or either of them, as prayed by the counsel for the defendant; whereupon,
*460] *the said counsel excepted to the said opinion of the court, and its refusal to give either of the said instructions as prayed.

It is obvious, that the instructions given by the court, at the prayer of the plaintiff's counsel, cover the whole matter contained in this prayer of the defendant. It is, in truth, an effort to separate the circumstances of the case from each other, and to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one of them amounted itself to usury. The court ought not to have given this instruction. It was proper to submit the case, with all its circumstances, to the consideration of the jury; and to leave the question whether the contract was, in truth, a loan, or the *bonâ fide* purchase of an annuity, to them.

There is no error in the opinion of the court, refusing the second and fourth instructions prayed by the defendant and avowant in the court below, nor in giving the instructions prayed by the plaintiff in replevin; but this court is of opinion, that the circuit court erred in deciding that Jonathan Scholfield was a competent witness for the plaintiff in that court. This court doth, therefore, determine, that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to that court, with directions to set aside the verdict, and award 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 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 annulled; and that this cause be and the same is hereby remanded to the said circuit court, with directions to set aside the verdict, and award a *venire facias de novo*.

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*461] *Robert Fenwick, Plaintiff in error, *v.* Eliza Chapman and Robert Chapman, by Kitty Chapman, their mother and next friend, Defendants in error.

Slavery.—Manumission.

By the Statute of Maryland, of 1796, ch. 67, § 13, manumissions of slaves, by will and testament, may be made to take effect at the death of the testator; the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors.

The right to freedom may be tried at law, in a suit against the executors, at the instance of the manumitted slaves; and the executor may, in such suit, admit the existence of a sufficiency of real assets or real estate to pay the debts of his testator.

A judgment at law in favor of manumitted slaves, in a suit against an executor, obtained on the admission by the executor of a sufficiency of assets, may be set aside in equity, if such admission was made, without foundation in fact, or in fraud or mistake. In such a proceeding in equity, to which the executor, the manumitted slaves, and all persons interested have been made parties, there may be an entire review of the administration of the estate, of the conduct of the executor, and that of the creditors, in regard to the estate, and in respect to the vigilance of the executor in paying, and of the creditors in the pursuit of their debts.

Fenwick v. Chapman.

The words in a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts.

When a testator manumits his slaves, by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events, the manifest intention, without express words to charge the real estate, will charge the real estate for the payment of debts if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator.

In such a case, the creditors of the testator must look to the real estate for the payment of debts, which remain unpaid, after the personal estate, exclusive of the manumitted slaves, has been exhausted; and they may pursue their claims in equity, or according to the statutes of Maryland, subjecting real estate to the payment of debts.

When an executor permits manumitted slaves to go at large and free, under manumission to take effect at the death of the testator, he cannot recall such assent; nor can it be revoked, under an order of the orphans' court of Maryland, for the sale of all the personal estate of the testator; that court not having jurisdiction of the question of manumission.

It being admitted, that a testator left real estate to an amount in value more than sufficient to pay his debts, without the sale of slaves manumitted by his will, those persons are free, notwithstanding a deficiency of personal assets.

Chapman *v.* Fenwick, 4 Cr. C. C. 431, affirmed.

*Error to the Circuit Court of the District of Columbia, and county of Washington. The defendants in error instituted a suit in [*462 the circuit court, to recover their freedom, alleging that they were entitled to it, under the last will and testament of their late mistress, Frances Edelin, deceased, in the state of Maryland. The plaintiff in error claimed the petitioners as his slaves, having purchased them of the sole acting executor of the deceased, at a sale made by the order and authority of the orphans' court of Prince George's county, in Maryland; and by the consent of all parties to the suit, the executor was admitted to defend the same in the court below. It was proved in the circuit court, that the slaves were sold by the executor, with all the other personal estate of the deceased, by authority of the aforesaid orphans' court, as assets in the hands of the executor, to pay the debts of the deceased; there not being assets enough to pay the same, without the sale of said slaves, and without recourse to the real estate. It was contended, that the sale was a good one, and that the slaves were not entitled to their freedom. The following facts in the case were agreed, and submitted to the court, with the other evidence in the case, and making a part of the record now before this court.

It is agreed in this case: 1. That the petitioners are the same named in the will of Frances Edelin, deceased, to whom she gave their freedom, after her death, as appears by the said will, a copy whereof is hereto annexed. 2. That Edelin, the defendant, was the executor of the last will and testament of said deceased, and as such, sold, in the year 1833, said petitioners to the other defendant, Fenwick. 3. That the sale of the petitioners was made in Prince George's county aforesaid, where the deceased lived at the time of her death, and where the petitioners were; and that, from the time of deceased's death, to the time of their sale, they were permitted by the executor to go at large, as free, and that after the purchase made by Fenwick, he brought them to the district of Columbia, where the present suit was instituted; and that after the institution of the said suit, Fenwick transferred his claim to the petitioners, to the defendant, Edelin, who repaid him his money, and appears to defend the suit. 4. *That the deceased left [*463 real estate to an amount in value more than sufficient to pay her debts,

without the sale of the negroes emancipated by the will, as will appear by her will referred to, and made a part of this agreement; but not personal estate sufficient. 5. That the original copy of all the proceedings had in the orphans' court of Prince George's county, relative to the settlement of the deceased's estate, by her executors or administrators, may be filed as part of this case.

