General Court of Virginia in this cause be, and the same is hereby, affirmed, with costs.

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*170] *THOMAS H. MCCLANAHAN, ADMINISTRATOR OF WILLIAM J. MCCLANAHAN, DECEASED, COMPLAINANT AND APPELLANT, *v.* RICHARD DAVIS, WILLIAM D. NUTT, ADMINISTRATOR OF GEORGE COLEMAN, DECEASED, ELIZABETH BLACKLOCK, THE WIDOW AND RELICT OF NICHOLAS F. BLACKLOCK, DECEASED, NICHOLAS F. BLACKLOCK THE YOUNGER, JANE LOWE, LATE JANE BLACKLOCK, DAVID LOWE, HER HUSBAND, AND ELIZABETH FOX, LATE ELIZABETH BLACKLOCK, THE SAID NICHOLAS F. THE YOUNGER, JANE, AND ELIZABETH BEING THE CHILDREN OF THE LATE NICHOLAS F. BLACKLOCK THE ELDER, DECEASED, DEFENDANTS.

The assent of an executor must be obtained before a legatee can take possession of a legacy. But this assent may be implied, and an assent to the interest of the tenant for life in a chattel inures to vest the interest of the remainder. Therefore, where a bill averred the possession of the subject of the legacy by the life-tenant in pursuance of the bequest in the will, and this bill was demurred to, it is sufficient to raise a presumption that the possession was taken with the assent of the executor.[1]

By the laws of Virginia, where there is a tenancy for life in a slave, with remainder to the wife of another person, the interest of the husband in the wife's remainder is placed upon the footing of an interest in a chose in action. If, therefore, he survives the wife, he may reduce the property into possession at the expiration of the life estate; but if he be dead at such expiration, the property survives to the wife, and on her death passes to her legal representative as part of her assets.

Query, whether the husband or his personal representative is not bound to administer upon the wife's estate, before bringing suit to recover property so situated in the state of Virginia.

Where there was no direct or positive averment that the defendants, or either of them, had any interest in the property claimed, or that it was in their possession, no ground of relief against those parties was shown, and the right to a discovery as incidental thereto, failed also.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and sitting as a court of equity.

The object of the bill was to reclaim the possession of cer-

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[1] Where the property bequeathed is allowed to pass into the possession of the legatee, and remain in his possession for a long time, the presumption of assent will attach. *Whorton* v. *Morange*, 62 Ala., 201; and such assent cannot be arbitrarily revoked. *Eberstein* v. *Camp*, 37 Mich., 176.

[2] S. P. *Hurst* v. *Hurst*, 2 Wash. C. C., 127.

tain slaves, and to compel an account and compensation for the value of certain other slaves, all of which were alleged to be the property of the complainant and appellant, in his character of administrator.

The facts were these:

In 1797, one Elizabeth Edwards, an inhabitant of Northumberland county and state of Virginia, by her last will and testament, bequeathed to her daughter, Sarah Nutt, a certain negro girl named Lavinia, a slave for life, with her future increase, for and during the life of said Sarah Nutt, and at her death to Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix.

In the same year, viz., 1797, the testatrix died, and in June, 1797, the will was duly proved at the court of monthly session, and letters testamentary granted to Griffin Edwards, one of the executors named in the will.

*At some period of time after the death of the testatrix, the record did not show when, Sarah Nutt, the daughter, removed the girl Lavinia from the county of Northumberland to Alexandria, in the District of Columbia, and there sold her to one Nicholas F. Blacklock. After such sale, Lavinia had a numerous family of children and grandchildren. [*171

Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix, intermarried with William J. McClanahan, and died, leaving one child, an infant, who survived its mother but a short time. William J. McClanahan also died after his wife and child, but before Sarah Nutt, without having reduced any of the said slaves into his possession. After his death, the complainant administered upon his estate. The order in which the parties died was according to the following numbers:—

Elizabeth Edwards (1)
|
Sarah Nutt (5)
|
Wm. J. McClanahan (4)=Elizabeth Faunt. Nutt (2)
|
Daughter (3)

Sarah Nutt, the last survivor of the five, died in 1840, and after her death Thomas H. McClanahan took out letters of administration upon the personal estate of William J. McClanahan, and also upon the personal estate of Elizabeth F. McClanahan, his wife; both letters being taken out from Northumberland County Court in the state of Virginia.

