JOHN WEST, APPELLANT, v. JOSEPH SMITH AND ELLEN, HIS WIFE.

Where a bill was filed in the Circuit Court of the United States for the County of Alexandria, by a legatee, against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia who resided in Virginia, a party defendant.

The Orphans' Court had power to allow a commission to the executor for paying over a specific legacy, and a right to extend this commission to ten per cent.

Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed.

Where the executor paid legacies to persons who had occupied property, which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner, by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy.

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

It was a bill filed in the Circuit Court by Ellen Smith, then Ellen Mandeville, one of the legatees of Joseph Mandeville, deceased, whose will was before this court for construction at January term, 1844. The case is reported in 2 Howard, 560. It will be seen by reference to that case, that John West became a party to the proceedings, upon the ground of being the residuary legatee, and, as the court then held, residuary devisee also.

Ellen Mandeville, who intermarried with Joseph Smith pending the suit, was a legatee under that will for $3,000. One of the clauses of the will was this. "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them."

Mandeville, the testator, died in July, 1837.

In May, 1839, Ellen Mandeville filed her bill in the Circuit Court, (to which suit her husband, Smith, afterwards became a party,) charging the making and publication of the will, the bequest to herself and others of certain legacies, which in default of personal assets were chargeable upon the real estate, the death of the testator, and the deficiency of personal assets; *and praying a sale of lands for the satisfaction of her legacy. To this bill, all the other pecuniary [*403
legatees, the residuary devisee, West, and the executor of Mandeville, were made defendants.

It is not necessary to trace the progress of the suit through its successive stages. It was at last referred to a master in chancery, who reported sundry matters of account, to some of which exceptions were taken by the defendant, West. The court, however, overruled these exceptions, and proceeded to decree a sale of so much of the real estate as might be necessary to pay the legacies. From this decree West appealed, and the case now came before this court upon the exceptions to the master's report. Only four of these exceptions were insisted on in the argument, viz., the second, third, seventh, and eighth.

They were as follows. The first exception is inserted for the purpose of explaining the second.

1. For that said commissioner has improperly allowed William C. Gardner, deceased, a credit in his account as executor of Joseph Mandeville, deceased, the sum of eight hundred and forty-two dollars and ninety cents, as having been paid to Sarah A. Hill, "a specific legacy of slaves, furniture, &c., as appraised," which said property was properly subject, at the time of its delivery to the said legatee, Sarah A. Hill, to the payment of the debt of Joseph Mandeville, deceased.

2. For that the said commissioner has improperly allowed the said William C. Gardner, deceased, as a credit in his said executorial account on the estate of Joseph Mandeville, deceased, the sum of eighty-four dollars and twenty-nine cents, as a commission on the said $842.90, mentioned in the first foregoing exception, which said sum was not so due to said Gardner.

3. For that the said commissioner has improperly allowed the said Gardner, as a credit in his said executorial account, the sum of three hundred and sixteen dollars and thirty-seven cents, and a further credit in said account of nine hundred and twenty dollars and twenty-six cents (920.26), as having been paid by said Gardner on account of a judgment in favor of Samuel Bartle, against said Gardner, as executor of Joseph Mandeville, deceased, the items or most of them forming the account of said Bartle against said Mandeville's estate, on which said judgment is predicated, being unsustained by legal proof, and barred by the statute of limitations.

7. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with the several sums of two hundred and twenty-five dollars and four hundred and fifty dollars interest thereon, after allowing a credit of one hundred *and fifty dollars, as a legacy due to Mary Mandeville, under the will of Joseph Mandeville, deceased; the said legacy being subject to a further credit of two hun-

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dred and twenty-five dollars, for the use and occupation of a portion of the real estate of Joseph Mandeville deceased.

8. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with seven hundred and thirty-five dollars, the interest due thereon, as a legacy to Julia Mandeville, under the will of Joseph Mandeville, deceased, when the same should have been credited with the sum of two hundred and twenty-five dollars for the use and occupation of a portion of the real estate of Joseph Mandeville, deceased.