The will of Frances Edelin, the proceedings in the orphans' court of Prince George's county, and all the material facts in the case, are fully stated in the opinion of this court, delivered by Mr. Justice WAYNE. Upon a hearing in the circuit court, judgment was given in favor of the petitioners in that court, now defendants in error, and from that judgment a writ of error was sued out to this court.

The case was argued by *Brent*, for the plaintiff in error; and by *Key*, for the defendants.

Brent stated, that the only questions for the court to decide, are, whether the defendants in error are entitled to their freedom or not, under the circumstances of the case; and whether the plaintiff in error (the executor) had, or had not, the right to sell them, as assets, to pay the debts of the testator. After reading the petition, the answer, and the agreement as to the facts in the case, and the will of Frances Edelin, he referred to the proceedings in the orphans' court of Prince George's county; which showed that the personal estate of the testator was insufficient to pay the debts of the deceased; and that under these circumstances, the orphans' court ordered the sale of the negroes, and they were sold.

Prior to the year 1796, there could not be, under the laws of Maryland, a manumission of slaves by will. This act was, in 1796, repealed, under certain limitations; and among them, that no such manumission is available, if done in prejudice to creditors. The first ground for the reversal of the judgment of the circuit court, is, that this manumission was in prejudice
*464] of creditors. The fact of the insufficiency of the personal estate, *exclusive of those negroes, is established by the proceedings of the orphans' court, and the accounts of the executor. Creditors are not bound to resort to the real estate for the satisfaction of their claims, when personal estate can be found. Cited, 1 P. Wms. 294 n; 2 Ibid. 664; 1 Rob. on Wills 67; Kelty's Laws of Maryland, Act of 1798, ch. 101, sub-div. 7. This act declares what shall be assets for the payment of debts; among which are negroes. In a case in 1 Har. & Gill, the testator charges his land with the payment of debts, rather than that his negroes shall be sold, and deprived of their freedom, which is given to them. In this case, the question as to the construction of the act of 1796, was waived.

Key, contrà.—The testator died in 1825, and, by her will, she charges her whole estate with the payment of her debts, both real and personal, and gave freedom to the defendants in error. The executor assented to the bequest of freedom; they were at liberty for eight years; when, under an order of the orphans' court, to which they were not parties, and of the proceedings of which court they had no notice or knowledge, they were taken and sold. Over such a case, that court had no authority or jurisdiction. The court could not manumit. It will be found, on an examin-

ation of the proceedings of the orphans' court, that, in July 1833, the balance due the executor was $591, and the court did not specifically order the negroes sold. The order was general, to sell all the personal estate, and not to sell any particular part of it. This is shown by the acts agreed. By the 24th chapter of the law of Maryland of 1729, negroes are not to be sold, so long as there are other goods. In this case, the only debts are to the executor himself, for over-payments by him in his administration of the estate; and he is the residuary legatee.

All the legatees, on a deficiency of other assets, must contribute. 2 Vern. 708; 2 Madd. Ch. 109. 107; 2 Ves. jr. 415, 420. Where it may be collected from a will, that any particular legacy should be paid, and exempted from contribution, in the *event of a deficiency to pay debts, it shall be done. In the case of a bequest of freedom, there must, from its very nature, be such an intention. How could the negroes be made to contribute? The whole of the bequest is defeated, and its purpose destroyed, if the executor has a lien on the freedom of the negroes for contribution. Freedom cannot be parted, it cannot be enjoyed, nor does it exist, unless it is entire. Any restraint upon it, which puts in the power of another a right to sell a part of it, destroys it altogether. No inference can be drawn from the bequest of freedom, but that it was entire and unincumbered. It was fully, completely and irrevocably bestowed, when it was given at all. [*465

Nor does the law warrant the claim which is made by the counsel for the plaintiff in error; that because there is a deficiency of personal estate, when the real estate is also charged with the debts of the testator, personal estate, specially bequeathed, shall be taken from a legatee and sold, leaving the real estate free and unmolested.

It is also contended, that the executor, having consented to the freedom of the defendants in error, cannot afterwards withdraw this consent, and subject them to slavery. Once free, always free. By no law or proceeding, existing or authorized in any state of the United States, can they again be made slaves. Where a legacy has been assented to, or paid by an executor, it cannot be recovered back. This principle applies to the case before the court, as the freedom of the defendants was assented to by the executor. Cited, in support of the discharge of the legacy from reclamation, 1 Vern. 94; 2 Vent. 358; 2 Chan. Cas. 145; 1 Chitty's Dig. 630.