In April, 1845, the administrator filed his bill against all the representatives of Nicholas F. Blacklock, who was dead; and also against all those persons who were alleged to have

purchased any of the slaves. The bill recited the above facts, and averred, that, after the decease of the tenant for life, the rightful ownership of the slaves passed to William J. McClanahan, notwithstanding he never had the slaves aforesaid in his possession, by virtue of his intermarriage with, and survivorship of, his said wife and infant daughter, and only child, by the said Elizabeth, his aforesaid wife, according to the form and effect of the statute in such case made and provided, entitled "An act to reduce into one the several acts directing the course of descents," passed the 8th of December, 1792. The said life estate having ceased and determined, as your orator avers, on the day of , 1840, by the death of the said Sarah Nutt, and that your orator, as the administrator of the said William J. McClanahan, deceased, now has good right and title to sue for the recovery and possession of the said Lavinia, and her children and grandchildren, no right of action having accrued until after the death of the said Sarah Nutt.

*172] *The bill then prayed for a discovery of the number of slaves, in whose possession they were, and for an account of the value of their services, &c., &c.

In October, 1845, the defendants filed the following demurrer to the bill:

"These defendants, respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show,—

"1st. That the said complainant hath not, in and by said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is sought and prayed for, from and against these defendants.

"2d. That the said complainant hath not, as appears by his said bill, made out any title to the relief thereby prayed.

"3d. That the said complainant, by his own showing in said bill, is not entitled to the discovery and relief therein prayed, but is barred therefrom by lapse of time, and the statute of limitation, in such cases made and provided. Wherefore, and for divers other errors and imperfections, these defendants humbly demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray hence to be dismissed with their reasonable costs in this behalf expended.

"FRANCIS L. SMITH, *Solicitor for Defendants.*"

In May, 1846, the cause came up for argument, when the court sustained the demurrer and dismissed the bill.

The complainant appealed to this court.

The cause was argued by *Mr. Neale*, for the appellant, and *Mr. Francis L. Smith*, for the appellees.

Mr. Neale, for the appellant, in reply to the first cause assigned for demurrer in the appellees' printed brief, argued, that notice could not have been given the purchasers of the slave Lavinia and her offspring, because those in remainder were kept in profound ignorance of the sale by the life-tenant, until after her death, which happened in the year 1840;—and as to its operating a fraud on the purchasers, he was at a loss to imagine how a charge so foul could be imputed to the appellant, or those whose interests he represented. He thought that the late Sarah Nutt, the life-tenant, was alone properly obnoxious to the imputation of fraud, for that she, and she only, *was concerned in the transaction [*173 That she was entirely regardless of her mother's last solemn bequest, and equally reckless of her own child's legitimate rights; and he asked, was this a "mother's love,"—which, in the beautiful language of poetry, is said to be a "living fountain of undying waters." So far from it, he contended, that the mean and detestable passion of avarice, which converted all the noble and generous feelings of our nature into the meaner passions of the soul, at once, in this case, quenched and dried up forever the holy fountain, which otherwise would have been, as it should be, a perennial stream.

And in regard "to the general policy of the laws of Virginia, in protecting *bonâ fide* purchasers of personal property without notice,"—as reported in 5 Leigh (Va.), 520,—he denies that it applied to the case then under consideration, reminded the opposite counsel of the maxim, *caveat emptor*, and argued, that, while the law had been fully complied with as regarded the will of Elizabeth Edwards, not so as regarded the mortgage mentioned and reported in 5 Leigh (Va.), and that the two cases were entirely dissimilar, and then proceeded to show it by comparing them.