The cause was argued by *Mr. Jones*, for the appellant, and *Mr. Neale* and *Mr. Davis*, for the appellees.

Mr. Jones submitted a preliminary objection of a defect of parties, because of the nonjoinder as a defendant of James Mandeville, a nephew of the testator, and a specific devisee of ten thousand acres of land upon the head-waters of Guyandotte River, in Virginia.

He then proceeded to argue, in support of the second exception, that no commission was allowable on the specific legacy, in addition to the general commissions incident to the administration of the assets.

Of the third, that the executor suffered judgment at the suit of Bartle, in consequence of his improper and illegal concessions, and of evident negligence, amounting to a *devastavit*.

Of the seventh and eighth, we maintain,—1st. That the evidence clearly entitled the exceptant to the set-offs claimed in these exceptions. 2d. That the pretence set up, of long possession under a parol gift, was wholly unsupported by evidence,—indeed disproved,—and was moreover barred by estoppel, the parties claiming both under and against the will.

And further maintained, that the court erred in proceeding to the final decree, whilst the claims of the two creditors and the two legatees named in these exceptions remained *sub judice*.

Lastly, that the court had no jurisdiction to decree satisfaction of the creditors out of the real estate.

Mr. Neale, for defendants in error.

2d Exception. If this exception is made as a legal and valid objection, it is thought that such is not the law; on the contrary, the allowance is fully authorized by law. No doubt the commissioner was guided by the allowance made the executor of Mandeville by the Orphans' Court of Alexandria county, in *which the accounts were [*405

settled; and that court had full power and authority, under the testamentary system of Maryland, to make the allowance, it being a matter within the admitted discretion of the court; and being in its discretion, not even an appeal, much less this exception, is sustainable. 2 Laws of Maryland, 482; Dorsey's Testamentary Law of Maryland, 17; 1 Pet., 565; 5 Id., 224.

The exception, if sustained, might, by a future proceeding on the part of the appellant against the executor's legal representative, tend to defeat, at least in part, the commission allowed Mandeville's executor by the Orphans' Court aforesaid, and which could only have been done, in the first instance, by an appeal, alleging and proving fraud in its procurement. It would, therefore, seem to be an attempt to do that indirectly, which could not have been done directly and lawfully.

3d Exception. This exception is clearly untenable for the following reasons; that is to say, because the judgments of every court of competent jurisdiction, if fairly obtained, are conclusive upon the parties, until reversed by writ of error or supersedeas; nor can a court of equity look into them, unless fraud, mistake, accident, or surprise in their procurement be alleged and proved; in such a case, it is admitted that chancery has jurisdiction. But no such allegations are to be found in the record of this cause, and for want thereof, this honorable court, sitting as an appellate chancery court, will not, it is imagined, disturb the allowance. The appellant was made a party defendant on the 8th of June, 1842, and although Commissioner Eaches made his report on the 31st of May, 1839, the appellant never filed exceptions thereto until the 3d of October, 1846, long after the death of Mandeville's executor; and having so long failed to do so, it is submitted whether the court will now entertain the same. 2 Robinson's Pr., 214, 383; 3 How., 691; and the same remarks apply to Commissioner Green's report.

(*Mr. Neale* then went into an argument that the statute of limitations did not apply.)

7th and 8th Exceptions. The claim set up by the appellant for use and occupation is strictly legal, and as a general principle can only be enforced in a court of law. Such claim must be founded on the privity of contract, either express or implied, and neither the one nor the other can arise without the previous relation of landlord and tenant. 1 How., 153.

