*Ann Pray, executrix, J. J. Maxwell and George Waters, executors, of John Pray, deceased, Appellants, *v.* George G. Belt, trustee, and James P. Heath, *prochein ami.*

Construction of will.—Clause of forfeiture, in case of invocation of judicial action.—Action for legacy.—Parties.

The testator, in his will, said, " whereas, my will is lengthy, and it is possible, I may have committed some error or errors, I, therefore, authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator. p. 679.

Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimdiation, than as concluding the rights of the parties. If an unreasonable use be made of such a power, so given in a will, one not foreseen, and which could not be intended, by the testator, it has been considered as a case, in which the general power of courts of justice to decide on the rights of parties ought to be exercised.[1] p. 680.

There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice; a court must decide, whether the construction of the will adopted by those who are named, is the right construction, or the grossest injustice might be done. p. 680.

Where a legacy, for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in either family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. p. 681.

Appeal from the Circuit Court of the United States for the District of South Carolina. The appellees, complainants in the court below, on behalf of Jane Heath, the wife of James P. Heath, and of her children, filed a bill in the chancery side of the circuit court of the United States for the district of South Carolina, against Ann Pray, executrix, J. J. Maxwell and George Waters, executors, of the last will of John Pray, deceased, for the recovery of a legacy to which Jane Heath was entitled under the will. The clauses of the will of John Pray, brought under the notice and consideration of the court, and exhibited by the record, were:

[1] Clauses or provisions in a will, revoking and annulling all devises, legacies and other provisions made in favor of any child, legatee or devisee, who shall dispute, contest or litigate any devise, bequest or other testamentary provision in the will, are to be construed strictly, as they go to divest estates already vested. Where such provisions are merely denounced against disputing a will, without a devise over, they are only to be considered *in terrorem*, and not as fixing intestacy on the share of the litigating devisee. But where there is a devise over, in case of a violation of such provision, to some person named, or a provision that the share thus limited shall fall into the residue of the estate for distribution, the devise thus limited will so pass, upon breach of the condition, unless there exist *probabilis causa litigandi*, or where it would be a mere penalty and really subversive of the real intent of the testator. Chew's Appeal, 45 Penn. St. 228. And see Jackson *v.* Westerfield, 61 How. Pr. 399, 407; Rhodes *v.* Muswell Hill Land Co., 20 Beavan 560; Powell *v.* Morgan, 2 Vern. 90; Morris *v.* Burroughs, 1 Atk. 404; Lloyd *v.* Spillet, 3 P. Wms. 345.

*"Item 51. Whereas, I hold ten bonds, given by John J. Maxwell, payable by ten instalments, the first on the tenth of January next, and the others on the tenth of January in each year after. It is my will, and I direct, that the bonds payable tenth of January 1820, 1821 and 1822, say the three first, shall be applied in aid of the payment of my just debts, if any due, and in the payment of the legacies by me left. It is my request, that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank-stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton; first, to pay any debts, and then legacies, any heretofore left, or which I may hereafter leave to be paid. It is my will, and I do direct, that my executors do pay up the one-half of all the cash legacies by me left to my relations, out of the first fund they can command from my estate, except those I may have directed to be paid immediately, and after they have paid the one-half to my relations, thereafter it is my will, that they do pay up, in equal proportions, agreeably to sums left, to all my other legatees; and be it understood, and it is my will and intention, that after they have paid the one-half to my relations, that they will continue to pay them the other half in equal proportions with my other legatees; my object and intention is, to place them on the same footing with my other legatees, after the payment of one-half to my said relations. It is my will and request, that my executors do pay all my debts and legacies, as soon as possible after my death; but be it explicitly and plainly understood, that no interest whatever is to be allowed on any legacy by me left to any one of my legatees, as in all probability the resources and funds of my estate will be equal to the payment of my debts and legacies, before the three bonds mentioned of John J. Maxwell may fall due and be collected. In case all debts and legacies can be paid, before the three aforesaid bonds can be collected, then and in that case, whatever balance may remain to be collected on the three aforesaid bonds, principal and interest, it is my will, that the same shall be equally divided, as collected, between the following persons, share and share alike: To my executors, in trust for the use and benefit of my aunt Turpin, my uncle's present wife; it is my intention to keep it from being subject to my uncle's debts, that I leave it in trust; in case of no risk, my executors will pay it over to my aunt. My god-daughter, Mary Jane Pray Hines, wife of Lewis Hines. The children of Thomas Mann, by his present wife, as also Ann and Jane, now in New
*672] Providence; any part *which the children of Harriet Mann, Thomas Mann's wife, may be entitled to, is to be ascertained by the number she may have, at the time these bonds are collected, and my executors are ready to pay over. In case all is not applied on my debts and legacies, and if Harriet hath any child, after the payment, then such child to receive such proportion as the other children, out of the part paid to such as she before had, or has, at the time the same is paid. My executors will be governed in the distribution, by the number of children Harriet has, on the day they are ready to make a distribution. In case of any surplus left on said bonds, the said children's parts to be paid to their legal representatives, so it is not their father (I omitted the word Mann, after the words Ann and Jane, above). And to Richard K. Heath, in trust for the benefit of Jane Heath,