To the second cause of demurrer he insisted, that "every preliminary act necessary to make the plaintiff's title complete" was to be found in the bill. And to the objection, that the bill did not aver the assent of the executor of Elizabeth Edwards, who died in the year 1797, and that, without such assent being averred, an action of detinue could not be sustained, he contended, that the possession of the slave Lavinia.

from the time of the death of the testatrix in the year 1797, by the life-tenant, until her death in 1840, was sufficient presumptive evidence at least of such assent, but at the same time he argued that no such averment was necessary in a chancery suit, but admitted that such assent was necessary, and should be averred, in a court of law. He also contended, that the title to the slaves in remainder vested in Elizabeth F. Nutt at the death of Elizabeth Edwards, and that it also vested in the appellant's intestate, upon his intermarriage with the said Elizabeth F. Nutt; that the possession of the life-tenant was the possession of those in remainder; that the same remark applies with equal propriety to the purchasers, who by the purchase acquired no greater title than Sarah Nutt took under the will of her mother, Elizabeth Edwards; that it was, in technical language, a *possessio fratris;* that William J. McClanahan took by operation of law,—had a constructive possession,—and that no administration was
*174] necessary on the personal estate of Elizabeth F. McClanahan *either by her late husband when living, or by the appellant, who is his administrator. But even assuming *arguendo*, that such administration was necessary, and under it a recovery of the slaves had been effected, in that event her administrator would have recovered and held the slaves, as trustee, for the administrator of William J. McClanahan or his next of kin, which might have caused circuity of suits, or actions, to prevent which is one of the heads of equity jurisdiction. O. R. Code, p. 168, sec. 3; Id., p. 164, sec. 27; 1 Tucker's Bl. Com., book 2, p. 318; 1 Munf. (Va.), 98.

He also submitted, that, if the infant child, under the statute of distribution, succeeded to the property of the mother, if the father, under the third section of the statute of descents, was not the heir of his infant child.

To the plea of the statute of limitations, he relied on the savings of non-residence in said statute as conclusive in favor of the appellant. O. R. Code, p. 107, § 4; Id., p. 109, § 12; Laws of United States, old edition, p. 268, § 1.

And in reply to the forfeiture, for the removal out of the state of the slaves in question, he contended that it applied only to dower slaves, and not to legacies. O. R. Code, p. 191, § 44.

Mr. Francis L. Smith, for the defendants, contended, under the first ground of demurrer, that the plaintiff had not showed himself to be entitled to any relief.

The allegations of the bill are vague and indefinite throughout. There is no distinct and express averment that the

defendants, or either of them, claim or are possessed of the negro woman Lavinia, or her offspring.

The nearest approach to an express charge is in reference to Betsey, but the bill does not expressly aver that she is either claimed or possessed by Davis or Nutt; it is said that she and the children whom she is said to have had, since her sale to Coleman, are in possession of either the one or the other.

There is still more uncertainty as to the other slaves; even Lavinia is not averred to be claimed by either of the defendants, or to be in their possession. But she and her daughter Maria are charged as hiring themselves about the town of Alexandria, and as accounting for their hires with the family of Nicholas F. Blacklock, deceased.

The bill is too loose and uncertain to require any specific answer. The allegations should have been direct and positive, both as to facts and parties. Story Eq. Pl., ed. 1840, §§ 244 to 251, inclusive; also § 510.

*The case made by the bill should have traced the plaintiff's title, and shown his right to recover, with as much certainty as to the substantial facts, as pleadings at law. *East India Co.* v. *Henchman*, 1 Ves., 287; Mitf. Pl., 150; *Ryves* v. *Ryves*, 3 Ves., 343; *McGregor* v. *East India Co.*, 2 Sim., 432; *Hardman* v. *Elames*, 5 Id., 640; S. C., 2 Myl. & K., 732; *Walburn* v. *Ingsby*, 1 Id., 177; *Jerrard* v. *Saunders*, 2 Ves., 186; *Mechanics' Bank* v. *Levy*, 3 Paige (N. Y.), 606. [*175

There must be an actual, not a pretended, necessity for a discovery, presented by a full statement of the case, and not by general averments. *Meze* v. *Mayse*, 6 Rand. (Va.), 660; *Webster* v. *Couch*, 6 Id., 524; *Russell* v. *Clarke's Executor*, 7 Cranch, 69, 89.

A defect in the charging part of a bill cannot be supplied by a subsequent interrogatory. *Parker* v. *Carter*, 4 Munf., 273. Whilst it is admitted, on behalf of the defendants, that there may be cases in which a court of equity can properly entertain jurisdiction for the recovery of slaves, yet they insist that this case does not fall within the rule.