No such relation is pretended in this case; none such ever existed; the parties, on the contrary, are now contending before *the court below, in a suit at law, about their legal rights to the lot of land in question, and to the rent of

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which lot the appellant in this chancery suit claims to be entitled. It would therefore appear to be a fit subject for an action at law, and not a bill in equity, for the right of property in this case is a question which involves matters of fact as well as of law, and should be adjudicated in a court of law, where the appellant has adequate remedy; and having such remedy, a court of equity is not the proper forum. 1 Laws U. S., old edition, p. 59, § 16.

The evidence in the record is, that the Misses Mandeville entered on the premises in dispute, under a gift from their uncle, the late Mr. Mandeville, and that they held, used, and occupied it for more than twenty years prior to their said uncle's death, and that, too, with his personal knowledge and consent, and that they still hold, use, and occupy it as their own property. If, then, the Misses Mandeville entered on the premises under color or claim of title, and held possession adversely to their uncle for so long a period, with his knowledge, and without any attempt on his part to eject them, it gives them good right and title under Virginia law, and is a complete bar to a possessory action, although it might not be against a writ of right, founded on the seizin of the appellant's devisor or testator, for in Virginia it has been decided that a devisee, like an heir, may maintain a writ of right.

Mr. Davis, for the defendant in error, contended that the exceptions were properly overruled:—

As to the first exception, because,—

1. The realty as well as personalty being liable, under the will and law, to both debts and legacies, it is immaterial to the residuary devisee and legatee to which object the personalty is applied. *Tayloe* v. *Thomson*, 5 Pet., 367; 5 Geo. II., ch. 7 (1732); *Silk* v. *Prime*, 1 Dick., 384; 1 Bro. C. C., 138, *n;* 2 Stat. at L., 103, 104, §§ 1–756, § 4.

2. Had the executor sold the specific legacy for payment of debts, the legatee would have been substituted to the creditor's rights against the realty; it being liable to the debts by law, and charged with the legacies by will, and only the residue given to West.

By analogy to specialty creditors, 2 Lomax on Executors, 252, 253, § 7, 253, 254, §§ 14, 15, 16; *Byrd* v. *Byrd*, 2 Brock., 171.

Or where the devise is of the residue of personalty and realty, **Hanby* v. *Roberts*, 1 Ambl., 129; 2 Smith Ch. Pr., 282; *Norris* v. *Norris*, 1 Dick., 253; *Headly* v. *Redhead*, Coop., 51. [*407

Or when the lands are charged with debts, *Keeling* v. *Brown*,

5 Ves., 359; 2 Smith Ch. Pr., 282, 283, (*a*); *Eland* v. *Eland*, 4 Myl. & C., 42; 1 Story Eq. Jur., §§ 565, 566; *Clifton* v. *Burt*, 1 P. Wms., 678, 679, Cox's note; *Haslewood* v. *Pope*, 3 P. Wms., 323; 2 Lomax on Ex'rs, 254, § 13.

3. The language of the will imports a debt, and this legacy in satisfaction.

As to the second exception, because the commission is an incident to the legacy, and has been allowed by the Orphans' Court, and for the reasons given on the first exception.

As to the third exception, because,—

1. The exception does not specify item by item the part objected to, nor the grounds of objection, and is in the alternative. *Harding* v. *Hardey*, 11 Wheat., 103; *Wilkes* v. *Rogers*, 6 Johns. (N. Y.), 568, 591, 592; *Story* v. *Livingston*, 13 Pet., 359, 365, 366; *Buller* v. *Steele*, reported in 2 Smith Ch. Pr., 372.

2. If the exception covers all the items, then, as some are proper, it must be overruled. *Green* v. *Weaver*, 1 Sim., 404; 3 Cond. Ch. R., 204, 218, 219.

3. No objection was made before the master for want of, or to the competency of, the proof.

4. The verdict and judgment fix the debt as due at testator's death; and the receipts on the execution show its payment. *Garret* v. *Macon*, 2 Brock., 213, 214; *Strodes* v. *Patton*, 1 Id., 230, 231; *Powell* v. *Myers*, 1 Dev. & B. (N. C.), Eq., 502; *Munford* v. *Overseers of Poor*, 2 Rand. (Va.), 313, 316; *Chamberlayne* v. *Temple*, 2 Id., 384, 396, 397.

