due, amounts to no more than averring that nothing was due. Had the action been upon a bond, or other instrument for the payment of money, the instrument itself would show what was due. But this is an action of covenant, sounding in damages, and such damages depend upon matter *dehors* the instrument declared on, and must be ascertained by proof *aliunde*. It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages, and money *in numero*, is material to be attended to. Chit. Plead. 113. The court, therefore, erred in the instruction given to the jury, that it was not necessary for the plaintiffs to prove any of the averments in their declaration.

It is not deemed necessary to express any definitive opinion upon the validity of the pleas to which the plaintiffs have demurred. It may not be amiss, however, to intimate that, had it become material to decide those points, it is probable, the judgment of the court below, upon the demurrers, would be sustained.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to issue a *venire facias de novo*.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*Francis Henderson and wife, Plaintiffs in error, *v.* Ira Griffin, [*151
Defendant in error.

State decisions.—Statute of uses.—Ejectment.—Costs of former suit.

The supreme court of the state of South Carolina having decided, that the act of the legislature of that state, of 1744, relative to the commencement, within two years, of actions of ejectment, after nonsuit, discontinuance, &c., is a part of the limitation act of 1812, and that a suit, commenced within the time prescribed, arrests the limitation; and this being the decision of the highest judicial tribunal on the construction of a state law relating to titles and real property must be regarded by this court as the rule to bind its judgment.

That court having decided on the construction of a will, according to their view of the rules of the common law in that state, as a rule of property, this decision comes within the principle adopted by this court in Jackson *v.* Chew, 12 Wheat. 153, 167, that such decisions are entitled to the same respect as those which are given on the construction of local statutes.

Where an estate was devised to A. and B., in trust for C. and her heirs, the estate, by the settled rules of the courts of law and equity in South Carolina, as applied to the statute of uses of 27 Hen. VIII., c. 10, in force in that state, passed at once to the object of the trust, as soon as the will took effect, by the death of the testator; the interposition of the names of A. and B. had no other legal operation than to make them the conduits through whom the estate was to pass, and they could not sustain an ejectment for the land. C., the grandchild of the testator, is a purchaser under the will, deriving all her rights from the will of the testator, and obtaining no title from A. and B.; and A. and B. were as much strangers to the estate, as if their names were not to be found in the will.

The case contemplated in the law of 1744, by which a plaintiff or any other person claiming under one who had brought an ejectment for land, which suit had failed by verdict and judgment

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against him, or by nonsuit or discontinuance, &c., is empowered to commence his action for the recovery of the said lands *de novo*, is clearly a case where the right of the plaintiff in the first suit passes to the plaintiff in the second; where it must depend upon some interest or right of action which has become vested in him by purchase or descent, from the person claiming the land in the former suit.

It would be quite a new principle in the law of ejectment and limitations, that the intention to assert the right was equivalent to its being actually done; it is settled law, that an entry on land, by one having the right, has the same effect in arresting the progress of the limitation as a suit; but it cannot be sustained as a legal proposition, that an entry by one having no right is of any avail.

Where the court ordered the costs to be paid, of a former ejectment brought by the plaintiffs, in the names of other persons, but for their use, before the plaintiff could prosecute a second suit, in his own name, for the same land, this was not a judicial decision that the right of the plaintiffs in the first suit was the same with that of the plaintiffs in the second suit: it was perfectly consistent with the justice of the case, that when the plaintiffs sued the same defendant, in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by the court to meet the justice and exigencies of cases as they occur;
*152] not depending solely on the interest *which those who are subjected to such rules may have in the subject-matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances, which, in the exercise of a sound discretion, may furnish a proper ground for their interference.

Error to the Circuit Court of South Carolina. This was an action of trespass, instituted in the circuit court, to try titles, according to the forms prescribed by the local law of South Carolina; by which this action is substituted for an ejectment.

The plaintiffs proved a good title to a tract of land, in Abbeville district, South Carolina, under the will of Henry Laurens, who devised the land in question to Dr. and Mrs. Ramsay, and their heirs, in trust for the use and behoof of Frances Eleanor Laurens (now the wife of Francis Henderson), during her life, &c. The jury found a verdict for the plaintiffs for a part of the said land, with damages. But the defendant having set up a claim under the statute of limitations, the plaintiffs, in reply, showed, from the records of the state court, that this action was commenced the 29th of May 1823, and on the 21st of November 1823, a rule was made and entered by the said court, against the plaintiffs, in these words: "Francis Henderson and wife *v.* John Carey, and the Same *v.* Other Defendants, to the number of forty, including Ira Griffin. On reading the affidavit of Henry Gray, it is ordered, that the plaintiffs show cause, on Monday morning, why all proceedings in these cases should not be stayed, until the costs of the actions prosecuted in the names of the heirs of David Ramsay, by the same plaintiffs, in the state court, against the same defendants, be paid." On the return of this rule, counsel were heard for and against it; and on the 20th of April 1824, the court ordered, that upon a taxed bill of costs in the state court being made out, the same be forthwith paid by the plaintiffs.