The plaintiff's remedy was in a court of common law. *Armstrong* v. *Huntons*, 1 Rob. (Va.), 323; *Wright* v. *Wright*, 2 Litt. (Ky.), 8; *Bass* v. *Bass*, 4 Hen. & M. (Va.), 478; *Joyce* v. *Grinnals*, 2 Rich. (S. C.) Eq., 259; *Parks* v. *Rucker*, 5 Leigh (Va.), 149.

This is an effort to recover the slave Lavinia and her increase from *bonâ fide* purchasers, holding under Blacklock; the parties in remainder, having failed to give notice of their claim to the slave Lavinia or her increase, which would operate a fraud on such purchasers.

As to the general policy of the laws of Virginia, in protecting *bonâ fide* purchases of personal property, without notice, see *Lane* v. *Mason*, 5 Leigh (Va.), 520.

The second cause of demurrer is, that the plaintiff has not made out any title in himself to the discovery and relief prayed.

Every preliminary act necessary to make the plaintiff's title complete should be averred in the bill, and the mere allegation that his title is complete is not sufficient. 1 Dan. Ch. Pr., mar. page 422, and cases there cited.

Before the title to the slave Lavinia could, under the will of Elizabeth Edwards, be complete in Sarah Nutt or Elizabeth Fauntleroy Nutt, it is indispensable that the assent of the executors to the legacy should have been obtained, and so alleged in the bill. There is no such averment.

See 2 Lomax on Executors and Administrators, § 3, pp. 128 and 129, and cases there referred to, declaring that a *176] legatee of a slave cannot, if the assent of the executor has not been obtained *to the legacy, maintain an action of detinue against one who unlawfully holds possession of the slave; nor will the assent in such case be dispensed with, though no one has taken out probate or letters of administration. *Sutton* v. *Crain*, 10 Gill & J. (Md.), 458; *Woodyard* v. *Threlkeld*, 1 Marsh. (Ky.), 10, 11; *Hœirston* v. *Hall*, 3 Call (Va.), top page 188, side page 219.

But is the title to the slaves in the plaintiff? He must recover, if at all, either because William J. McClanahan, by virtue of his marital rights, during the coverture reduced the slaves into possession, or from his having obtained letters of administration on his wife's estate, not being compelled to make distribution. The bill expressly negatives the first, and is silent as to the second ground. There being no averment that he so administered, we have a right to assume in this argument that he did not.

How else, then, can the plaintiff claim title to the slaves, in his character as administrator of William J. McClanahan?

If there be any outstanding valid title, legal or equitable, as against the defendants, it must be in the personal representative, or next of kin, of the deceased wife, Elizabeth Fauntleroy McClanahan, and if so, the plaintiff cannot maintain this suit. 2 Bl. Com., ed. 1847, p. 433; *Wallace* v. *Taliaferro*, 2 Call (Va.), 447; *Upshaw* v. *Upshaw*, 2 Hen. & Munf. (Va.), 381.

Thirdly, the discovery and relief prayed for are barred by lapse of time and the statute of limitations.

Both of these grounds of defence may be taken advantage

of by demurrer. *Wisner* v. *Barnet et al.*, 4 Wash. C. C., 638, 639, and cases there cited; *Humbert* v. *The Rector of Trinity Church*, 7 Paige (N. Y.), 195; *Dunlap* v. *Gibbs*, 4 Yerg. (Tenn.), 94.

The limitation to an action of detinue in Alexandria is five years. See Old Revised Code, ed. 1803, p. 107. And it is the settled doctrine in Virginia, that the adverse possession of a slave for that period, acquired without force or fraud, confers absolute title. *Newby's Adm'rs* v. *Blakey*, 3 Hen. & Munf. (Va.), 57; *Taylor* v. *Beal*, 4 Gratt. (Va.), 93; *Ellmore* v. *Mills*, 1 Hayw. (N. C.), 412; *Halsey's Adm'r* v. *Buckley*, 2 Id., 234; *Orr et al.* v. *Pickett et al.*, 3 J. J. Marsh. (Ky.), 268; *Kegler* v. *Miles*, Mart. & Y. (Tenn.), 426; *Shelby* v. *Guy*, 11 Wheat., 361; *Brent* v. *Chapman*, 5 Cranch, 358.