Brent, in reply, insisted, that real estate can be resorted to in no other case, but where there is a deficiency of personal estate; and even in such a case, by the law of Maryland, an application to make the real estate liable must be made to the chancellor.

The testatrix does not charge her whole estate with her debts. This is not the true interpretation of the will. When debts are charged by a testator on an estate, that portion of it which, *according to law, is first held liable to debts, is understood to be so charged in the first place. This is a just and legal execution of the will. In Roberts on Wills 175, it is laid down, that real estate will not be ordered for sale, to save a charity. Cited also, 1 P. Wms. 294. [*466

It is denied, that the executor could give the negroes their freedom, to the prejudice of creditors. Their rights could not be affected by any act of

the executor. Nor did he give them their freedom; he barely allowed them to go at large.

WAYNE, Justice, delivered the opinion of the court.—The object of this writ of error is, to reverse a judgment of the circuit court of the district of Columbia, for alleged error in having adjudged the defendants in error (colored persons) to be free and discharged of and from the service of the plaintiff in error. The judgment of the court was rendered upon a statement of facts entered into at the trial term of the court, signed by the counsel of the parties. It is necessary, however, to set out the facts in the case more in detail, as they appear by the record of the proceedings in the cause.

Eliza Chapman and Robert Chapman, infants and colored persons, by their mother and next friend, claiming to be free by the laws of the land, allege, that they are illegally detained and confined in custody, by one Robert Fenwick, who sets up some pretended claim or title to them, as his slaves for life. They pray that a *subpœna* may issue to the marshal of the district of Columbia, commanding him to summon the said Robert Fenwick to be and appear before the judges of the circuit court of the district of Columbia for the county of Washington, to answer the allegation of the petitioners in the premises. The *subpœna* was issued; and on the day of the return of it, the defendant appeared by his attorney, and in his plea denied that the petitioners were entitled to their freedom, as alleged; and put himself upon the country.

Before the trial of the issue, by consent of all parties, one Richard J. Edelin was admitted as a party defendant; he being the executor of the last will and testament of Frances Edelin, deceased, late of Prince George's
*467] county, Maryland; and having, *as such, sold the petitioners to the defendant, Robert Fenwick, as the executor contends, in virtue of an order of the orphans' court of Prince George's county, to sell all the personal estate of Frances Edelin. This order was made upon the petition of the executor, dated 16th July 1833; in which he states, that Frances Edelin, by her will, had directed that certain negroes should be free at her death; and that he had discovered there were not assets enough, independent of those negroes, to discharge the debts of the testatrix. The executor had included the negroes manumitted by the will, in an inventory and appraisement of the personal estate of the testatrix, returned by him to the orphans' court, on the 17th of January 1826. The will is dated the 2d day of November 1825. The testatrix died before the 8th day of December of the same year; and immediately after her death, the defendant, Richard J. Edelin, took upon himself the burden and execution of her will.

The testatrix begins her will in the following words: "In the name of God! Amen. I, Frances Edelin, of Prince George's county, in the state of Maryland, being of sound and disposing mind, memory and understanding, do make and publish this my last will and testament, in manner and form following. First, and principally, I commit my soul to the mercies of my dear Redeemer and Lord Jesus Christ, and my body to the earth, to be decently buried; and after my debts and funeral charges are paid, I devise and bequeath as follows:" Then follow sundry devises and specific legacies; and so much of the will relating to the freedom of the defendants in error, and to the other persons manumitted by the will, is in these words: "Item,

I give and bequeath to my nephew, Richard James Edelin, the small house and lot now occupied by Robert Frazer, which I give to him, his heirs and assigns for ever, with this proviso, that the negroes which are hereinafter mentioned to be free, to live in the back room of said house." "Item, negro woman Letty, her daughter Kitty, a mulatto, with her three children, to wit, Eliza, Robert and Kitty Jane, with their future increase, and an old woman named Lucy, I do hereby declare them free, at and after my death, and they shall have the right to live in and occupy the back room in the house and lot I give and bequeath to my nephew, Richard James *Edelin. To the two old negro women, I give them, and bequeath, ten dollars a year to each of them, as long as they live; and ten dollars a year, during two years after my death, exclusive of the year in which I die, to mulatto Kitty. Item, my three nephews, John Aloysius, Richard James and Walter Alexander Edelin, for and in consideration of the bequests I have made them, shall pay every year to negro woman Lucy, and to negro woman Letty, ten dollars for every year the said negro women may live, as mentioned in the foregoing item; and my nephew, John B. Edelin, for and in consideration of the bequests I have left him, shall pay, during the two years above mentioned, to mulatto Kitty, ten dollars for each year." [*468

The law of Maryland permitting the manumission of slaves by will is in these words (Act of 1796, ch. 67, § 13): "that from and after the passage of this act, it shall and may be lawful for every person or persons, capable in law to make a valid will and testament, to grant freedom to and effect the manumission of, any slave or slaves, belonging to such person or persons, by his, her or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators or at such other periods as may be limited in such last will and testament; provided always, that no manumission hereafter to be made by last will and testament, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence."

