agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute.

9th. That the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

10th. That said counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress.

11th. That the averments in said counts, that the defendant harboured said Andrew, are sufficient.

12th. That said counts are otherwise sufficient.

13th. That the act of Congress approved February 12th, 1793, is not repugnant to the constitution of the United States. And,

Lastly. That the said act is not repugnant to the ordinance of Congress adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court of the United States for the District of Ohio.

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*WILLIAM TAYLOR, GEORGE TAYLOR, WILLIAM PRIMROSE, AND ELIZA, HIS WIFE, GEORGE PORTER, AND ELSPET, HIS WIFE, WILLIAM RAINEY, ALEXANDER RAINEY, AND ELIZABETH RAINEY, COMPLAINANTS AND APPELLANTS, *v.* VINCENT M. BENHAM, ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED, OF SAMUEL SAVAGE, DECEASED, RESPONDENT AND APPELLEE. [*233

VINCENT M. BENHAM, &c., *v.* GEORGE TAYLOR, &c.

By the laws of Alabama, an administrator *de bonis non*, with the will annexed, is liable for assets in the hands of a former executor.[1]

Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident

[1] See *Chew* v. *Hyman*, 10 Biss., 250; *Wilkinson* v. *Hunter*, 37 Ala., 268; but the general rule is, that the succeeding executor or administrator is not liable for moneys collected by the former administrator or executor, or the value of chattels to the use of which a legatee is entitled for life by the will. *In Re Place*, 1 Redf. (N. Y.), 276; *Brownlee* v. *Lockwood*, 5 C. E. Gr. (N. J.), 239; *Anderson* v. *Miller*, 6 J. J. Marsh. (Ky.), 568; *Smithers* v. *Hooper*, 23 Md., 273; *Ruff* v. *Smith*, 31 Miss., 59; nor any *devastavit* or default of his predecessors. *Alsop* v. *Mather*, 8 Conn., 584.

or mistake, to make it just to reopen and revise the account after the lapse of twenty years and the death of the parties concerned.[2]

Where a person who held land as trustee directed by his will that the whole of the property that he may die seized and possessed of, or may be in any wise belonging to him, should be sold, the executors had power to sell the land held in trust, as well as that belonging to the testator in his own right.[3]

The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original *cestui que trust*.[4]

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[2] In a case where no fraud or misconduct was alleged, it was held that a final account would not be opened after a lapse of twenty years. *Child's Appeal*, 23 N. H., 225; but where the settlement of account was affected with fraud, it was held that the Probate Court would open it, though final, and of twenty years' standing. *Davis* v. *Cowdin*, 20 Pick. (Mass.), 510; yet not in a court of equity. *Sever* v. *Russell*, 4 Cush. (Mass.), 513; *Jennison* v. *Hapgood*, 7 Pick. (Mass.), 1, 7; see also *Decker* v. *Elmwood*, 1 Thomp. & C. (N. Y.), 48; *Mix's Appeal*, 35 Conn., 121. *Sherman* v. *Chace*, 9 R. I., 166; *Stetson* v. *Bass*, 9 Pick. (Mass.), 27; *Campbell* v. *Bruen*, 1 Bradf. (N. Y.), 224. In a case where, from the lapse of time, the death of all the parties cognizant of the transaction, the destruction of the records of the county, and loss of papers had occurred, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and therefore refused. *Stamper* v. *Garnett*, 31 Gratt. (Va.), 550. In *Gregory* v. *Gregory*, Coop., 201, the court refused to set aside a purchase by a trustee, after a lapse of eighteen years. So in *Baker* v. *Reed*, 18 Beav., 398, a bill filed after the lapse of seventeen years to set aside the purchase of a testator's estate by his executor at an undervalue, was dismissed on the ground of delay. *Carr* v. *Chapman*, 5 Leigh (Va.), p. 164. After a lapse of twenty years, it was held that the presumption was that the administrators had duly settled, and the burden of proof to the contrary was upon the complainant. *Estate of Bentley*, 9 Phil. (Pa), 344.

[3] "It is now settled, after some fluctuations of opinion, that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected." Hill on Trustees, 283. This principle is abundantly substantiated by the cases. *Lord Braybroke* v. *Inskip*, 8 Ves., 417; Co. Litt., 205, a., *n.* 1 (6th); *Lindsell* v. *Thacker*, 12 Sim., 178; *Doe d. Reade* v. *Reade*, 8 T. R., 118; *Hawkins* v. *Obeen*, 2 Ves., 559; *Ex parte Shaw*, 8 Sim., 159; *Sir Thomas Lyttleton's case*, 2 Ventr., 351. This general rule is acted upon in the United States. *Heath* v. *Knapp*, 21 Pa. St., 228; *Jackson* v. *Delancy*, 13 Johns. (N. Y.), 537; *Deane* v. *Gunter*, 19 Ala., 731; *Richardson* v. *Woodbury*, 43 Me., 206; *Asay* v. *Hoones*, 5 Pa. St., 35; *Ballard* v. *Carter*, 5 Pick. (Mass.), 112; *Merrit* v. *Farmers' Ins. Co.*, 2 Edw. (N. Y.), 547; *Hughes* v. *Caldwell*, 11 Leigh (Va.), 342.

[4] Where a power of sale is created by will, and no one is named to exercise it, but the proceeds of the sale are directed to be applied or distributed by an executor, administrator, or other person, such executor, administrator, or other person, by implication, takes the power of selling, unless some other intention can be gathered from the will. *Newton* v. *Bennett*, 1 Bro. Ch., 135; *Forbes* v. *Peacock*, 11 Sim., 152; *Lippincott* v. *Lippincott*, 4 Green (N. J.) Ch., 121; *Jones's Appeal*, 5 Grant (Pa.), 19; *Curtis* v. *Fulbrook*, 8 Hare, 28. If the power is given in order to pay debts or legacies, by implication, the executor takes the power. *Bogert* v. *Hertell*, 4 Hill (N. Y.), 492; *Lockhart* v. *Northington*, 1 Sneed (Tenn), 318; *Foster* v. *Craige*, 2 Dev. & B. (N. C.) Eq., 209; *Putnam Free School* v. *Fisher*, 30 Me., 523; *Houck* v. *Houck*, 5 Pa. St., 273; *Devone* v. *Forning*, 2 Johns. (N.Y.) Ch., 254; *Gray* v. *Henderson*, 71 Pa. St., 368.

The power in the executors to sell was a power coupled with a trust.

It might also be considered as a power coupled with an interest.

The distinction between these powers adverted to.

In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the *cestui que trust.*

Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise and not by descent, although they were supposed to be also *cestuis que trust.*

If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does.[5]

The testator, who held the land as trustee, having died in South Carolina, the executor took out letters testamentary in that State, sold the lands which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary.[6]

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[5] An alien, possessed of real estate, died intestate, without any known heirs. It was held that the real estate vested in the State without office found; that a sale of such real estate to satisfy a debt against the alien, in a proceeding to which the State was not made a party, was void as to the State, but the purchaser was entitled to the rights of the creditor, and to have the real estate subjected to its payment. *Sands* v. *Lynham*, 27 Gratt. (Va.), 291; s. c., 21 Am. Rep., 348.

"The freehold must always vest somewhere, and it is on this account that the authorities uniformly hold that, whenever there is a defect of heirs, the title passes at once." *Crane* v. *Reeder*, 21 Mich., 24; s. c., 4 Am. Rep., 430. To the same effect are *Mooers* v. *White*, 6 Johns. (N. Y.) Ch., 360; *Slater* v. *Nason*, 15 Pick. (Mass.), 345; *Fairfax* v. *Hunter*, 7 Cranch, 603; *Montgomery* v. *Dorion*, 7 N. H., 475; *Rubeck* v. *Gardner*, 7 Watts (Pa.), 455; *O'Hanlin* v. *Den*, Spenc. (N. J.), 31; s. c., 1 Zab., 582; *Hinckle* v. *Shadden*, 2 Swan (Tenn.), 46; *White* v. *White*, 2 Metc. (Ky.), 185; *Johnson* v. *Hart*, 3 Johns. (N. Y.) Cas., 322; *Fry* v. *Tucker*, 2 Dana (Ky.), 38; *Stevenson* v. *Dunlap*, 7 B. Mon. (Ky.), 134. Many of the cases cited hold that where there is a devise, office found must first be had before the State can claim the land. *Commonwealth* v. *Hite*, 6 Leigh (Va.), 588.

[6] A person, domiciled in England, died there, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries. In a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended. The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction. The administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of those English letters, and could not be known as a representative in Pennsylvania. Two suits, therefore, one in England, between the executor and administrator of the claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties; and neither the decree nor the proceedings in the English suit are competent evidence in the American suit. Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England when a suit is pending in this country for American assets. A decree of the High Court of Chancery, in England, purporting to distribute assets so situated, is void for want of jurisdiction. *Aspden* v. *Nixon*, 4 How., 467. So if there is a complete

Having sold the lands and received the consideration, he must be responsible to the residuary legatees.

An objection that only one executor sold (there having originally been four) cannot be sustained. Where a power is coupled with a trust, it is only necessary to show such a case as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust.

A power to sell, coupled either with an interest or trust, survives to the surviving executor. So also, if all the trustees or executors in such a case decline to act, except one.

When a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute.[7]

The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase money being received by him, he is responsible to the *cestui que trusts* for the money thus received. The reception of an additional sum, as purchase money, by them, with the reservation of the right to sue the executor, is not an avoidance of the first sale by the executor.

But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence or wilful default. A claim for damages would also be subject to the operation of the statute of limitations.[8]

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want of privity between the different administrators in different States, an action of debt will not lie in one State against an administrator, on a judgment recovered against a different administrator of the same intestate, appointed under the authority of another State. *Stacey* v. *Thrasher*, 6 How., 44. This subject is thoroughly discussed in *Hill* v. *Tucker*, 13 How., 458. The record of a debt against an administrator in one State, is not sufficient evidence of the debt against an administrator of the same estate in another State. *Hill* v. *Meek*, 18 How., 16. An administrator, appointed in the Cherokee Territory, was held entitled to receive payment of a debt in the District of Columbia, and to give a valid discharge. *Mackey* v. *Cox*, 18 How., 100; see 2 Kent, Com., pp. 434, 435 and note.

[7] In nearly all the States no will, until duly probated, can be used to prove the transfer of any interest, legal or equitable, in property of the testator. *Strong* v. *Perkins*, 3 N. H., 517; *Kittredge* v. *Fulsome*, 8 N. H., 98; and if the will affects the title of property in a State, other than the one in which it was originally proven, it must be recorded in such other State. *Wilson* v. *Tappan*, 6 Ohio, 172; *Bailey* v. *Bailey*, 8 Id., 239; *Campbell* v. *Wallace*, 4 Gray (Mass.), 162; *Campbell* v. *Sheldon*, 13 Pick. (Mass.), 8; *Iver* v. *Allyn*, 12 Vt., 589; see *Inchiquin* v. *French*, 1 Cox, 1; *Metham* v. *Devon*, 1 P. Wms., 529. And a court of equity has no jurisdiction over trusts created by the will of a foreigner, upon filing a certified copy of the will in the probate court of the jurisdiction where the remedy is sought. *Campbell* v. *Wallace*, 4 Gray (Mass.), 162.

[8] Trustees, in general, are liable for interest where they delay unreasonably to invest, or mingle the money with their own, or neglect to settle their accounts or pay over the money, or disobey directions of the will, or of a court, as to the time or manner of investing, or embark the funds in a trade or speculation without authority. *Knowlton* v. *Bradley*, 17 N. H., 458; *Lund* v. *Lund*, 41 N. H., 355; *Wood* v. *Garnett*, 6 Leigh (Va.), 271; *Graves' Appeal*, 50 Pa. St., 189; *Hess' Estate*, 69 Pa. St., 454; *Carr* v. *Laird*, 27 Miss., 544; *Armstrong* v. *Miller*, 6 Ohio, 118; *Williamson* v. *Williamson*, 6 Paige (N. Y.), 298; *Nelson* v. *Hagentown Bank*, 27 Md., 53. If they make usurious interest, they are liable for it. *Barney* v. *Saunders*, 16 How., 543; *Martin* v. *Rayborn*, 42 Ala., 468; *Oswald's Appeal*, 3 Grant (Pa.), 300. If the trustee cannot show the amount of interest he has received, he is chargeable with legal interest. *Bentley* v. *Shreve*, 2 Md. Ch., 219; *Rapalje* v. *Hall*, 1 Sandf. Ch. (N. Y.), 339.

*If the executor himself did not set up a claim, as an offset, for his personal expenses, his representative cannot do it, under the circumstances of this case. [*234

The *cestui que trusts* residing in a foreign country, the statute of limitations did not begin to run until a demand was made upon the executor for the money. His retaining it during that time is no evidence that he did not intend to account for it.

Although the bill made no distinction between the two characters in which the executor acted, namely, as an executor proper, and as an executor having a power coupled with a trust, yet as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged upon which the claim rests.

THESE cases were twice before partially brought to the notice of the court, and are reported in 1 How., 282, and 2 Id., 395.

They were cross appeals from the district Court of the United States for the Northern District of Alabama, sitting as a court of equity.

The bill was originally filed by Samuel Taylor, the father of William, George, Eliza, and Elspet, together with his nephews, William Rainey, Alexander Rainey, and his niece, Elizabeth Rainey, against George M. Savage, executor of Samuel Savage, deceased. The object of the bill was to hold the estate of Samuel Savage responsible for certain moneys which, it was alleged, he had received during his lifetime, in his capacity of executor of William F. Taylor, a citizen of the State of South Carolina, and also for his alleged neglect of lands in Kentucky, by which they were lost.

The record was very voluminous, as a great mass of evidence was filed in the court below, all of which was brought up to this court.

The claim divided itself into two distinct branches, one arising from transactions in South Carolina, where William F. Taylor, the testator, died, and where letters testamentary where taken out by Samuel Savage; and the other from transactions in the State of Kentucky. Each of these branches will be stated separately.

William F. Taylor resided in South Carolina, where he had been naturalized in 1796. Savage lived with him for some time, and afterwards continued to reside in the vicinity. In 1811, Taylor died, leaving a will, which was admitted to probate on the 11th of August, 1811.

At the time of his death, the brother and sister of the testator, namely, Samuel Taylor and Mary Taylor, were both alive, married and had issue. Their children ultimately became parties to this suit, and their names are in the title of the case. Samuel Taylor had two sons, namely, William and George,

and two daughters, namely, Eliza, who intermarried with William Primrose, and Elspet, who intermarried with George Porter. Mary Taylor intermarried with William Rainey, and her issue were two sons and a daughter, namely, William, Alexander, and Elizabeth.

The first section of William F. Taylor's will was as follows, namely:—

*235] *"First. I do hereby order, will, and direct, that [on] the first day of January, first after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or may in any wise belong to me, be sold on the following terms and conditions, that is to say: All the personal property on a credit of twelve months from the day of sale, purchasers giving notes of hand or bonds, with security, to the satisfaction of my executors; and all landed or real property belonging, or in any wise appertaining to me, shall be sold on a credit of one, two, and three years, by equal instalments, purchasers to give bond, bearing interest from the date, with securities to the satisfaction of my executors, and, moreover, a mortgage on the premises."

