the stocks and bonds intended to pass under the 5th clause of the will did and should go to Mrs. Garland absolutely, and made immediate and self-executing orders to that effect. It appointed commissioners

to select and set apart said stocks and bonds, and ordered these same commissioners "to allot and assign over one moiety thereof to the said Mary L. Garland." It also ordered: "And if it be in order to perfect said allotment and assignment, that any transfer in writing should be made, then the said John P. Slaughter, administrator de bonis non, as aforesaid, is directed to make such transfer."

This order was not conditional. It was no mere adjudication to be carried into effect in the future by decrees thereafter entered. It was to be executed at once. The Appellants knew this. They were present and participated in this decree. They saw that their rights, as involved in the 5th clause of the will, were here finally adjudicated, present one moiety. No appeal was taken. Sixteen years passed before any

appeal was taken. It is true the Appellants, when a new judge came upon the bench, and after new counsel had been employed, did attempt to disturb the settlement made by the decree of 1863. They made the attempt on the grounds set forth in their exceptions to the report of Commissioners McDaniel, Spence and Meem, which we have already examined. The new judge simply affirmed or reiterated what Judge Marshall had done. He said Mrs. Garland's right to the moiety of these stocks, which had then been in her absolute enjoyment and ownership for more than ten years, was clear; but that, as her taking this moiety would cause a great loss and disappointment to Mrs. Morriss and her children, the whole of the other half should be paid and delivered to them—not, as the will provides, when Mrs. Garland should die, but by the very day the other half passed to Mrs. Garland.

There was error in this decree. But it was error favorable to the Appellants. It gave them the enjoyment of their legacy more than twenty years (and we know not how much more) before the will intended them to have it.

And now, on this head, we insist that as the decree of 1863 finally adjudicated Mrs. Garland's right to one moiety of this legacy, as that decree was executed in a few weeks after it was passed; as Mrs. Garland enjoyed the ownership of one moiety of the stocks for more than ten years without objection, and as no proper effort to alter or reverse that decree was made for sixteen years, that decree cannot—it certainly ought not—to be now disturbed by appeal. The error in it is barred by the statute of limitations. The right to it is barred again and again by laches. The decision of Burton v. Brown, 22 Grat., 1, settles this point. It is settled by any number of decisions, which hold that laches will operate to cut off forever the rights of parties who, for long years, allow those rights to remain under an adverse adjudication, or who see those rights pass into the ownership of others, without objection. If this position is sound, then it results, from what we have already shown, that not only one-half the stocks allotted by Commissioners McDaniel, Spence and Meem should have gone to Mrs. Morriss and her children, and so, that she is now in the enjoyment of more than four-fold the value of her just and equitable rights under the 5th clause of S. Garland's will.

If laches are ever rightly reckoned against a party to a suit, they ought to be so reckoned in a case like this. It was a suit instituted to assist and expedite the administration of an immense estate. It contemplated that decrees and execution of decrees would be pari passu. To allow these decrees to thus securely escape objection, relying on the right of appeal from all, when the final decree was entered, would defeat the very end and object of the suit. It would be a course of continued bad faith to all concerned. It would hinder and delay, instead of helping on, and would render the position of the administrator hazardous in the extreme, and instead of giving him the protection of the Court, would expose him to perils of the gravest character. Can this

art now, consistently with its duty and safeguards sought its aid and protection, annul the decree of November, 1863, from which no appeal was taken for sixteen years after it had been executed?

P. S.—When this note was nearly completed and printed, we received notice that the Appellants would take depositions to pass upon our motion to dismiss this appeal, in this Court. Mr. Brown's deposition has been taken and it is contemplated to take that of Mr. Morriss hereafter. What Morriss will say we know not, and as he would in any event, and on any point, be an incompetent witness, his statement is not very important we would know. We have filed with Mr. Brown's deposition our exceptions to it, which the Court will consider. He says nothing that can alter or affect the case. What he intended, what he said, what his adversaries admitted or intended, can, in no way, do away with the effect of the decrees under which his clients elected to take. In the nature of the things the Appellants could not elect, take, under and against the decree of November, 1857, 1877. However they might desire to do so, they could not. They had to take what the decree gave them or appeal from the decree, and assert their larger claim elsewhere. They could not receive stocks, bonds, and money "on full satisfaction of all claims under the 5th clause of the will of S. Garland, Sr," and yet, go on to seek another and different satisfaction here. All the depositions of counsel and parties must be unavailing to annul and repeal the everlasting principles of justice and equity which stamp every such effort as vain and wrong.

KIRKPATRICK & BLACKFORD,

For the Appellees.

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Garland

Supreme Court of Appeals, Va.

No. 24, MARCH TERM, 1883.

MORRISS' TRUSTEE, &c., Appellants, }

vs. } Appeal from Decree

GARLAND'S ADM'R, &c., Appellees. } of the Circuit Court

of Lynchburg.

BRIEF FOR MRS. MORRISS AND HER CHILDREN,

BY

EDWARD S. BROWN.

Samuel Garland, Sr., dec'd, left a widow, but no children. He left a very large estate in Virginia and in Mississippi. His Virginia estate consisted in part of about $350,000 of stocks and corporate bonds, of various kinds—paying good interest and dividends. His widow renounced his will. The 5th clause is as follows:

"5th. I will and direct my Executors to set apart Fifty Thousand Dollars worth, at par value, of my bank and other paying stocks and corporate bonds, paying at least six per cent. per annum, the interest or dividends whereof must be paid to my wife, half yearly, during her natural life, to be used as her own without accountability on her part. At her death the stocks, bonds, &c., pass to Charles Y. Morriss in trust for the use of his wife, our adopted daughter, P. B. Morriss, and her children, as separate estate."

I. The fifth clause does not give specific stocks and corporate bonds

II. The renunciation of the will did not give the widow one-half of any specific stocks or corporate bonds—it gave her one-half, in value, of the surplus of the personal estate, after the payment of funeral expenses, charges of administration, and debts.

III. The Court decreed, that Comm'rs select $50,000 of the most valuable of the stocks and corporate bonds, and allot one-half to the widow. They reported that they had selected the Bank stock The Adm'r had previously distributed the Bank stock, one-half to the widow and one-half to the residuary legatees. The Bank stock was soon after rendered valueless, by the results of the war. The distribution, to the widow and residuary legatees, did not preclude Mrs. Morriss and her children from excepting to the report, if these stocks and bonds were intended for the same mentioned in the fifth clause.