The plaintiffs in the circuit court, by their counsel, showed on the trial, that the suit in the state court, prosecuted in the name of the heirs of David Ramsay, against the defendant, was regularly discontinued in that court, on the 23d of October 1822, and they were compelled to pay the costs of that suit, before they could proceed with the present. And the plaintiffs' coun-
*153] sel contended, that the title was not barred by the *act of limitations, when the suit in the name of the heirs of Ramsay was commenced; and the act did not run against the plaintiffs since that time, inasmuch as

the present suit ought to be joined and connected with the said former suit in the state court. But the court, admitting that the plaintiffs' title was not barred at the commencement of the first suit, instructed the jury, that the present suit could not be connected with the former, and the jury found a verdict accordingly. To which instruction and finding, the plaintiffs' counsel excepted, and prosecuted this writ of error.

The counsel for the plaintiffs in error claimed to reverse the judgment in the circuit court, because the suit in the state court, in the name of the heirs of Ramsay, trustees for the plaintiffs, ought to have been connected with the present action; being for the same land, under the same title, and by the showing of the same defendant, upon the records of the court, prosecuted by the same plaintiffs, in the name of their trustees.

The case was argued by *Wirt* and *McDuffie*, for the plaintiffs in error; and by *Warren R. Davis*, for the defendant.

For the *plaintiffs*, it was contended, that the suit in the state court, and that which was subsequently instituted in the circuit court, being substantially between the same parties, and for the same tract of land, was fully within the provision of the act of assembly of South Carolina, which saved the parties to such a suit from the effect of the limitation. The 19th section of the act of 1744 declares, that if, in an action of ejectment, there shall be a nonsuit or discontinuance, or letting fall of the action, it shall not be conclusive; and the party may institute another suit, within two years, and thus have the benefit of the time in which the first suit was instituted. The object of the first suit was, to maintain the title of the *cestuis que trust*, and the names of the heirs of Mr. Ramsay were used for no purposes of their own, but only with the same object as that in the present suit. They were parties to that suit in form only; essentially, Mr. and Mrs. Henderson were the plaintiffs. The defendant, by the first suit, had notice of the plaintiffs' title; thus they were within the words, as *well as the spirit, of the exception in the law of South Carolina. 2 McCord 252; 2 Brev. Stat. of S. C. 21, 24. [*154

The order on the plaintiffs to pay the costs of the suit in the state court, showed, that there was, in the opinion of the court, a connection between the suits. One was deemed a continuation of the other. Tidd's Pract. 479, 480; 3 Bos. & Pul. 22; 2 Esp. 75, 493; 1 Str. 1192; 8 Cranch 462.

Davis, for the defendant, insisted, that the parties to the two suits were different. The legal title, asserted in the suit in the state court, was claimed to be in the plaintiffs in that suit; and in the suit now before the court, other parties sought to maintain their legal title. The provisions of the law of South Carolina applied only to cases between the same parties, and who claimed, in the second suit, the title set up by them in the first suit.

Baldwin, Justice, delivered the opinion of the court.—The action in the court below was brought to try title to a tract of land, in Abbeville district, claimed by the plaintiffs, under the will of Henry Laurens; and by the defendant, in virtue of a possession of five years, which, by the limitation law of South Carolina, gives a good title.

On the trial of the cause, it appeared, that Henry Laurens, being seised

in fee of the premises in controversy, devised the same to his daughter, Mrs. Ramsay, and to Dr. Ramsay, "to hold the same, to them and their heirs, in trust for the use and behoof of his grand-daughter, Frances Eleanor Laurens, wife of the plaintiff, during her life, &c." On the 23d of October 1822, the heirs of David Ramsay, claiming by the will aforesaid, brought their action against the defendant, in the state court of South Carolina, to recover the land claimed by him, which was part of a larger tract of land, devised to Mrs. Henderson by the will of Mr. Laurens. The supreme court, on argument, decided that the legal estate was in those for whose use it was devised, and that the action could not be sustained in the name of the heirs of Ramsay. *Ramsay and others Trustees* v. *Marsh*, 2 McCord 252. *Whereupon, the suit was discontinued, on the 23d *155] of October 1822. At the commencement of that suit, five years had not expired from the time of the defendant's entry on the land; but they had expired when the present action was brought, on the 29th of May 1823: so that the only question arising in this action is, whether the two suits can be so connected, that the present can relate back to the former one, and thus bring it, by legal intendment, within the five years. The circuit court being of opinion, that the two suits could not be connected, a verdict and judgment passed for the defendant; and this is the only error assigned.