The second section gave a legacy to his negro woman Sylvia.

The third and fourth sections also bequeathed legacies to particular individuals.

The fifth and sixth sections were as follows:—

"Fifthly. I do hereby will, order, give, grant and devise all the remainder or residue of my estate which shall be remaining, after paying the before-mentioned legacies, to my dearly beloved brother, Samuel Taylor, of the parish of Drumblait and shire of Aberdeen, in Scotland, and to my beloved sister, Mary Taylor, of the same place, share and share alike, provided they shall both be alive at the time of my decease, and have issue, which issue, after their respective deaths, shall share the same equally; but if either the said Samuel Taylor or said Mary Taylor shall die without issue, then the survivor, or, if both shall be dead, the issue of the said Samuel Taylor or Mary Taylor, whichsoever shall leave the same, shall be entitled to the whole of the said remainder or residue of my said estate, share and share alike.

"And sixthly and lastly, I do hereby nominate, constitute, and appoint my friends, Samuel Savage, Esquire, of the district of Abbeville and State of South Carolina, Patrick McDowell, of the city of Savannah and State of Georgia, merchant, Duncan Matheson and William Ross, of the city of Augusta and State of Georgia, merchants, executors of this my last will

and testament; hereby revoking and making void all former wills and testaments, at any time by me heretofore made, and do declare this to be my last will and testament."

The executors all qualified as such. No bond was given, as neither the laws of the State nor the practice of the court required a bond from an executor under a will. This narrative will treat,

1st. Of the transactions in South Carolina where all the executors acted.

2d. Of the Kentucky lands, where Savage acted alone.

1. With respect to what was done in South Carolina.

On the 30th September, 1811, an inventory and appraisement were made of the goods and chattels of the deceased. But as the *amount was not added up, it cannot properly be stated; and on the 18th of January, 1812, an [*236 additional inventory and appraisement were made, which latter amounted to $808.12. A list of notes and accounts due to the estate was also handed in by Savage, as one of the executors. Ross also filed a list of notes, bonds, and open accounts belonging to the estate in his possession.

In January, 1812, the four executors made sales of the real and personal property, amounting to $24,011.46, and returned a list thereof to the Court of Ordinary. The law at that time did not require an account of sales to be recorded. After this, McDowell did not appear, by the record, to have any further participation in the settlement of the estate.

Savage, Matheson, and Ross, each filed separate accounts. Those of Matheson and Ross will be disposed of before taking up those of Savage.

Matheson filed but one account, namely, on the 30th March, 1813, by which a balance was due to the executor of $281.76.

Ross filed three accounts, namely:—

1813, March 30th.	Balance due the estate,	$4,034.80
1814, April 4th.	" " "	6,093.63
1815, April 4th.	" " "	6,299.77

Ross does not appear to have filed any further accounts, and what became of this balance the record does not show. It does not appear to have been paid over to Savage; but the complainants, in their bill, disavowed all claim against Ross.

Savage filed ten accounts, one in each year till 1818, April 22.

The last-mentioned account was as follows:—

DR. *The Estate of Wm. F. Taylor, deceased, with Samuel Savage, Executor.* CR.

1818.

March 11,	V	To cash paid ordinary, . . .	$1.75
	V	" cash paid Butler & Brooks, . .	23.62½
	V	" cash paid Butler & Hammond, .	16.00
14,	V	" cash paid James Day, . . .	2.50
		" expenses to Edgefield court-house, and to Augusta, . . .	25.25
22,	V	" cash paid M. Mims, clerk, &c., for cost, ...	17.18¾
	V	" cash paid the clerk, . . .	1.56¼
			87.87½
		My commissions on $10,393.42½, at 2½,	259.82
		" " 87.87½, .	2.18
			$349.87½
*237]	*V	Cash paid the ordinary, . . .	1.18¾
		Expenses at Edgefield court-house, .	5.00
April 22,	V	Cash paid Adam Hutchinson, attorney for the parties interested, .	10,037.36¼
			$10,043.55

1818.

March 14,	By balance due the estate, as per last return, ...	9,966.97½
	" cash received of adm'r L. Hammond,	180.00
	" cash received of adm'r Wm. Hall, it being the balance of his bond and interest, after deducting $200, under a compromise of a land case, .	246.45
		$10,393.42½
	Deduct amount from the other side,	349.87½
		$10,043.55
	Amount balanced,	$10,043.55

The account current, received in the ordinary's office on the oath of Samuel Savage, executor, the 22d April, 1818, and find vouchers for every item marked with the letter V on the left-hand margin. JNO. SIMKINS, *O. E. D.*

At the time of filing this account, there was filed also the following receipt:—

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"Received of Samuel Savage, executor of the estate of Wm. F. Taylor, deceased, the sum of ten thousand and thirty-seven dollars and thirty-six and one quarter cents, in full of his actings and doings on the said estate up to this date, as per his account current this day rendered to the ordinary of Edgefield district. I say, received by me this twenty-second of April, anno Domini 1818.

SAMUEL TAYLOR,
WILLIAM RAINEY, and
MARY RAINEY, his wife.
Per ADAM HUTCHINSON,
Their Attorney."

These accounts of Savage have been stated together, in order not to make a break in the narrative. It will be necessary now to go back in the order of time.

On the 14th of February, 1815, Savage applied, by petition, to one of the judges of the Court of Equity in South Carolina for authority to loan out the funds of the estate, praying the court to make such order as might seem equitable and just. Whereupon the *court passed an order [*238
that the petitioner should lend out the money on a credit of twelve months, on such good security as he might approve of.

At some time in the year 1815, Samuel Taylor came to the United States.

On the 9th of February, 1816, he executed the following paper:—

"GEORGIA, *City of Augusta:*

"Whereas, Samuel Savage, one of the executors of the last will and testament of William F. Taylor, late of Edgefield district, South Carolina, deceased, and Samuel Taylor, brother of the said William F. Taylor, deceased, for himself, and in behalf of his sister, Mary Rainey, and her husband, William Rainey, of Scotland, being desirous of adjusting the affairs of said estate, so far as have come to the hands of the said Samuel Savage, consent and agree that the said executor shall pay over to the said Samuel Taylor, at this time, as much money as he can spare, and on or before the first of April ensuing, to pay over all the money that may be collected on account of said estate. The said Samuel Taylor, for himself, and in behalf of his said sister Mary and her said husband, doth hereby consent and agree, on receiving from the said executor all the moneys that can be collected by the first of April next, to allow the said executor two years from this time to

close the remaining business of said estate; and for the money heretofore deposited in the bank of Augusta, and which has since been put out at interest, no interest will be required of the said executor for said money during the time the same remained in bank; and [on] all moneys which may be collected hereafter by the said executor, no interest will be required, provided the same shall be paid over to the said Samuel Taylor, or his lawful agent, in a reasonable time after the same shall have been collected. The said executor hath permission to compromise all doubtful claims or debts due to the said William F. Taylor in his lifetime, or any litigated cases relating to the recovery of lands in South Carolina.

"Given under my hand, this 9th of February, 1816.

SAMUEL TAYLOR,
For himself, and for my sister,
MARY RAINEY, and
WILLIAM RAINEY, her husband.

"Test: NICHOLAS WARE."

On the day of the execution of the above, namely, the 9th of February, 1816, Savage paid to Taylor $5,300, and on the 26th of March following, the further sum of $4,700, both of which are entered in the account settled on the 3d of February, 1817, with the Court of Ordinary.

On the 2d of April, 1816, Samuel Taylor executed a power *239] of *attorney to Adam Hutchinson and Peter Bennock, or either of them, authorizing them to receive on behalf of his sister, Mary Rainey, and her husband, William Rainey, all sums of money which were, are, or may become due and owing to the estate of the late William F. Taylor, and to sue for or prosecute all actions necessary for the recovery of a real estate in the State of Kentucky belonging to him, the said Taylor, and his sister.

On the 26th of September, 1817, Savage addressed a letter to Taylor, representing that there was great difficulty in collecting money due to the estate, his anxiety to bring the matter to a settlement, that during the winter he would be able to pay three or four thousand dollars, but that he must advance it out of money arising from the sale of a tract of land of his own, &c., &c., &c.

On the 22d of April, 1818, Savage paid to Hutchison the sum of $10,037.36, as already mentioned.

In 1818, Savage went to Kentucky, and we pass on to the other branch of the complainants' claim; namely,

2. Transactions respecting Kentucky lands.

In order to understand the position of William Forbes Taylor, the testator, with regard to these lands, it will be necessary to recur to the original and subsequent titles.

On the 25th of May, 1786, Patrick Henry, governor of Virginia, in consideration of six land-office treasury-warrants, as well as by virtue and in consideration of a military warrant under the king of Great Britain's proclamation of 1763, granted to Daniel Broadhead, junior, a tract of land containing four thousand four hundred acres, beginning, &c., &c., &c.

On the 30th of September, 1786, Broadhead conveyed the land to William Forbes, of the city of Philadelphia, in consideration of the sum of £183, Pennsylvania currency.

On the 19th of February, 1794, Forbes conveyed the land to John Phillips, for the consideration of £37 10s.

On the 3d of June, 1802, John Phillips conveyed the same land to Mary Forbes, widow and administratrix of William Forbes, deceased, in trust for the right heir or heirs of the above-named William Forbes. The consideration was one dollar.

On the 17th of September, 1805, Mary Forbes, widow and administratrix, conveyed the land to William Forbes Taylor, of South Carolina, in trust for the right heir of William Forbes, deceased. The consideration was one dollar.

In 1808, Taylor went to Kentucky and caused about thirty ejectments to be brought against the occupants of the land.

In 1811, William F. Taylor died.

On the 14th of September, 1815, Mary Taylor, otherwise Rainey, and her husband, William Rainey, executed a power of attorney to Patrick McDowell and Samuel Taylor, authorizing them to sue for, &c., all houses and lands which belonged to *William Forbes. The power contained the recital [*240
of a pedigree, by which Mary Taylor claimed to be the niece and one of the heirs of William Forbes, deceased, and of his intestate son, Nathaniel Forbes.

In 1818, Samuel Savage, the executor of Taylor, went to Kentucky, and whilst there executed two deeds, one to Alexander McDonald and others, and one to Zachariah Peters and others, for portions of the land in question. The sums which he is stated in the deeds to have received are $800 in one case, and $1,318 in the other.

In 1818, Savage removed from South Carolina to Tennessee, and afterwards to Alabama.

In 1836, William Primrose, who had married Eliza Taylor, the daughter of Samuel Taylor, went to Kentucky and made a compromise with many of the settlers on the land.

In June, 1837, Primrose visited Savage in Alabama and

inquired what had become of the Kentucky lands, to which Savage replied that they had never been sold; but upon the production of the two deeds above mentioned, admitted that he had executed them, but denied that he had ever received any money for them.

In December, 1837, Savage died, and George M. Savage became his executor.

On the 1st September, 1838, the bill in this case was filed by Samuel Taylor, William Rainey, Alexander Rainey, and Elizabeth Rainey (all of whom were aliens, residing in Scotland), against George M. Savage, the executor of Samuel Savage, deceased.

The bill states that William F. Taylor, who was a native of Scotland, but a naturalized citizen of the United States, died in the Edgefield district, in South Carolina, about the year 1811, having first made his last will, which was duly proved and admitted to record before the Court of Ordinary in the Edgefield district, on the 11th day of August, 1811, and appointed Patrick McDowell, Duncan Matheson, William Ross, and Samuel Savage his executors, who, on the said 11th August, 1811, were duly qualified as such, and took upon themselves the trust reposed in them.

By the provisions of the will, the bill further states, after the payment of sundry legacies, all of which it is suggested were paid, the testator gave, granted, and devised all the remainder or residue of his estate, remaining after the payment of said legacies, to his brother, Samuel Taylor, of the parish of Drumblait, and shire of Aberdeen, in Scotland, and to his sister, Mary Taylor, of the same place, share and share alike; provided, that both of them were alive at the time of the testator's death, and have issue, which issue, after the respective deaths of his brother and sister, were to share the same equally; but if either of them should die without issue, then the survivor, or, if both should be dead, the issue of said Samuel and Mary, were to be entitled to the whole of the remainder or residue of said estate, share and share alike.

*241] *The bill further states, that the residuary legatees were alive at the time of the testator's death; that they were both legally married, and respectively had issue; that the sister, Mary Taylor, is dead, and that the complainants, William, Alexander, and Elizabeth Rainey, are her issue.

The bill further states, that the executors executed their trusts severally; that Matheson and Ross departed this life, the first in 1812, and the last 1816; that the principal part of the business appertaining to the estate in Georgia was

under the management of McDowell, and that in South Carolina under that of Savage; that Matheson and Ross fully settled their accounts in their lifetime, and that the balances due from them have been fully paid to the complainants.

The bill further states, that the bulk of the testator's estate was in South Carolina, and was managed, as before mentioned, by Savage, and that an amount of property belonging to the estate, equal in value to $100,000, went into Savage's hands, of which the sum of fifty thousand dollars has never been accounted for.

The bill further states, that, at the time of the testator's death, Savage was justly indebted to him, on open account, as stated on the testator's books, in the sum of $789.70, which was never noticed in the inventory of Savage as returned to the ordinary; that he received, in cash on hand at the time of the testator's death, the sum of $681.75, of which no return was ever made by Savage; and that Savage fraudulently concealed his indebtedness, and the receipt of the last-mentioned sum of money. In proof of these statements, an inventory and appraisement of the effects of the testator in South Carolina are exhibited, from which, it is alleged, it will appear that no returns were made of the last-mentioned liabilities, and from which it will also appear, as it is further alleged, no returns were made of debts due to the estate, although a large amount of debts due by bond, note, and account came to Savage's hands.

The complainants charge, that there is no account of sales returned to the Court of Ordinary by Savage; that a large quantity of valuable land in South Carolina was sold by the executors, the proceeds of which, to the amount of several thousand dollars, went into Savage's hands, and have never been accounted for; that they have examined the records of the said Court of Ordinary, and cannot find that any final settlement was ever made therein by Savage; that only partial accounts were rendered by him, of which they file transcripts as exhibits, marked from 1 to 10; that an item of $10,037.55, in exhibit 10, which is alleged to have been paid to the attorney in fact of the complainants, is untrue; and they require proof, not only of the payment, but of the authority of Hutchinson (the person to whom it purports to have been paid), to receive it; that the exhibit 10 appears to be the last attempt on the part of *Savage, to render [*242
an account; and they charge the fact to be, that Savage retained $3,232.31, for commissions and travelling expenses, without charging himself with any interest on the

amount of money received by him, which alone would amount to the sum of $5,000, up to the time that Savage alleges it to have been paid over by him to the legatees; and that amount, at least, with interest to the time of filing the bill, the complainants claim as their undisputed right.