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STATEMENT OF THE CASE.

Samuel Garland, Sr., a resident of Lynchburg, died in Nov., 1861. He left a widow, Mary L. Garland, but no children. He had adopted his niece, Paulina B. Garland, who married Charles Y. Morriss, and towards her he stood in loco parentis. He left a very large estate in Virginia and in Mississippi. In Virginia, in addition to his valuable real estate, and a large number of slaves, and very considerable perishable estate, he left between $300,000 and $400,000 of the best dividend-paying stocks and corporate bonds.

His will was proved and recorded in the Court of Hustings for the City of Lynchburg, the 2d of December, 1861. The fifth clause is as follows:

"5th. I will and direct my Executors to set apart Fifty Thousand Dollars worth, at par value, of my bank and other paying stocks and corporate bonds, paying at least six per cent. per annum, the interest or dividends whereof must be paid to my wife, half yearly, during her natural life, to be used as her own without accountability on her part. At her death the stocks, bonds, &c., to pass to Charles Y. Morriss in trust for the use of his wife, our adopted daughter, P. B. Morriss, and her children, as separate estate. The slaves in the 4th clause, to pass in the same way—as separate estate, and to the same trusts." (Rec. 9-10).

The tenth clause proceeds as follows:

"10th. After the fulfilment of all the above and foregoing devises, then I give to John F. Slaughter the houses and lots now occupied by him, S. W. Shelton, —— Burch, and garden on 7th street, and the adjoining three tenements on 8th street—all in the same square, and $10,000 of my South-Side R. R. bonds, and no more of my estate."

He continued to give special legacies to the 17th clause, and proceeded as follows:

"17th. I do not intend to die intestate to any part of my estate, now held, or hereafter acquired, and hereby make and declare Charles R. Slaughter and Samuel Garland, Jr., jointly and equally, my residuary legatees, entitled to all the estate or estates, real, personal, or mixed, of which I may die seized and possessed, not herein disposed of by this will." (Rec 11, 12).

He appointed his residuary legatees his Executors, and they both qualified.

On the 5th of March, 1862, the widow, Mary L. Garland, executed her deed renouncing the will, which was proved, and recorded the next day. (Rec. 13.)

Charles R. Slaughter only lived a few months after his qualification.

On the 5th of May, 1862, Samuel Garland, Jr., surviving Executor, filed the Original Bill in this cause. He exhibited the will of the Testator, and the deed of renunciation by the widow. He represented that by the renunciation there was left in the hands of the Executor "the tenement in the City of Lynchburg, the slaves, the household and kitchen furniture, piano, silver-ware, plate, and carriage-horses—also the $50,000 in Bank and other paying stock, devised and bequeathed to the said Mary L. Garland," * * * which the Plaintiff thought "ought to be employed, and their profits appropriated to the relief of the disappointed devisees or legatees." (Rec. 6-7.) He further represented, that the Testator was "owner of stocks in various corporate companies, State and corporate bonds, which, with the debts due him by individuals, amount to about the sum of $400,000—estimating the stocks at their par value;" (Rec. 5.)

that his co-executor, "Charles R. Slaughter, in his lifetime, transferred and delivered over to John F. Slaughter

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and Samuel G. White and Samuel G. White, infant son of Samuel G. White," the stocks and bonds respectively bequeathed to them; and that he, the Plaintiff, had transferred and delivered to Mary R. Slaughter, and John F. Slaughter, son of John F. Slaughter, the stocks and bonds respectively bequeathed to them; (This made $22,000 of stocks and bonds under the 10th, 11th, 12th and 15th clauses) and that his co-executor and himself had advanced to Mrs. Garland considerable sums of money, which should be deducted from the stocks, which may fall to her in the distribution of the estate at their market, and not their par value; (Rec. 8) and "that there is nothing in the condition of the Testator's estate to prevent the distribution of the real estate and slaves belonging to the Testator's estate, and not less than $200,000 of the stocks and bonds between the said Mary L. Garland and the devisees and legatees of the will, according to their respective rights, which he prays may be done by commissioners appointed by decretal order of the Court." (Rec. 7).

Samuel Garland, Jr., died soon after the Bill was filed, and John F. Slaughter qualified as his Ex'or, and as Adm'r of Charles R. Slaughter, dec'd, and as Adm'r de bonis non of Samuel Garland, Sr., dec'd, with the will annexed; and he filed his Bill reviving the suit in his name as the personal representative of these several decedents.

Charles Y. Morriss, Trustee, and Paulina B. Morriss, his wife, and their children answered the Original Bill, and the Bill of Revivor, and took the ground, that, on her renunciation, the legacy to the widow fell into the residuum of the estate; that the legacy to these defendants, under the 5th clause of the will, should come to them at the death of the widow, just as it would have done if she had not renounced the will; that Mrs. Garland's portion of the estate will be made up from the residuum, and, if that be insufficient, it will be charged in the special legacies, commencing with and subsequent to, the 10th clause. (Rec. 17, 18).

On the 18th of December, 1863, the case being matured, the Court decreed that commissioners lay off, and assign to Mrs, Mary L. Garland one-third of the lands of her deceased husband, as her dower therein; that commissioners value the household and kitchen

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furniture, silver-plate, &c.—Mrs. Mary L. Garland having agreed to take the same at valuation; that commissioners value the slaves of the Testator—Mrs. Mary L. Garland being entitled to one-half of said slaves for life; that the Adm'r do pay to Mrs. Mary L. Garland $10,000 in money, and deliver to her $6,500 of South-Side R. R. bonds, $12,500 of Orange & Alexandria R. R. bonds, $2,500 of East Tenn. & Virginia R. R. bonds, and $2,500 of Va. & Tenn. R. R. bonds; (making $24,000 of corporate bonds) and

"that J. R. McDaniel, Jno. G. Meem, and David E. Spence, who are appointed Commissioners for the purpose, do select and set apart from all the stocks and securities, other than individual debts, belonging to the estate of Samuel Garland, Sr., dec'd, the most valuable of said stocks and securities, to the amount of $50,000, according to their face value; and to allot and assign over one moiety thereof to the said Mary L. Garland, and make report thereof to the Court;"

"And if it be necessary, in order to perfect said allotment and assignment, that any transfer in writing should be made, then the said John F. Slaughter, Adm'r de bonis non, as aforesaid, is directed to make such transfer." (Rec. 26).