5. There is no bill of particulars, nor any part of the record showing the items on which said judgment is founded.

6. The burden of showing the items to be barred rests on the exceptant, the judgment being *primâ facie* evidence of a just debt, and he has produced no proof, either of what the items were, or of what proof was before the jury, or that any of them were barred by limitation.

7. If he rely on the report and account incorporated by the clerk in the record of *Bartle* v. *Mandeville's Executor*, it is no part of the record, and so not competent evidence. *Cunningham* v. *Mitchell*, 4 Rand. (Va.), 189, 190, 192; *Moore* v. *Chapman*, 3 Hen. & M. (Va.), 260, 267; *Lessor of Fisher* v. *Cockerel*, 5 Pet., 248; *Lessor of Reed* v. *Marsh*, 13 Id., 153. It does not appear ever to have been returned and filed in court, nor to have been confirmed or adopted by the court or parties. No judgment was entered on it. It does not appear even to have been *read before the jury. Nor that it was all or the only evidence before them; and in the absence of proof to the contrary, the verdict and judgment must be pre-

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sumed right. *Thompson* v. *Tomlie*, 2 Pet., 165; *Grignon's Lessee* v. *Astor et al.*, 2 How., 319, 340; *Voorhees* v. *Bank of United States*, 10 Pet., 472, 473; *Williams* v. *United States*, 1 How., 290; 1 Saund., 329, notes 3, 4, 330, *n.* 5; 2 Id., 50, *n.* 3; 1 Id., 334, *n.* 9; 2 Lomax on Exec., 428, 429, § 33.

8. If the report is to be considered, then it does not appear from it that any item allowed in that report accrued more than five years before testator's death, nor more than five years before the commencement of the suit, and it rests on the exceptant to show that the items were barred. *Adams* v. *Roberts*, 2 How., 486, 496.

Testator died 25th July, 1837, nar. filed Aug. rules, 1838. The capias must have been before May, 1838; it may have been before October, 1837, and on or at any time after July 25, 1837, the date of testator's death.

All the items reported as due or as suspended, i. e., for further evidence, appear to have accrued during or after 1834,—except $158.19½, the several sums of $26.88, $17.23, $22.37, making $66.48, and $37.62.

The $37.62 is dated 1833; it may have accrued in January, or in December, 1833; in either case, it may have been within five years from the beginning of the suit; if after May, it must have been so.

The items composing $66.48 have nothing to fix their date, except that they are prior to April 30, 1835.

The item of $158.19½ has no date assigned; it is only said to have been found in a book for 1831, 1832, and 1833; if it accrued due after July 25th, 1832, it may have been within five years of writ, and was within five years before testator's death.

Rev. Code (1792), 167, s. LVI. 8. The law requiring the court to strike out the items barred, and dispensing with a plea of limitation, the presumption is that any item which, though apparently barred, has not been stricken out, was sustained by evidence removing the bar. 2 Lomax on Exec., 423, § 25; 2 Pet., 165; 2 How., 340; *Brook* v. *Shelly*, 4 Hen. & M. (Va.), 266.

9. If any items be apparently more than five years before suit, but not before testator's death, the executor may have promised to pay them within the five years; which he had a right to do.

The obligation to plead statute is discretionary, and failure should be shown to be unreasonable.

*10. The dealings between Bartle and Mandeville were mutual, long continued, and complex, and probably neither party kept or had full proof of all items, so that [*409

the only mode of making a fair settlement was by reference to a commissioner, with production of books and papers, and it should be shown that this proceeding was ill advised, as in case of submission to arbitration. *Strodes* v. *Patton*, 1 Brock., 230, 231.