The complainants further charge, that in the year 1818 Savage removed to Tennessee; that, in the same year, he went to Kentucky, where the testator had lands to a large amount and of great value; that he then fraudulently represented himself to be the only surviving executor of the said estate, although McDowell was still living; and that, regardless of the provisions of the will requiring the lands to be sold on a credit of one, two, and three years, with securities and a mortgage on the premises sold, Savage sold for cash 1,059 acres of the land for the sum of $2,118; in proof of which they refer to exhibits D and C, which are copies of deeds executed by Savage to Alexander McDonald and others, to Zachariah Peters and others, of record in Kentucky.

They charge these lands to have been then worth eight dollars per acre, and would have sold for that, if the terms of the will had been complied with; and that the lands were worth at the time of filing the bill forty dollars an acre.

They further state that Savage, shortly after these sales, removed to Lauderdale county, Alabama, where he resided until his death, which occurred about the month of December, 1837; that he never made any return of said sales, but fraudulently concealed them from the complainants; that Primrose, the attorney in fact of the complainants, inquired of Savage, a few months before his death, if anything had ever been done with the Kentucky lands, and that he fraudulently answered that they were unavailable, and had never been sold; which statement he continued to make until the deeds were shown to him, and then he acknowledged he had sold them.

They further state, that the quantity of lands actually embraced in the deeds C and D was at least two hundred acres more than the quantity mentioned therein; that besides the lands above referred to, the testator had, in Kentucky, other lands to the amount of thirty thousand acres, more or less, of the value of $500,000, all of which could have been sold by Savage, or by proper diligence secured to the estate; that he neglected to attend to the last-mentioned lands; that after they were secured to the testator by judgments at law, bills in chancery were filed by the settlers thereon, in the Kentucky courts, and through the gross neglect of Savage decrees

were permitted to go in their favor, and the lands were lost.

They further state, that George M. Savage had become the personal representative of Samuel Savage, and they make him a defendant to the bill.

*Finally. They pray for an account, and that the defendant, the executor, be decreed to pay the amount due from Samuel Savage; that he be decreed to pay either the actual value of the Kentucky lands sold by Samuel Savage, or their present value, with interest; together with the value of the lands lost by Samuel Savage's negligence. [*243

On the 25th March, 1839, George M. Savage, the defendant, filed his answer.

The answer denies that Samuel Savage undertook the execution of the will or the trusts therein, as regarded any property or effects whatever of the testator, or other duty, beyond the limits of South Carolina. On the contrary, as far as he had knowledge or belief, the will was never admitted to record or proven in any other State than South Carolina, nor did the executors qualify in any other State; and he expressly states, that they did not qualify, nor was the will ever proven or recorded, in Kentucky, to the defendant's knowledge; nor was it the right or duty of the executors to interfere with the testator's property situated in any foreign jurisdiction, beyond the limits of South Carolina, where the testator was domiciled at the time of his death.

The answer declines admitting that Samuel or Mary Taylor, or either, took any estate or interest in the property of the testator under the will, or that they are in any manner entitled under the same. On the contrary, he charges that the bequests in the will are void, and vest no interest or estate either in the said Samuel or Mary, either as legatees or otherwise, or in the complainants. Nor is it admitted that the complainants are the next of kin, having right to prosecute this suit; but, on the contrary, the supposed claim of Mary Taylor could only be prosecuted through the authority of her personal representative, legally appointed in the courts of the United States.

The defendant further states, that it is not true that the principal part of the business of the estate in South Carolina was under the management of Samuel Savage, exclusively; on the contrary, the four executors jointly executed and filed in the Court of Ordinary of the Edgefield district a true and perfect inventory of the estate, together with an account of sales of both real and personal estate, as appears by the exhibits L and M.

The defendant further states, that Samuel Savage had nothing to do with estate in Georgia; that the property both real and personal in South Carolina, which came or ought to have come to the hands of the said Savage, was truly accounted for, as also appears by exhibits L and M, and the various settlements made by Savage from time to time in the Court of Ordinary, which are contained in exhibit N.

The defendant denies that there was any property or estate, or other effects of the testator, in South Carolina, which was not accounted for in the said court.

*244] *The defendant denies that $100,000 of the testator's estate went into Savage's hands, full fifty thousand of which was never accounted for. On the contrary, the before-mentioned records exhibit a full and complete account of all property or effects which came or ought to have come into Savage's hands; all of which has been truly accounted for, and paid over to Samuel and Mary Taylor, or their agent.

The defendant denies the indebtedness of Savage for the account of $789.70.

The defendant also denies the allegation in the bill, that Savage received $681.75, cash on hand, at the testator's death.

The defendant also denies the charge of fraudulently concealing the before-mentioned items of indebtedness from complainants.

The defendant, further answering, states that the exhibit L corresponds with exhibit B in the complainant's bill, and denies that no return of debts due to the estate was made to the court by the executors; on the contrary, he avers that Samuel Savage and Ross, in January and February, 1812, severally returned and filed in the said court an inventory of the bonds, notes, accounts, and other claims due to the estate, as appears by exhibits O and P in the answer, which include all that was due from all sources, as far as the defendant has heard, knows, or believes.

The defendant, further answering, denies the allegation in the bill, that no account of sales was ever returned to the ordinary by Samuel Savage; on the contrary, the records show a complete and full return of sales, of both real and personal estate, made by Savage and the other executors.

The defendant also denies that a large quantity of valuable land in South Carolina was sold by the executors, and that the proceeds, to the amount of several thousand dollars, went into the hands of Samuel Savage; on the contrary, the executors sold no lands in South Carolina but what are fully accounted for to the said court.

The defendant insists that Samuel Savage, as the executor in South Carolina, on the 22d April, 1818, made a full, fair, and final settlement of all his transactions with said estate in the said Court of Ordinary, in presence of Adam Hutchinson, the attorney of the said Samuel and Mary Taylor; the accounts of the said Samuel Savage were then balanced, and the sum due from him paid over in said court to the said Hutchinson, as the attorney and agent aforesaid, as will appear by the exhibit N; and also by a copy of a receipt of Samuel Taylor and William Rainey and wife, by the said Hutchinson, as their attorney, executed in their name to Samuel Savage, on the 22d April, 1818, for the sum of $10,037.36\frac{1}{4}$, filed as exhibit T.

The defendant denies that Samuel Savage ever applied the money of the estate to his private use.

*The defendant alleges, that the said Samuel Savage stated to him that he had never made any interest out of the funds of the estate; and the defendant asserts that he believes the statement to be true. [*245

The defendant further states, that the complainants can set up no claim for interest, because, on the ninth of February, 1818, Samuel Taylor, for himself and his sister, the said Mary Rainey, and her husband, William Rainey, executed the exhibit S to the said Samuel Savage, which is an agreement, made under circumstances mentioned in detail by the defendant, in substance as follows:—The said Samuel Taylor, and the said William and Mary, agreed that Samuel Savage should pay over to the said Samuel Taylor, at that time, as much money as he could spare, and in the ensuing April to pay over such other moneys as might be collected on account of the estate; and the said parties agreed, on receiving all moneys that could be collected by the first of April ensuing, to allow the said Samuel Savage two years from that date to close the remaining business of the estate; that for the money theretofore deposited in the Augusta Bank, no interest was to be required for the time the same remained in bank; and that, on all moneys that might be collected by the said Samuel Savage, no interest was to be required, provided the same should be paid over to the said Samuel Taylor, or his agent, in a reasonable time after it was collected.

The defendant further states, that on the very day of the agreement Samuel Savage paid to Taylor, for himself and his sister, the sum of $5,300, as appears by Taylor's receipt. And on the 26th March, 1816, he again paid the sum of $4,700, as per Taylor's receipt; that Samuel Savage pro-

ceeded with all dispatch to close the remaining business, and in April, 1818, as before stated, made the final settlement of the estate; all which, it is insisted, is a complete bar to interest.

The defendant further states, that Samuel Savage did not retain the sum of $3,232.31 for commission and travelling expenses; but the exhibit N will show what he did retain, which the defendant insists was a reasonable sum, and came before the ordinary for examination.

The defendant further states, that as late as March, 1816, Samuel Taylor was satisfied with the manner in which Savage conducted the business of the estate, as appears by a copy of a letter dated 26th March, 1816, exhibit Z; that shortly after the date of this letter, Taylor left the United States, having first constituted the said Adam Hutchinson the agent of the legatees to supervise the management of the estate, and finally to settle it, and receive the moneys. And a copy of the power of attorney to Hutchinson is exhibited, G, the original being destroyed.

From that time no further claim is set up, and the whole business sleeps for more than twenty years, when this attempt is made to overhaul the accounts and settlements before the ordinary.

*246] *The defendant, therefore, insists,—

1. That the settlements are absolutely conclusive, and that it is not competent for any other court to open and inquire into the correctness or regularity of the proceedings before the ordinary.

2. That, if not conclusive, they are *primâ facie* evidence of the correctness of the settlements.

3. Upon the statute of limitations and lapse of time, as evidence that the estate has been settled, and all the moneys paid over.

As to the Kentucky lands, the defendant states he is informed, and believes, that the testator was not the owner of any lands in that State at the time of his death, or since; that a suit was there pending many years before his death for 4,000 or 5,000 acres of land, and prosecuted till the 8th of January, 1818, when judgments were recovered, &c., is not denied; and the defendant has been informed that Primrose, the pretended agent of the complainants, in the year 1836, made a compromise with the tenants in possession of the said lands, by which, for an inconsiderable sum, he agreed to release the claims of the complainants. But if, on investigation, it should be that the testator had title, then the defendant insists,—

1. That that title, upon his death, escheated to Kentucky; and that if the lands were ever subject to trusts, such as those in the will, the same were lost when the lands escheated, and could not be enforced, either in law or equity.

2. That the power to sell being a naked power, and having been conferred on four executors, could not be executed by one, so as to convey the title.

The defendant admits that Samuel Savage, in the year 1818, did go to Kentucky, and that he executed the papers D and C, exhibited in the bill; but he denies that he fraudulently represented himself as the only surviving executor; and he also denies that the execution of the deeds violated the provisions of the will, or that he had authority, however he may have thought so himself, to convey the lands under the will.

The defendant further insists, that the sales were merely void, and did not affect the rights of the complainants, on another ground,—that McDowell, another executor, was alive at the date of the deeds, and did not join in the conveyance.

The defendant further denies that the lands in Kentucky were sold for cash, but for an inconsiderable amount in property.

And, if it shall be material, he pleads, as to the consideration for the sale of those lands, the statute of limitation and lapse of time.

The defendant admits that Samuel Savage died in November, 1837, in Lauderdale county, Alabama, where he was domiciled; that the defendant is the executor of his will, and is a citizen of Alabama.

Finally, the defendant pleads to the jurisdiction of the court.

On the 31st May, 1839, the complainants filed an amended bill.

*They admit therein, that the domicil of the testator was in South Carolina. [*247

That his father and mother died before his death.

That Samuel Taylor was his only brother, and Mary Taylor his only sister.

That she intermarried with William Rainey, and had issue the three other complainants.

That the testator had no kindred in the United States at the time of his death.

And that the said Samuel and Mary were, at that time, his only heirs at law.

The complainants further state, that Samuel Taylor visited

South Carolina in 1815, for the purpose of settling with the executors; and that he received, in February and March, 1816, from Samuel Savage, the sum of $10,000, as part of the estate; but no interest was paid, for the reasons assigned by him.

That Savage wrote to Taylor, in September, 1817, a letter, which is exhibited, and the substance of which is set forth. Exhibit I.

That the legatees never received any moneys afterwards.

That Savage never made a final settlement of his accounts.

That, after his removal from South Carolina, he received at least $10,000 of the money of the estate.

That, since filing their bill, they have received the testator's cash-book, from which it appears that Savage was indebted, as is alleged in the original bill, at the time of the testator's death.

That the executors did not execute any bond for the faithful execution of their trusts, &c.

The answer of the defendants was filed on the 19th day of September, 1839, and in almost every particular traverses the allegations of the amended bill. It need not, therefore, be set forth at length.

These were the issues between the parties.

The District Court, after a careful review of all the points in the cause, decreed, that the complainants recover of the defendant the sum of $5,212.92, to be levied of the goods and chattels, lands and tenements, of the said Samuel Savage; and that the defendant pay the costs of the suit.

The above sum of $5,212.92 was made up of the principal sum of $2,118 received by Savage on the 21st July, 1818, from the sale of the Kentucky lands, and interest on that amount from the said 21st July, 1818, to the commencement of the term of the court when the decree was rendered, amounting to the sum of $3,094.92.

On the day before the decree was rendered, George M. Savage, the executor of the last will of Samuel Savage, was removed from his office of executor by the court in Alabama having jurisdiction to make the removal, and Vincent M. Benham was appointed the *administrator *de bonis non*, with the will annexed, of the said Samuel Savage.

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The complainants appealed from the decree, and executed bond to prosecute the appeal. They complained that the District Court erred in not decreeing the whole amount claimed by them in their bill and amended bills. But they ordered execution to issue for the amount for which the decree was rendered, which was levied on a large number of

slaves, which were claimed as belonging to the estate of Samuel Savage.

An order granting an appeal to the defendant George M. Savage was also made by the court, and bond was ordered to be given within a stipulated time; but in consequence of the removal of George M. Savage the order could not be executed, and no bond was executed in conformity with the order.

Upon a motion made to this court by Benham, at the January term, 1843, the execution that issued on the decree was held to be a nullity, and an intimation given that the decree was not rendered against the proper party in the District Court.

On the 4th October, 1844, a bill of revivor was filed by the complainants against Vincent M. Benham, the administrator *de bonis non* of Samuel Savage, and he was brought before the court by process.

In November following, Benham filed his answer to the bill of revivor, and a demurrer at the same time.

The causes of the demurrer were,—

1. That the bill of revivor did not state the proceedings and relief prayed by the original bill.

2. That it did not show or allege that the defendant ever had any assets belonging to the estate of Samuel Savage.

3. That the defendant, as administrator *de bonis non*, with the will annexed, of Samuel Savage, could not be made a party to the original bill by bill of revivor.

4. That the defendant, as such administrator, was not in privity with George M. Savage, against whom the decree was rendered; and for want of that privity, a bill of revivor would not lie.

5. That the bill of revivor did not show whether the decree was rendered before the removal of George M. Savage as executor.

The court overruled the demurrer.

The answer stated, that the defendant had no personal knowledge of the original suit, or of the proceedings and decree therein. It admitted that the removal of George M. Savage from his office of executor, on the 28th November, 1842, and that the defendant, on the same day, within a few hours afterwards, was appointed administrator *de bonis non*, with the will annexed, of Samuel Savage, by the same court. It alleged, that at the time the original decree was rendered against George M. Savage, the defendant Benham was the administrator *de bonis non*.

*249] *On the 29th November, of the same term, the defendant Benham moved the court to dismiss the suit for want of prosecution; which motion was overruled.

The District Court, notwithstanding the defendant's answer, ordered that the decree against George M. Savage, as executor of Samuel Savage, be revived against said Benham, administrator *de bonis non*, with the will annexed, of Samuel Savage, and the defendant Benham prayed an appeal.

Upon these cross appeals the cause came up to this court.