And that "John F. Slaughter do render, before one of the Commissioners of this Court, an account of his transactions as Adm'r de bonis non of Samuel Garland, Sr., dec'd, and an account of the transactions of C. R. Slaughter, dec'd, who was Ex'or of Samuel Garland, Sr., dec'd, and an account of the transactions of S. Garland, Jr., dec'd, who was Ex'or of Samuel Garland, Sr., dec'd." (Rec. 27).

STOCKS AND BONDS WERE DISTRIBUTED AS FOLLOWS:

By C. R. Slaughter, Ex'or. (Rec. 38).

To Mrs. Mary L. Garland, 15 bonds of O. & A. R. R. Co. $15,000.00

" " " " 21 "c of South-Side R.R.Co. 21,000.00

" Jno. F. Slaughter, bonds of South-Side R. R. Co.

(10th clause Rec. 8, 10, 20,)..... 10,000.00

" Sam'l G. White, Sr., bonds of O. & A. R. R. Co.,

(12th clause Rec. 8, 11,)..... 5,000.00

" Sam'l G. White, Jr., bonds of East Tenn. & Va. R.
R. Co., (15th clause Rec. 8, 11,)..... ... 1,000.00
By Sam'l Garland, Jr., Ex'or. (Rec. 8).
To Mrs. Mary R. Slaughter, bonds of Va. & Tenn. R. R.
Co., (11th clause Rec. 8, 11,).... ..... 5,000.00
" Jno. F. Slaughter, Jr., bonds of East Tenn. & Va.
R. R. Co., (15th clause Rec. 8, 11,). 1,000.00

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By Jno. F. Slaughter, Adm'r.
To Stocks and bonds sold prior to 16th Sept., 1863, (Rec.
39,)..... 20,445.00
" Stocks and bonds decreed to Mrs. Garland 18th
Nov., 1863. (Rec. 26):
Bonds of the South-Side R. R. Co. .....$ 6,500.00
Bonds of O. & A. R. R. Co.. .... 12,500.00
Bonds of East Tenn. & Va. R. R. Co..... 2,500.00
Bonds of Va. & Tenn. R. R. Co. 2,500.00
_____ 24,000.00

By Jno. F. Slaughter, Adm'r, Dec., 1863,
Jan'ry, 1864, and July, 1864, called
1st Division, (Rec. 46-51), ½ to Mrs.
Garland and ½ to Residuary Legatees:
Bonds of O. & A. R. R. Co. 34,500.00
Bonds of East Tenn. & Va. R. R. Co..... 10,500.00

Bonds of South-Side R. R. Co. 39,500.00

Stock of Merchants Bank..... 20,000.00

Stock of Citizens Savings Bank. 8,000.00

Stock of Bank of the Commonwealth..... 10,000.00

Bonds of the City of Memphis..... 10,000.00

Bonds of Desha County..... 18,616.96

Bonds of City of Lynchburg..... 2,600 00

Stock of Va. & Tenn. R. R. Co., guaranteed. 20,000.00

Bonds of Va. & Tenn. R. R. Co 43,000.00

_____ 218,716.96

By Jno. F. Slaughter, Adm'r, Jan'ry, 1865,
called 2d Divison, (Rec. 51-3), ½ to
Mrs. Garland and ½ to Residuary Leg-
atees:

Bonds of O. & A. R. R. Co 500.00

Stocks of O. & A. R. R. Co..... 2,000.00

Stock of Bank of the Commonwealth..... 800.00

Stock of Fire & Hose Co. 20,000.00

Stock of Gaslight Co..... 2,500.00

Stock of Lynchburg Savings Bank 500.00

_____ 26,300.00

_____

$347,461.96

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On the 8th of January, 1864, (Rec. 47-8), the Adm'r distributed to Mrs. Mary L. Garland, the widow, and to the estate of C. R. Slaughter, dec'd, and Samuel Garland, Jr., dec'd, the Residuary Legatees, of which he was the personal representative,

All the Merchants Bank Stock..... $20,000.00

All the Citizens Savings Bank Stock..... 8,000.00

And the Commonwealth Bank Stock in 1st div . 10,000.00

_____

$38,000.00

And on the same, 8th of Jan'ry, 1864, (Rec. 49), of the

Va. & Tenn. R. R. bonds, he distributed to Mrs.

Garland... . ... $6,000.00

To, the estate of C. R. Slaughter..... 3,000.00

And to the estate of Samuel Garland, Jr. 3,000.00

_____ $12,000.00

_____

$50,000.00

The Commissioners appointed by decree of the 18th of Nov., 1863, to assign to Mrs. Garland her dower, and to value the household and kitchen furniture, &c., and the slaves, made their Report, dated the 9th of January, 1864.

The Commissioners, Jno. Robin McDaniel, John G. Meem and David E. Spence, who were appointed by said decree to set apart from all the stocks and securities of the estate of Samuel Garland, Sr., dec'd, the most valuable of said stocks and securities, to the amount of $50,000, and to allot and assign over one moiety thereof to Mrs. Garland, reported that they had selected and set apart the following stocks and bonds:

Merchant's Bank Stock..... $20,000.00

Citizens Savings Bank Stock..... 8,000.00

Bank of the Commonwealth Stock... ..... 10,000.00

Va. & Tenn. R. R. Bonds, enlarged mortgage... 12,000.00

_____

$50,000.00

This Report is dated the 9th of Jan'ry, 1864, and was filed the 24th of Feb'ry, 1864. (Rec. 32-3.)

The papers in the cause were for some years missing from the

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Clerk's Office, and the cause was generally continued, with little or no progress therein. The report of Messrs. McDaniel, Meem and Spence, remained unnoticed by the Court or the counsel, until the 6th of Nov., 1874, when the counsel for Mrs. Morriss and her children and their Trustee, excepted to it, so far as the report might affect their rights—because they had no notice when the Comm'rs would proceed to execute the decree; and if it was designed to be a selection under the 5th clause of the will, the Comm'rs had erred, because under the will the selection was intended to be of stocks or corporate bonds, paying at least six per cent., during Mrs. Garland's life; and by the decree they were required to select the most valuable of all the stocks and securities of the Testator, and allot one moiety to Mrs. Garland; and that the Bank Stocks, soon after the report was made, became wholly worthless; that, instead of selecting the most valuable, they had selected the most valueless. (Rec. 33).

