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**Peter Vs. Beverly**

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**Court** : US Supreme Court

**Decided On :** 1836

**Appeal No.** : 35 U.S. 532

**Appellant** : Peter

**Respondent** : Beverly

**Judgement** :

Peter v. Beverly - 35 U.S. 532 (1836)
U.S. Supreme Court Peter v. Beverly, 35 U.S. 10 Pet. 532 532 (1836)

**Peter v. Beverly**

**35 U.S. (10 Pet.) 532**

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES*

*FOR THE DISTRICT OF COLUMBIA IN THE COUNTY OF WASHINGTON*

## SYLLABUS

David Peter, of the District of Columbia, by his will declared it to be his intention that all the proceeds of all his estate should be vested in his wife for her support and for the maintenance and education of his children; that no appraisement or

valuation should be had of any part of the property attached to his dwelling house; that his children should receive good educations. He provided for the payment of his debts by the following clause in his will:

"I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose, and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object."

He appointed his wife, Johns, and George Peter his executors. The whole of the personal property attached to the dwelling house went into the bands of Mrs. Peter, and site maintained her family and educated her children out of the proceeds of the estate. At the time of the decease of David Peter, he was largely indebted to the banks in the District of Columbia, and the executors, to obtain a continuance of the loans, and considering it advantageous to the estate to do so, gave their individual notes for the debts, and received the notes of their testator. This was done under the understanding that the arrangement was to continue as long as the banks should he willing to indulge the estate or until the executors could make sales of the estate for the payment of the debts. In the settlement of the accounts of the executors, in the orphans' court, the notes of the testator received from the banks were charged by the executors. The Dulin farm was sold, but no title made to the purchaser, he having paid a part of the purchase money and given his notes endorsed for the balance. His notes were not paid, and an ejectment was brought for the recovery of the estate, which has not been decided. George Peter survived the other executors, and he was called upon by the banks to sell the real estate of David Peter directed to be sold to pay the debts. The children of David Peter obtained a perpetual injunction in the circuit court to prevent the sale of the city property of their father for the payment of the debts, alleging that no debts were due, as the notes of the executors had been received by the banks for the debts of the testator, and they had charged them in their accounts with the estate, and also alleging negligence in not collecting the balance due for the sale of "the Dulin farm," and that the executors were liable as for a

*devastavit* for the money which went into the hands of their mother for the support of the family and the education of the children, and it was denied that the power to sell the estate of the testator survived to the surviving executor, George Peter. The court held that the direction of the will of David Peter to sell a portion of his real estate for payment of his debts created a power coupled with an interest that survives. That the surviving executor is, by necessary implication, the person authorized to execute that power

and fulfill that trust. That the debt due the banks has not been extinguished by the notes substituted by the executors

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as renewals in the bank, or the estate of the testator in any way discharged from the payment of the debt. That the executors are not chargeable with negligence or misapplication of the personal estate that ought to render them personally responsible for these debts, and that satisfaction of these debts should be had out of the lands appropriated by the testator for that purpose. The perpetual injunction granted by the circuit court was ordered to be dissolved.

If executors have paid a debt to banks, or the banks have accepted their note in payment in place of the notes of the testator, so that the executors became the debtors and personally responsible to the banks, the only effect of this is that the executors became the creditors of the estate instead of the banks, and may resort to the trust fund to satisfy the debt.

The testator had a right, unquestionably, so far as respected his children, to charge the payment or his debts upon any part of his estate, real or personal, as he might think proper and most advantageous to his family. And if the creditors were willing to look to the fund so appropriated to that object, no one would have a right to counteract or control his will in that respect. And he having thought proper to constitute his widow the trustee of the proceeds of all his estate for the maintenance and education of his children, thereby vesting in her an unlimited discretion in this respect so far as the proceeds of his estate would go, the

surviving executor is not accountable for anything applied by her for that purpose, not even if she would be chargeable with a *devastavit.*

It is a well settled rule that one executor is not responsible for the *devastavit* of his co-executor any further than he is shown to have been knowing and assenting at the time to such *devastavit* or misapplication of the assets, and merely permitting his co-executor to possess the assets, without going farther and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets.