It was argued by *Mr. Morehead* and *Mr. Sergeant*, for Savage's administrator, and by *Mr. Crittenden* and *Mr. Berrien*, for Taylor, &c.

Mr. Morehead. I. For the reasons alleged in the defendant's demurrer to the complainants' bill of revivor, the demurrer ought to have been sustained, particularly because it was erroneous to revive a decree against the administrator *de bonis non*, which had been rendered against the executor of Samuel Savage. *Grout* v. *Chamberlain*, 4 Mass., 611; *Allen* v. *Irwin*, 1 Serg. & R. (Ia.), 554; *Alsop* v. *Mather*, 8 Conn., 584; *Carrol* v. *Connett*, 2 J. J. Marsh. (Ky.), 199, 206; *Bradshaw* v. *Commonwealth*, 3 Id., 133; *Graves* v. *Downey*, 3 Mon. (Ky.), 353; *Slaughter* v. *Froman*, 5 Id., 20; *Potts* v. *Smith*, 3 Rawle (Ky.), 361; *Bank of Pennsylvania* v. *Haldeman*, 1 Pa., 161; *Kendall* v. *Lee*, 2 Id., 482; *Hagthorp* v. *Hook's Administrators*, 1 Gill & J. (Md.), 270.

On the merits:—1. The bill having been filed with the obvious design of making the executor of Samuel Savage liable for the fiduciary delinquencies of the said Samuel, as one of the executors of Taylor, it was erroneous to decree against him for the personal acts and misconduct of the said Samuel. *Dance* v. *McGregor*, 5 Humph. (Tenn.), 428.

2. The letters testamentary granted in South Carolina conferred no power or authority on the executors of Taylor to act without the jurisdiction of that State. *Carmichael* v. *Ray*, 1 Rich. (S. C.), 116; *Kerr* v. *Moon*, 9 Wheat., 565; *Doolittle* v. *Lewis*, 7 Johns. (N. Y.) Ch., 45, 47; *Attorney-General* v. *Bouwers*, 4 Mees. & W., 171, 190, 191, 192; Story, Confl. of L., p. 425, § 514.

3. The sale of the Kentucky lands, therefore, by Samuel Savage, did not divest the residuary legatees of Taylor of any title they may have had to those lands, or of any interest in the same.

First. Because the authority conferred by the will on the executors to sell the real estate must have been strictly pur-

sued. *Williams* v. *Peyton's Lessee*, 4 Wheat., 77; *Wiley* v. *White*, 3 Stew. & Pr. (Ala.), 355; 4 Johns. (N. Y.) Ch., 368; 6 Conn., 387; 2 Swinb., 730, note; 10 Pet., 161.

Secondly. Because the authority, being joint, could not be *executed and performed by one only. *Halbert* v. *Grant*, 4 Mon. (Ky.), 582; *Smith* v. *Shackelford*, 9 [*250 Dana (Ky.), 472; *Johnston* v. *Thompson*, 5 Call (Va.), 248; *Carmichael* v. *Elmendorff*, 4 Bibb (Ky.), 484; 14 Johns. (N. Y.), 553; Co. Litt., 112, *b*.

4. The devise of the testator's real estate to be sold conferred an authority by implication on the executors to sell. *Anderson* v. *Turner*, 3 A. K. Marsh. (Ky.), 131. But it was a naked authority, uncoupled with an interest; and the lands, until the sale was made, descended to the heirs at law of the testator. *Ferebee* v. *Procter*, 2 Dev. & B. (N. C.), 439; *King Ferguson*, 2 Nott & M. (S. C.), 588; *Shaw* v. *Clements*, 1 Call (Va.), 429; *Warneford* v. *Thompson*, 3 Ves., 513; *Hilton* v. *Kenworthy*, 3 East, 557; Co. Litt., 236, 112, 113, 181; 2 Sugd. Powers, 173, 174.

5. The will of William F. Taylor was never offered for probate, or proven in Kentucky by Samuel Savage, or by either of the executors. As to the real estate, therefore, which was in Kentucky. William F. Taylor died intestate. *Kerr* v. *Moon*, 9 Wheat., 565; *McCormick* v. *Sullivant*, 10 Id., 202; *Carmichael* v. *Ray*, 1 Rich. (S. C.), 116; *Smith* v. *Shackelford*, 9 Dana (Ky.), 472. And the lands descended, of course, to his heirs at law.

The complainants were his heirs at law, as well as residuary legatees, and they were, at the time of the testator's death, *aliens*. It follows, that they could not *take* the Kentucky lands, which fell by escheat to that commonwealth *without office found*. *Montgomery* v. *Dorion*, 7 N. H., 475; *Mooers* v. *White*, 6 Johns. (N. Y.) Ch., 360; *Doe* v. *Jones*, 4 T. R., 300; *Doe* v. *Acklam*, 2 Barn. & C., 779; *Doe* v. *Mulcaster*, 5 Id., 771. *Sutliff* v. *Forgey*, 1 Cow. (N. Y.), 89; *Dawson's Lessee* v. *Godfrey*, 4 Cranch, 321; Co. Litt., 2, *b*.

6. That the complainants have disaffirmed the sale made by Samuel Savage of the Kentucky lands, by having since sold and conveyed the same lands. This they could not do and still insist on Savage's liability for the sale made by him. If he sold the lands in Kentucky in violation of his trust, the beneficiaries of Taylor cannot demand to have the lands and also the purchase-money received for them. By following the title to the lands they repudiate the sale made by Savage. *Murray* v. *Ballou*, 1 Johns. (N. Y.) Ch., 581; Id., 445; Story, Eq. Jur., 505–507; 5 Ves., 800.

7. That in April, 1818, a final settlement was made in the proper court in South Carolina of all the official transactions of Samuel Savage, as executor of Taylor, and that such settlement could only be impeached or disturbed by surcharging and falsifying the same by specific allegations and proofs of error or omission. *Wooldridge's Heirs* v. *Watkin's Executor*, 3 Bibb (Ky.), 352; *Quinn* v. *Stockton*, 2 Litt. (Ky.), 346; *Vance's Administrators* v. *Vance's Distributees*, 5 Mon. (Ky.), 521; *Preston, Executor*, v. *Gressom's* **Distributees*, 4 Munf. (Va.), 110; *Owens* v. *Collinson*, 3 Gill & J. (Md.), 25.

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8. That William F. Taylor had no title which he could transmit by will to the lands devised to be sold, he being a trustee only, holding the legal title for the use and benefit of others, not parties to this suit.

9. That the District Court of Alabama had no jurisdiction to adjudicate upon the matters contained in the bill and amended bill of the complainants. It was manifestly a suit against the executor of Samuel Savage, for a final settlement of the fiduciary accounts and transactions of the latter as executor of Taylor. The courts of South Carolina alone had jurisdiction of the matters in controversy between the parties, and the District Court ought to have dismissed the complainant's suit. *Vaughan* v. *Northup's Administrators*, 15 Pet., 1; Story, Confl. of L., §§ 513, 514, to the end, pp. 422–426.

Mr. Crittenden, for Taylor, &c., relied upon the following points and authorities.

1. That the peremptory direction given in the will of William F. Taylor, to sell his lands, &c., is equivalent, in every equitable sense, to a devise to his executors and the survivor of them, with authority to sell, and will equally prevent an escheating of the land. 7 Dana (Ky.), 1–12, &c.

2. That although it was a prerequisite to his legal authority to sell the Kentucky lands, that he (Samuel Savage) should have obtained letters testamentary in Kentucky; yet, if without it he took upon himself to act under the will of his testator, to make sales and receive money of them, as executor, he cannot, because of that irregularity, excuse himself from his responsibility to the complainants, the legatees, for that money so received; as executor he received it, and as executor he must account for it. 7 Dana (Ky.), 349. Their authority was from the will. 7 Dana (Ky.), 351–355.

3. That the least measure of his responsibility is the amount of money he received, as executor, on the sales of Kentucky lands made by him as executor, and that he cannot be allowed

to evade that by any impeachment of the sales made by himself.

4. That having undertaken to act in reference to said lands in Kentucky, he was bound to fulfil his undertaking and the trust assumed by him, and is responsible for the damage or loss of land occasioned by his failure so to do, and by his inattention and negligence. 7 Dana (Ky.), 349.

5. That, in respect to the land in Kentucky which he did sell, he is liable for the fair value of it, or the price at which he could have sold it at the time, which was much greater than the price at which he did sell.

6. That the removal of Samuel Savage from the State of South *Carolina; the residence of the complainants in a foreign and distant land, and the coverture and infancy of some of them; the misstatements, equivocations, and fraud of the said Savage, and his concealments from the complainants of his transactions in respect to said lands, especially, exclude him from all benefit or advantage from lapse of time or the statute of limitations. 1 Madd. Ch., 98, 99; 2 Id., 308–310; 10 Wheat., 152; 1 Sch. & L., 309, 310, 428–431, 413–442; 2 Id., 629, &c. [*252

The money received by Savage, as executor of Taylor, for land sold by him as executor, ought to be accounted for by him as other moneys arising from the estate of his testator. He did so account for the proceeds of the land sold in Carolina. And why should he not for the proceeds of the Kentucky lands? He charged the estate for going to Kentucky to attend to those lands, &c. He did give some attention to, and did sell a portion of, them. And what, now, are the objections made to his responsibility? They are, in substance,—

1st. That he was not bound to attend to them, as executor only in South Carolina.

2d. That complainants were aliens, and that the land escheated on the death of the testator, Taylor.

3d. That complainants have lost or waived all right by the statute of limitations and lapse of time.

4th. That they have lost or waived all right of recovery against him by the compromises and sales made by their agent, Primrose.

To the first, it is deemed a sufficient answer to say, that he did assume and undertake to attend to those lands, and was paid for it. And that was enough to charge him for a due responsibility for his performance of his undertaking,—to charge him as agent or executor *de son tort*, if not otherwise. 7 Dana (Ky.), 349, 351–355.

But, moreover, he was in the nature of a trustee under the will, and having undertaken the trust by assuming the office of executor in South Carolina, he was bound to fulfil the whole trust by proving the will in Kentucky, or by doing whatever else was necessary to a complete and faithful performance of it.

The testator contemplated this, as is clearly inferable from his will. Savage was not merely an executor, in the ordinary sense, but as to the lands of the testator he was in the condition of a trustee. And, accepting the trust, he must perform the whole of it, as much as if he had accepted the same trust created by deed instead of will. The power given by the will, in respect to the lands, is different from and collateral to the mere official power of an executor, and constitutes him in effect a trustee whose powers and duties are not governed by the rules or laws which regulate mere executorial duties. His duties in the one case depend on the laws which regulate his office; in the other, on the nature of his contract or undertaking.

*253] *As to the second objection, that the lands escheated, &c., the answer is, that it is too late to urge that defence against his own act in selling them and receiving money for them.

But it is, moreover, insisted that the lands did not escheat. It is settled that lands devised to be sold and the money paid to aliens do not escheat. *Craig* v. *Leslie*, 3 Wheat., 563; *Craig* v *Radford*, 3 Id., 594.

The direction given in this case to sell is a trust in the contemplation of a court of equity, and will be enforced as such, just as if the land had been devised on trust for the same purposes. 1 Madd. Ch., 55 (56); *Harding* v. *Glyn*, 1 Atk., 469; *Clay & Craig* v. *Hart*, 7 Dana (Ky.), 1–12, &c.; Co. Litt., 113 *a*, and note (2), which see; 3 Co. Litt., 146, note, 113 *a*; 2 Sugden, 173.

And even the non-execution of the powers would not defeat the trust; the general rule in equity is, "that a trust shall never fail of execution for want of a trustee," &c. 1 Madd. Ch., 455–458; Co. Litt., and note, as above referred to; 2 Atk., 223.

As to the third objection, neither the statute of limitations nor lapse of time apply to this case. The circumstances of the case, and the fraud and concealment, exclude them from any operation on the case. The suit was brought immediately on the discovery of the cause of action. 1 Madd. Ch., 98, 99; 2 Id., 308, 310; *Elmendorf* v. *Taylor*, 10 Wheat., 152; 1 Sch. & L., 309, 310, 428, 431, 413–442; 2 Id., 629, &c.

Fourth objection. The facts answer this, and it seems but a mockery to insist on the last desperate effort at compromise as releasing defendant.

Mr. Berrien, on the same side with *Mr Crittenden.*

It is objected by the opposing counsel, that this decree cannot be revived against defendant, because, as administrator *de bonis non*, he has no privity with George M. Savage, the executor of Samuel. But what are the facts in the case?

(*Mr. Berrien* here reviewed the facts, and then proceeded.)

The privity which is necessary in this case is privity with Samuel Savage, against whose estate the decree was rendered, and out of whose assets it was payable.

If a decree is obtained against an executor, for the payment of a debt of his testator, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets may be pursued in his hands, without reviving against the representative of the original defendant.

If George M. Savage had died intestate, his administrator would not have been the representative of Samuel Taylor. In this event, this suit might have been revived against the administrator *de bonis *non* of Samuel Taylor. Story, Eq. Pl., § 370; Mitf. Eq. Pl. by Jeremy, 78; *Johnson* [*254 v. *Peek*, 2 Ves., 465.

Then having been removed from office, under the statute of Alabama,—having no representative who can represent the estate of Samuel Taylor,—it is only against his administrator *de bonis non* that this proceeding can be had; or there is a right judicially ascertained, without a remedy.

As to the Kentucky lands.

The first objection is, that the District Court of Alabama, acting as a Circuit Court, had not jurisdiction of this case. When I encounter an argument, leading to a conclusion from which the intelligence of professional men must, in my judgment, revolt, however it may seem to be supported by authority, I am disposed rather to distrust my own capacity to detect its fallacy, than to yield to the conclusion to which it would lead me. I am sure I am not singular in this feeling. Let us examine the conclusion to which the argument would lead.

Samuel Savage left the State of South Carolina in 1818, removed first to Tennessee, and afterwards to Alabama, where he settled permanently, and died.

After 1818, he was not suable in South Carolina.

Not in the State courts. It does not appear that he was

ever there after that time; and if he had been transiently there, complainants, aliens, residents in a foreign country, were not required to be on the watch to catch him there. No original process issued by the State courts of South Carolina, which was not personally served, could have rendered a citizen of Alabama amenable to their jurisdiction.

Not in the courts of the United States in the District of South Carolina, for the words of the Judiciary Act of 1789 are,—"No civil suit shall be brought in the courts of the United States against a defendant, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The conclusion, from the proposition of defendants, then, is this,—that until Samuel Savage chose to go to South Carolina, and subject himself to the service of process, he was not liable to suit anywhere; that complainants were remediless, or that their right to a remedy depended upon the will of their adversary. Is the jurisprudence of the United States subject to this reproach? Has this court pronounced any decision which may, by fair construction, lead to such a consequence? This is said to be the age of progress; but is it a progress in intelligence, or its opposite? What is the reference to authority on this point?

(*Mr Berrien* here examined and commented on 14 Pet., 166; Story, Confl. of L., §§ 513, 514; 15 Pet., 1.)