On the 31st of Oct., 1872, (Rec. 38), Comm'r Bocock reported a general account of the administration of the estate, showing no provision whatever for the legacy of the $50,000 of stocks and corporate bonds mentioned in the 5th clause, and reporting, that "By the will of Samuel Garland no bequest is made to Mrs. Paulina B. Garland now Morriss." (Rec. 44).

To this Report, Mrs. Morriss and her children excepted, (Rec. 72), on the ground that the $50,000 worth at par value of the Testator's Bank and other paying stocks and corporate bonds—paying at least six per cent. per annum, to pass, at the death of the widow, to the Trustee for Mrs. Morriss and her children, was a legacy to them, and a preferred legacy; that it was error to say, "no bequest was made to Mrs. Morriss"—that it was error to distribute the stocks and corporate bonds to Residuary Legatees, and to

the Special Legatees, subsequent to the 9th clause, when the $50,000 worth, under the 5th clause, had not been provided for.

Testimony was taken, and it was proved, that at the close of the war, the Merchant's Bank, the Citizen's Savings Bank and the Bank of the Commonwealth went into liquidation; that at the date of the Report of Messrs. McDaniel, Meem and Spence, the stock of

these Banks and the bonds of the Va & Tenn. R. R. Co., compared with other stocks in the State of Virginia, and with those belonging to the estate of the Testator, were considered the most safe and solid, and that the Commissioners thought they had made the best selection they could for the widow; that soon after the report was made the Bank stocks became totally worthless, except a small dividend on the Merchant's Bank stock on final settlement; that the Va. & Tenn. R. R. bonds bore eight per cent. interest, that, for a few years after the war, this Company funded their coupons, but soon redeemed the funded debt and paid their interest promptly. (Rec. 81-8 and 93-4).

On the 25th of Nov., 1875, the case was heard (Rec. 78) on the Report of Comm'r Bocock—returning the general account of the administration, and on the Report of Jno. Robin McDaniel, John G. Meem and David E. Spence, dated the 9th of Jan'ry, 1864, and said exceptions of C. Y. Morriss, Trustee, and Mrs. Morriss and their children, to said Reports, and the Court overruled said exceptions and decreed as follows: (Rec. 79-80).

"The Court is further of opinion that the fifth clause of the will of Samuel Garland gave to his wife a specific legacy in the use and profits of his Bank and other paying stocks to the amount of fifty thousand for the life, and of the stocks themselves to Mrs. Morriss and her children after the death of Mrs. Garland for life by his executors—first out of his Bank-stocks and then out of his paying stocks (yielding at least six per cent.) at par to an amount sufficient, when added to the Bank stock, to make an amount of stock, at its par or face value, of fifty thousand dollars—and that by virtue of the fifth clause of his will, the Testator's right to dispose of one half of the stock, became entitled to one-half of this and all the other stocks held by the Testator as her absolute property, and his estate became divested of it as completely as if it had been recovered against it by any other person by a right or title paramount to that of the Testator; and that consequently one-half of this specific legacy was thereby extinguished, destroyed and annihilated, and the remainder to Mrs. Morriss and her children, as to one moiety, therefore failed, and was defeated and adeemed.

"But the Court is further of opinion that she, or her Trustee for her, was entitled presently to receive the remaining moiety of the said specific legacy to compensate her for her disappointment in failing to get the whole at the death of Mrs. Garland.

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"The Court is further of opinion that, as the Executor brought his bill and came into Court for the purpose of having the estate of his Testator administered under the sanction and direction of the Court, it was proper for the Court to set apart the stocks for the said specific legacy as directed by the fifth clause of the said will in the place and stead of the said Executor, by Commissioners to be appointed by it for that purpose; and that they were so set apart by Commissioners McDaniel, Spence and Meem, acting under the decree herein of the 18th November, 1863; or, at all events, if it was not then expressed in terms and in technical forms, to be done in pursuance of the said fifth clause of the said will, inasmuch as the Testator intended that the said legacy should be made up of his Bank Stocks and so much of his other stocks, paying six per cent. per annum as would be equal to $50,000, at their par or face value; and inasmuch if it had not already been done, the stocks in satisfaction of the said legacy would now be set apart in the same manner and from the same subjects as was done by the said Commissioners —— their action in setting apart said stock in satisfaction of said legacy (if it were necessary), should now be sanctioned, and the same be accordingly approved and confirmed.

"The Court is also of opinion that C. Y. Morriss, the Trustee of Mrs. Morriss and her children, was entitled to one-half of the subjects of the legacy mentioned in the said fifth clause of the said will at the same time that Mrs. Garland got her half; but as the stock mentioned in the said report of the Citizens' Savings Bank and the Bank of the Commonwealth perished, and that of the Merchants Bank greatly diminished in value by the result of the war. The Court is of opinion and doth decide that the loss thus occasioned must fall upon the legatees of the specific stocks.

"The Court is also further of opinion that the said John F. Slaughter should, out of the stocks which he has turned over to himself as the personal representative of Charles R. Slaughter and Samuel Garland, Jr., the residuary legatees of the said Samuel Garland, dec'd, now return in equal proportions from the shares of each of the said residuary legatees Virginia & Tennessee Railroad Bonds secured by what is termed the enlarged mortgage of said Company, otherwise called Virginia & Tennessee Railroad Bonds of the enlarged mortgage as specified in the Report of the said Commissioner to the amount of $6,000, and deliver the same to the said C. Y. Morriss, as be held by him as Trustee for his wife, Mrs. Paulina B. Morriss and her children, under the provisions of the will of the said Samuel Garland, dec'd, or if he does

not have them he should procure them for that purpose, and he should in like manner pay over to the said Trustee the amounts received and collected by him on the shares of the stock of the Merchants Bank not assigned to Mrs. Garland at the winding up and the liquidation of the affairs of the said Bank, or at any other time, and all other dividends or interest received by him on any of said stocks or bonds."

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And the Court further decreed that Jno. F. Slaughter, the personal representative of Charles R. Slaughter and Samuel Garland, Jr.,—the residuary legatees, should deliver to C. Y. Morriss, Trustee, $6,000 of the bonds of the Va. & Tenn. R. R. Co., and that he render an account of all money he had received on account of the Merchants Bank stock before, and on its final settlement, and all the interest or dividends received by him on any of said Bank Stocks or said Railroad Bonds after the 9th of Jan'ry, 1864, the date of said Report. (Rec. 80).