It is a well settled rule in chancery, in the construction of wills as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of lands, courts of equity in dealing with the subject will consider it that species of property into which it is directed to be converted.

The general principle of the common law, as laid down by Lord Coke and sanctioned by many judicial decisions, is that when the power given to several persons, is a mere naked power to sell not coupled with an interest, it must be executed by all, and does not survive. But where the power is coupled with an interest, it may he executed by the survivor. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the

devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the

power is to be exercised, that snakes the interest in question. And when an executor, guardian, or other trustee is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives.

The courts of America have generally applied to the construction of such powers, the great and leading principle which applies the construction of other parts of the

will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power; as the



office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power, and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for the want of a trustee.

It is a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish the debt unless it is expressly agreed that it is received as payment.

The auditor to whom the accounts of the executors were referred made an estimate of the expenses of the family of Mrs. Peter for twelve years, without having called for vouchers for all the items of the expenditures. The court held the allowance of $6,000 dollars for the expenses of the family for twelve

years must certainly be a very moderate charge. It was a proper subject of inquiry for the auditor, and there is no ground upon which this Court can say

the allowance is exceptionable. From the nature of the expenditure for the daily expenses of the family, it could hardly be expected that a regular account would be kept, and especially under the large discretion given by the testator in his will in relation to the maintenance of his family.

The amounts paid by the executors for the curtails and discounts on the notes running in the banks were properly allowed to their credit. Those were debts due

from the estate, and whatever payments were made were for and on account the estate

The appellees filed their bill in the court below to enjoin a sale of certain real estate, being lots in Washington which had belonged to David Peter, deceased, which sale was about to be made by George Peter, his surviving executor, for the payment of debts due from his estate to the other appellants.

The following is a copy of his will:

"In the name of God, Amen. I, David Peter, of Georgetown and District of Columbia, do hereby make and establish this my last will and testament, revoking all heretofore made by me."

"1. It is my intention that the proceeds of all my estate shall be vested in my dear wife Sarah Peter, for the maintenance and education of my children."

"2. I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose, and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object. "



3. I desire that the corner lot on Bridge and Congress streets shall be given to my son William, and the corner lot on Water and High streets to my son Hamilton, and the storehouse and lot adjoining the last named corner, devised to my son Hamilton, to my youngest son James.

"4. I desire that no appraisement or valuation shall be had of any part of the property attached to my dwelling house."

"5. I desire that my sons shall receive as good educations as the country will afford, and my daughters the best the place can furnish, and I desire that in the general distribution of the residue of my estate on the division between my sons

and daughters, my sons may receive in the proportion of five as to three."

"I constitute and appoint my dear wife Sarah Peter, captain George Peter, Leonard H. Johns, my executrix and executors of this my last will and testament."

"In witness whereof, I have hereunto set my hand and seal this 30th day of November 1812."

"DAVID PETER [L.S.]"

The will was executed in the presence of three witnesses.

They charged in their bill that George Peter was about to sell certain real estate of the testator, whose heirs and devisees they are, for the payment of debts alleged to be due to the Bank of Columbia and to the Bank of the United States; the said debts having been assigned to him, that a very large real and personal estate came to the hands of the executors of said David Peter, and that if they had used due and reasonable diligence in respect to the trust confided in them by the said will, and had properly applied the assets arising from the sales of the real and personal estate of said David, in a lawful course of administration, all the debts of the said David would have been fully paid, without any further application to the real estate to raise money for that purpose.