We are seeking to obtain from this defendant, as administrator *de *bonis non*, the balance which was in the hands of Samuel Savage of the estate of W. F. Taylor, of which we are legatees. We charge him, and we prove our charges, with frandulent concealment of the assets which came to his hands; and we seek to make his estate, in the hands of defendant, liable for his individual personal default; and this right, with the aid of a court of equity, we can enforce wherever we find him.

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If he had remained in South Carolina, we would of course have sought redress there, and in its courts. But he voluntarily withdrew from the protection of those courts. He was a fugitive from justice, liable to arrest wherever he was found.

The bill, it is said, seeks an account; but not that merely. It alleges fraud and concealment; it charges Samuel Savage with official misconduct, for which it holds him to individual responsibility; it does not ask him to pay for these frauds out of the assets of W. F. Taylor, which he has wasted, but out of his own estate, into which those assets have been converted.

The proposition, that the courts of South Carolina have exclusive jurisdiction, cannot be urged as an objection to the jurisdiction of the Circuit Court of Alabama. Their exclusive jurisdiction is over the subject-matter,—the administration. The executor is personally amenable to the forum of his domicile. There he may rely on a settlement and discharge by the courts of South Carolina, as having exclusive jurisdiction of the subject-matter, and the acts of the court of South Carolina should have like effect in the court of Alabama as they would have had in the State in which they were rendered; but this is the extent of the exclusive jurisdiction which can be claimed for them, in behalf of an executor who is a fugitive from their borders.

The third, fourth, and fifth points of the respondent's statements will be considered jointly.

1. The order of testator, that his lands should be sold,—especially that they should be sold on "securities to the satisfaction of his executors,"—gave to them a power, an authority to sell, by implication, but as ample as if it had been given by express words.

The appointment of his executors, and the appropriation of the proceeds of the sales, so to be made by them, to purposes within the scope of their duties as executors, which he did by the devise of all the remainder or residue of his estate, after payment of certain legacies, imposed upon them an obligation, and charged them with a trust,—that of so appropriating them.

The executors were the agents of the testator, his attorneys, if you will, but more properly donees of the power conferred on them by him for the sale of these lands. But they were also trustees of the devisees, in relation to the fund thus acquired. They had no interest in that fund; but the authority conferred on them was not, therefore, a mere naked power. It was a power coupled with a *trust, which [*256
it is the peculiar province of a court of equity to guard and to enforce. 2 Story, Eq. Jur., §§ 1059–1061. And a court of equity will construe the will to give them such an interest as is necessary to the execution of the trust.

But we are seeking to make Samuel Savage, who was only one of these trustees, alone liable for the faithless execution of his trust, and we are met with the objection,—

1. That the authority and the trust, being joint, could not be executed by one only. There are numerous decisions on this question. 2 Story, Eq. Jur., § 1062. The whole doctrine is summed up by Mr. Sugden. Sugd. Powers, ch. 3, §

2, art. 1, pp. 165, 166 (3d edit.); 2 Story, Eq. Jur., p. 399, in note.

A power coupled with a trust will survive, and may be executed by a surviving trustee. *Osgood* v. *Franklin*, 2 Johns. (N. Y.) Ch., 1–21.

Power to executors to sell, not by name, but as executors, may be executed by one. *Clay & Craig* v. *Hart*, 7 Dana (Ky.), 1.

Where one of several trustees refuses to accept, the power vests in the others. *King* v. *Donnelly*, 5 Paige (N. Y.), 46.

2. It is objected, that as this was a naked power (that is, as there was no express devise to trustees), the land must have descended to the heirs, to await the exercise of the power; that as the will was not proved in Kentucky, and therefore *quoad* testator's property in that State he died intestate, it must for that cause also have descended to the heirs; and as these heirs were aliens, it vested by escheat in the State of Kentucky.

The answer is, that a court of equity will carry out the manifest intention of a testator, will see that this trust is executed according to such intention, and will raise such an estate by implication in the trustee as is necessary to accomplish this object. The court will imply a power to sell in executors not expressly designated for this purpose. 2 Story, Eq. Jur., § 1060. They will imply such a power, from an authority to "raise money" out of lands. Id., § 1063. Nay, they will imply a power to sell, from a power to raise money out of "rents and profits." Id., § 1064. As a power to sell will be raised by implication, not only without but against the words of the will, as in the case cited, "rents and profits." As a trust to appropriate proceeds will in like manner be implied, in both cases, to effectuate the intention of testator, so also where there is no express devise, implication will not stop short of a fee where there are trusts to be executed which require it. *Markham* v. *Cooke*, 3 Burr., 1686. In *Trent* v. *Henning*, 4 Bos. & P., 116, the devise to trustees, as well as the trust for sale, was implied, and yet they took a fee. Fletch. Est. Trust., 1–4, 19.

I am aware of the cases which decide that a mere naked power to executors to sell will not give an interest; but,—

1. This is not a mere naked power; taken in connection with the devise of the residue, it is a power coupled with a trust.

*257] *2. It is indispensable, to effectuate the intention of the testator, that such an interest should pass.

In the cases referred to, the question was between heir and distributee, or devisee, or creditors. The land descended to the heir, subject to the exercise of the power, and the intention of the testator was accomplished. According to the argument of respondent's counsel, that cannot be in this case, unless such an interest is held to pass.

Yes, there is another mode. Land directed to be sold and converted into money loses the quality of real, and is converted into personal estate, and *e converso* of money directed to be laid out in land. 2 Story, Eq. Jur., § 790. In this latter case, anterior to the sale, and by the mere force of the will, the money so fully becomes land as, 1. not to be personal assets; 2. nor to be subject to the courtesy of the husband; 3. nor to pass as land by will, and other consequences. So of land directed to be sold. 2 Story, Eq. Jur., § 109, in note; *Hawley* v. *James*, 5 Paige (N. Y.), 318.

As to the time when the conversion shall be supposed, *Hutcheon* v. *Mannington*, 1 Ves., 365; *Clay & Craig* v. *Hart*, 7 Dana (Ky.), 1.

It is objected, that the will was not proved in Kentucky. But probate was not necessary to the execution of the power, and adds no force to it, for the probate has no concern with the power, and relates only to the jurisdiction over the goods and chattels. *Doolittle* v. *Lewis*, 7 Johns. (N. Y.) Ch., 48; *Lessee of Lewis and wife* v. *M'Farland et al.*, 9 Cranch, 151.

The intention of the testator can be effected, then, in one of two ways:—

1. By construing the will so as to imply a devise to the executors for the purpose of effectuating the trust.

2. By considering the land as money from the death of the testator, when his will became operative.

The testator was a naturalized citizen. All his relatives were aliens, and incapable of holding real estate. Aware of this disability, he directs his property, real and personal, to be converted into money, and bequeathes it to them. There can be no doubt of his intention to give to his executors such power as was necessary to effectuate his will. That will became operative upon his death, and did not depend upon the probate. The court will imply a power to sell. They will imply a trust to distribute. Will they not consummate the intention of the testator, either by considering the land as money at the time of his death, or by giving to the trustee such an estate as is necessary to protect the land from escheat? *Craig* v. *Leslie*, 3 Wheat., 577. The lands in possession of the heir are held subject to the exercise of the power. Why should it not be in the hands of the State?

*258] Or is the lord, who takes by *escheat, more favored than the heir, who takes by inheritance? *Pawlett* v. *Attorney-General*, Hardr., 465, 469; 2 Atk., 223.

But however these questions may be decided, defendant cannot evade the equitable demand of complainants. Whether this power was capable of being executed separately by Samuel Savage, or whether, for want of an express devisee, it was incapable of being executed at all, the defendant cannot escape.

An affirmance of the positions for which we contend will increase the amount for which he is answerable; a denial of them will not release him from responsibility. He can only escape by maintaining, that the fraudulent assumption of the character of the trustee of these complainants, the concealment from them of his actings and doings while professing to act as their trustee, the receipt of money in that character, the denial of such receipt, and the conversion of it to his own use, are wrongs which a court of equity is incompetent to redress.

(*Mr. Berrien* here stated and commented on the facts respecting the Kentucky lands.)

In every event, complainants are entitled to a decree for the amount actually received by Samuel Savage, and that with compound interest. It may be admitted that complainants had no title to the land which they could have enforced, that they have obtained by compromise what they could for the land; still, the money received by him was their money; it diminishes the amount which they obtained by the compromise, it was paid by the tenants of the land to him, professing to act as their trustee; it was received by him in that character and has been converted by him to his own use, and fraudulently withheld from them. A court of equity will not permit him thus to abuse the trust which he assumed.

An executor is liable for the value of an estate sold by him without authority. *Smith et al.* v. *Smith's Executor*, 1 Desau. (S. C.), 304; 1 Paige (N. Y.), 147; 6 Id., 355. He is liable to compound interest in case of fraud or wilful neglect. *Schiefflin* v. *Stewart*, 1 Johns. (N. Y.) Ch., 620; *Myers* v. *Myers*, 2 McCord (S. C.) Ch., 266; 1 Hopk. R., 423; 2 Johns. (N. Y.) Ch., 1.

Defendant cannot be protected by the statute of limitations from a decree for this amount. The bill charges, and the evidence proves, that this transaction was fraudulently concealed from complainants, and there is evidence to sustain it. Fraud and trust are not within the statute of limitations, as

it does not begin to run until the fraud is discovered. *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch., 122. There is an express allegation of the bill as to the time when the fraud was discovered.

Nor can the question of jurisdiction ever arise, as to this part of the case. Savage never acted under the authority of any court of Kentucky, which may be supposed to have had exclusive jurisdiction of this matter.

*It is submitted, then, that on this part of the case we are entitled at least to $2,118.00, with interest thereon at six per cent from 21st July, 1818, compounding the same. [*259

As to the estate in South Carolina.

(*Mr. Berrien* here went into a minute examination of the accounts, which is omitted, as the opinion of the court did not consider the question open.)

To protect himself from this claim, defendant relies on several grounds:—

1. That he was not liable to suit in Alabama.
2. That he made a final settlement.
3. The statute of limitations, and lapse of time.

The argument against the jurisdiction of the Circuit Court of Alabama has been already considered.

The final settlement. A bare inspection of the accounts will show that it was not final. It was not so recognized by the ordinary, but styled an "account current," and so recorded by the ordinary. The payment of the balance due to Hutchinson, if he had had power to receive it, would not make it a final settlement. Hutchinson did not so receive it. His receipt is merely for the actings and doings of Savage up to the date, as per his "account current," not "final settlement." To make it a final settlement he should have charged himself with the amount of sales, and interest on each note until it was paid, for the notes given at the sale bore interest.

2. The amount of the notes and open accounts found at the time of Taylor's death, and interest on the former, which came to Savage's possession.

3. If any of these were desperate, this should have been stated.

4. He should have charged himself with interest on the annual balances remaining in his hands.

Instead of this, it was a mere annual account current, crediting such receipts as Savage chose to acknowledge, and charging such payments as he alleged to have made. All that the ordinary did was to examine the vouchers for the

payments. He could make no final settlement, because there was no exhibit of the assets.

As to the statute of limitations. Fraud and trust are not within the statute; it does not begin to run until the fraud is discovered. *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch., 122; 3 P. Wms., 144, 145; 2 Story, Eq. Jur., § 1521. The circumstances must be forcible to induce the court to make lapse of time a bar to the claims of heirs and legatees for an account and settlement of the estate. *Gist* v. *Cattel*, 2 Desau. (S. C.), 53. Infancy and coverture will prevent the statute from running. The children of Samuel Taylor were infants; Mary Taylor (Rainey) was a feme covert. Respondents urge, that complainants are barred by the statute of limitations of Alabama, because they did not sue there within six years, and deny the *right to sue there at all. Specific allegations in the bill of fraud, showing when they were discovered, are equivalent to a general allegation that they were only discovered within six years.

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As to interest. An executor is chargeable with interest on the annual balances kept in his hands, unless they are necessarily kept for the purposes of the estate. *David* v. *Eden*, 3 Desau. (S. C.), 241; *Benson* v. *Bruce*, 4 Id., 463; *Walker* v. *Bynum*, 4 Id., 555; *Jenkins* v. *Ficklin*, 4 Id., 369; 2 Hill (N. Y.), 561, in note.

Mr. Sergeant, for Savage's administrator, replied to *Mr. Berrien*. He commented upon the long time that had elapsed since the final settlement of the estate, upon the cases before referred to in 14 and 15 Peters, and contended that before the complainants below could recover any thing on account of the Kentucky lands, they must establish three propositions;—1st. That Taylor owned the land; 2d. That he devised it; and, 3d. That the executors had power to sell and did sell. Each one of these propositions he denied, and argued upon at great length. The deed to Taylor, he contended, contained a use which was immediately executed and vested the title in the heir of Forbes, who was some person in Germantown. The land must therefore have escheated. 2. Taylor did not devise the land. He might have done so specifically, but did not. 3. The executor had no power to sell. The *Case of Northup*, in 15 Peters, is an exposition of the law upon this subject. The court in Alabama had no jurisdiction over a foreign executor. An executor can neither sue nor be sued in another State.

Mr. Justice WOODBURY delivered the opinion of the court.

The original proceeding in this case was a bill in equity. The complainants are heirs and devisees of William F. Taylor, being aliens and resident in Scotland. He was a naturalized citizen of South Carolina. The respondent was George M. Savage of Alabama, prosecuted there as executor of Samuel Savage of that State. The claim set up in the bill was, that William F. Taylor, before his death in A. D., 1811, made a will, devising the residue of his estate, after the payment of a few legacies, to the complainants, directing all his property to be first sold and converted into money, and making the said Samuel Savage one of his executors, associated with three others. It was further alleged, that the business was divided between them, and each had settled for what he took in charge, except Savage, who had not accounted fully for the property received by him in South Carolina, or the proceeds of certain lands of William F. Taylor in Kentucky sold by Savage, and that by his negligence large quantities of other lands situated there had been lost.

The original answer denied that the executors took out letters testamentary, except in South Carolina, or assumed any trusts as to *the property of the testator beyond the limits of that State, or ever proved the will in Kentucky. It also denied that any part of William F. Taylor's property in South Carolina had not been duly accounted for. As to lands in Kentucky, it averred that the testator owned none, and, though he set up some title to about 4,400 acres, that it was invalid, and was compromised and released by an agent of the complainants in A. D., 1836. That, as the latter were aliens, the title in the mean time had escheated to the State; the executors having, as alleged, only a bare power to sell, and some of them dying before A. D., 1818, this power could not be exercised by the others. And though it admitted, that Samuel Savage in that year executed deeds of about one fourth of the land claimed by the testator, receiving a small consideration therefor, yet it contended that no title passed thereby, and that no court out of the State of South Carolina had any jurisdiction over the matter. The statute of limitations was also pleaded to all the claims. [*261

Some other particulars, and some amendments of the answer, which may be found material in the progress of the inquiry, will be noticed as occasion shall require.