And the Judge then endorsed on the Report of Messrs. McDaniel, Meem and Spence, under the Exceptions of Mrs. Morriss and her children and their Trustee, (Rec. 33), that

"This Exception, taken more than ten years after the report had been acted on and the stocks assigned and delivered to Mrs. Garland, and accepted by her without objection, now, after the value of the stocks have been changed by the results of the war, comes too late, and would be overruled for that if there was no other reason for it."

When the report was made of the amount received by the Residuary Legatees, on the $6,000 of Va. & Tenn. R. R. Bonds and on the Bank Stocks, after the 9th of January, 1864, the Court decreed as follows: (Rec. 108-9).

"The Court doth therefore adjudge, order and decree, that John F. Slaughter, Administrator de bonis non with the will annexed of Samuel Garland, Sr., dec'd, do transfer and deliver to Charles Y. Morriss, as Trustee for his wife, Paulina B. and her children, six bonds of one thousand dollars each of the six per cent. enlarged mortgage bonds of the Virginia & Tennessee Railroad Company, with the unpaid coupons thereon, which became due the 1st day of January, 1874, and the 1st day of July, 1877, respectively, and the eight per cent. bond and certificate of the same Company for the sum of one thousand, six hundred and seventy-seven dollars and sixty cents, on which the interest due the 1st day of January, 1874, and the 1st day of July, 1877, respectively, is unpaid, and he shall deliver and transfer to the said C. Y.

Morriss, as Trustee as aforesaid, whatever evidence or security for said last named interest he may have taken.

"The Court doth further adjudge, order and decree, that the said John F. Slaughter, as Administrator as aforesaid, out of the assets of his Testator in his hands to be administered if so much he hath; and, if not, then out of his own proper goods and chattels, do pay to the said Charles Y. Morriss, as Trustee aforesaid, the sum of six thousand, one hundred and two dollars and

twelve cents, with interest on four thousand, four hundred and thirty-five dollars and ten cents from the 15th day of October, 1877, until paid, which bonds, certificates, coupons and money are to be received by the said Trustee in full satisfaction of all claims of his wife, Paulina B. and her children, under the fifth clause of the will of Samuel Garland, Sr., dec'd, in and to fifty thousand dollars in bonds and stocks given by the said clause to the Testator's wife for life, with remainder to the said Paulina B. Morriss and her children, and are to be held by the the said Charles Y. Morriss in trust for the sole and separate use of his said wife and her children, free from his debts or control, except as Trustee as aforesaid."

ASSIGNMENT OF ERRORS.

The Court erred:

1. In holding that the fifth clause gave a specific legacy of stocks and corporate bonds.

It gave $50,000 worth, par value, of any of the Testator's $300,000 or $400,000 of Bank and other paying stocks and corporate bonds, paying not less than six per cent. per annum; and the Executors were to select and set apart such $50,000 worth as would yield the best interest or dividends during the widow's life.

2. In holding that the widow's renunciation gave her a title paramount to that of the Testator in one-half of any specific stocks or corporate bonds; and that it extinguished, destroyed and annihilated one half of the legacy to Mrs. Morriss and her children.

By her renunciation she surrendered everything that the will gave her, and took what the law gave her, if he had died intestate, to-wit: one-half the surplus of personal property in value, after the payment of funeral expenses, charges of administration and debts.

3. In holding that the delivery on the 8th of January, 1864, (before the report was made), of $50,000 of Bank Stocks and Corporate Bonds—one-half to Mrs. Garland and one-half to the Residuary Legatees, precluded Mrs. Morriss and her children, if this $50,000 was intended for the same mentioned in the fifth clause, from excepting to the report, because the Bank Stock became worthless before the report was confirmed.

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ARGUMENT AND AUTHORITIES.

I. The fifth clause does not give specific stocks and corporate bonds.

A specific legacy, as defined by Lord Hardwicke, in Purse v. Snaplin, generally cited as Pierce v. Swaveling, 1 Atkins, 417, is, "when a particular chattel is specifically described and distinguished from all other things of the same kind." Redfield on Wills, (Ed. of 1866, pp. 457-8, § 49,) says, all legacies are general or specific—"general when it is not answered by any particular portion of or article belonging to the estate, the delivery of which will alone fulfill the intent of the Testator; when it is so answered it is said to be a specific legacy." A familiar illustration in the books is when a Testator says "my gold watch," or "my diamond ring," it is a specific legacy, because no other gold watch and no other diamond ring will answer the description; but if he should say "a gold watch" or "a diamond ring," it is a general legacy, because any gold watch or any diamond ring will answer the description. Sometimes the Testator gives a general legacy, but points to the source whence it shall be obtained. If a Jeweller, with many gold watches and many diamond rings, should in his will say "I give a gold watch" or "a diamond ring" to be selected by my Executor from my stock now in store," it would be a general legacy. There might be in the store one hundred gold watches or one hundred diamond rings, each different from every other, but any one of them would answer the description. This is called a demonstrative legacy; and it is general, because the Testator has not confined the bequest to a specific article.

Samuel Garland, Sr., had at his death stock of the Merchants Bank, of the Citizens Savings Bank, of the Bank of the Commonwealth, and of the Lynchburg Savings Bank. He had stock of the Va. & Tenn, R. R. Co., with six per cent. dividends thereon guaranteed by the City of Lynchburg, stock of the Orange & Alexandria R. R. Co., of the Lynchburg Gas Co., and of the Fire & Hose Co. He had bonds of the Orange & Alexandria R. R. Co., of the Va. & Tenn. R. R. Co., of the South-Side R. R. Co., and of the East Tenn. & Va. R. R. Co. He had bonds of the

City of Lynchburg, of the City of Memphis, and of the County of Desha—about $350,000 of the best stocks and corporate bonds of the country; and this was by no means the bulk of his estate. He was worth nearly a million of dollars in good money.

In disposing of this vast estate, he says:

"5th. I will and direct my Executors to set apart $50,000 worth, at par value, of my Bank and other Paying Stocks and Corporate Bonds, paying at least six per cent. per annum, the interest or dividends whereof must be paid to my wife, half yearly, during her natural life."

Any stock and any corporate bond of that $350,000 might have been selected in making up the $50,000 worth. Each answered the description. The Testator specified no stock and no bond ex nomine. If he had said "my Merchants Bank Stock" it would have made the $20,000 of his Merchants Bank Stock specific, just as the expression "my capital stock of £1,000 in the India Company's stock," in Ashburner v. Macguire, 2 Bro. C.C. 108, made that specific; or as "thirty shares which I own in the Bank of the United States" made the legacy specific in Walton v. Walton, 7 Johns. Chy 258.