They charged them with having received moneys which they have not accounted for; that they sold the land in Maryland, mentioned in the will, and received about one-half the purchase money, and that the whole ought to have been received, if the executors had used due diligence. They state that the executors have settled accounts in the orphans' court which they had exhibited, whereby it appeared that they have overpaid the personal estate more than $12,000, and they contended, that if

"by the neglect of the

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executors they have not received and applied the whole of the purchase money of the land sold, to indemnify and reimburse them for the advances made towards the payment of the debts, they, the complainants ought not to be affected by such negligence."

They deny

"that there is any debt due to the banks, or any other debt whatsoever, for the payment of which it is necessary, proper, or lawful for the said George Peter to make sale of the said city lots."

They prayed for injunction and general relief.

The answer of George Peter stated that he was the brother of the testator, and that of the other executors appointed by his will, one was his widow and the other, Leonard H. Johns, her brother; that at the death of the testator in 1812, he resided in Georgetown, and in 1816 removed to the country, in Maryland, where he has ever since resided; that although he consented to qualify as executor, he did not deem it necessary that he should interfere in the management or settlement of the estate with the widow and her brother, and that except in attending to a farm and the stock thereon, and a few inconsiderable tenements in Montgomery County, Maryland, which were near his own property, he did not so interfere; that believing Mr. Johns to be fully competent, and that he would attend to the business in the way best calculated to promote the interest of his sister and her children, he left it to them to settle the estate, and collect and dispose of the proceeds thereof, and provide for the support and education of the family as they might think best.

That all this was well known to the complainant Beverly, who married the oldest daughter of the testator in 1819 and who and his wife lived with her mother till within a year or two of her death, and he exhibited a letter of said Beverly to prove this.

He stated that he had nothing to do with the settlement of accounts in the orphans' court;

"Further than that, it was explained to him to be necessary in order to comply with the rules of the banks, and thus to continue the debts, and save the property from sacrifice by a sale, to put in by way of renewal the notes of the executors for those of the testator, and that the accounts should be settled in the orphans' court, so as to show those debts in the banks, thus paid by the executors, they having substituted their own notes, and that this arrangement should continue as long as the banks would be willing to indulge the estate, or until the executors should be able to make sales for the payment of said debts, and he avers that this arrangement was explained and understood, and assented to by the said



executors and the said banks, and he presumes was explained to the orphans' court."

That this arrangement was well understood by Beverly, the widow and all the children, who were old enough to understand anything of their affairs, was often talked of by the complainants, Beverly and Ramsay, who always spoke of the estate as liable to the banks, and he exhibits numerous letters from Beverly showing his knowledge of and acquiescence in it, and shows that said Beverly was, for a considerable time, acting as agent for the estate, under the authority of the executors, and paying discounts on these substituted notes to the banks out of the rents of the estate, and sometimes from partial sales of lots, and at other times attempting to make sales for the purpose of paying interest to the said banks. He admits the sale of the land, called Dulin's in the will, to George Magruder; that he paid part of the money, was sued and became insolvent; and that an ejectment was brought to recover the land, that it might be resold; that the ejectment was removed to the Court of Appeals of Maryland, where he believes it is still pending; that if there was any neglect or delay in recovering this land, it was the neglect of the complainant Beverly, who undertook to attend to it, being then agent for the estate, who also employed counsel to file a bill in chancery in Maryland, for a resale of the land.

The defendant under these circumstances, considering this business in the hands and under the care of complainant, did not suppose it necessary for him to interfere in it. He admits that he received some small sums of money from the farm in Maryland, which he always sent to Mrs. Peter or Mr. Johns, and which, with the other money they received, he believes were faithfully applied in paying the debts, and supporting and educating the children. He knows that great expenses were incurred in this way; that the family continued to be supported in the way they had been accustomed to live; and that the income of the estate, which had greatly diminished, must have been insufficient for these purposes; that rents had greatly fallen, and most of the city property was unproductive, and the taxes were considerable. Under these circumstances, the executors exercised their discretion, honestly and fairly, in withholding the city property from forced sales at very low prices, and became responsible to the banks, who consented to the arrangement made to save the estate from sacrifice. He avers that considerable advances were made by the executors, particularly by himself

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and Johns, for the payment of debts, and the necessary support and education of the family.