11. It appears, on the contrary, to have been prudent and beneficial, for,—1st. Mandeville gets credit by his own books for $912.01, 17th February, 1834. 2d. For $1314.06, for none of which is there any proof in the record or report, and which seems to have come entirely from Mandeville's books by consent of plaintiff. 3d. For the claims of S. B. Larmour & Co., Daniel Cawood & Co., against Bartle, included in the above $1314.06, otherwise than by consent not an offset.

As to the seventh and eighth exceptions:—

1. A joint demand cannot be set off against a several demand. 2 Story Eq. Jur., § 1437.

2. Credit for the whole sum is claimed against each legacy.

3. It does not appear that any such sum is due as claimed, no tenancy being proved, and, on the contrary, an adverse occupation being expreesly reported.

Mr. Justice WOODBURY delivered the opinion of the court.

The original proceeding in this case was a bill in chancery instituted in September, 1839, in the Circuit Court for the District of Columbia, sitting for the County of Alexandria. The object was to recover a legacy of $3,000, bequeathed by Joseph Mandeville, in 1837, to Ellen Mandeville, now the wife of Smith.

William C. Gardner, the executor, took upon himself the execution of the will, and was made one of the original defendants, with West and several other legatees. West, being residuary legatee, took a leading part in conducting the defence in the Circuit Court, and made the appeal to this court. Various answers were put in by the respective respondents, several depositions filed, and some documentary evidence. From these it appears, that proceedings had for some time been instituted in the Orphans' Court for the County of Alexandria, for the purpose of settling the estate of Joseph Mandeville. Most of the debts had been adjusted, and some of the legacies; and the personal estate being exhausted, permission had been asked to sell and apply a part of the real estate, situated in said county of Alexandria, to pay the residue.

410] To this application, as well as to some of the previous proceedings and decrees in the Orphans' Court, sundry objections had been interposed. But the exceptions

made by West to the last report of the commissioner, in the Circuit Court, in May, 1846, disclose all the matter finally relied on in opposition in that court by the respondent. Those exceptions having been there overruled, this appeal was taken.

Before going into the consideration of those exceptions in detail, and the correctness of the decision which was pronounced upon them, it may be well to dispose of a preliminary question raised here, that James Mandeville of Virginia, a legatee of 10,000 acres of land there situated, ought to be made a party defendant, with those already before the court.

We feel obliged to overrule this objection.

It is not clear, that it could be made here after an appeal; though, if proper, the case might perhaps be sent back, and an amendment made there,—as new parties can be admitted there as late as the final hearing. (Mitford, Pl., 144, 145; *Owing's Case*, 1 Bland (Md.), 292; *Clark* v. *Long*, 4 Rand. (Va.), 451.)

At the same time, it is true as to exceptions to a master's report, that none can generally be made in the appellate court which were not taken below. *Brockett et al.* v. *same*, 3 How., 691. The objection here, however, must in any view be overruled, because the Orphans' as well as the Circuit Court, for the county of Alexandria, proceeded, and ought to have proceeded, against parties and property situated within their limits, and not against either situated like James Mandeville and his land in Virginia, and without their jurisdiction. *Hallett* v. *Hallett*, 2 Paige (N. Y.), 15; *Townsend* v. *Auger*, 3 Conn., 354. Though he held his land under the same will, yet it is admitted that he and his land were both in another state. Another excuse for not joining him is, that property enough existed within the county of Alexandria to discharge the claims of the original plaintiffs, without a resort to James Mandeville, or the land devised to him. *Russell* v. *Clarke's Executors*, 7 Cranch, 72.

Especially must West and all the property devised to him be first made liable, as he is only a residuary legatee, or, in other words, is entitled only to what is left, after all others are satisfied. And, finally, it was not necessary to make James Mandeville a party to this bill, when neither he nor his land could be affected by a decree made against other persons and other lands, and in a case instituted in another jurisdiction and in which no service had been made on him. *West* v. *Randall*, 2 Mason, 181; *Joy* v. *Wirtz*, 1 Wash. C. C., 517; *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Wheelan* v *Wheelan*, 3 Cow. (N. Y.), 538.