wife of James P. Heath, and such children as she may have when that surplus may be collected, in case of there being any.

"It is my will, and I direct, that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid, debts, if any, first, and as soon after as possible, to be disposed of as hereinafter directed.

"In case of accident by fire, at any time before or after my executors pay my debts and legacies, it is my will, that my wife receive the amount of insurance to aid in rebuilding; and in case of accidents by fire on lots in Nos. 6 and 7, before my debts and legacies are paid, it is my will, in such case, that my executors hold all my estate together, until they can add $10,000 to what may be received on insurance; and they are requested to put on fire-proof buildings on said lots, to both these amounts, and if these sums are insufficient, they are authorized to raise any balance for erecting proper buildings, on the credit of my wife; this balance, if any required, be it understood, is to come out of my wife's portion of my estate left her.

"In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks. Whereas, there is no doubt but there must be a considerable surplus fund of my estate, by debts due, or crops on hand, or near made, after my executors have paid all my debts and legacies, which my wife will come in for, if my executors discover that, by such surplus, that the same will not be equal to $10,000, in that case, it is my will, that they continue all my estate together, until they can make up $10,000; and it is my request, that they will, as soon as possible after raising the aforesaid sum, proceed to put up fire-proof buildings on the aforesaid lots.

"Whereas my will is lengthy, and it is possible, I may have committed some error or errors. I do, therefore, authorize and *empower, as fully as I could do myself, if living, a majority of my acting executors, [*673 my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they may determine is my intention, shall be final and conclusive, without any resort to a court of justice."

The defendants, John J. Maxwell and George M. Waters, in their separate answers, alleged, "That, in the month of December, in the year 1819, the defendants qualified as executors of the will of John Pray, and having ascertained that there was a sufficient sum of money to be raised from the crops which had been made that year, as also from debts due the estate of said John Pray, the testator, on bonds, notes and other securities, which could soon thereafter be realized, to satisfy all the unpaid legacies of the said testator, commenced a delivery of some portions thereof to those claiming and entitled under the will. That, in the meantime, after they had commenced a division of the estate of said testator, and before its completion, to wit, on the tenth day of January, in the year 1820, the accident occurred, which had been guarded against by the sixty-first item of the will of said testator, as set forth in the complainant's bill; and the buildings on lots No. 6 and 7 were destroyed by fire; that, at the time when this event occurred, the debts of said testator, which were small, may have been, and as this defendant believes, were all paid and discharged, but the legacies remained partially unpaid and unsatisfied, although, as this defendant believes, at the time, and as previously stated in this answer, there was a