He exhibits statements with his answer, showing what, upon the lowest estimates, must have been the annual expenses for maintaining the family and educating the children, and what was the annual income of the estate, showing its great inadequacy to meet those objects.

He contends that under the arrangement with the banks, with the perfect understanding of the complainant, the estate remained liable to the banks, but that if this were not so, yet if the executors had made themselves liable, they would have an undoubted right to resort to the estate for their indemnity or reimbursement, and might use and apply this right for the benefit of the banks, to whom the said debts are still due.

The answer of the banks refers to the answer of the surviving executor, for the facts stated as to the arrangement between the executors and the bank, which they aver was entered into to save the estate of testator from sacrifice, and to continue the accommodation, and that the executors and the bank, and the agents of the executors, one of whom was the complainant Beverly, always so understood it, and looked to the trust estate as still liable to the banks. They exhibit statements showing the situation of these debts at the death of the testator, and the various renewals by the executors afterwards, with the payments made by them and their agent, and the balance now due.

An amended bill was filed calling for an account of another sum of money alleged to have been received by the executors, or some of them, and charging more particularly negligence in the executors in not suing the endorsers on the notes of George Magruder, the purchaser of Dulin's farm, in time, and the consequent loss of the balance of the purchase money, by such neglect.

To this amended bill the surviving executor answered stating his knowledge and belief as to the further sum charged to have been received and unaccounted for by the executors: and he denies, as before, the negligence imputed to the executors, and avers if there was any negligence, it was that of Beverly the complainant, who, being interested in the estate and being a lawyer, undertook to attend to the recovery of the balance of the purchase money; that the endorsers were in very doubtful circumstances; that the land was looked upon by all interested as a sufficient security for the

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balance of the purchase money, and that the counsel employed in recovering the balance of the purchase money advised a resort to a resale of the land, as the best remedy to recover said balance; that for this purpose an ejectment was brought, and a bill in chancery filed in Maryland, under the direction and superintendence of said Beverly, and that if any delay or negligence occurred in the prosecution of these suits, it was caused by said Beverly.

On the coming in of this answer, the cause was referred to the auditor to make a report and account and take depositions, &c.;

The following report was made by the auditor:

"This cause having been referred to the auditor, with directions to take and report an account of all sums received by the executors from the real and personal estate of David Peter deceased, and of the sums paid by them, &c.;, and to take depositions and report all evidence and testimony by him taken, the auditor, after having notified the parties, proceeded to examine the accounts and vouchers of the executors, and the several statements made by the counsel of the complainants and defendants; and now bogs leave of this honorable court to report: "

"That he has examined the several statements made by the executors with the orphans' court, and has extracted therefrom the several sums received and paid by them. In making the statement now submitted, the auditor has omitted the charges made by the executors, and for which they obtained credit in their settlement with that court for payments stated to have been by them made to the Bank of Columbia and the Union Bank of Georgetown, because it does not appear that these debts were at that time paid by them."

"When David Peter died, he was largely indebted to these banks upon endorsed notes, discounted in them. A proposition was made by the executors and acceded to by the banks to prevent these notes from lying under protest, to substitute notes to be drawn by Mrs. Sarah Peter, executrix, and endorsed by Leonard H. Johns and George Peter, executors. These notes of David Peter were retired by this substitution, and passed as credits to the executors in the orphans' court as paid, when in truth and in fact they were not paid. Whether the bank by this arrangement released the estate of David Peter or not the auditor does not undertake to determine. In the account with the orphans' court, the executors are charged with the amount of the inventory of the personal estate, both in the District of Columbia and in Maryland. In the present statement, these charges are