In Lambert v. Lambert, 11 Ves. Jr., 607, the expression was, "I bequeath the sum of £12,000 of my funded property," and it was held that this is not a specific legacy; for any funded property that he had would have answered the description.

In Gillaume v. Adiderly, 15 Ves. Jr., 384, is this language: "My will is, that £5,000 or 50,000 current rupees, now vested in the Company's bonds, be remitted to England as opportunity may or shall offer, and that the said sum of £5,000 sterling be vested in the Bank, or some Government security, in trust for

my said daughter." It was held that the £5,000 was not a specific legacy; that the Testator had simply indicated the source whence it should come. Sir Samuel Romilly said, p. 387, to make the legacy specific "it must be considered as a bequest of an individual corpus," and he cited Coleman v. Coleman, 2 Ves. Jr., 639; Roberts v. Pocock, 4 Ves. Jr., 150; Kirby v. Potter, 10. 748; Sibley v. Perry, 7 Ves. Jr., 522; Deane v. Test, 9 Ves. Jr., 146, and Lambert v. Lambert, 11 Ves. Jr., 607.

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In Smith v. Fitzgerald, 3 Ves. & Beame 4, Sir William Grant said, pp. 5-6, "a gift of a sum of money, though with never so plain a reference to the amount of the fund out of which it is given, is very different from a gift of the fund itself with all the chances of its actual amount."

In Tifft v. Porter, 8 N. Y., (4 Selden) 516, the Testator said "I give, devise and bequeath unto my wife, Ursula Tifft, 240 shares of bank stock in the Cayuga County Bank at Auburn." The Court held this is not a specific legacy, for it might be any 240 shares in the Cayuga County Bank.

In Corbin v. Mills, 19 Gratt. 470, one bequest was of $300 per annum "being the interest on $5,000 of State Stock of Virginia," and then another bequest "of $5,000 in Virginia State Stock." The Court held that these bequests are not specific because it was no particular $5,000 in Virginia State Stock, the corpus of which was given, but it might have been any $5,000 in Virginia State Stock.

The Testator's "Bank and other paying stocks and corporate bonds" consisted of the stock of four Banks, of two Railroad Companies, and of two other Corporations, the bonds of four Railroad Companies, of two Cities, and of one County—fifteen corporations in all, and of fifteen different values—aggregating about $350,000. From these fifteen varieties, and from this $350,000 of stocks and bonds, the Ex'ors were required to select and set apart $50,000 worth, which would yield an annuity to the widow, during her life, of at least six per cent. The intent to cull out the most permanent and best paying stocks and bonds, and set them apart as a capital, from which the widow's annuity should come, so long as she should live, cannot be questioned; and the purpose not to specify which of the fifteen varieties shall be set apart is equally apparent. The Testator is studious to avoid making this legacy specific; and to guard against fluctuations in the value of his stocks and corporate bonds between the time of making his will and its execution, by making it the duty of the Ex'ors, when they should execute his will, to select the $50,000 worth from all his Bank and other paying stocks

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and corporate bonds—taking none which would not pay at least six per cent.

The construction of the lower Court, that it was the Testator's intention, for his Ex'ors to take first all his Bank stock, "and then out of his paying stocks (yielding at least six per cent.), at par, to an amount sufficient, when added to the Bank stock, to make an amount of stock, at its par or face value, of $50,000," (Rec. 79), is not sustained by the context. This construction excludes the corporate bonds from the selection. I can imagine but one reason for the supposition, that the Bank stock was intended to be exhausted, before any other stock could be taken, and all the stock to be exhausted, before any corporate bonds could be taken, and that is, because the word "bank" in the clause occurs first, "other paying stock" next, and "corporate bonds" last. Suppose the words "corporate bonds" had been written where the word "bank" stands in the clause, and the word "bank" where the words "corporate bonds" stand, would it be supposed, that the Testator's intention was, that the Ex'ors should exhaust the corporate bonds, before they could take any Bank and other paying stocks? Any grouping of the different classes of securities, where equality in the range of selection is intended to be conferred, is of necessity attended with the use of the name of one of the classes first. When the Testator said, "of my Bank and other paying stocks and corporate bonds," he put all these securities in one group and gave the Ex'ors an equal right to select any of them.

II. The renunciation of the will did not give the widow one-half of any specific stocks or corporate bonds—it gave her one-half, in value, of the surplus of the personal estate, after the payment of funeral expenses, charges of administration, and debts.

On the renunciation, the widow became entitled (sec. 12, ch. 119, Code 1873, p. 919), to "such share of her husband's personal estate, as she would have had if he had died intestate." By sec. 10, it is provided, that "when any person shall die intestate as to his personal estate, or any part thereof, the surplus, after the pay-

ment of funeral expenses, charges of administration and debts, shall pass and be distributed * * * as follows:" * * *

"If the intestate leave a widow, but no issue by her, the widow shall be entitled absolutely to such of the personal property, in the said surplus, as shall be acquired, after this act takes effect, by the intestate, in virtue of his marriage with her, and remain in kind at his death; she shall also be entitled, if the intestate leave issue by a former marriage, to one-third; if no such issue, to one-half of the residue of such surplus."

The personal estate of the intestate is applied, first, to the payment of funeral expenses, charges of administration and debts; and the surplus is for distribution. The widow's share of the surplus, if there be no children, is, first, every specific article she brought to the marriage, that remains in kind at the death of her husband, and, then, one-half the residue of the surplus—not one-half of every stock, or one-half of every bond, or one-half of every specific article that enters as an element in the residue of the surplus; but, in the language of the statute, it is a share of the residue of the surplus. The widow takes the whole of every specific article she brought to the marriage that remains in kind, but she takes no other specific article. As well might it be said, that of the other one-half of the residue, every other distributee takes a portion, according to their number, of every stock, and of every bond, and of every specific article.

The word surplus and the phrase residue of the surplus are general, and not specific. They embrace every thing of every kind, that might be left, after the payment of funeral expenses, charges of administration and debts, or after the widow had taken out the specific articles she brought to the marriage that remained in kind; and it is not pretended that Mrs. Garland brought to the marriage any of these stocks or corporate bonds.

If the fifth clause of the will had given Mrs. Garland specific stocks and corporate bonds, she surrendered them, when she renounced the will, and instead of the provision made for her by the will, she took her share in the estate under the law—one-half in value of the surplus—a general and not a specific interest.