The statute of Virginia, 1 Revised Code, (ed. 1819,) p. 431, § 48, declares the estate of the life-tenant forfeited by a removal of slaves out of the state.

Assuming the removal to have occurred as stated in the bill, then the title to Lavinia was, by the forfeiture, immediately divested out of Sarah Nutt; and the party in remainder might forthwith have maintained detinue for the slave. [*177 *Wilkins* v. **Despard*, 5 T. R., 112; *Roberts* v. *Withered*, 5 Mod., 193; S. C., 12 Id., 92, and cases there cited. Also reported in 1 Salk., 225, by the name of *Roberts* v. *Wetherall*.

The statute of limitation, in case of a contingency, runs from the time the contingency happens. *Fenton* v. *Emblers*, 1 W. Bl., 354. So of usury,—it begins to run the instant the money is paid. 6 Bac. Abr. (Gwillim's ed., 1844), 372. And in actions for taking insufficient bail, from the return of *non est inventus* on the execution against the principal. Id., p. 373.

As soon as a trust ceases, action accrues, and the statute begins to run. *Green* v. *Johnson*, 3 Gill & J. (Md.), 389. Trover is barred after six years, though the plaintiff was ignorant of the conversion, the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. *Granger* v. *George*, 7 Dowl. & Ry., 729.

If an executor in trust for another neglects to bring his action within the time prescribed by the statute, the *cestui que trust* or residuary legatee will be barred. *Wych* v. *East India Co.*, 3 P. Wms., 309.

The statute runs in favor of disseisors and tortfeasors. *Harrison* v. *Harrison et al.*, 1 Call (Va.), top page 372, side page 428.

In all cases of concurrent jurisdiction at law and in equity, the statute of limitations is equally obligatory in each court. 2 Story Eq. Jur., §§ 1520 and 1520 *a*; 6 Bac. Abr., 385.

This is nothing more than an action of detinue in the form of a suit in equity.

The lapse of time, and gross laches of the parties claiming in remainder, should of itself be a complete defence to the claim.

The bill is multifarious. On this point it is only necessary to cite 1 Dan. Ch. Pr., pp. 438 to 451 inclusive, and the cases there cited.

NOTE.—Extract from 1 Revised Code of Virginia, (ed. 1819,) p. 431, § 48:—"If any person or persons possessed of a life estate in any slave or slaves shall remove, or voluntarily permit to be removed, out of this commonwealth such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit every such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the reversion or remainder thereof, any law, custom, or usage to the contrary notwithstanding."

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the District of Columbia, and County of Alexandria.

*178] *The bill was filed by the administrator of Thomas H. McClanahan against the defendants, to obtain possession of Lavinia, a slave, together with three children, Betsey, Polly, and Maria, and several grandchildren, which had been bequeathed by Elizabeth Edwards to Sarah Nutt, her daughter, for life, and after her decease to Elizabeth F. Nutt, a granddaughter, the wife of the complainant's intestate. Elizabeth, the granddaughter, died, leaving the intestate, her husband, surviving, who died also, leaving Sarah, the life-tenant, surviving. The latter died in 1840.

The complainant took out letters of administration on the estate of the husband, September 9, 1839, and afterwards upon the estate of Elizabeth, the wife, on the 9th of November, 1840, and filed this bill in April, 1845, claiming that the property and right to the possession of the slaves bequeathed to the wife in remainder became complete in him, as the representative of the estate of the husband, on the death of the life-tenant.

The defendants demurred to the bill, and several grounds of objection have been taken under the demurrer.

1. That there is no averment that the executors of Mrs. Edwards assented to the legacy to the granddaughter, so as to vest the property in the legatee, and enable the personal representative to bring the suit. *Hairston* v. *Hall*, 1 Call

(Va.), 188; *Smith and Wife* v. *Towne's Administrator*, 4 Munf. (Va.), 191.