A preliminary question has been raised in this court, in consequence of what had taken place in the progress of the

cause, which it may be proper to dispose of first. After judgment had been rendered in the Circuit Court in favor of the complainants for a portion of their claims, and before an appeal was taken, George M. Savage, the executor of Samuel, was removed, and Vincent M. Benham appointed administrator *de bonis non* of Samuel Savage, with the will annexed. The cause was then entered in this court, and attempted to be proceeded in, but was directed to be remitted to the Circuit Court in order first to make Benham a party (1 How., 282, and 2 Id., 395). This having been done, the case came here again, and now it is objected, at the threshold, to any examination of the original questions in the case, that an administrator *de bonis non* is not liable for assets in the hands of the deceased executor. See *Grant* v. *Chambers*, 4 Mass., 611; *Alsop* v. *Marrow*, 8 Conn., 584; 1 Serg. & R. (Pa.), 549; 1 Gill & J. (Md.), 207; and other cases cited.

But if the correctness of these decisions be not doubtful at law, they may require several exceptions and limitations in equity. See *Blower* v. *Massetts*, 3 Atk., 773; 2 Ves. Sr., 465; Mitf. Pl., 64, 78; 2 Vern., 237; *Fletcher's Administrator* v. *Wise*, 7 Dana (Ky.), 347; 1 How., 284, in this case. And it is clear, that under a statute of Alabama, which must, by the thirty-fourth section of the Judiciary Act, govern this case, the objection cannot be sustained. This statute provides, that "where any suit may have been commenced, on behalf of or against the personal representative or representatives of any testator or intestate, the same may be prosecuted by or against
*262] any person or persons who *may afterward succeed to the administration or executorship; such person or persons may, at any time, be made parties, on motion, and the cause shall proceed in the same manner, and judgment therein be in all respects as effectual, as if the same were prosecuted by or against the parties originally named." Passed September 4th, 1821. See Clay Dig., 227.

The grounds or causes for relief presented in the bill are next to be examined, and are two. One is the claim on account of an alleged failure by Samuel Savage to settle, as executor in South Carolina, for a debt due from himself to William F. Taylor, and some other debts collected there, with proper interest thereon. This is the first ground on the merits; and it may be better considered separate from the second one, which is the amount demanded for alleged neglects and receipts of money by Savage in relation to the lands situated in Kentucky. The property left by the testator in South Carolina was held in his own right, and the proceeds of it were collected by the executor by virtue of his letters testa-

mentary. The first objection interposed to the claim respecting that is, that in point of fact nothing is shown to have been due or collected there which the executor did not account for, and finally settle and pay over the balance, April 22d, 1818. Another is, that if any thing collected there and then omitted, or not since paid over, should now be accounted for, it ought to be in the State of South Carolina, where the letters issued, and not in Alabama. Or, at all events, that some action must first be had in South Carolina, and the account re-opened, and the new matters examined and charged there upon Samuel Savage, one of the original executors, before he or George M. Savage, his executor, can be prosecuted elsewhere for the amount. The following cases may be referred to in support of such a position. *Vaughan et al.* v. *Northup et al.*, 15 Pet., 1; 14 Id., 33; Story, Confl. of L., 513; *Aspden et al.* v. *Nixon*, 4 How., 467; *Carmichael* v. *Ray*, 1 Rich. (S. C.), 116. While others may be seen against it in 14 Pet., 116; 15 Id., 119; 2 Wash. C. C., 338.

But it is to be recollected, that the statute of limitations is pleaded against this no less than the other claim; and hence, if, on examination, that statute, or the great length of time which has elapsed since 1818, should be found, under all the circumstances of the case, to render a recovery of any part of this claim illegal or inequitable, a decisive opinion on the other points just mentioned will become unnecessary.

We therefore proceed to inquire into this first.

The settlement in 1818 seems to have been a final one; the balance was paid over to an agent of the plaintiff then present; and the executor, Samuel Savage, soon after left the State, and, for aught which appears, never returned again. The statute, if running at all as to the matters in South Carolina, should, therefore, as a *general principle, begin in 1818; and any special excuse for not suing the [*263 executor within six years for any thing not then accounted for, such as coverture, minority, or residence abroad, ought in equity as well as law to have been set up in the bill originally (7 Johns. (N. Y.) Ch., 74); or by an amendment of it, allowed after the answer, instead of a special replication, as provided by the 45th rule of this court. See *Marstaller et al.* v. *M'Clean*, 7 Cranch, 156, and *Miller* v. *McIntyre*, 6 Pet., 64.

But, notwithstanding this omission, as some doubts exist whether the statute of limitations can technically apply to a claim situated like this, we have looked further,—to the circumstances of laches and long neglect by the complainants, independent of the statute. And they seem to us to operate in equity very conclusively against going back of an

executor's account, thus formally and finally settled, after the lapse of twenty years and the death of the parties concerned. *Gardner* v. *Wagner*, 1 Baldw., 394, 454. It must be a very strong case of fraud, proved in such a settlement, or of clear accident or mistake, which could ever make it just, under such circumstances, to reopen and revise it. 9 Leigh (Va.), 393.

Considering, then, that the agent of the complainants, present at the final settlement of the account and receiving the balance, had, for aught which appears, a full opportunity to know all the circumstances, and make objections if he pleased, and that no fraud or mistake is shown in the settlement, whatever error in law may have happened in computing interest, we consider it as a very proper case for length of time to bring repose. In support of this may be seen the following cases. 1 Sch. & L., 428; 2 Id., 309; 10 Wheat., 152; 1 Madd. Ch., 99; 2 Id., 308; *Miller* v. *McIntyre*, 6 Pet., 66, 67; *Cholmondely* v. *Clinton*, 2 Jac. & W., 1; 9 Pet., 62; 6 John. (N. Y.) Ch., 266; 7 Id., 90.

The other claim for the money received by Samuel Savage, on account of his conveyance of a portion of the lands situated in Kentucky, and to which William F. Taylor set up an interest, rests on principles entirely different, both as regards the title of Taylor and the responsibility of Savage. It does not seem to have been considered fully, heretofore, that those lands did not belong to William F. Taylor, like the rest of his property in South Carolina, absolutely as his own in fee. They came to him by a deed in trust for others, from Mary Forbes, administratrix of William Forbes, who was uncle of William Forbes Taylor, and a naturalized citizen of Pennsylvania, dying without issue except a son, Nathaniel, who also died without issue after William F. Taylor's death in A. D., 1811, and before September, 1815. The facts in the case do not seem to fix the time with any great certainty. These lands, amounting to about 4,400 acres, had been conveyed to William Forbes in fee, in A. D., 1786, by one Daniel Broadhead, and by Forbes to John Philips in A. D., 1794.

*264] They seem to have remained in Philips's *hands till June 3d, A. D., 1802, when he conveyed them to the said Mary, the administratrix of William Forbes, with the following limitation in the deed, viz.:—"in trust, nevertheless, to and for the only proper use and behoof of the right heir or heirs of the above-named William Forbes, deceased, in such way and manner as such heir or heirs may order, direct, and appoint."

On the 17th day of September, 1805, she, as before men-

tioned, conveyed them to William Forbes Taylor, the nephew of her husband, and his only heir or relative naturalized in this country, except the son Nathaniel, the rest being aliens in Scotland, and the son in such health as not likely long to survive. The lands were, therefore, in danger of escheating to the State of Kentucky, or a part of them at least, unless so conveyed as to pass an interest to some person here, which could be held in behalf of those heirs who might reside abroad, so that their shares might not be lost or forfeited. The limitation in the deed to William F. Taylor from Mary Forbes was the same in form as that in the conveyance to her, except the clause creating the trust begins "in witness nevertheless," instead of "in trust nevertheless." Whether this is an error of the press, or in copying, or an intended alteration, is not stated, but it seems not to have been contended in argument, that any different meaning was designed to be attached to the expression. After receiving such a conveyance for such a purpose, it appears that in 1808, William F. Taylor instituted thirty-three suits in ejectment in the State of Kentucky against settlers on these lands, which were pending at his death in A. D., 1811. But, as the actions were in the name of nominal lessees, they did not abate by his death, but continued on the docket till a recovery was had in all of them, in January, 1818.

Prior to this recovery, and subsequent to the death of William F. Taylor in 1811, it does not appear that any of his executors, or any of the heirs of William Forbes, or any of the devisees of William F. Taylor, did any thing respecting these lands, except this. Samuel Savage, in his administration account rendered in December, 1812, charged for a journey to Kentucky in relation to them. And on the 14th of September, 1815, Mary Taylor and her husband gave a power of attorney to Patrick McDowell and Samuel Taylor, to collect her share not only in the estate of William F. Taylor, but in the lands in Kentucky of which she claimed to be one of the heirs, in conjunction with Samuel Taylor, from Nathaniel, the son of William Forbes, and their mother Elizabeth. Samuel Taylor soon after, in 1816, visited this country, and on the 2d of April in that year appointed Adam Hutchinson and Peter Bennock attorneys for himself and sister, not only to collect and receive what was due to them from the estate of William F. Taylor, but to prosecute all actions necessary to recover the real estate in Kentucky belonging to him and his sister. But notwithstanding this, and not *exactly in keeping with it, on the 26th of September, 1817, Samuel Savage, rather than these [*265

attorneys, writes a letter to Samuel Taylor about the Kentucky lands, as well as the estate of William F. Taylor in South Carolina, then unsettled. And to show the further progress as to these lands after the recoveries in 1818, it does not appear that any of the heirs or their agents took possession of them under the judgments, or did any thing in respect to them till 1837. But, on the contrary, Samuel Savage visited Kentucky in July, 1818, having removed from South Carolina to Tennessee in May previous, and sold about one fourth of the lands to the occupants for $2,118, calling himself, in the deeds, "surviving executor of the last will and testament of William Taylor," and "authorized" to sell by the will. The other occupants, who did not buy of him, took out soon afterwards injunctions against the judgments recovered, and continued to possess the lands peaceably till William Primrose, an attorney of the complainants, visited Kentucky in 1837 to look after their interests.

The previous special attorneys had not interfered, as Hutchinson, one of them, soon died, and Bennock, the other, declined to act. And Samuel Taylor, in letters to him in 1824 and 1825, inquiring, among other things, if Savage had returned to South Carolina and exhibited any further account of his doings in the ordinary's court, makes no mention of the Kentucky lands.

Primrose, soon ascertaining that in 1818, Savage had sold about eleven hundred acres of them, and the rest had been suffered to remain in the possession of the former occupants, persuaded the latter to give him something more for a release or quitclaim, but a sum, including what had been paid to Savage, not at all equal to their full value.

It is a very important fact, in connection with this arrangement, that Primrose, though at first denying the validity of Savage's doings, was compelled, in order to effect a compromise with the occupants and obtain something more on a settlement, finally to agree, under his hand and seal, in behalf of the plaintiffs, "as far as it is in their power to do so, to ratify and confirm the deed made as aforesaid by the said Savage," but "reserve to themselves the benefit of all claims they may have against the said Savage or his representatives for the consideration which the said Savage received for the sale of the land aforesaid." After executing the releases, he visited Samuel Savage, in Alabama, and demanded of him the money he had received in behalf of the heirs, and indemnity for injuries they had sustained by his alleged neglect in respect to all the lands.

Another material circumstance is very imperfectly stated

in the record; but it is probably thus. When William F. Taylor died, in 1811, both Nathaniel, the son of William Forbes, and Elizabeth, *the sister of William Forbes, being the mother of Taylor, were aliens. [*266

On these facts, it is next to be decided, whether the interests of the complainants were such in the lands in Kentucky, when Samuel Savage sold a part of them, in 1818, as to make him liable to the complainant for his conduct, wherever he might reside; and, if so, to what extent. It is first manifest, from a part of the statement, that the interest of William F. Taylor, at the time of his death, was only that of a trustee in these lands, and not as the owner of any portion of them in his own right. But still, in that capacity, he had power by his will to direct the sale of them by his executors, and into whose hands the proceeds should afterwards be placed, to be held, of course, for the benefit of the true *cestui que trusts.*

The clause in his will, bearing on the sale, is,—"I do hereby order, will, and direct, that on the first day of January next after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or *may be any wise belonging to me,* be sold."

This undoubtedly meant to empower the executors to sell the land he held in trust, as well as that in fee, by including any property that may be "any wise belonging to me." But what interest was thus vested in the executors concerning it? A mere naked power to sell? or a power coupled with a trust? or merely a power coupled with an interest? These are necessary inquiries as to the question made in the case, that these lands have escheated to the State of Kentucky, and also are useful, if not necessary, towards settling the validity of the sale by Savage, and the place where, if liable at all, he can be made to account for the proceeds. To determine these inquiries, it will be necessary to look further into the will.

In that, after directing the payment of a few small legacies out of the proceeds of his property, he proceeds,—"I do hereby order, give, grant, and devise all the remainder or residue of my estate which shall remain after paying the before-mentioned legacies to my dearly beloved brother, Samuel Taylor," &c., "and to my beloved sister, of the same place, share and share alike, provided they shall be both alive at the time of my decease and have issue, which issue, after their respective deaths, shall share the same equally," &c. On this and the previous provision in the will, coupled with the facts which have been mentioned, we consider the law to

be, that William F. Taylor, taking this property by a deed which made it an express trust in his hands for the heirs of William Forbes, held it as trustee for them till his death. He then virtually devised the trust and the lands to the complainants, by directing that the lands be sold, and, after discharging some special legacies, the proceeds be paid over
*267] to the complainants, as his residuary legatees. *The executors were thus invested with a power to sell, coupled with a trust; and the residuary legatees thus became trustees to the heirs of William Forbes. To identify those heirs is somewhat difficult, but is very important to a true construction of the will. Probably, in 1810, they were his son Nathaniel, who, dying between that period and 1815 without issue, his grandmother, Elizabeth Forbes, succeeded to him; and, on her death about that time, the complainants, her only surviving children, succeeded to her. As all these, except Nathaniel, were aliens, and he was in feeble health in 1811, the paramount intention of the testator doubtless was to prevent an escheat of this and his own property. From consideration of affection, as well as duty, he must have desired to secure both that and his own estate free from escheat in the hands of those near relatives likely soon to be the heirs both of William Forbes and himself.

Either of two constructions of his will would accomplish this object. The one we have just adopted, considering him as devising the proceeds of the lands, and hence their title, to his brother and sister, subject to a power in the executors, coupled with a trust, to sell them, and pay certain legacies; or another, which would consider the power of the executors as one coupled with an interest, and vest the title at once in them for the purpose of selling the lands and discharging the small legacies and debts, if any, but holding the proceeds in trust to be paid over to his brother and sister, for the benefit of the heirs of William Forbes, whomsoever they might then happen to be. See 2 P. Wms., 198; 8 Ves., 437; Lew. Trusts, 234; *Peter* v. *Beverly*, 10 Pet., 533. One of these seems, also, to have been the construction put on the will by Samuel Savage himself, as he proceeded to visit Kentucky twice to discharge his trust in relation to these lands, and finally sold about a fourth of them as surviving executor, which he could not have done honestly, unless deeming himself possessed of more than the naked power which his executor in his answer now sets up. In order to survive to him, it must have been a power coupled either with a trust or an interest. See cases, *post*. To show that the executors, by such a devise, became possessed of a power coupled with a trust at least, reference

may be had to the following cases besides those already cited. 1 Atk., 420, 469; 2 Johns. (N. Y.) Ch., 254; *Clay et al.* v. *Hart*, 7 Dana (Ky.), 1; Sugd. Powers, 95, 167; 3 Co. Litt., 113, note, 146, 181, *a*; 2 Story, Eq. Jur., § 790; 5 Paige (N. Y.), 318; *Zebach* v. *Smith*, 3 Binn. (Pa.), 69. One of the tests on this subject is, that a naked power to sell may be exercised or not by the executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust. 7 Dana (Ky.), 1; 10 Pet., 533; 12 Wend. (N. Y.), 554; 2 Story, Eq. Jur., § 1070; 10 Ves., 536.