The plaintiffs in error rest their case on the following clause of an act of assembly of South Carolina, passed in 1744. (2 Brevard's Digest 24.) "And in case verdict and judgment shall pass against the plaintiff in such action, or that he suffers a nonsuit or discontinuance, or any otherwise lets fall the same, such verdict or judgment, nonsuit or discontinuance, or other letting fall the action or suit aforesaid, shall not be conclusive and definitive on the part of such plaintiff; but at any time within two years, the said plaintiff, or any other person or persons claiming by, from and under him, shall have right, and is hereby empowered to commence his action for the recovery of the said lands and tenements *de novo*, and prosecute the same, in the manner, and with the expedition, herein-before directed."

The supreme court of that state have decided that this law is considered as a part of the limitation act of 1712, and that a suit commenced within the time prescribed arrests the limitation (*Edson* v. *Davis*, 5 McCord 555–6): and this being a decision of their highest judicial tribunal on the construction of a state law relating to titles and real property, it must be adopted by us, as the rule to guide our judgment; and this brings the merits of this case to this single question, whether the plaintiffs claim by, from or under David Ramsay's heirs?

The opinion of the court in the case of *Kennedy* v. *Marsh*, was an able and deliberate one; it was a judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that state, as a rule of property, and comes within the principle adopted by this court in *Jackson* v. *Chew*, 12 Wheat. 153, 167, that such decisions are *entitled to the same respect as those which are given on the *156] construction of local statutes. By so considering it, and adopting it as a rule by which to decide this case, it follows, conclusively, that if there was no such estate in the heirs of Dr. Ramsay as would authorize them to sustain an ejectment under this will, in their own names, the trust in the will was one clearly executed in Mrs. Henderson. By the settled rules of

courts, both of law and equity, as applied to the statute of uses of 27 Hen. VIII., c. 10, in force in South Carolina, there was, according to the principle of the decision of the state court, nothing executory in the trust. Mr. or Mrs. Ramsay were to do no act, before both the legal and beneficial interest vested in the devisee in trust. The estate never vested in them for a moment, but passed directly to the objects of the trust, as soon as the will took effect by the death of the testator. The interposition of the names of Mr. and Mrs. Ramsay, had no other legal operation than to make them the conduits through whom the estate was to pass. The application of the statute of Henry VIII. to a will, gives it the effect of a deed of bargain and sale to uses; they are only modes of passing title. Having no legal operation to vest the legal estate in the names used as the conduits or instruments of conveyance, the effect of either would be the same, if the grant or devise were made directly to the purposes and uses declared, transferring both the title and possession. "The statute conveys the possession to the use, and transfers the use into possession, thereby making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity. The possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but an actual estate." 2 McCord 254.

This decided opinion of the highest court of South Carolina renders it unnecessary for this court to express their own opinion on this will. Thus construed, neither Mr. nor Mrs. Ramsay ever had, and their heirs never could have, any right or estate in the premises so devised by Mr. Laurens, in law or equity—no right of entry, possession or ultimate enjoyment. They could not take the rents and profits, as the entire estate of the devisor vested in the devisee; they could, therefore, sustain no ejectment, which must be founded on a right of *possession. Mrs. Henderson is a purchaser, directly under the will of her grandfather, deriving all her rights [*157 from him. There being not a spark of right in the Ramsays, she could by no possibility claim by, from or under them. There was no privity of estate between them; the Ramsays formed no link in the chain of title from the person last seised to the plaintiff. They were as much strangers to the estate in law, as if their names were not to be found in the will; and there could be, in no principle of law, any connection between the present and the former suit. The case contemplated in the law of 1744 is clearly one where the right of the plaintiff in the first suit passes to the plaintiff in the second, where it must depend upon some interest or right of action, which has become vested in him by purchase or descent from the person claiming the land in the former suit.

These are the views which inevitably result from the local laws, expounded by the highest court in the state; in accordance with which, the right of Mrs. Henderson was as perfect on the death of Mr. Laurens, as it could be afterwards. She might have supported her ejectment against Griffin, at the time when the heirs of Ramsay brought theirs; and this is not the case provided for by the law; which, in our opinion, applies only to the case of a suit brought to enforce a right derived from the first plaintiff. To give the law any other interpretation would be to establish in South Carolina the principle, that an action brought by a person having no right, title or interest in land, in the actual possession of a person claiming it for

himself, would arrest the act of limitation, and prevent its running on the right of a stranger to the suit. It would be doing violence to the law, to give it this meaning.