The agreement or statement of facts entered into between the counsel of the parties, at the trial term of the cause, and upon which the judgment of the court was given, is as follows: 1. That the petitioners are the same named in the will of Frances Edelin, deceased; to whom she gave their freedom, after her death, as appears by said will, a copy whereof is hereto annexed. 2. That Edelin, the defendant, was the executor of the last will and testament of said deceased, and as such, sold, in the year 1833, said petitioners, to the other defendant, Fenwick. 3. That the sale of the petitioners was made in Prince *George's county aforesaid, where the deceased lived at the time of her death, and where the petitioners were; and that, from the time of deceased's death, to the time of their sale, they were permitted by the executor to go at large as free; and that after the purchase made by Fenwick, he brought them to the district of Columbia, where the present suit was instituted; and that, after the institution of the said suit, Fenwick transferred his claim to the petitioners to the defendant, Edelin, who repaid him his money, and appears to defend the suit. 4. That the deceased left real estate to an amount in value more than suffi- [*469

cient to pay her debts, without the sale of the negroes emancipated by the will, as will appear by her will, referred to, and made a part of this agreement; but not personal estate sufficient. 5. That the original copy of all the proceedings had in the orphans' court of Prince George's county, relative to the settlement of deceased's estate, by her executors or administrators, may be filed as a part of this case.

Under the aforegoing circumstances, the statement of facts entered into by the counsel of the parties, and the law of Maryland permitting the testamentary manumission of slaves, when it is not done "in prejudice of creditors," the question to be decided is—were the defendants manumitted in prejudice of creditors? And we will first consider it, by inquiring what effect the words in the will, "and after my debts and funeral charges are paid, I devise and bequeath as follows," have to charge the real estate of the testator with the payment of debts, in the event of there not being a sufficiency of personal estate to pay them, without the manumitted slaves. Without any construction of our own upon these words, the effect of them to charge the real estate is settled by decisions which are uncontested, and cannot be controverted.

In the case of *Kidney* v. *Coussmaker* (Trin. 1793), 1 Ves. jr. 436, it is said, "after paying debts," amounts to a charge upon real estate; for which very little is sufficient. In *Newman* v. *Johnson* (East. 1682), 1 Vern. 45: "My debts and legacies being first deducted, I devise all my real and personal estate to J. S." These words were said to amount to a devise to sell for payment of debts. *A devise of land, after payment of debts, is a charge on the land; for, until debts paid, testator gives nothing. 3 Ves. 739. In the case of *Trott* v. *Vernon*, 2 Vern. 708, the testator willed and devised, that his debts, legacies and funerals should be paid in the first place, and then devised his land to his sister for life, with remainder to her issue, remainder over, and made the sister executrix; it was decreed, that the lands be charged with the debts. The lord chancellor said, it was but natural to suppose, that all persons would provide for the payment of their just debts; and directing them to be paid in the first place, imports, that before any devise by his will should take place, his debts, &c., should be paid. See cases, Cas. temp. Talb. 110; 3 P. Wms. 95; 1 Ves. sen. 499; 2 Johns. Ch. 614; for the same doctrine.

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And in the case of the *Earl of Godolphin* v. *Pennock*, 2 Ves. sen. 270, it was held, that real estate was charged for the payment of debts, under a general clause in a will that debts should be first paid and satisfied. Though cases both before and after it can be found of a contrary character, yet that such a general clause will charge real estate, has been always held. In the case before us, the word "after" implies, as strongly as any word in the English language can do, that the payment of debts is a condition precedent to the absoluteness of any entire devise in the will. A contrary doctrine seems to have been held in *Davis* v. *Gardiner*, 2 P. Wms. 189, and it was so held, under the devise in that case; but the lord chancellor, in his decision, admits, that the real estate would have been charged, in a case, which is, indeed, the case under the will of Frances Edelin. He says, "I admit, the portions might be charged on the real estate, had the devise of the land been to the son in fee, absolutely; for without such construction, the devise would have been void, and the son would have taken the land by descent.

So that the will must, in such a case, have signified nothing as to the land, unless it were to operate so as to charge the land with the legacies, and to intimate that the heir was not to take it, until after the legacies paid." And there is no difference, in the rule of construction, between legatees and creditors.

But leaving out of view the words in the will, "and after *my debts and funeral charges are paid, I devise and bequeath as follows," [*471 and the authorities which have been cited to show that they make a charge upon the real estate for the payment of debts, would there not be a charge upon the real estate for the payment of debts, if it be manifest from the will, that it was the intention of the testatrix, that the manumitting clause in her will was to take place, or to have effect at all events? The general rule is, that the personal estate of a testator shall, in all cases, be primarily applied in the discharge of his personal debts or general legacies, unless he, by express words or manifest intention, exempt it. Bac. Abr., tit. Executor and Administrator, L. 2. The testator may exempt a part of it, by making it a particular legacy; or the whole of it, either by express words, or plain manifest intention, or by giving it as a specific legacy. *Adams* v. *Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13; *Bamfield* v. *Wyndham*, Prec. in Ch. 101; *Wainwright* v. *Bendlows*, Ibid. 451; Ambl. 581; *Stapleton* v. *Colville*, Cas. temp. Talb. 202; *Phipps* v. *Annesley*, 2 Atk. 58; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Webb* v. *Jones*, 2 Ibid. 60; *Burton* v. *Knowlton*, 3 Ves. 107; *Milnes* v. *Slater*, 8 Ibid. 305.