sufficiency of funds to be realized from the means already pointed out, to discharge and pay the remaining unsatisfied legacies, and which the executors, when they commenced the division of the estate, as aforesaid, intended to apply to the payment of said unpaid legacies ; that previously also to the said conflagration, by which the said buildings on lots No. 6 and 7 were destroyed, the first bond of the said John J. Maxwell had been collected, and applied to the payment of the debts and legacies. That the funds which were to be realized from the crops, bonds and notes, as aforesaid, by the executors, and which had been deemed adequate to the payment of the unpaid legacies, were insufficient for that purpose, and the payment of the said $10,000 bequeathed to the said Ann Pray in the said sixty-first item of said will, in the event of the destruction of the buildings on the said lots six and seven, which actually occurred : that the two remaining of the three bonds of the said John J. Maxwell, which were directed by the fifty-first item of the said will to be appropriated in aid of the payment of the said debts and legacies, were then resorted to by the executors, from which, in *674] addition to the available *effects already specified, a fund was realized equal to the payment of the legacies, and the sum of $10,000, which was appropriated to the use of said Ann Pray, as directed in sixty-first item of said will ; that the said appropriation of the two remaining bonds of the said John J. Maxwell, was made after the division of the estate had commenced, as already shown, but before its completion.

"That if the estate of the said testator had been kept together, after the conflagration aforesaid, a sufficient time, funds may have been realized sufficient to pay all debts and legacies, and to meet the aid authorized and directed for the said Ann Pray ; but this defendant declares, that it would have required the estate to have been kept together four or five years for this purpose, without resorting to the said bonds ; in the mean time, the said bonds would have become due, and been realized ; the one being due on the — day of January 1821, and the other on the — day of January 1822. That in and by the fifty-first item of the said will, the said bonds are expressly directed to be appropriated in aid of the payment of the debts and legacies, and only to be distributed among the legatees therein named, in the event of the debts and legacies being paid out of the funds, made subject by the will to that purpose, before the said bonds should become due or could be collected. That if the said estate of the said testator had been kept together, until the necessary funds for the relief of the said Ann Pray, and the payment of the legacies had been raised from the annual proceeds, the benefit arising to the said Jane Heath and her children, by receiving their proportion of the real estate of said testator devised to them, must have been delayed four or five years ; whilst, by the early division of said estate, they were greatly benefited, having realized, at that time, from this means, $3500. And this defendant admits, that the complainants have applied to the executors of said testator, on the subject of the proportion of Jane Heath in said bonds, and to which they supposed her entitled. That the division of the estate having been commenced, and a portion of the property delivered to the devisees and legatees, and a fund sufficient to pay the legacies, and which was to come into the hands of the executors, having been reserved for that purpose, they consider themselves bound in justice to the legatees and devisees, who had not received their proportion of the estate, to proceed in

the completion of the division of the estate; and therefore, conceived the estate, so far as regarded their power to continue it together until the $10,000 could be raised to relieve the said Ann Pray, from the annual proceeds, as having been in effect divided." *No answer to the bill of the appellees was filed by Mr. Pray. [*675

The case was heard on the bills and answers, and the circuit court determined, that the executors had misapplied the proceeds of the bonds of J. J. Maxwell, on which the legacies claimed were charged; and that Mrs. Pray would have to refund to the value of the residue bequeathed to her, and ratably also, according to the interest and income of the property specifically bequeathed to her. An order of reference was made, and thereupon, the master was ordered to make certain statements of the condition of the estate, and of other facts necessary to a final decree. These reports having been afterwards made by the master, the circuit court, on the 9th of May 1826, made the following decree:

"This cause came on to be heard, on the master's report, pursuant to a reference at the last term, on the following points: 1st. A statement of the debts due by the testator. 2d. A statement of the pecuniary and other legacies, and how and when paid. 3d. Of the funds applicable to the debts and legacies. 4th. Of the receipts and expenditures of the executrix and executors. 5th. Of the value of the residue bequeathed to Mrs. Pray. 6th. Of the value or amount of the income which the estate would have produced, had it been kept together specifically. Of the several amounts claimed by these complainants, in behalf of those whom they represent as legatees, and his own views of the correctness of those claims, with reference to the principles on which they are calculated. And he, the said master, having duly made and submitted his report upon all the matters so referred to him, and it appearing from said report, that the proportion of the funds of the said testator, to which, under his will, the complainants are entitled, amounts to the sum of $12,111, as by reference to said report of file in the registry of this court will more fully apppear. It is ordered, adjudged and decreed, that George M. Waters and John J. Maxwell, executors, and Ann Pray, executrix, do pay to the said complainants, the sum of $12,111. And it is further ordered, decreed and adjudged, that the said sum, when collected by force and virtue of this decree, be paid into the hands of the clerk of this court, and on the receipt of the said sum, he is hereby ordered and directed, so soon as the same can be effected, to invest the said sum in purchase of United States stock, or bank-stock of the United States' Bank, as may appear most advantageous to the complainants; and it is further ordered, adjudged and decreed, that the defendants do pay the *costs of this suit, and interest on the principal sum decreed, to be computed from the service of this decree. [*676

WILLIAM JOHNSON."