The whole of the personal estate of the testator devolves upon the executor; and it is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate, without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence the necessity that the legatee, whether general or specific, and whether of chattels real or personal, must first obtain the executor's assent to the legacy before his title can become perfect. He has no authority to take possession of the legacy without such assent, although the testator by the will expressly direct that he shall do so; for, if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. 2 Wms. on Exec., p. 843, ch. 4, § 3, and cases there cited.

But the law has prescribed no particular form by which the assent of the executor shall be given, and it may be, therefore, either express or implied. It may be inferred from indirect expressions or particular acts; and such constructive permission shall be equally available. An assent to the interest of the tenant for life in a chattel will inure to vest the interest of the *remainder, and *e converso*, as both constitute but one estate. So an assent to a bequest of a lease for years carries with it an assent to a condition or contingency annexed to it; and it may be implied from the possession of the subject bequeathed by the legatee for any considerable length of time. Id., p. 847, and cases. [*179

The bill, in this case, contains an averment of the possession of the subject of the legacy by the life-tenant, in pursuance of the bequest in the will, and which is admitted by the demurrer; and, upon the principles above stated, lays a sufficient foundation for the presumption, that the possession was taken with the assent of the executors,—a presumption of law from the facts admitted, and which assent inured to the benefit of the remainder-man. This ground of objection is not, therefore, well taken.

2. The next objection is, that the complainant has shown no title to the slaves in question, upon the face of the bill.

Because the interest in the remainder did not vest in the intestate, the husband, before his death, so as to make the property a part of the assets of his estate, to be administered upon by his personal representative. He survived Elizabeth, his wife, the legatee in remainder, but died before the life-

tenant, and therefore had not, and could not have, reduced the subject of the legacy into possession in his lifetime.

This question is to be determined upon the laws of the state of Virginia; and, on looking into the course of the decisions of the courts in that state, it will be found that the interest of the husband in the wife's remainder of this species of property is placed upon the footing of an interest in a chose in action of the wife, which vests in the husband, if he survives, subject to be reduced to possession by him, if living at the termination of the life estate, and if not, by his legal representative, as a part of his personal estate. *Dade* v. *Alexander*, 1 Wash. (Va.), 30; *Wallace et ux.* v. *Taliaferro et ux.*, 2 Call. (Va.), 447, 470, 471, 490; *Upshaw* v. *Upshaw et al.*, 2 Hen. & M. (Va.), 381, 389; *Hendren* v. *Colgin*, 4 Munf. (Va.), 231, 234, 235; *Wade* v. *Boxley, &c.*, 5 Leigh. (Va.), 442.

In a very early case in the Court of Appeals, *Dade* v. *Alexander*, decided in 1791, it was resolved, a feme sole being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband. The president (Pendleton) stated, that this was the constant decision of the old General Court from the year 1653 to the Revolution, and has since been confirmed in this court, in the cases of *Sneed* v. *Drummond*, *and *Hord* v. *Upshaw*, and that it had become a fixed and settled rule of property. The case of *Wade* v. *Boxley, &c.*, decided in 1834, affirmed the same principle. There the question was between the surviving husband and the children of the deceased wife, as to the slaves in remainder, the wife having died before the life-tenant. The court held the wife took a vested remainder in the slaves, which at her death devolved to her husband, and not to the children.

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There is some question in the books whether the husband can bring a suit in his own name, or, in case of his death, a suit can be brought in the name of his personal representative, to reduce to possession this species of property after the termination of the life interest; or whether he or the personal representative, as the case may be, is not bound to take out letters of administration upon the estate of the wife, and bring the action as such administrator.

That the husband, and, in case of his death, his personal representative, are entitled to administration in preference to the next of kin to the wife, was expressly decided in the case of *Hendren* v. *Colgin*, already referred to.

In the case of *Chichester's Exec.* v. *Vass's Adm'r*, 1 Munf. (Va.), 98, Judge Tucker expressed the opinion, that, in equity,

letters of administration upon the estate of the wife were unnecessary; and he referred to several authorities in England, in support of the position, and especially the case of *Elliot* v. *Collier*, 3 Atk., 528; S. C., 1 Wils., 168; S. C., 1 Vern., 15. See also *Squib* v. *Wyn*, 1 P. Wms., 378, 380, 381; Harg., note to Co. Lit., 351; *Whitaker* v. *Whitaker*, 6 Johns. (N. Y), 112, 117, 118.