*To proceed next to the consideration of the exceptions made below, it is to be remembered that the first one was waived at the hearing, and need not, therefore, be repeated. The second exception is, that the executor, Gardner, was improperly allowed a commission of $84.29 on a specific legacy of slaves, furniture, &c., made and paid to Sarah A. Hill.

This commission was at the rate of ten per cent.; and though that rate seems high, yet, if the Orphans' Court had authority to make any allowance in such a case, its decision within its authority and jurisdiction must be considered binding. 1 Pet., 566; *Thomas* v. *Fred. City School*, 9 Gill & J. (Md.), 115.

On general principles, it would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies, the trouble and risk are as great, if not greater, than in moneyed legacies, and it would be difficult to find elementary principles to justify commissions in one case, and withhold them in the other.

If this point is to be governed by these principles, as it must be, provided the laws of Virginia at that time controlled the matter in the county of Alexandria, then the exception must fail under those principles, and under a practice, well settled there, authorizing in such cases a *quantum meruit*. Under that, as much as ten per cent. on moneys received and paid out has in several instances been sanctioned. *McCall* v. *Peachy*, 3 Munf. (Va.), 301; and *Hutchinson* v. *Kellam*, Id., 202.

But if it is to be governed by the laws of Maryland, as is contended by the plaintiffs, a like result will follow, by means of express statutory provisions and decisions in that state.

They contend this, because in February, 1801, Congress established in Washington and Alexandria counties an Orphans' Court for each county, and provided that they "shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the register of wills and judges of the Orphans' Court within the state of Maryland," &c. 2 Stat. at L., p. 107, § 12; *Yeaton* v. *Lynn*, 5 Pet., 230.

It is argued, that this provision extended to the power and duty of the Orphans' Court in Virginia to allow commissions as large as here, and for specific as well as moneyed legacies, and not to the mere organic structure and jurisdiction of the Orphans' Court, leaving all else in Alexandria County to be

governed by the laws of Virginia, and in Washington County by the laws of Maryland.

If this view be correct, which is supposed to be the one *usually acted on in this District, it was provided [*412 in Maryland by statute in 1798, ch. 101, that a commission may be allowed, "not under five per cent., nor exceeding ten per cent. on the amount of the inventory." *Nichols et al.* v. *Hodges*, 1 Pet., 565; 5 Gill & J. (Md.), 64.

The third exception is, that a judgment was allowed by the executor to be recovered by one Bartle against the estate of the deceased Mandeville, which "was unsustained by legal proof, and barred by the statute of limitations."

But this judgment was recovered after due notice and hearing. No fraud or collusion is set up or proved between the parties to it, for the purpose of charging the estate. And the chief, if not only, exception to its fairness or validity is, that Gardner, the executor, did not plead the statute of limitations to a part of the claim on account, when he might have done it under the apparent time when the cause of action accrued on that item. But in Virginia, and especially if the court, by not striking out the item, sanction a waiver of the statute, as is inferred to have been done here, the executor seems fully justified in not pleading it. (2 Lomax on Exec., 419; *Bishop* v. *Harrison*, 2 Leigh (Va.), 532; 1 Robinson's Pr., 112; 1 Rev. Stat., 492.) So in England, formerly, the executor was held excused in his discretion from interposing as a defence the statute of limitations. (*Norton* v. *Frecker*, 1 Atk., 526.) But in a recent case, doubt is cast over this in England, in 9 Dowl. & Ry., 43.

The Virginia law, however, must control here, and conduces to justice, when the court or the executor is satisfied no payment has been made, or that there had been a re-promise by the deceased. *Holladay's Ex'rs.* v. *Littlepage*, 2 Munf. (Va.), 316; 4 Hen. & M. (Va.), 266.