By agreement of counsel, a part of the master's record was afterwards corrected, and the number of persons among whom the amount of John J. Maxwell's bonds were to be distributed, being accurately stated, the sum to which the complainants below were entitled, according to the principles of the decree of the circuit court, was found to be $9909, instead of $12,111, as stated in the report.

The case was argued by *Berrien*, for the appellants; and by *Key*, for the appellees.

The following points were made by the appellants: 1. There is no sufficient evidence on which to found a decree for any specific sum. 2. The necessary parties were not before the circuit court. 3. The proceeds of the three bonds of John J. Maxwell were well applied to the payment of debts and legacies, and among others, to the payment of the contingent legacy to Ann Pray. 4. The decision of the executors, is the will of the testator, by the express provision of the will; and cannot be questioned by the legatees.

MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the circuit court for the district of Georgia, by George G. Belt, the trustee for Jane Heath and her children, who are infants, and by James P. Heath, husband of the said Jane, and father of her children, against the executors of John Pray, deceased, and Ann Pray, his widow, to recover a legacy bequeathed to them and others, by the said John Pray. The executors resist the demand, on the principle that the bonds for which the suit is instituted, were required to pay the debts and legacies due from the testator and to raise the $10,000 to replace the buildings on lots 6 and 7, which were consumed by fire. They also contend, that their testator has submitted the construction of his will, absolutely, to their judgment, and that their decision against the claim of the legatees, is final. The circuit court established the claim of the plaintiffs, and decreed to them the proportion of the three bonds, which was estimated to be their part. From this decree, the executors have appealed to this court.

In argument, several formal objections have been taken to the decree, which will be considered. The question on the *merits, depends on *677] the construction of the will. The will is very inartificially drawn. It is, in some parts, rendered more confused than it would otherwise be, by a recurrence in different places to the same subject. In item 51, he says, in the first instance, that the three bonds which are the subject of controversy "shall be applied in aid of the payment of his just debts, if any due, and in the payment of the legacies by him left." He adds, "it is my request, that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank-stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies," &c.

The language of this part of the will, in relation to these bonds, shows an intention to apply them to debts and legacies, if necessary; but indicates, we think, the expectation that it would not be necessary. They are to be applied in aid of the payment of his just debts, and in the payment of legacies. They are then to aid another fund. That fund is afterwards described in terms which show it to be a large one. There is some reason to suppose, from this part of the will, that these three bonds were not comprehended in it, because the testator introduces the enunciation of its items by saying, "it is my request, that my executors do also apply all funds, &c." Again, he assigns as a reason for withholding interest from his legatees,

"that in all probability the resources and funds of his estate will be equal to the payment of his debts and legacies, before the three bonds mentioned of John J. Maxwell, may fall due and be collected." This shows, unequivocally, the belief of the testator, that these bonds would not be required for the debts and legacies. He then adds, "in case all debts and legacies can be paid, before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected, shall be equally divided between the following persons," &c. This bequest does not depend on the fact, that the debts and legacies should be actually paid, before these three bonds were collected, but on the sufficiency of the fund for the object. Should the fund be sufficient, its application must be made; and whether made in fact or not, the right to the bonds vests in the legatees.

The testator then proceeds to say, "it is my will, and I direct that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid." This whole item 51, shows the opinion, that the profits of his *estate, including dividends on his stock, added to the debts actually due at the time, were sufficient for [*678 the payment of debts and legacies. Yet his estate is to be kept together till they shall be paid. The profits are, of course, to be applied to that object. If this fund amounted, before the 10th day of January 1820, when the first bond from J. J. Maxwell fell due, to a sufficient sum for the payment of debts and legacies, the right of the legatees to the three bonds then vested; if it was not sufficient on that day, it may be doubted, whether such part of the first bond as was necessary for this primary object might be brought to its aid immediately. We suppose it might. A codicil to the will is dated the 18th day of June 1819, and the will and codicil were proved on the 27th of the succeeding month. The executors qualified in the month of December; having ascertained, they say in their answer, the adequacy of the fund provided for debts and legacies, they commenced the division of the estate.