The lower Court speaks of the paramount title of the widow

extinguishing, destroying, and annihilating the remainder to Mrs. Morriss and her children, as to one moiety of the stocks and corporate bonds, in the fifth clause, which therefore had failed, and was defeated and adeemed. If this be so, what is the effect of her paramount title on other legacies? In the tenth clause, the Testator gave John F. Slaughter "$10,000 of his South-Side R. R. bonds." That looks a little like a specific legacy. Does the widow's paramount title extinguish, destroy, and annihilate, one moiety of this $10,000 of South-Side R. R. bonds; and has the Adm'r de bonis non administered this moiety, as if it had failed, and was defeated and adeemed? Has he?

The widow's title to her husband's personal estate is not paramount to his title. By his will he gives her what he chooses. If she renounces his will, the law gives her a share of his estate, because it was his—not because she had a paramount title. The renunciation puts the widow in the precise condition she would have occupied, if her husband had never made a will. She is in no respect affected by it.

After the payment of funeral expenses, charges of administration and debts, the Adm'r de bonis non with the will annexed must pay to Mrs Garland one-half in value of all the surplus. When that has been done, the other one-half of the surplus goes to the other legatees as provided in the will.

In Mitchell v. Johnson, 6 Leigh 461, the Court said, (p. 474), "the Legislature could not have intended that the renunciation of the wife should disappoint the will of the husband farther than is absolutely necessary for the enforcement of her rights. In all other respects, it ought to be executed, as nearly as possible, according to the wishes and intentions of the Testator;" and the Court held that the legacy she surrendered by the renunciation should be "applied to the indemnification of such of the devisees and legatees as may have sustained loss."

In the case of McReynolds v. Counts, 9 Gratt. 242, Joseph McReynolds had devised his lands to his widow for life with remainder to Isaac McReynolds. The widow renounced the will. The Court said, (p. 244), "the waiver and renunciation placed the

widow in precisely the same condition, she would have occupied, if her husband had died without a will;" and, (p. 245), "that the rents and profits on the two-thirds remaining, after the assignment of dower should be applied, as far as necessary, to indemnify the legatees who are disappointed, and after full indemnification, or after the death of the widow, whichever shall first occur, the lands shall go to Isaac McReynolds."

Our practice corresponds with that of the Chancery Court of England. They sequester the legacy surrendered till satisfaction is made to the disappointed legatees. (See Lady Cavan v. Pulteney, 2 Ves. Jr., 539; Green v. Green, 2 Merrivale 94, s.o., 19 Ves. Jr., 609; Lewis v. King, 2 Brown C.C. 603, 604).

The legacy to Mrs. Garland was not $50,000 worth of stocks and corporate bonds for life, with remainder to Mrs. Morriss and her children. It was an annuity of the interest or dividends of the stocks and bonds, to be paid to her, by the Ex'ors semi-annually, during her life. Her renunciation throws back the interest or dividends into the general estate. The stocks and bonds were to be set apart and held by the Ex'ors intact. They had no authority to deliver them to Mrs. Garland—still less to the residuary legatees. The Ex'ors were to deliver them at the death of Mrs. Garland to the Trustee of Mrs. Morriss and her children.

III. The distribution, before the report was made, of $50,000 of stocks and corporate bonds, one half to Mrs. Garland and one-half to the Residuary Legatees, did not preclude Mrs. Morriss and her children from excepting to the report, if these funds were intended to be the same mentioned in the fifth clause.

The design in that portion of the decree, of the 18th of Dec., 1863, which appoints Comm'rs to select and set apart $50,000 of the most valuable of the stocks and securities, and to allot and assign over one moiety to Mrs. Mary L. Garland, is hard to comprehend. It could not have been intended to execute the fifth clause of the will; because, by the terms of the clause, none of

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the stocks and bonds mentioned were to be allotted and assigned to her; and because, she had renounced the will, and was, not only not entitled to the stocks and bonds mentioned in that clause, but she was not entitled to any interest or dividends thereon. Neither the Adm'r de bonis non, with the will annexed, nor the Comm'rs could have supposed that these stocks and bonds were intended to be the same mentioned in the fifth clause: because, on the 8th of Jan'ry, 1864, (Rec. 47-8-9), every dollar of stock and bonds, mentioned in the report, was distributed, one-half to Mrs. Garland and one-half to the residuary legatees. Having assented to the distribution, the title of the estate of Samuel Garland, Sr., to these stocks and bonds, was gone; and when the Comm'rs went to work on the 9th of January, 1864, it must have been understood, that they were only giving form and shape on paper, to the division of the Bank stock and some of the R. R. bonds, which the Adm'r had divided, the day before, equally between

the widow and the residuary legatees—all of which is incompatible with the idea that these were the same $50,000 of stocks and bonds mentioned in the fifth clause.

Again: to suppose that the Adm'r assented to the distribution of the $50,000 of stocks and bonds, mentioned in the fifth clause, to distributees or legatees, who were not entitled to them, is to suppose a devastavit. When he passed away the title of the estate to the Bank stock mentioned in the report, that stock was of some value. It did not perish on his hands; and if it be the same as that mentioned in the fifth clause, the Adm'r is personally liable to Mrs. Morriss and her children for its value. See Burnley v. Lambert, 1 Washington 312; Lawrason v. Davenport, 2 Call 95; Ruth v. Owens, 2 Rand. 507.

The Report of Messrs. McDaniel, Meem and Spence, was filed the 24th of Feb., 1864. What became of it, for some time thereafter, we do not know. The Report and most of the papers of the cause disappeared. The confusion, produced by the war, was at its height. When the Report came to light, and we, for the first time learned of its existence, and thought it possible, that the $50,000 of stocks and bonds, mentioned in it, might be, by some of the

parties, supposed to be intended for the same $50,000 of stocks and bonds mentioned in the fifth clause, we excepted to it, so far as it might affect the rights of Mrs. Morriss and her children, on the ground that it was not in conformity with the will; that the fifth clause looked to the selection of the most permanent and productive of all the Testator's stocks and bonds, and that the Comm'rs erred in selecting the Bank stock, because it was in fact worthless. The exceptions were taken the 6th of Nov., 1874,—more than one year before the case came to a hearing on the report.

Comm'rs are agents of the Court, and their acts do not bind any of the parties, till they are confirmed by the Court. Under our Virginia practice, exceptions may be taken to a report at any time before the case is heard on it. The statute, (sec. 28, ch. 128, Code 1873, p. 951), in regard to reports of fiduciary accounts, provides, that the Court "shall examine the same, with such exceptions thereto as may be filed at any time before such examination."