The cases of *Dade* v. *Alexander*, *Robinson* v. *Brock*, *Drummond* v. *Sneed*, and *Wade* v. *Boxley*, *&c.*, already referred to, are cases in which the administration on the wife's estate seems to have been dispensed with.

The usual course, however, is to take out letters; though it is difficult to assign a reason for the requirement; except, perhaps, to give the creditors of the wife a remedy, as the surviving husband is liable for her debts in this representative character to the extent of her assets. (*Heard* v. *Stamford*, Cases Temp. Talb., 173; 3 P. Wms., 409; 2 Wms. on Exec., 1083, 1084; *Gregory* v. *Lockyer*, 6 Mad., 90.) These are limited to her personal estate, which continued in action, and unrecovered at her death. Beyond this he is not responsible, after her decease, no matter what may have been the estate received by her. (2 Wms. on Exec., 1084; Went. Off. Exec., 369; and cases before cited.)

In this case the complainant took out letters of administration *upon the estate of Elizabeth, the wife, [*181 which are referred to in the bill, as well as the letters upon the estate of the husband; but there is no averment of a claim to the possession of the slaves in that right, the claim being placed exclusively upon his right as administrator of the husband. The bill is, probably, defective for want of this averment; but as it is defective upon another ground, which we shall presently state, it is unnecessary to express a definitive opinion upon this one.

The will of Elizabeth Edwards bequeathed to Sarah Nutt, her daughter, the slave Lavinia, together with her future increase, during her life, and, at her death, to Elizabeth, the granddaughter, the wife of the intestate, and to her heirs for ever. And the daughter, before the termination of the life estate, and after the slave came into her possession, sold her to one Nicholas F. Blacklock, residing in the city of Alexandria, since deceased, leaving a widow and three children. These children and the husband of one of the daughters are made defendants, and also the husband of the only living child of George Coleman, who, it is charged, purchased Betsey, one of the children of Lavinia, and William D. Nutt, his administrator. These comprise all the defendants.

The bill prays that the defendants may be decreed to make restitution of the slave Lavinia, her children and grandchildren, and also to make compensation for the services of the same since the right of the intestate accrued; and, further, that they discover the numbers and names of the children and grandchildren, and the person or persons in whose possession they are, or who own or claim them, or either of them; and also various other facts and circumstances tending to establish the title of the complainant to Lavinia, and her increase, which it is not material further to notice.

The ground of objection upon the demurrer, in this part of the case, is, that there is no direct or positive averment in the bill that the defendants, or either of them, have any interest in the slaves in question, or that the slaves themselves are in their possession, or under their control, or in the possession or under the control of either of them; and which ground of objection, we are of opinion, is well taken, and fatal to the relief prayed for.

There is not only no direct averment of possession or control, but the contrary appears upon the face of the bill. It is charged that Lavinia and her daughter Maria reside in the town of Alexandria, and go out to service, accounting therefor to the family of Nicholas F. Blacklock, for and in behalf of the widow, who is not a party to the bill; that Polly and her children *reside in the city of Washington, with persons unknown; and that Betsey and her children are either in the actual possession of Richard Davis, the husband of the daughter of George Coleman, deceased, or under the control of William D. Nutt, his administrator.

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Possession is thus shown to be out of the defendants, with the exception of Betsey and her children, who are stated, as we have seen, to be either in the possession of Davis, or under the control of Nutt.

It is apparent, therefore, upon the face of the bill, that the complainant has set forth no title to relief against these defendants, or either of them, whatever may be the right which he has shown to the slaves themselves; as it is not averred that they or either of them have any interest in the slaves, the subject-matter of the suit, or that they are in any way liable to account to him for the same, or chargeable for their services.

The purchase of Lavinia, by Blacklock, of the life-tenant, was lawful, and vested in him the title and right to her service and increase, until the termination of that estate, in 1840. The sale by him of Betsey to Coleman was also lawful; and whether or not the others continued in the family and be-

longed to him at his decease, and passed to the widow and children, as part of his estate, is nowhere stated in the bill.