In *Jones* v. *Selby* (Hil. 1709), Prec. in Ch. 288, it is said, "where the testator's intention clearly appears, that a legacy should be paid at all events, the real estate is made liable, on a deficiency of personal assets." That such clear intention of the testator will charge the real estate, is also decided by authority. Was it clearly the intention of the testator that these defendants should be free, at all events, so far as she had power to make them so, under the law of Maryland? We think it was: and the conclusion is sustained by the words of the manumitting clause of the will, by the provision which she makes of a place for their residence, by the annuities which are bequeathed to some of them, the manner in which they are made, and, above all, we say, by the nature of manumission itself. After naming the slaves, her language is, "I do hereby declare them free, at and after my death; and they shall have the right to live in, and occupy the back room in the house and lot I give and bequeath to my nephew, Richard James Edelin." And the devise of that house and lot to Richard James Edelin (the now plaintiff in error) is made with "this proviso, that the negroes which are hereinafter mentioned to be free, *to live in the back room [*472 of said house." In confirmation, too, of its having been the intention of the testatrix, that these negroes were to be free, at all events, it is worthy of remark, that the effective words of manumission are in strict conformity with, or a repetition in part of these words in the statute of Maryland, "and such manumission of any slave or slaves may be made to take effect at the death of the testator." But the testatrix, after declaring these negroes to be free, at and after her death, provides for them a residence; and the measure of her benevolence being unexhausted, she bequeaths to some of them annuities or pecuniary legacies; two of them as charges upon her estate, and the rest she directs to be paid by her devisees and nephews,

in consideration of the bequests she had made to them. Can it be supposed by any one, that such provisions would have been made by the testatrix, for these manumitted slaves, if it had not been her intention that they should be free at her death, at all events? We think no one will answer the inquiry in the negative. But without such assistance from a will, to collect the intention of a testator, the nature of the thing directed to be done, may clearly show an intention that it is to be done at all events, so as to make real estate liable for payment of debts, on a deficiency of personal assets. As, for instance, when the thing to be done cannot be partially performed by the executors, without defeating altogether the intention which directs it, and the thing itself. Manumission, to take effect at the death of a testator, is of that character. What is manumission? It is the giving of liberty to one who has been in just servitude, with the power of acting, except as restrained by law. And when this liberty is given in absolute terms, by will, under the law of Maryland, it can only be defeated, by the person conferring it, having done it in prejudice of creditors, or by the slave standing in the other predicament of the law, of being over forty-five years of age, and being unable to work and gain a livelihood, at the time the freedom given shall commence.

But what meaning shall be given to the words of the statute of Maryland, "that no manumission hereafter to be made by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors?" It is, that the manumitter must not be insolvent; that a creditor of the testator shall not be deprived in reality of his *debt, by the manumission. Any other construction in favor of the creditor, from any right to personal assets for the payment of debts, of the executor's obligation so to apply the whole of them, or in favor of the creditor's remedy at law to have the personal assets applied to the payment of his debt, including manumitted slaves, when the other personal estate is not enough to pay all debts, or against his being carried into a court of equity, to make land liable for his debt, when the personal assets have been exhausted, exclusive of manumitted slaves—any other construction than that which has been given to the words "in prejudice of creditors"—would interfere with the right of a testator to make his real estate chargeable with the payment of debts, when he manumits a slave; and would, therefore, confine effective manumissions to those cases in which a testator leaves personal property enough, besides the manumitted slaves, for the payment of his debts, or when he dies owing no debts. It would also, so far as his creditor's remedy at law, or his not being carried into a court of equity are concerned, be equivalent to a denial of a testator's right to make a specific legacy of all his slaves, and to charge the payment of his debts exclusively upon his land. The first is not in conformity with the statute of Maryland; and the second, no one will deny to be a testator's right. The statute is a privilege to all persons, capable in law to make a valid will and testament, to grant freedom to, and effect the manumission of any slave or slaves, belonging to such person or persons, by will and testament; and it may be made to take effect at the death of the testator or testators, if the same shall not be "in prejudice of creditors." Now, can the construction of that statute be, that the testator is limited to the manumission of slaves, only in the event of his having other personal property sufficient to pay