*There are some conflicting cases on this subject; but it is not necessary to review them again, it having been so ably performed by Thompson, J., for this court in *Peters* v. *Beverly*, 10 Pet., 565. There, as here, the executors were not expressly named as the persons who were to sell the land, yet, say the court, "it is a power vested in them by necessary implication." See also 2 Sim. & S., 238; 2 Story, Eq. Jur., § 1060; 1 Atk., 420; 15 Johns. (N. Y.), 346; 4 Kent, Com., 326; 2 Johns. (N. Y.) Ch., 254; 4 Hill (N. Y.), 492. There, as here, it was also contended, that if they had the power to sell it was a naked one, and could not survive; but the court say, if they had another duty to perform under the will, with the proceeds, it was a power coupled with a trust or an interest, and survived. 10 Pet., 567; 15 Johns. (N. Y.), 349. And the only difference is, that the subsequent duty to be performed there was the payment of debts, and here it was to pay over the money as legacies, and of course after the payment of any existing debts out of it. [*268

If William F. Taylor, when making his will, supposed that he, as trustee of this land, could direct the proceeds to be paid over to others than the heirs of William or Nathaniel F., the devise would none the less show his intent to pass to the executors a power to sell coupled with a trust; and they would none the less take it coupled with a trust. Indeed, if it was necessary, in a case like this, to carry into effect the leading object of the testator in the will, to consider him as granting to the executors a power coupled with an interest, rather than one coupled with a trust, it would not be difficult to sustain such a construction in a court of equity, as we have before intimated. Courts, in carrying out the wishes of testators, the pole-star in wills, are much inclined, especially in equity, to vest all the power or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it. 4 Kent, Com., 304, 319; 10 Pet., 535; *Schauber* v. *Jackson*, 2 Wend. (N. Y.), 34; *Bradstreet* v. *Clarke*,

12 Id., 663; *Bloomer* v. *Waldron*, 3 Hill (N. Y.), 365; *Oates* v. *Cooke*, 3 Burr., 1684; *Jackson* v. *Martin*, 18 Johns. (N. Y.), 31; 1 Ves. Sr., 485; *Coster* v. *Lorillard*, 14 Wend. (N. Y.), 299. They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished. *Shelly* v. *Edlin*, 4 Ad. & E., 585; *White* v. *Simpson*, 5 East, 164; 1 Barn. & C., 342; 5 Taunt., 385. Though the distinctions between these different powers are not always well preserved, no doubt exists that a power coupled with an interest may be inferred by obvious implication from the whole will, as the fee not being at once vested elsewhere, and it being necessary to have it in the executors to effect the general design (*Jackson* v. *Schauber*, 2 Wend. (N. Y.), 1, 54, 55, overruling s. c., 7 Cow. (N. Y.), 193), as well as from the usual course, which is by an express devise to the executors. *Brad-*
*269] *street* v. *Clarke*, 12 Wend. (N. Y.), *665, 667. Nor is it of any consequence how small the interest be. *Osgood* v. *Franklin*, 2 Johns. (N. Y.) Ch., 20; *Bergen* v. *Bennett*, 1 Cai. (N. Y.) Cas., 16; 2 P. Wms., 102. It is enough if only to distribute the proceeds as here, or to take the rents or use for the benefit of others. Same cases, and 14 Johns. (N. Y.), 555; *Zebach* v. *Smith*, 3 Binn. (Pa.), 69. The interest, too, may be equitable or legal. *Hearle* v. *Greenbank*, 3 Atk., 714; 2 Johns. (N. Y.) Ch., 20. And it is an interest not required to yield a profit or gain, but any title in the estate itself, the thing to be sold. *Hunt* v. *Rousmanier*, 8 Wheat., 174, 206. Being given by the will, when it is a power coupled with an interest, and the conveyance under it being by and through the will, it is of course for the use of the person designated in the will, as if it was a devise over to him. And if the whole scope and design of the will could not otherwise be accomplished, it might not therefore be unjustifiable in a court of equity, in a case like this, to let the title vest in the executors first, for the purpose of being sold and turned into personal estate, for the alien legatees, in order to avoid the very escheat now set up by the respondent. *Craig* v. *Leslie*, 3 Wheat., 576, 577; 1 Ves. Sr., 144, 485; 4 Kent, Com., 304, 310, note; 14 Wend. (N. Y.), 268. Indeed, a court of equity, if it should appear necessary, in order to avoid an escheat, and to enforce any apparent devise of the testator when trustee, directing land to be turned into money and to go to certain legatees, or *cestui que trusts*, will look to substance rather than form, will consider the act as done at once, which is directed to be done, and the land as money,

and thus to be passed to those entitled to it.[1] *Peter* v. *Beverly*, 10 Pet., 533, 563; 3 Wheat., 563; 5 Paige (N. Y.), 318; *Bogert* v. *Hertell*, 4 Hill (N. Y.), 495; 2 Story, Eq. Jur., § 790; Newl. Contr., 48 to 64, and authorities cited.

But as the title here can be considered as passing to the complainants at once, leaving only a power coupled with a trust in the executors, and still accomplish the object of the testator in preventing an escheat, we are inclined to adopt that construction of the will as the safer one, amidst several conflicting authorities and opinions in relation to this question. See some of them in 4 Kent, Com., 321, note, 5th ed. In such cases, till the sale is made, the title usually vests in the heirs, if no other intent is manifest. *Jackson* v. *Burr*, 9 Johns. (N. Y.), 105, 106; *Denn* v. *Gaskin*, Cowp., 661. But where it is given by devise, as here, and the devisees were not the *cestui que trusts* and heirs as to those lands when he died, it is proper that the title should be considered as passing by devise, and as being in the complainants by devise rather than descent. *Jackson* v. *Schauber*, 7 Cow. (N. Y.), 197; Cowp., 661; 8 Wheat., 206, 207; 2 Wend. (N. Y.), 34; *Coster* v. *Lorillard*, 14 Wend. (N. Y.), 326. And the more especially is it so, when, if the heirs took it as heirs, it might escheat.

The case of *Jackson* v. *De Lancy*, 13 Johns. (N. Y.), 555, reviews most of the cases connected with this question, and comes to the *conclusion, substantially, that the title [*270 to the trust estate would pass in a case like this to the residuary legatees, and be held by them for the *cestui que trusts*. See the cases there cited, and among them *Braybroke* v. *Inskip*, 8 Ves., 417; 2 P. Wms., 198; *Ex parte Sergison*, 4 Ves., 147; 1 Meriv., 450; 5 Pick. (Mass.), 112. See also *Dexter* v. *Stewart*, 7 Johns. (N. Y.) Ch., 55. The better opinion is, that a trust estate always passes in a general devise like this to the residuary legatees, if no circumstances appear to indicate a contrary intent. *Braybroke* v. *Inskip*, 8 Ves., 417, 436; 3 Id., 348; 4 Id., 147; 13 Johns. (N. Y.), 537; *Ballard et al.* v. *Carter*, 5 Pick. (Mass.), 115; *Marlow* v. *Smith*, 2 P. Wms., 198, 201. Here, the circumstances fortify the idea, rather than impair it, that the trust estate was intended, in the end, to pass to the residuary legatees, as they were then probably supposed to be the *cestui que trusts*, and in fact became so before the devise took effect.

Another reason is, that the devisees would, if not *cestui que trusts*, hold the estate for them, and be bound to account for

[1] FOLLOWED. *Cropley* v. *Cooper*, 19 Wall., 174.

it to them, so as to make it safe. *Marlow* v. *Smith*, 2 P. Wms., 201.

This view of the case disposes first of the point made, that these lands had, before the sale by Savage, escheated to the State of Kentucky. It was hence argued that they could not be sold by him, though no office had been found, the respondent considering an escheat good without any office found. *Montgomery* v. *Dorion*, 7 N. H., 480; 6 Johns. (N. Y.) Ch., 365. But that is correct only as to land cast by descent on an alien. 7 Cranch, 629. For, as to land taken by devise or purchase, an alien can always hold it till office found. *Knight* v. *Duplessis*, 2 Ves. Sr., 360; Co. Litt., 2, 6; Powell Dev., 316; *Hubbard* v. *Goodwin*, 3 Leigh (Va.), 512; 3 Wheat., 589; *Governeur's Heirs* v. *Robertson*, 11 Id., 332, 355; *Fairfax* v. *Hunter's Lessee*, 7 Cranch, 618.

It will be seen, on a very brief examination, that the idea of a descent cast upon aliens of these lands, on the death of William F. Taylor or Nathaniel Forbes, cannot be sustained under the opinions we have just expressed. The aliens took them by devise, and not by descent, in either of the two constructions of the will which can be at all vindicated. As a general principle, too, in all cases, a court of chancery will not raise a use "by implication," in an alien, so as to endanger the estate, but will rather pass a title to the executors in trust. 2 Wash. C. C., 447. So it has been held that, if it can be avoided, a court will not vest the estate in an alien by construction, in order to have it escheat, when otherwise it would not. 3 Leigh (Va.), 513, and cases cited.

We are prepared next to see whether Samuel Savage or his representatives are liable to account for this property in Alabama, provided he is chargeable anywhere. Because, if not so liable in Alabama, this part of the case must fail for want of jurisdiction in the State in which the proceedings were instituted; and the further questions as to his liability need not be examined.

*271] *First, then, it happens, that though the heirs of Nathaniel Forbes and Elizabeth are the same persons here as the residuary legatees of William F. Taylor, yet they take an interest in the Kentucky lands and their proceeds, in a different right and for a different purpose from what they do in the property of William F. Taylor held in his own right. It happens, too, that the interest they thus take is derived from the deed by Mary Forbes to William F. Taylor, and not through the will of the latter, except as directing the trust property to be sold by his executors and paid over to them. It is important to observe also, in this connection, that their

taking of this property and the sale of it are neither of them by virtue of any letters testamentary issued in South Carolina; that the property is not assets of William F. Taylor collected or to be accounted for there; and as the sale made by Samuel Savage of a part of these lands was made in a different State, and of property situated in a different State, and the proceeds of it never carried into South Carolina, and the sale made after he had removed therefrom and closed up his administration there, no reason exists for making him account in that State for the sale. See 1 Rich. (S. C.), 116; 2 Wend. (N. Y.), 471; 6 Pick. (Mass.), 481; 3 Mon. (Ky.), 514; Story, Confl. of L., § 523. So, not having taken out letters testamentary in Kentucky, or even proved the will there, and residing elsewhere, he could not be sued in that State. *Fletcher's Administrator* v. *Wier*, 7 Dana (Ky.), 348. It follows, then, that if liable at all for the proceeds of the sale of this trust property, being not that owned by the testator in his own right, and the sale made by virtue of a power in the will, and not of letters testamentary, he was liable in Alabama, the State where he had his domicile, the State whither he carried the proceeds,—where the demand was made on him by the complainants, where George M. Savage, his executor, took out letters on his estate, and where alone George M. Savage could be proceeded against for any claim against his testator. *Bryan et al.* v. *McGee*, 2 Wash. C. C., 338; *Trecothick* v. *Austin et al.*, 4 Mason, 29.

Being liable, then, in Alabama, if at all, for the acts done in respect to these lands, it is next to be considered whether Samuel Savage or his representatives are responsible for them to the complainants at all, and if so, to what extent. When applied to in 1838, by Primrose, the attorney of the complainants, to pay over the proceeds of his sale, Savage admitted that in 1818 he executed releases of about one fourth of these lands, in which he acknowledged a consideration received by him of more than two thousand dollars; that he professed to make the sale and receive the consideration as surviving executor of William F. Taylor, and by virtue of a power in his will, and that he never had accounted for the proceeds since, but contended that the sum actually realized by him was much smaller than that named in the deeds, and objected to pay over any *thing, though not assigning particularly his reasons for the refusal. But the counsel for the respondent now interpose various specific reasons against accounting for those proceeds beside that already disposed of, which questioned the jurisdiction over the matter in Alabama. One of their objections is the want of interest [*272

in the complainants as legatees or *cestui que trusts* to recover. Another is the irregularity, and indeed illegality, of his sale. Another is the small amount received, not exceeding his expenses. And another, still, is the statute of limitations.

But we have already shown that the complainants, as residuary legatees, were entitled to the trust estate under the devise immediately, and, in any permissible view, as soon as it was converted into money, and would be bound to manage and account for it to the true *cestui que trusts*, if they were not so themselves. See before, 13 Johns. (N. Y.), 555, and 8 Ves., 417, 436, and other cases. Being now, however, *cestui que trusts* themselves, as well as devisees, their interest in the proceeds of the sale is beyond controversy, there having been, as already shown, no previous escheat of the lands.

In respect to the informality and illegality of the sale, they are insisted on from its not appearing that all the executors except Savage were then dead, from his not recording the will in Kentucky, and from the verbal denial at first of the validity of his sale by Primrose. But it is to be remembered that this is a bill in equity, that the executors had a power under the will to sell this property, which was a power coupled with a trust. That is not a title to be made out at law under a special statute, where much strictness is required. 6 Mass., 40; 14 Id., 286.

Nor is it only a naked power, not coupled with any trust or interest, where much strictness is also requisite. *Williams et al.* v. *Peyton's Lessee*, 4 Wheat., 79; 10 Pet., 161, and other cases cited. But it is merely a case to show such a sale as may make, in a court of equity, an agent or trustee liable to those for whom he acts. *Minuse* v. *Cox*, 5 Johns. (N. Y.) Ch., 441, and *Rodriguez* v. *Hefferman*, Id., 429.

Now it appears that Savage, in his deeds of this land, averred himself to be surviving executor of Taylor's will. And the case discloses the death of two of them, but says nothing of the other, except, in 1824 and 1825, he is referred to as dead "some time ago." Considering him also as then dead, which is the probable inference from these facts, the right of Savage alone to sell under the will would be good. A power to sell, not merely a naked one, but coupled either with an interest or a trust, survives to the surviving executor. *Peter* v. *Beverly*, 10 Pet., 533; Co. Litt., 113*a*, 181*b*; Lew. Trusts, 266; Sugd. Powers, 165, 166; 2 Johns. (N. Y.) Ch., 1; 7 Dana (Ky.), 1; 5 Paige (N. Y.), 46; 2 Story, Eq. Jur., § 1062; 10 Johns. (N. Y.), 562; 8 Wheat., 203; *Jackson* v.