There is no averment that the children, who are made defendants, took any interest in them at his decease, as his heirs, next of kin, or legatees; and, as we have already stated, not even so much as possession. The only allegation in this respect is, "that, since the sale to Blacklock by Mrs. Nutt, the said Lavinia has had a numerous increase, to wit, children and grandchildren, most of whom have been sold, or otherwise disposed of, as your orator is informed, and believes; and that some of them are now going at large, or are in the possession of the family of the said Blacklock;" but in the possession of what members of the family, or whether in the possession of any of those who are made defendants, are matters left altogether to conjecture and surmise.

The same vagueness and uncertainty exist in respect to the charges against the other defendants.

There is no averment that Betsey and her children belonged to Coleman at his decease, and passed to his widow and children, or that they had any interest in the same, the only allegation, in this respect, being, that they are said to be in the possession of Davis, the son-in-law, or under the control of Nutt, the administrator.

The radical vice in the bill is, that no case is made [*183 out *against these defendants, or either of them,—no foundation laid creating a liability, legal or equitable, to deliver the slaves to the complainant, or to account for their value or services; they seem to have been made parties, one and all, as witnesses to establish a supposed right of the intestate to the property, under the idea that, from their connection with the families of the former owners of the life interest, they might be able to give some information on the subject. (Story's Eq. Pl., §§ 234, 244, 245, 510, 519; Cooper's Pl., 41, 42; 2 Johns. Ch., 413.)

There are other objections taken to the relief sought in this form, which are worthy of consideration; but as the ground above stated disposes of the case, it is not important that we should examine them.

The complainant having, in our judgment, failed to set forth any foundation for relief, the right to the discovery, which is claimed as incidental, of course fails with it. (Story's Eq. Pl., § 312 and note; 17 Maine, 404; 3 Edw., 107; 3 Beav., 284.)

The decree below must be affirmed.

Order.

This cause came on to be heard on the transcript of the

record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

CHARLOTTE TAYLOR, BY JAMES M. WALKER, HER NEXT FRIEND, APPELLANT, *v.* JAMES TAYLOR, JULIA SCARBOROUGH, GODFREY BARNSLEY AND JULIA, HIS WIFE, JOSEPH SCARBOROUGH AND WILLIAM SCARBOROUGH, ROBERT M. GOODWIN, NORMAN WALLACE, AND ANDREW T. MILLER.

A deed from a female child, just of age, and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation by the parents, and containing in its preamble a recital of false statements, ordered to be set aside, and the property reconveyed to the grantor.[1]

The principles upon which a court of equity interferes to protect persons from undue and improper influences examined and stated.

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[1] A deed will not be set aside on the ground of fraud, unless it be proved beyond a reasonable doubt. *Phettiplace* v. *Sayles*, 4 Mason, 312.

A deed to a parent, by a child just come of age, is *prima facie* valid, and the burden of proving undue influence or fraud, is on the party attacking it. *Sullivan* v. *Sullivan*, 21 Law Rep., 531; *Reehling* v. *Byers*, 94 Pa. St., 316.

In *Hallett* v. *Collins*, 10 How., 174, releases obtained for an inadequate consideration, from heirs just come of age, who were poor and ignorant of their rights, were set aside.

In *Miller* v. *Simonds*, 5 Mo. App., 33, a gift of valuable property was made by a motherless girl of twenty-three, to her father who had been her guardian. The court set aside the deed, treating her legal term of disability as extended, on proof that her habits of submission to her father remained unchanged.

In *Thornton* v. *Ogden*, 3 Vr. (N. J.), 723, a conveyance by an unmarried woman to her brother, with whom she resided, executed in the confidence that the brother would deal justly with her, was set aside for great inadequacy of consideration.

In the recent English case of *Kempson* v. *Ashbee*, L. R. 10, Ch. Cas. 15, two bonds issued by a young woman, living at the time with her mother and step-father—one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond,—were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. S. P. *Davis* v. *Dunne*, 46 Iowa, 684; *Rankin* v. *Patton*, 65 Mo., 378; *Miller* v. *Simonds*, 72 Mo., 669.