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debts ; or to deny to him a right, when he manumits, to do what he could have done before the statute was passed, and what it must be admitted he can still do—to make all of his slaves a specific legacy, and to charge his land with the payment of his debts, even though he may have, at the time of his death, no other personal property than slaves. But in opposition to the protest against any interference with a creditor's right to have a remedy at law, to enforce the payment of his debt out of the personal assets, and against his being carried into a court of equity to make *the land liable, when, by the manumissson of slaves, the other personal assets [*474 shall be insufficient to pay his debts ; it is sufficient to say, that he holds this right in all cases at the will of a testator, and in many cases subject to the dubious expression of a testator's intention. The creditor may be carried into a court of equity, or voluntarily resort to it, to obtain his debt, either from the lands or the personalty, when the testator leaves it doubtful from what funds his debt are to be paid ; or when the executor doubts, from the will, or the indebtment of his testator, how assets are to be applied, or whether the land is not chargeable with the payment of debts, or when the whole of the personal estate has been left as a specific legacy ; or when the specific legatee of a part contends for the payment of debts out of the real estate ; and in many other instances, with this of manumission added to them, when the personal property, besides, is insufficient to pay debts; on account of its reasonableness, and because the legislative intendment of the statute of Maryland, allowing freedom to be given to slaves by will, might be defrauded in the greater number of cases, if a creditor was not required to go into equity to obtain his debt by a sale of the testator's land.

This construction, too, of the words "in prejudice of creditors," and of a creditor's obligation to go into a court of equity, is in exact conformity with that indisputable rule in equity ; that, where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy* v. *Duke of Athol*, 2 Atk. 446; 1 Ves. 312 ; *Mogg* v. *Hodges*, 2 Ves. 53; *Trimmer* v. *Bayne*, 9 Ibid. 209. With this rule in view, see, by a course of short reasonings, how absolute its application is to sustain the correctness of our construction of the words in the statute, "in prejudice of creditors," and of a creditor's obligation to go into equity, in a case of manumission, after other personal assets are insufficient to pay debts.

Manumission is good by the act of Maryland, 1796, ch. 67, § 13, if it be not in prejudice of creditors. If ample funds exist, and they are accessible, by the laws of Maryland, to the creditors, they cannot be prejudiced. Lands devised for the payment of debts, or which have *become [*475 chargeable by implication, constitute a fund for the payment of debts ; and an ample and plain remedy is admitted to exist, in the laws of Maryland, so to apply them. How then are creditors prejudiced, if the land liable, in a case of manumission, is sufficient to pay all of a testator's debts ?

As to an executor's obligation to apply personal assets to the payment of debts, not specifically bequeathed or manumitted, an opposite construction to that which has been given to the words "in prejudice of creditors," would be to make him master of the rule directing the application of assets ; and in all cases of manumission, would place it in the executor's power to

postpone or defeat the testator's intention in that regard. The will is the executor's law, and he is no more than the testator's representative in all things lawful in the will. A specific legacy of all the personal property is a law to him. The manumission of all the slaves of his testator, if he leaves no other personal property to pay debts, and if it be made in a way to charge real estate with the payment of all debts, is equally his law. In a case of manumission and insufficiency of other personal assets to pay debts, it is the duty of an executor to file his bill against the creditors and all interested in the estate; placing the manumitted slaves in the guardianship of the chancellor, and praying that the lands may be made liable to the payment of debts; that equity may be done to all concerned, according to the law of equity. If an executor withholds freedom from manumitted slaves, the slaves may prefer their petition at law, against the executor, or against any person holding them under him, and they may recover their freedom by a judgment at law, though the question raised by the plea is, that the manumission has been made in prejudice of creditors. And the slaves may do this, upon the principle that a statute never gives a right without providing a remedy; or the absence of such provision, contemplating that there is a legal remedy to secure it. If an executor permits manumitted slaves to go at large and free, from the death of the testator, it is an assent to the manumission, which he cannot recall, any more than he can, after assenting to a legacy, withdraw that assent. Nor can he deprive the manumitted persons of their liberty by the order of an orphans' court in Maryland, for the sale of all the personal property of his testator; upon a suggestion that, *besides
*476] the manumitted slaves, there is not enough personal property to pay debts; that court having no jurisdiction, by the laws of Maryland, to try the question of freedom. And if, by such order, they have been sold by the executor, they may sue for their freedom in a suit at law, against the purchaser, or against any other person holding them in slavery.

The decision in the case of *Negro George et al.* v. *Corse's Administrator*, 2 Har. & Gill 1, was urged in argument, in opposition to the opinion just expressed. In that case, the petitioners claimed their freedom in virtue of the will and testament of their master, James Corse. The manumitting clause of the will gives freedom to some of the slaves, at the testator's death, and to others when they shall have arrived at particular ages; and the testator further says, if his personal estate, exclusive of the negroes, should not be sufficient to discharge all his just debts, "then my will is, that my executor or administrator, as the case may be, may sell so much of my real estate as will pay my debts, so as to have my negroes free, as before stated." The testator makes specific devises of real estate in fee to his son, and devises and bequeaths to his brother, Unit Corse, the residue of his estate, both real and personal, with the unexpired time of the negro girls and boys, as designated in the first clause of the will; and he appointed Unit Corse executor. The case was submitted to the jury, in the Kent county court, upon a statement of facts; and with instructions from the judge, that if the jury believed the facts, they must find a verdict for the defendant. The verdict and judgment being against the petitioners, they appealed. In the statement of facts, it is admitted, that the personal estate of the testator, either including or excluding his negroes, was not, at the time of the execution of his will, nor at any time after, sufficient to pay his