omitted. As far as any proceeds of the personal estate came into their hands, they are charged in this audit, but they are not charged with what the widow and heirs retained in their own hands, and for their own use, the object being to ascertain whether the executors are indebted to the estate or the estate to them. It will be seen that by an account stated by the counsel for the heirs and annexed to the auditor's statement, that he has charged the executors with $20,250, being the amount of sale of land to George Magruder. It appears from the papers that the first payment for this land, amounting to $6,895.96, and interest thereafter, in all $8,000, is all that has ever been paid or received by the executors on that account; the balance has not been paid, under the plea by the representative of Magruder that the will of David Peter did not sufficiently authorize the executors to sell and make a good title to the land. Under these circumstances, this charge for the balance of the purchase money is rejected by the auditor."

"The counsel for the bank and executors has also made a statement, which is also annexed. The auditor rejects both statements and presents one of his own. It appears that when David Peter died, he possessed a large estate, with a suitable establishment in Georgetown. He left a widow, three sons, and two daughters, minors. His estate, although large, was not proportionally productive. It consisted of land in Montgomery County, Maryland, and lots and houses in Georgetown and the City of Washington; most of the lots were unimproved. The land in Maryland was tenanted out, except one farm, which, being stocked, was reserved for the management and support of the family, and so remains to this day. The income arising from the estate annually, after paying taxes, was insufficient to defray the expenses of the establishment in Georgetown in the manner they had been accustomed to live and to educate the three sons and two daughters. The auditor has therefore estimated the family expenses at $1,500 per annum, or $500 over and above the produce of the stocked farm and the small amount of rents received in Montgomery. In addition to these expenses, the estate was bound by the will of David Peter's father to contribute to his mother's support during her life $500 in money, with a proportion of wood and provisions, per annum. These heavy

charges upon the estate, and the accumulation of interest and discounts on debts, has caused the estate to fall largely indebted to the



executors, while the Bank of the United States, as assignee of the Bank of Columbia, and other claimants, remain unpaid."

"The claims upon the estate by Richard West, Thomas P. Wilson, and the Union Bank were recovered by judgments against George Peter, as executor and endorser, and have been fully paid by him."

"By the statement now presented, it appears that the estate is indebted to the executors $17,539.61, arising from the above causes: the larger part, if not the whole, is in justice due to George Peter, in addition to which he has an account for a considerable amount which is suspended in this audit, on account of some charges in blank, for sundry payments to managers and overseers, blacksmith's bills, &c.;, which charges may be considered when the claims generally shall be presented for final settlement."

"The death of the executrix, the subsequent death of Leonard H. Johns, who was the acting executor, and the surviving executor not residing in the district, and knowing little about the manner in which the estate has been managed, the want of papers and confused state of the whole concern, renders it a laborious and difficult task to do exact justice to all parties, but with the materials within his reach, the auditor has made the best report in his power, which he hopes will be received. It cannot be very material to the heirs whether they still owe the bank or not, because if they do not owe the bank, they will be by the same amount more indebted to the executors."

"December 10, 1833."

The complainants excepted to the report of the auditor. The following is a summary statement of the exceptions:

1 and 2. That the auditor has not charged the said surviving executor with the amount of the inventories of the personal estate of the testator, filed by the said executors in the Orphans' Court of Washington County, District of Columbia, on 12 December in the year 1812, and on 12 January, 1813.

3. That the auditor has not recharged the surviving executors with the sum of $4,552, being the value of certain personal effects, part of the assets of the testator's estate, applicable to the payment of his debts, which was improperly delivered to Sarah Peter, widow and executrix of the said David, as a legacy, and for which said executors have obtained improperly a credit on the settlement of their accounts with the said orphans' court.

4 and 5. That the auditor has not charged the said surviving executor with the amounts respectively of two promissory notes of

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George Magruder and interest on one to 1 January, 1815, and the other to 1 January, 1816, which said notes were received by the said executors of said Magruder, for the second and third installments of the purchase money of the tract of land called Dulin's farm, devised to be sold and sold by said executors to aid in the payment of testator's debts, which said sums of money were lost by the gross neglect and fault of the said executors.