If, when the Court said, by its endorsement on the report, "this exception, taken more than ten years after the report had been acted on," it meant acted on by the Court, it was quite an error, for the Court had never acted on it, when the exceptions were taken. If it meant acted on by any of the parties, it was quite an error, for the first action on it was the endorsement of the exceptions of Mrs. Morriss and her

children. The Court says, "and the stocks assigned and delivered to Mrs. Garland and accepted by her without objection." They were not assigned and delivered to Mrs. Garland under the report, but before any report was made, and before any action was taken by the Comm'rs. Her accepting or rejecting the stocks—especially after she had renounced the will—could not change the rights of Mrs. Morriss and her children, as legatees under the will. The Court proceeds, "now after the value of the stocks have been changed by the results of the war, comes too late." The delay of the Court, in acting on the report of its Comm'rs, does not change the legal rights of the parties. When the report was filed, Bank stocks in the South were in a very unsettled state. Every business man knew, that if the Confederacy failed, (and in 1864 there was little hope of success), our Bank stocks

would be worthless. That this apprehension was speedily realized was good ground of exception, if the stocks, mentioned in that report, were intended to be the same, as those mentioned in the fifth clause.

The change of value, by the destruction of the property, in case of a sale, or by producing inequality, in case of a division, between the time of the sale or the division and its confirmation, is good ground for setting it aside. The acts of the Comm'rs are valid or void, as the Court confirms or rejects them, and when they are confirmed, they take effect, only, as of the time of the confirmation.

Minor exparte, 11 Ves. Jr., 559, was a case, in which, after the report of the sale, and before it was confirmed, a portion of the property was consumed by fire. Lord Eldon said, (pp. 501, 502), "the loss occasioned by the fire must fall on the vendor."

In Twigg v. Fifield, 13 Ves. Jr., 517, Lord Eldon said, he "considered the purchaser as having the purchase, from the confirmation of the report."

The proceedings of the Com'rs constitute a negotiation for the sale, and the confirmation of their report, the closing of the contract. Material change in the condition of the property, pending the negotiation is good ground for the abandonment of the purchase. The Com'rs are the agents of the Court, and their acts are conclusive, only, when they are confirmed by the Court. In this case, they are directed to select the most valuable of the stocks and corporate bonds. They err in making the selection, and the error is discovered before the selection is concluded. Can it be questioned, that a Court of Equity should correct the error, while its correction is within its control, rather than lend its aid to the perpetuation of it? The "interest or dividends" on the stocks and bonds, to be selected under the fifth clause, were intended by

the Testator as a sure annuity to his widow during her life. To leave out the R. R. bonds, paying from 6 per cent. to 8 per cent. interest, when there was a much larger amount of these, than the amount to be selected, and take, in lieu thereof, the worthless bank stock, would be to defeat the will of the Testator.

If, then, we regard the decree of the 18th of Dec., 1863, and

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the report of Messrs. McDaniel, Meem and Spence, dated the 9th of Jan., and filed the 24th of Feb., 1864, as contemplating the selection of stocks and bonds under the fifth clause, then, the error of the Com'rs ought to be corrected; but, as the decree ordered a disposition of the stocks and bonds, which the Com'rs were to select, wholly incompatible with the provisions of the 5th clause, and as the Adm'r de bonis non had before the execution of the decree, transferred all the stocks and bonds mentioned in the report, to distributees and legatees, other than those in the fifth clause, and before the Bank stock became worthless, it is more equitable to regard the selection of the stocks and bonds, mentioned in said decree and report, as wholly outside of the fifth clause of the will.

Again: Suppose the decree of the 18th of Dec., 1863, and the Report dated 9th of Jan., 1864, fully accomplished, as to all purposes intended, and now to be left undisturbed, there still remain, outside the stocks and bonds therein mentioned, and outside the widow's half of the surplus, about $150,000 of good Corporate bonds and stocks, paying at least 6 per cent. interest or dividends per annum, from which the legacy in the fifth clause to Mrs. Morriss, the Testator's adopted daughter, and her children, may be fully provided for. We do not seek to disturb the Adm'r, de bonis non, nor those to whom he had previously delivered the stocks and bonds mentioned in the report dated the 9th of Jan., 1864. All we ask, is, that the legacy to Mrs. Morriss and her children, in the fifth clause, shall be provided for, as the Testator intended.

Out of all his stocks and corporate bonds, the Testator made this legacy to Mrs. Morriss and her children a preferred lagacy. Before he had made any other disposition of stocks and corporate bonds, he says in the 10th clause, "after the fulfilment of all the above and foregoing devises, then I give," &c. So that, every other legatee, who takes stocks and corporate bonds, must wait until Mrs. Morriss and her children have been provided for. Whether their legacy, under the fifth clause, be specific or general, as between them and the other legatees, is of no consequence. The Testator has preferred their legacy, and required that it shall be first provided for; and, whether it be specific or general, as between these

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legatees and the widow, is of no consequence. When Mrs. Garland has received her full half of the surplus of the personal estate, and it is a very large surplus—his debts amounted to nothing—there still remain plenty of good R. R. bonds and R. R. stocks, paying at least six per cent., to satisfy the legacy under the fifth clause, and all other legacies of stocks and bonds in the will.

When the Ex'ors and the Adm'r, de bonis non, invoke the aid of the Court, in the execution of the will, the Court should look carefully to the intent of the Testator, both the general and the special intent, and give effect to it. The renunciation of the will by Mrs. Garland should not, in the language of Judge Cabell in Mitchell v. Johnson, 6 Leigh, 474, "disappoint the will of the husband farther than is absolutely necessary for the enforcement of her rights;" and, under the circumstances in this case, it is not necessary that her renunciation should interfere at all with this legacy to Mrs. Morriss and her children. Good paying stocks and corporate bonds, paying at least six per cent. interest or dividends, should be set apart, and held under the custody of the Court—the interest or dividends going into the residuum of the estate, during Mrs. Garland's life, and at her death said stocks and corporate bonds passing to the Trustee of Mrs. Morriss and her children, as the will requires. In this way, the rights of Mrs. Garland will be enforced, and the will of Mr. Garland will not be disappointed, farther than is absolutely necessary.

We submit that the Court has erred, and that its decree ought to be reversed.

EDWARD S. BROWN,

Counsel for Appellants.

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