debts; but that his real estate, exclusive of the negroes, was sufficient to pay all his just debts and funeral charges. Upon the appeal, three judges decided to affirm the judgment, upon the ground, "that the question of the existence of a sufficiency of real assets to pay the debts of the testator, never can be tried on an issue between the executor or administrator only, without "prejudice" to creditors. That it was an issue to which the creditors were no party, and to protect whose interest *nobody appears." And the court further says, the admissions made by the appellee, he was [*477 unauthorized to make; and the court was incompetent to pass judgment upon the facts they contained, not being matters in issue in the cause. The court also say, "so far as relates to the personalty, the executor or administrator is competent to act for all concerned; but in trying the facts whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest, either personally or in right of representation." With all respect for the judges deciding that cause, these opinions cannot command our assent.

We think with Judge CRANCH, and use his language in regard to that decision, when he gave his opinion in the circuit court in this case. The judge says, "when lands are devised to the executor, to be sold for the payment of debts, or when the lands are charged with the payment of debts, and a power is given to the executor to sell them; the lands are as much a fund in his hands for that purpose, as the goods and chattels; and he represents the creditors in regard to the lands, so far as their interests are concerned, as much as he does in regard to the personal estate; and the creditors are as much a party in the issue in respect of the lands, as they are in respect of the goods and chattels. When he is charged with the sale of his testator's lands, for payment of debts; he is as much bound to inquire in regard to the lands, as he is in regard to the personal estate. For it is his duty to execute the whole of his testator's will; and, in such a case, the creditors have as good a right to look to the land through him, for the payment of those debts, as they have to look to the goods and chattels, through him." To these remarks, we add, it is well settled, that executors have power to sell the real estate, where such power is given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. *Bentham* v. *Wiltshire*, 4 Madd. 44; Jac. & Walk. 189. And in Vin. Abr. 920, *Hawker* v. *Buckland*, 2 Vern. 106, it is said, "if a man devise lands to be sold by one for payment of his debts and legacies, and make the same person his executor, the money made by such person, upon the sale of the land, shall be assets in his hands." Now if, in case of such a devise, the executor can sell, and does sell, *bonâ fide;* and by doing so, can *deprive the creditors of all claim upon the land; substituting [*478 the price of it as assets—doing this without in any way consulting the creditors, and in virtue of the devise for that purpose; why may not the executor admit, in a suit at law between himself and another, that the land devised is sufficient to pay debts, though such an admission may release a part of the personalty, by the judgment of a court, from any future liability at law for the debts of his testator? Why should it be, that the value of lands so devised for the payment of debts, can only be ascertained, when creditors are a party to the proceedings? when they have no legal concern in fixing the price for which the executor may sell the land; and when,

moreover, if it be necessary to obtain, as it is in some cases, an order of a court of equity to sell the land, the creditors need not be made parties to the application. Their claim is upon the assets made by the sale of the land. It is true, creditors may, for cause, enjoin the executor from selling; or, upon his application to sell, in a case where the intervention of a court of equity is asked to permit or direct a sale, creditors may be allowed to make themselves parties; but the difference between these last positions; and the executor's right to sell, and having sold, is all that there is between the action of the executor being restrained by a court of equity, and where his power to sell has not been restrained, and is executed.

Suppose, in a case of a devise to sell land for the payment of debts, as in the case of *George* v. *Corse*, that the administrator had admitted assets from the sale of the land, without stating the amount, but sufficient to pay debts, and without stating the amount of the debts due by the testator; could the court, in the face of the admission, have conjectured it might be in prejudice of creditors, and upon such conjecture or apprehension, have given judgment that it was in prejudice of creditors. Or suppose, the administrator had, in his admission, stated both the amount of the assets and of debts, the former being larger than the latter, would it not have given judgment, that the manumission had not been made in prejudice of creditors, and have done so upon the executor's admission? The court could not, in such an issue, have given to the creditors any more protection than they had by the administrator's admission; it could not have possessed itself of
*479] the assets, or in any way *have directed the distribution of them. It was powerless to call upon the executor for a schedule of debts, or upon the creditors to make an exhibition of their claims. But it may be said, the difference in the case supposed, and that which existed, is that in the first, the assets were in hand; and in the other, were to be made by a sale of the land. The difference makes nothing against the argument, for the value of the land can be as well ascertained by proof, as it can be by the executor's sale; and when he admits the value to be sufficient to pay debts, he does, in truth, do no more than is done when he admits the existence of a sufficiency of personal assets, but unsold, to pay debts. As between himself and another, his admission may surely bind him in that other's favor; as well in regard to assets to be made from land, as in regard to personal assets undisposed of. In the latter case, there is as much a question of the sufficiency of assets, as there is in the case when assets are to be made by the sale of land; and so far as creditors are concerned, in a case of manumission, the reason for not trying the issue between a petitioner and an executor, is as strong, in an inquiry of a sufficiency of personal assets, as in one of real assets. And the court, in the case under remark, only excludes an inquiry into the value of the latter; and if it did not intend to do so, then a manumitted slave can never show that the manumission was not made in prejudice of creditors.