So far as the will has been considered, it is obvious, that the right of the legatees, to whom the two parts of the first three bonds due from Maxwell were bequeathed, was vested. Their right to the first bond may be more questionable. If part of the fund, which was applicable in the first instance to debts and legacies, could not be made available immediately, and the first bond or any part of it was substituted for debts which could not be collected, it cannot be doubted, that those debts, when collected, ought to replace the bond so substituted. The testimony in the cause does not show, with sufficient certainty, how this fact stands. It is remarkable, that this first bond was applied by the executors, before the 10th of January 1820, when it became due. They state this fact in their answer. But we are decidedly of opinion, that this precipitate appropriation of the bond, could not affect the rights of the parties. They must remain, as they would have stood, had the bond remained uncollected, till it became payable.

The contest in this suit would either not have arisen, or would have been confined to the first bond, had things remained as they stood before the 10th day of January 1820. But on that day, the buildings on lot Nos. 6 and 7 were consumed by fire. In that event, the testator had directed that his executors should, for the purpose of replacing the buildings, hold all his estate together until they can add $10,000 to what may be received on

insurance. He adds, "in case of such an accident, if necessary, not to delay rebuilding, my executors will resort to a loan from the bank or banks." "Whereas, there is no doubt, but there must be a considerable surplus fund of my estate, by debts due or crops on hand, or near *made, after my executors have paid all my debts and legacies, which my wife will come in for; if my executors discover that, by such surplus, that the same will not be equal to $10,000, in that case, it is my will, that they continue all my estate together, until they can make up $10,000."

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Instead of conforming to this direction of the will; instead of keeping the estate together; the executors have applied the remaining two bonds, payable the 10th of January 1821, and the 10th of January 1822, to this object. They say, that having commenced the delivery of the estate, before this event took place, they thought themselves bound to complete it; and considered themselves in the same situation as if it had been completed before the buildings were consumed. Suppose, this opinion to be correct, ought they not also to have considered the bonds as delivered? This also was a specific legacy; and after being vested, stands, we conceive, on equal ground with other specific legacies. These bonds do not constitute the fund on which the testator charges these $10,000, in the unlooked-for event that the surplus of his estate should not be sufficient to raise it. He does not charge this sum on the principal, but on the profits of his estate; and the whole is to be kept together in order to raise it. It is obvious, from the whole will, that these bonds do not constitute a part of that surplus, comprehending debts; and in this particular part of it, when he speaks of debts, it is of debts due. No one of these bonds was due at the date of the will, or of the death of the testator. It is, then, we think, apparent, that the application of these bonds towards raising the sum of $10,000, was a misapplication of assets. If the estate had really been delivered when the event occurred, the executors ought to have retained their rights upon it, to satisfy this contingent claim, and we presume, that the property would have been liable to it, in the hands of devisees and legatees.

But the plaintiffs in error contend, that should they have misconstrued the will of their testator, still their misconstruction binds the legatees, because the testator says: "Whereas, my will is lengthy, and it is possible, I might have committed some error or errors. I therefore authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial *construction, as would comport with the reasonable intention of the testator. Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If any unreasonable use be made of the power, one not foreseen, and which could not be intended, by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised. This principle must be kept in view, in construing the clause now under consideration.

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The acting executors and executrix are empowered, in all cases of dispute or contention, to determine what is the intention of the testator; and their decision is declared to be final. This power is given, in the apprehension that he may have committed error. It is to be exercised, in order to ascertain his intent in such cases. It certainly does not include the power of altering the will. It cannot be contended, that this clause would protect the executors in refusing to pay legacies altogether, or in paying to A. a legacy bequeathed to B., or in any other plain deviation from the will. In such case, what would be the remedy of the injured party? Is he concluded by the decision of the executors, or may he resort to a court of justice? But one answer can be given to these questions. So gross a departure from the manifest intent of the testator, cannot be the result of an honest endeavor to find that intent; and must be considered as a fraudulent exercise of a power, given for the purpose of preserving peace, and preventing expensive and frivolous litigation. But who is to determine what is a gross misconstruction of the will, if the party who conceives himself injured may not submit his case to a court of justice? And if his case may be brought before a court, must not that court construe the will rightly?