The plaintiffs' counsel seem to consider this as a case where the first ejectment was brought by a trustee, and the second by a *cestui que trust;* but this is not such an one. If the construction given to the will is to be considered as the law of the case, the will of Mr. Laurens did not sever his interest in the estate devised to his grand-daughter; the legal was not separated from the equitable estate; but the whole passed unbroken by the will. So that the relation of trustee and *cestui que trust* never subsisted. The utmost extent of the argument drawn from this alleged analogy in
*158] favor of the *plaintiff would be, that the heirs of Ramsay brought the first suit in assertion of the title of Mr. Laurens, but for the want of privity, they could not bring it to bear on the defendant, in their names. It would be quite a new principle in the law of ejectment and limitation, that the intention to assert the right was equivalent to its being actually done.

It is settled law, that an entry on the land, by one having the right, has the same effect in arresting the progress of the limitation as a suit; but it cannot be sustained as a legal proposition, that an entry by one having no right, is of any avail. If the use or trust was executory; if the legal title had remained in the Ramsays, as trustees, until they had done some act to vest it in the devisee, as the *cestui que trust*, there would be great force in the reasoning of the plaintiffs' counsel. But here there is no estate devised to Mr. and Mrs. Ramsay in trust. The statute, according to the local law of South Carolina, operates to make the devise directly to Mrs. Henderson.

The only remaining point made by the plaintiffs, is that which arises from the following rule made by the circuit court in this cause, on the 21st of November 1823. "On reading the affidavit of Henry Gray, it is ordered that the plaintiffs show cause, on Monday morning, why all proceedings in these cases should not be stayed, until the costs of the action prosecuted in the names of the heirs of David Ramsay, by the same plaintiffs, in the state court, against the same defendants, be paid." In pursuance of which rule, the plaintiffs paid the costs in the action referred to. Assuming the fact stated in the rule to be true, that the plaintiffs brought these suits in the name of David Ramsay's heirs, it shows no more than that it was a case which, by the rules and practice of all courts, authorized the order made by the circuit court. Costs had accrued to the defendant, by a suit brought and prosecuted by the plaintiffs in this suit, in the name of those who had no right to the land. It was perfectly consistent with the justice of the case, that when these plaintiffs sued the same defendant, in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by courts to meet the justice and exigencies
*159] of cases as they occur, not depending *solely on the interest which those who are subjected to such rules may have in the subject-matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances which, in the exercise of a sound discretion, may furnish a proper ground for their interference. A rule on A., to pay the costs of a suit in the name of B., is no judicial decision that he had any

interest in the subject, or that it was identical with one afterwards brought by A., in his own name, for the same property. It was the exercise of a summary power to compel what, under the circumstances of the particular case, the court consider to be justice to a party, in defending himself against an unfounded claim. The case before the circuit court was a proper one for the exercise of their discretionary powers, but their rule can have no possible bearing on the question in issue between the parties in the action.

It is, therefore, the opinion of the court, that there is no error in the record; the judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said circuit court; whereupon, it is considered, ordered and adjudged, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*John Backhouse, surviving Administrator *de bonis non* of John Backhouse, deceased, James Hunter and Martha [*160
Hunter, and James Hunter and John M. Garnett, Executors of Muscoe G. Hunter, Archibald Hunter and Adam Hunter, George W. Spotswood and William L. Spotswood, Executors of Alexander Spotswood, and Margaret Jones, Executrix of Gabriel Jones, who was Executor of Thomas, Lord Fairfax, *v.* Robert Patton, Administrator *de bonis non, cum testamento annexo* of James Hunter, deceased, Joseph Ennever, Administrator of Adam Hunter, deceased, James Hunter, son of John Hunter, deceased, who was heir of Adam Hunter, Robert Dunbar, the said Robert Dunbar, Administrator of Alexander Vass, John Strode, Robert Randolph, Executor of William Fitzhugh, deceased, Hugh Mercer and Robert Hening.

Legal and equitable assets.—Application of payments

In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets. By the law, the executor or administrator is required, out of the legal assets, to pay the creditors of the estate, according to the dignity of their demands but the equitable assets are applied equally to all the creditors, in proportion to their claims.

Legal and equitable assets were in the hands of an administrator, he being also commissioner to sell the real estate of a deceased person; and by decree of the court of chancery he was directed to make payment of debts due by the intestate, out of the funds in his hands, without directing in what manner the two funds should be applied; payments were made under this decree, to the creditors, by the administrator and commissioner, without his stating, or in any way making known, whether the same were made from the equitable or legal assets—a balance remaining in his hands, unpaid to those entitled to the same, the sureties of the administrator, after his decease, claimed to have the whole of the payments made under the decree credited to the legal assets, in order to obtain a discharge from their liability for the due administration of the legal assets: *Held*, that their principal having omitted to designate the fund out of which the payments were made, they could not do so.

Where debts of different dignities are due to a creditor of the estate of an intestate, and on specific application of the payment made by an administrator is directed by him, if the creditor