The court thought it was an issue to the prejudice of creditors, as they were no party to the proceedings, and to protect whose interest no one appeared; and "thus the judgment of the court, having once given effect to the manumission, on the ground, that effects in the hands of the heir should be applied to the payment of the debts, the executor or administrator is absolved from all responsibility, except as to the residue of the personalty,

and the creditors would be left to seek, through a court of equity, real assets which perhaps never had existence." But the mistake is in stating the land devised to an executor to be sold for the payment of debts to be assets in the hands of the heir; and that the judgment between the then petitioners and administrator, would have been conclusive against creditors as well in equity as at law. The assets were not legally in the hands of the heir; nor would the judgment *have concluded the right of [*480
the creditors from showing, in a proceeding in equity, to which the manumitted slaves, the executors, and all persons interested had been made parties, that the admission of the executor had been made without any foundation in fact, or in fraud or mistake; and upon showing either, in an entire review of the administration, a court of equity would set aside the judgment at law, and decree that the manumission had been made in prejudice of creditors, and subject the slaves to the payment of debts, either by sale for life or for a term of years; according as the one or the other might be requisite to pay the creditors. Such a course would be in perfect harmony with the statute allowing manumissions to be made by will. They may be made, to take effect at the death of the testator, but shall not be effectual, if done to the prejudice of creditors. Upon whom does it lie, to show it to have been done in prejudice of creditors? Surely, upon the creditors; or the words of the statute, "to take effect at the death of the testator," can never be fulfilled in any case of manumission, if it can only take effect after the manumitted slaves have shown it had not been done in prejudice of creditors; or if, as a condition precedent to effective manumission, the slaves must carry executors, creditors, and all interested in the real estate, into a court of equity, to prove the manumission not to have been made in prejudice of creditors.

But the case before us is distinguishable from that in Harris & Gill, in other particulars which make that case inapplicable. The first difference is, that the record shows in this case, there were no creditors of the testatrix, Frances Edelin, at the time the suit was brought in the circuit court. The only sum which could then be charged upon the estate was the right of retaining, which the executor had, on account of his having overpaid beyond assets. He then is the only creditor, by his own admission; and when he admitted the sufficiency of real estate to pay himself, there was an end of all inquiry as to what was the value of the land. There was nothing due to any one else; consequently, no one could be prejudiced: and the words of the statute, "in prejudice of creditors," cannot be construed to apply to any other than the testator's creditors at the time of his death, and such as might become so for funeral charges; not to such as the executor might make his creditors, **virtute officii;* and much less to defeat a manu- [*481
mission, in favor of an executor, because he has carelessly, though *bonâ fide*, paid debts beyond assets.

Upon the whole, then, our opinions are, that, by the statute of Maryland, 1796, ch. 67, § 13, manumissions of slaves by will and testament, may be made to take effect at the death of the testator; that the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors; that the right to freedom may be tried in a suit at law, against the executor, at the instance of the manumitted slaves; and that the executor may, in such suit, admit

the existence of a sufficiency of real assets, or real estate, to pay the debts of his testator; that a judgment at law in favor of slaves manumitted by will, in a suit between them and an executor, upon his admission of a sufficiency of real estate to pay creditors, may be set aside in equity, if such admission was made without foundation in fact, or in fraud or mistake, upon the creditors' showing either, in a proceeding in equity to which the manumitted slaves, the executors, and all persons interested have been made parties—in which there may be a review of the entire administration of the estate, of the conduct of the executor, and that of creditors in regard to the estate, and in regard to the vigilance of the one in paying, and of the others in pursuit of their debts. That the words in this will, "and after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate, for the payment of debts. That when a testator manumits his slaves by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events, the manifest intention, without express words, to charge the real estate, will charge the real estate for the payment of debts, if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator. That in such a case, the creditors of the testator must look to the real estate for the payment of debts which may remain unpaid, after the personal assets, exclusive of the manumitted slaves, have been exhausted; and that they must pursue their *claims in equity, *482] or according to the statutes of Maryland, subjecting real estate to the payment of debts, to make their debts out of the land. That when an executor permits manumitted slaves to go at large and free, under a manumission to take effect at the death of the testator, he cannot recall such assent by his own act: nor can it be revoked under the order of an orphans' court in Maryland, for the sale of all the personal estate of a testator, that court not having jurisdiction of the question of manumission. That in this case, it being admitted that the testatrix left real estate to an amount in value more than sufficient to pay her debts, without the sale of the negroes emancipated by the will, the defendants in error are entitled to freedom. The judgment of the circuit court is, therefore, affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.