Ferris, 15 Johns. (N. Y.), 346. Several of the States have positive statutes regulating this matter, and usually in this way.

*Again, if all of several trustees decline the trust except one, the estate vests in him, and he is authorized to sell alone. 3 Paige (N. Y.), 420; 4 Kent, Com., 326, *n*; *King* v. *Donelly et al.*, 5 Paige (N. Y.), 46; *In re Van Schoonhoven*, 560; Cro. Eliz., 80; 7 Dana (Ky.), 1; *Zebach* v. *Smith*, 3 Binn. (Pa.), 69.[1] [*273

All the executors in this case, except Savage, declined to have any concern with these lands, and do not appear ever to have done any thing concerning them. It is obvious, likewise, on principle, that where a sale is made under a will, which is merely the evidence of authority or power to do it, the omission to record it will not vitiate the sale, unless recording is in such case required by a local statute. If so required, the statute must of course govern. 9 Wheat., 565; 10 Wheat., 202. Probably the necessity for this must depend entirely on the local laws applicable to the transaction,—the *lex rei sitæ* (2 Hamm. (Ohio), 124; *Kerr* v. *Moon*, 9 Wheat., 570; 7 Cranch, 115),—and not on any general principles of international law applicable to immovable property. If not necessary by those laws, the omission to do it would not be taken advantage of by any one in any case; and if necessary, it would not seem very equitable to let the executor take advantage of it, who himself had been guilty of the omission.

But however this should be decided, looking to the laws of Kentucky, and how far it may be cured by the subsequent proof and recording of the will by Primrose for the complain-

[1] In case of a voluntary assignment, if one of two trustees decline to act, the trust is not thereby destroyed, but the whole estate vests in the other, and he alone is competent to execute the trust. *Scull* v. *Reever*, 2 Gr. (N. J.) Ch., 84; *Crewe* v. *Dicken*, 4 Ves., 100; *Nicloson* v. *Wordsworth*, 2 Swanst., 365; *Adams* v. *Taunton*, 5 Mod., 438. Of course such trustees have a power coupled with an interest, and the rule applies to such. *Hawkins* v. *May*, 12 Ala., 673; *Franklin* v. *Osgood*, 14 Johns. (N. Y.), 527; *Parsons* v. *Boyd*, 20 Ala., 112, 118; *Hannah* v. *Carrington*, 18 Ark., 85; *Williams* v. *Otey*, 8 Humph. (Tenn.), 562; *Matter of Stevenson*, 3 Paige (N. Y.), 420; *Robertson* v. *Gaines*, 2 Humph., 364; *Ellis* v. *Boston &c. R. R. Co.*, 107 Mass., 13. Upon the death of the last trustee, the estate descends to the heirs. *Mauldin* v. *Hewstead*, 14 Ala., p. 708; and if all of them disclaim the trust, the estate vests in the heirs subject to the trust. *Stacey* v. *Elph.* 1 Myl. & K., 195; *Austin* v. *Martin*, 29 Beav., 523; *Goss* v. *Singleton*, 2 Head (Tenn.), 67; *Schenck* v. *Schenck*, 1 C. E. Gr. (N. J.), 174; *Contra* in New York, *Clark* v. *Cryo*, 47 Barb., 597; *McCoker* v. *Brody*, 1 Barb. Ch., 329; *People* v. *Morton*, 9 N. Y., 176; so in Alabama, *McDougald* v. *Cary*, 38 Ala., 320; and in Missouri, *Hook* v. *Dyer*, 47 Mo., 421; but not as to personal property, in New York. *Bucklin* v. *Bucklin*, 1 N. Y., 242. In the cases cited from Alabama, Missouri, and New York, with respect to real estate, the property vests in the court, upon the death of trustees, which appoints new trustees.

ants (11 Pet., 211), and whether it is necessary to take out letters testamentary in Kentucky to make such a sale (*Lewis* v. *McFarland*, 9 Cranch, 151), we need not give any decisive opinion; since this branch of the inquiry, as to the liability of Savage, can be disposed of under a different aspect of the case.

If the land was sold informally by Savage, still it was sold in fact; it was conveyed in the character of surviving executor; the authority for doing it was claimed under the will; the money for it was received in this way; the lands were occupied quietly under his deed for near twenty years; the consideration was never paid back to the grantees, nor by law liable to be, as his deed was without warranty except against those claiming under W. F. Taylor, and, as regards them, was in the end expressly confirmed by his heirs and devisees under the compromise before detailed.

It is true, that their agent at first denied the legality of the sale by Savage, but from its having actually taken place, money been received under it, and the lands occupied in conformity to it so long, he was in the end obliged to compromise and confirm it for much less than the real value of the lands, and expressly reserved the right to resort to Savage for the amount he had received.

On a consideration of these facts, can there be a doubt that it is equitable to make Samuel Savage and his representatives pay over to the *cestui que trusts* the money he thus received on their account? *Can they be allowed to set up his own imperfect doings or neglect as a justification for not paying over what he actually received for them, and still holds? Is he not estopped in equity to deny his liability to the complainants? Have they not suffered in their interests to this extent by his conduct? Have not he and his estate profited to this extent by his sale of their property? These questions can be answered only in one way, and the replies must give a stamp and character to the whole transaction in a court of conscience unfavorable to Savage. Consequently, in this bill in equity between the parties as to a trust, we think it manifestly just that the complainants, as against Savage's estate, are entitled to this money; at least, to the amount adjudged in the court below. 1 Johns. (N. Y.) Ch., 620; 1 Paige (N. Y.), 147, 151; 6 Id., 355; 2 Johns. (N. Y.) Ch., 1; 7 Id., 122. Simple interest in such cases seems proper, and was allowed. 4 Ves., 101; 5 Id., 794; 16 Id., 410. As an analogy for estopping Savage to deny what he has said in his own deed, see *Speake et al.* v. *The United States*, 9 Cranch, 28, and cases in Com. Dig. *Estoppel*, *a*, 2.

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So, "it is a settled principle of equity, that when a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit." *Sweet* v. *Jacocks*, 6 Paige (N. Y.), 365.

So, "every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust." *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch., 110; *Scott* v. *Surman*, Willes, 404; *Shakeshaft's Case*, 3 Bro. Ch., 198.

He is liable, then, first, on the ground that the *cestui que trusts* might confirm the sale and resort to the proceeds, as they finally did in this case. Story, Eq. Jur., § 1262; 2 Johns. (N. Y.) Ch., 442; 1 Id., 581. It is true that such a confirmation must be full and distinct; whereas here a disavowal of it was at first made by their agent, and when it was in the end agreed to be ratified, the act was done on the receipt of additional money.

This, however, would not seem to vitiate it under the reservation made of a right to proceed against Savage for what he had received. The complainants, then, fully confirmed Savage's acts as a sale, just as much as if no further money had been paid. Though they asked for this additional sum, this was no injury to Savage, and should constitute no objection to his paying over to them what his vendees agreed he should, and what he virtually promised to do, when taking the money for their property.

But if this view of the matter was at all doubtful, another ground exists on which he might be made liable to a like extent, and on which the complainants seek to charge him for a much larger amount. The sale by Savage, if not valid and not confirmed, was *still injurious to the complainants. [*275
It gave such a color of title to the tenants, as to prevent the complainants from obtaining any thing more for their lands, but by way of compromise, and then a price in all, including what was paid to Savage, far less than their true value.

A trustee is liable for misconduct or breach of trust or negligence, as well as for money actually received. Jac., 120. And if in these ways he injures the *cestui que trust*, he is liable, whether he himself gains by his misbehaviour or not. Lew. Trusts, 634; 3 Bro. Ch., 198. But when we come to inquire, as the complainants insist, whether Savage was not liable for a much larger sum on this ground than what was

allowed in the court below, we are met by several difficulties. The amount, beyond the money received and interest thereon, rests on estimates somewhat conjectural after so long a lapse of time; and the neglect itself is not so easily fixed with much certainty, from a like cause, and the death of parties preventing explanations, and an extraordinary omission for almost a whole generation by the complainants themselves to bring this business to a close. Savage, also, may have proceeded no further in subsequent years to sell the rest of the lands, and take charge of the judgments which had been recovered, because discovering that Samuel and Mary Taylor, the heirs, had appointed Hutchinson and Bennock special agents instead of himself to manage the Kentucky property. The degree of neglect to be made out for any sum beyond that actually received is also different and greater. When the trustee is made liable for more, it must be, in the language of the books, "in cases of very supine negligence or wilful default." 14 Johns. (N. Y.), 527; Id., 634; *Pybus* v. *Smith*, 1 Ves., 193; *Palmer* v. *Jones*, 1 Vern., 144; *Osgood* v. *Franklin*, 2 Johns. (N. Y.) Ch., 27; 3 Bro. Ch., 340; 1 Madd., 290; *Caffrey* v. *Darby*, 6 Ves., 497. It would hardly be justifiable to find the existence of either of those after such a length of time, obscuring so much by its mists and obliterating so much by death.

Damages, likewise, for mere neglect would stand in a different attitude as to the statute of limitations from what we shall soon see it does as to money held in trust; and if the claim was on account of a breach of trust committed and perfected when the neglect first occurred, it would be difficult to overcome the bar occasioned by nineteen or twenty years since.

As to the remaining objection, under this head, that the sum received did not exceed Savage's expenses, this is not in the first answer, and comes from an executor who could not possess full means of knowing the facts, and is not entitled to so much weight as if it had been put in and sworn to by Samuel Savage himself. *Carpenter* v. *The Providence Ins. Co.*, 4 How., 185, and cases cited there.

Besides this, there is no evidence to support the denial. It *276] is *not accompanied with any exhibit of expenses; and no account for them seems to have been offered in evidence in the court below. To overcome this denial stands the admission in the first answer of receipts, to the extent of three or four hundred dollars, and no set-off claimed; next, the acknowledgment to Primrose of something received; next, the recorded confession in the deed that $2,118 was paid to him; and, finally, the testimony of several witnesses to actual pay-

ments, and the solvency of all the purchasers. But if any doubt existed as to this amount being the proper one, with interest, it would be removed by the proceedings in the District Court, where the account was stated in this manner after an examination by agreement before the judge, and with liberty to except to the account, and no exception taken.

The last objection to the recovery of the amount actually received, with interest thereon, is the statute of limitations. As before intimated, this statute, in respect to money taken in express trust, rests on principles very different from what it might as to damages claimed for a mere neglect of duty, which happened, if at all, near twenty years before any demand or suit. Let it be remembered, that, though this money was received by Savage, as trustee of the plaintiffs, in 1818, yet he never was requested to pay it over till 1837, and that then he first became in default for not accounting for it. Till then he lived remote from the complaints, they being residents in a forein country, and was not obliged to settle for their money in South Carolina as assets belonging to William F. Taylor, in his own right, as has before been shown.

Retaining it, under all the circumstances, till called on by the complainants or their agent, is therefore by no means decisive evidence of any neglect or intention not to account for it, till the demand made by Primrose, in A. D., 1837. Consequently, the statute in relation to this would not begin to run till then, and hence could have created no bar in September, 1838, when this bill in equity was filed. 1 Jac. & W., 87; *Attorney-General* v. *Mayor of Exeter*, Jac., 448; 10 Pet., 177; *Michoud* v. *Girod*, 4 How., 503; *Zeller's Lessee* v. *Eckert et al.*, Id., 289; 3 Johns. (N. Y.) Ch., 190, 216; *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch., 90; *Gist et al.* v. *Cattell*, 2 Desau. (S. C.), 55. The case of *Trecothick* v. *Austin*, 4 Mason, 29, was in this, and some other respects, such as to involve and settle principles similar to what have been laid down in this opinion.

The question of fraud and concealment has also been raised at the bar, not only to aid in charging the respondent, but in obviating the operation of the statute of limitations, as it would if existing. 3 Atk., 130; Hardw., 184; 7 Johns. (N. Y.) Ch., 122; 20 Johns. (N. Y.), 576; 6 Wheat., 181. But as it is not necessary to decide on these, we waive an opinion as to imputations, so difficult to settle correctly after the death of most of the parties and the lapse of a quarter of a century.

There are some exceptions as to the form of the claim and of the bill, that deserve a moment's notice before closing.

*277] *Though the plaintiffs make their claim in both cases against Savage, and would be entitled in the end, in one as legatees, if at all, and in the other as *cestui que trusts* rather than legatees; yet the views already expressed would allow them to recover in both cases as residuary legatees, because the trust passes properly to them under the devise, though accompanied by an obligation to account for the property to the *cestui que trusts*, if they should happen to be persons other than themselves.

The description of the complainants, and of their rights, then, in the bill, is not exceptionable; but the description of the liability of Samuel Savage, which is also objected to, is not so free from imperfection. He acted under William F. Taylor's will in a fiduciary capacity in two respects not exactly the same, but not discriminated from each other in the bill. One was, to sell the lands his testator held in Kentucky in trust, and the other, to sell the lands and the other property, held in his own right, in South Carolina. Notwithstanding this, the variance does not seem to us to be such as, in this stage of the cause, and in a court of equity, imperatively to require an amendment.

The claim in both respects is for the acts of Samuel Savage alone, and is to be recovered from his executor alone, and belongs to the complainants alone. The material facts are alleged, upon which it rests in both respects; and hence, as no objection was taken to this in the answer or other pleadings, it may be regarded as cured now, and more especially in a proceeding in chancery, and where there is enough alleged to indicate with distinctness the subject-matter in dispute between the parties. See 32d section of Act of Sept. 24, 1789 (1 Stat. at L., 91); *Garland* v. *Davis*, 4 How., 131.

It will be seen, that by the course of reasoning we have adopted, and by the points on which our opinions have been formed, it has become unnecessary to decide some other questions presented in this cause in the able arguments of the counsel on both sides. But having decided enough to dispose of the case, and being satisfied that the judgment of the court below was right, however we differ as to some of the reasons assigned in its support, we do not propose to go further into the questions raised, and direct, that in this case the judgment below be affirmed. The other appeal, relating to this matter and argued with it, must consequently be dismissed.

ORDER.

Vincent M. Benham, administrator *de bonis non*, with the will annexed, of Samuel Savage, deceased, Appellant, v. *William*

Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey.

This cause came on to be heard on the transcript of the record *from the District Court of the United States for the Northern District of Alabama, and was argued [*278 by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

William Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey, appellants, v. *Vincent M. Benham*, administrator *de bonis non*, with the will annexed, of Samuel Savage, deceased.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel. On consideration whereof, this court having affirmed the decree of the said District Court in this cause, on the appeal of the respondents at the present term, it is now here ordered and decreed by this court, that this appeal of the complainants be and the same is hereby dismissed with costs.

GEORGE W. PHILLIPS, PLAINTIFF IN ERROR, *v.* JOHN S. PRESTON, DEFENDANT IN ERROR.

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them.

Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error.[1]

Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.[2]

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[1] RELIED ON. *Arthurs* v. *Hart*, 17 How., 12. See also *Paul* v. *Rider*, 58 N. H., 121.

[2] Trial by jury is a privilege that may be waived; and when either party has an opportunity to demand it, and