This is not the only objection which the plaintiffs in error must encounter, in supporting their construction of this clause. The executors have not, we think, this power, unaided by the executrix. It is given to a majority of the acting executors, "his wife to have a voice as executrix." Her participating in the decision, is indispensable to its validity. If this power was given to her solely, in her character as executrix, it is seriously doubted, whether it can be exercised, till she assumes that character. Even had she united with the executors, this would certainly *be a case which might [*681 well be considered as an exception from the general operation of the power. The bonds to which it was applied, are the bonds of one of the executors, and it was exercised, by bestowing them on the executrix, instead of the persons to whom they were bequeathed by the testator. In doing this, the executors have plainly misconstrued the will. The testator had not charged the $10,000, which were to be raised in order to rebuild the houses that were destroyed by fire, on these bonds, but on a different fund. It is, therefore, the very case put, of paying to the executors the legacy bequeathed to other persons. It may also be observed, that neither of the executors, nor Mrs. Pray, say in their answer, that this diversion of these bonds to a different purpose from that directed by the testator, was made from a belief that it was his intention, in the event which had occurred. They refer to the clause, and rely upon it, as if it had empowered them to do whatever they thought best, in the progress of their administration; instead of doing what, in their best judgment, they believed to be his intention.

But however correctly the will of the testator may have been construed in the circuit court, and we think it was construed correctly, at least, so far as respects the last two bonds mentioned in item 51 of the will of John Pray, deceased; other objections have been taken to the proceedings in the circuit court, which seem to be well founded.

The legacy for which this suit is instituted, is given jointly to several persons in different families. The legatees take equally, and the numbers in neither family are ascertained by the will. Under such circumstances, we think all the claimants ought to be brought before the court. The rights of

each individual depend upon the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed. If this fact were to be examined, in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, that decree would not bind persons who were not parties. The case cannot be distinguished from the rule which is applied to residuary legatees. The bill filed in this case, does not even state the number of persons belonging to the different families, nor to that family in whose behalf the suit is brought; nor does it assign any reason for not making the proper parties. It does not allege, that the other legatees refuse to join, as plaintiffs, or that they cannot be made defendants. For this cause, the decree must be reversed, and the case remanded to the circuit court, that the plaintiffs may amend their bill.

*682] *The objections to the report, are not entirely unfounded, and it is not quite satisfactory. It does not, we think, show with sufficient clearness, whether the plaintiffs in that court were entitled to the first bond. But as the case must go back, to amend the bill, a new report will, of course, be made; and if that shows, that the funds of the estate were sufficient to pay the debts and legacies, without applying this bond to that purpose, the plaintiffs below will be entitled to that also.

This cause came on, &c.: On consideration whereof, it is decreed and ordered by this court, that the decree of the circuit court in this cause be and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said circuit court, for further proceedings to be had therein, and that the plaintiffs may amend their bill.

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*683] *William B. Alexander, Francis Swann and Thomas Swann, Plaintiffs in error, *v.* Elisha Brown, Defendant in error.

Execution.—Forthcoming bond.

Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bond, of the motion for execution, the property levied on not having been re-delivered according to the condition of the bond; if the notice given to the obligors, of the plaintiff's intention to proceed is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. p. 684.

Error to the Circuit Court for the District of Columbia.

This case was argued by *Swann*, for the plaintiffs; and *Jones*, for the defendant. The material facts of the case appear in the opinion of the court.

Marshall, Ch. J., delivered the opinion of the court.—This was a motion to the circuit court for the district of Columbia, sitting in Alexandria, for an award of execution upon a forthcoming bond, taken in pursuance of the execution law of Virginia. That law directs, that if the owner of any goods or chattels, which shall be taken by virtue of a writ of *fieri*