At all events, on elementary principles, the judgment thus obtained must stand as binding till duly reversed, and be till then for most purposes presumed correct. *Voorhees* v. *Bank of United States*, 10 Pet., 472, 489; 2 How., 319; *Lupton* v. *Janney*, 13 Pet., 381.

Under the sixth and seventh exceptions, the respondent insists that Mary and Julia Mandeville, legatees of the deceased, ought to have been charged rent for a piece of land which they occupied, and that the amount thereof ought to have been deducted from these legacies.

It is true that this land once belonged to the deceased, but Mary and Julia insist that they have been in the exclusive

occupation of it for more than twenty years. They had
*413] always since their entry claimed it as their own, and this land was not, *by name, devised by the deceased to any one, as if still his property. The legatees insisted, that at first, being relations of J. Mandeville, and the premises contiguous to their house, they were given to them for a garden, and that their possession had ever since been adverse to all the world. Nor was there any contract shown to pay rent by them to him; nor any proof that rent had ever been demanded by him while living. Without, then, settling here the disputed title to this property, it is sufficient to say, that under these peculiar circumstances such a use and occupation of these premises would not warrant the recovery of rent from them in an action of assumpsit at law. 1 Chit. Pl., 107; *Birch* v. *Wright*, 1 T. R., 387; *Smith* v. *Stewart*, 6 Johns. (N. Y.), 46. Such an action must rest on a contract express or implied. *Lloyd* v. *Hough*, 1 How., 159, and cases there cited. And if no implied promise could be raised to recover rent, when the occupation is adverse, and no express one is pretended to exist, the executor could not legally set off this claim against their legacies.

The rights to the land, or to any rent thereon, must be settled by a direct action at law, and not in this collateral manner; and if the legatees do not succeed there, they can be made to pay, in trespass, for mesne profits, what they are not liable for as rent, *ex contractu*, when holding adversely.

A concluding objection to the proceedings below, subsequent to overruling the written exceptions to the report, is, that the court proceeded to a final decree whilst the claims of two of the creditors and two of the legatees were held under consideration.

But either those claims are independent and not necessary to be decided before a final decision on the rest,—or they are so connected, that a decision on them was proper at the same time, and then this appeal itself would be premature, and would have to be dismissed. 4 How., 524; *Perkins* v. *Fourniquet et al.*, 6 How., 206. This, it is understood, is not moved, nor desired by either party.

Such independent claims, however, may properly be suspended under the circumstances existing here, according to *Royal's Administrators* v. *Johnson et al.*, 1 Rand. (Va.), 421.

The judgment below must, therefore, 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 [*414 by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JOHN D. MURRILL AND THE BANK OF NEW ORLEANS, APPELLANTS, *v.* ALEXANDER NEILL AND WILLIAM T. SOMERVILLE.

A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:—

It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors *pari passu;* and out of further remittances there was to be paid the sum of $12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor.

The construction of this deed must be, that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds.

Under the deed, it was the duty of the trustee to divide the first $15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them, proportionally.

The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid.[1]

The American and English cases respecting this rule examined.

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[1] FOLLOWED. *Davis* v. *Howell*, 6 Stew. (N. J.), 75. CITED. *Bowen* v. *Billings*, 13 Neb., 443. S. P. *Collins* v. *Hood*, 4 McLean, 186; *Matter of Warren*, Daveis, 320; *Matter of Ingalls*, 5 Law Rep., 401; *Ex parte Byrne*, 16 Am. L. Reg., 499; *Inbusch* v. *Farwell*, 1 Black, 566; *Peck* v. *Schuetze*, 1 Holmes, 28; *Crane* v. *Morrison*, 4 Sawy., 138; *Bailey* v. *Kennedy*, 2 Del. Ch., 12; *Cox* v. *Russell*, 44 Iowa, 556; *Bond* v. *Nave*, 62 Ind., 505; *Davis* v. *Howell*, 6 Stew. (N. J.), 72.