ages for breach of a promise. The facts stated do not amount to fraud. Fraud consists in the intention, the *quo animo*, which is not averred in the plea; and fraud can never be presumed, especially, if it be not averred. 1 Vent. 9, 210; 3 Bac. 320; 1 Fonbl.

March 13th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—It is admitted by the counsel in this case, that a bond cannot be delivered to the obligee as an escrow. But it is contended, that where there are several obligees, constituting a copartnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion, that a delivery to one, is a delivery to all. It can never be necessary to the validity of a bond, that all the obligees should be convened together at the delivery.

Upon the other point, the counsel for the plaintiff in error has insisted that the plea is sufficient. But the court thinks it so radically defective as to be bad even upon general demurrer. There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud. Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable. Upon what was the plaintiff below to take issue? Upon all the circumstances stated in the plea, which are mere inducement, or upon the conclusion that "the bond is void"? If he had traversed the inducement, *358] the issue would have been immaterial; *if he had traversed the conclusion, it would have been putting in issue to the jury matter of law.

Judgment affirmed, with costs.

C. Lee suggested, that there was also an exception to the refusal of the court to allow an amended plea to be filed, after the court had adjudged the pleas bad.

But the CHIEF JUSTICE said, that the court had, in an early part of this term,(*a*) decided, that such refusal was no error for which the judgment could be reversed.

BRENT *v.* CHAPMAN.

Title by possession.

Five years' adverse possession of a slave, in Virginia, gives a good title, upon which trespass may be maintained.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of trespass, brought by Chapman against Brent, marshal of the district of Columbia, for taking in execution on a *fi. fa.* against the estate of Robert Alexander, deceased, a slave named Ben, who was claimed by Chapman as his property. The jury found a verdict for the plaintiff, subject to the opinion of the court upon a statement of facts agreed by the parties, which was in substance as follows:

The slave was the property, and in possession of the late Robert Alex-

(*a*) See the case of Mandeville and Jamesson *v.* Wilson, at this term, *ante*, p. 15.

ander, the elder, at the time of his death. His sons, Robert Alexander and Walter S. Alexander, were named executors of his will, but never qualified as such. On the 17th of December 1803, Walter S. Alexander took out letters of administration with the will annexed. No division was *ever made, by the order of any court, of the personal estate of the deceased, among his representatives; but previous to August 1800, a parol division of the slaves was made between Robert Alexander, the younger, and his brother, Walter S. Alexander, the latter being then under the age of twenty-one years. Robert Alexander, the younger, being possessed of the slave, and being taken upon an execution for a debt or debts due from himself in his individual character, in August 1800, took the oath of insolvency under the laws of Virginia, and delivered up to the sheriff of Fairfax county, in that state, the slave, as a part of his property included in his schedule. The sheriff sold him at public sale, and the plaintiff, knowing the slave to belong to the estate of the deceased Robert Alexander, as aforesaid, became the purchaser, for a valuable consideration, and took possession of the slave, and continued possessed of him, under the sale and purchase, until July 1806. The plaintiff, in the winter, usually resided in Maryland, and in the summer, in Virginia, on his farm, where he kept the slave, and had never resided in the district of Columbia. [*359

Dunlop & Co. obtained judgment against Robert Alexander, the younger, as executor of his father, Robert Alexander, and, upon a *fieri facias* issued upon that judgment, the marshal seized and took the slave, as part of the estate of the testator, Robert Alexander, there being no other property belonging to his estate in the county, which could have been levied, except what Robert Alexander, the younger, had sold and disposed of for the purpose of paying his own debts. The agent of the creditors, Dunlop & Co., as well as the marshal, had notice, prior to the sale, that the plaintiff claimed the slave. Upon this state of the case, the court below rendered judgment for the plaintiff, according to the verdict. And the defendant brought his writ of error.

C. Lee, for the plaintiff in error, contended, that, *under the circumstances of this case, five years' possession did not give a good title to Chapman. The possession was not adverse, for there was no administration upon the estate of Robert Alexander, sen., consequently, no person legally competent to claim the possession. Besides, Chapman knew that the slave belonged to the estate of the testator. This debt was a legal lien on the slave. [*360

Robert Alexander, jun., could only transfer his right to the sheriff of Fairfax. The goods of the testator cannot be taken in execution for the debt of the executor. *Farr* v. *Newman*, 4 T. R. 625. Chapman could, therefore, only purchase the right of Robert Alexander, jun., in the slave.

The parol partition was void, for the infancy of one of the parties. There was no executor qualified to assent to the legacy. By the law of Virginia, an executor cannot act, until he has given bond. *Fenwick* v. *Sears*, 1 Cr. 259; *Ramsay* v. *Dixon*, 3 Ibid. 319.

It is very doubtful, whether five years' possession of a slave, in Virginia, is itself a good title for a plaintiff. It may protect the possession of a defendant; and that is the only effect of the statute.

Swann, contrà.—Robert Alexander, the younger, did not hold the slave

as executor of his father's will, but under the legacy. It is immaterial, whether Chapman did or did not know that the slave belonged to the estate of the testator. Five years' possession by Chapman was a good title against all the world.

In England, twenty years' possession is a good bar in ejectment, and it is also a good positive title in itself, upon which an ejectment may be maintained.

*361] *Marshall, Ch. J.—Can an executor distribute the estate, before he has qualified and obtained letters testamentary?

Livingston, J.—In England, an executor, before probate, can do everything but declare.

Washington, J., mentioned the case of *Burnley* v. *Lambert*, 1 Wash. 308, in which it was decided, by the court of appeals of Virginia, that, "after the assent of the executor, the legal property is completely vested in the legatee, and cannot be divested by the creditors."

March 13th, 1809. Marshall, Ch. J., delivered the opinion of the court, to the following effect:—This court is of opinion, that the possession of Chapman was a bar to the seizure of the slave by the marshal, under the execution stated in this case. The only objection of any weight was, that there was no administration upon the estate of Robert Alexander, sen., and consequently, that the possession of Chapman was not an adverse possession. But there was an executor competent to assent, and who did assent, to the legacy, and to the partition between the legatees, and who could not afterwards refuse to execute the will.

Judgment affirmed.

Auld *v.* Norwood.

Fraud.

If the owner of a slave permit her to remain in the possession of A. for four years, and A., then, without the assent of the owner, delivers her to B., who keeps her four years more, the possession of B. cannot be so connected with the possession of A., as to make it a fraudulent loan, within the act of assembly of Virginia, in regard to B.'s creditors.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of detinue, for a female slave named Eliza.

*362] Upon the *trial of the general issue, in the court below, the plaintiff in error, who was defendant in that court, took a bill of exceptions, which stated that evidence was offered of the following facts: The slave, in November 1798, was the property of John Dabney, against whom a *fieri facias* was issued, at the suit of Norwood, the present defendant in error, upon which the slave was seized and sold by the proper officer; that one Charles Turner bought her for the said Norwood, and held her, as Norwood's property, until November 1802, when he delivered her, without authority from Norwood, to one R. B. Jamesson, who held her until September 1806, when he became insolvent, under the insolvent act of the district of Columbia, and delivered her, as part of his property, to Auld, the plaintiff in error, who was appointed trustee under that act. This suit was commenced on the 19th of September 1806. Whereupon, the plaintiff in