Montalet *v.* Murray.

Practice in error.

If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record, and go for an affirmance.

Marshall, Ch. J., stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance.

P. B. Key, for the defendant, had the plaintiff called.

Dismissed.

The Chief Justice also stated, in answer to a question from the clerk, that, in such cases, costs go, of course.

Sarah and Abigail Silsby *v.* Thomas Young and Enoch Silsby.

Construction of will.—Abatement of legacy.

D. devised all his estate to his executor, in trust to convert the same into money, and after payment of debts, to invest the surplus in the funds, or put it out on interest. He then bequeathed 1500*l.* to E., to be paid at the age of 21, subject to the subsequent provisos; and directed 1000*l.* to be set apart, and the interest to be paid to S., during her life, and after bequeathing other pecuniary legacies, said, provided "that in case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case, I direct, that the said annuities and legacies so by me bequeathed, shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the 1500*l.* bequeathed to E.," whom he also made his residuary legatee. The estate was more than sufficient at the time of the testator's death, to pay all debts, annuities and legacies, but afterwards, by the bankruptcy of the executor, became insufficient: *Held*, that E.'s legacy of 1500*l.* should be liable to S.'s annuity.[1]

This was a writ of error to the Circuit Court of the United States for the district of Georgia, to reverse the decree of that court, which dismissed the bill of the complainants, Sarah and Abigail Silsby.

Daniel Silsby, the brother of the complainants, and uncle of the defendant, Enoch Silsby, being seised and possessed *of real and personal [*250
estate in England and in the state of Georgia, by his will, made in England, on the 11th of January 1791, devised all his estate to his executor, W. Gouthit, of London, in trust, to turn the same into money, or securities for money, and after payment of his debts, to place out the surplus upon any public or private securities, upon interest, or to invest it in the public funds.

He then bequeathed to his nephew, Enoch Silsby, 1500*l.* sterling, to be paid to him at twenty-one years of age, "subject to the provisos hereinafter mentioned," and directed the interest to be paid to his guardian, during his minority, to be applied to his maintenance and education. He then directed his trustees to set apart 1000*l.* sterling, and pay the interest thereof to his sister Sarah, during her life, for her sole and separate use and disposal, and in case of her death, without issue, the principal was to be paid over to

[1] See Murdock's Appeal, 31 Penn. St. 47.