7. That the auditor has given credit to said executor in said account current for the sum of $5,809.92 cents, being the estimated amount of taxes on the real estate devised by said David Peter to the complainants (the appellees) and supposed to have accrued prior to the year 1829, without any evidence that the said executors had ever paid that or any other sum of money on account of such taxes.

8. That the auditor has given credit to the executors for the sum of $6,000, being, as he says, the estimated amount of the expenses of Mrs. Sarah Peter's family for twelve years, without evidence to show that that or any other sum of money was expended by the said executors for such purpose.

9, 10 and 11. That the auditor has given credit to the said executor, for the sum of $8,931.12 for discounts and curtails paid in the Union Bank of Georgetown, and $1,430.75 for discounts and curtails paid in the Bank of Columbia, since 25 September, 1815, after which time no debt was due from the estate of David Peter to either of the said banks, and after the said executors were in possession of assets of the said estate sufficient to pay all the debts of the said David.

12. That the auditor has rejected the statement and account presented on the part of the complainants, the appellees, and refused to charge the said executors as they are therein charged.

In January 1835, the circuit court overruled the exceptions, and on 25 May, 1835, the following decree was made.

"This cause having been set for hearing upon the bill, answers, exhibits, and evidence and having been argued by counsel, it is this 25 May, 1835, upon further hearing of the parties and their counsel, ordered, adjudged, and decreed that the auditor's report heretofore excepted to by the complainants be and the same is hereby confirmed and the exceptions thereto overruled."

"And the court, further considering the said cause, does order, adjudge, and decree that the said injunction, granted as aforesaid on

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the prayer of said complainants be and the same is hereby made perpetual, and that the defendants pay to the complainants their costs of suit."

From this decree the defendants appealed to this Court, and the complainants appealed from so much of the decree as confirmed the auditor's report.

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

The bill was filed by the appellees in the court below to enjoin the appellants from proceeding to sell certain lots of land in the City of Washington belonging to the estate of David Peter for the payment of debts alleged to be due to the Bank of Columbia and the Bank of the United States. David Peter made his will bearing date 30 November, 1812, and shortly thereafter departed this life, and by his will he declares and directs as follows:

"It is my intention that the proceeds of all my estate shall be vested in my dear wife Sarah Peter for the maintenance and education of my children."

"I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose, and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object."

"I desire that no appraisement or valuation shall be had of any part of the property attached to my dwelling house."

"I desire that my sons shall receive as good educations as the country will afford, and my daughters the best the place can furnish."

And he appointed his wife Sarah Peter, his brother George

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Peter, and his brother-in-law Leonard H. Johns, the executrix and executors of his will, of whom George Peter is the only survivor.

The bill charges that George Peter, the surviving executor, under color of the directions in the will, was about to sell that part of the real estate of David Peter which lies in the City of Washington, and has actually offered the same for sale at public auction. The bill further charges that there came to the hands of the executors personal estate of the said David Peter to the amount of more than $25,000. That they had sold the Dulin farm for $20,688.90 to George Magruder in the year 1813, and received one-third of the purchase money, and took for the

balance, divided in equal sums, two promissory notes, one payable 1 January, 1815, and the other 1 January, 1816, one endorsed by Patrick Magruder and the other by Lloyd Magruder. That the purchaser, George Magruder, was put into possession of the farm and still holds it, and that the notes given for the balance of the purchase money have been lost by the negligence of the executors. The complainants deny the existence of any debt due from the estate of David Peter to the said banks or either of them, or any other debt whatsoever for the payment of which it is either necessary, proper, or lawful for the said George Peter to sell the said city lots. And the bill prays that the executor may fully account for the real and personal estate of the said David Peter and show how the same has been disposed of, and that the banks may be required to produce the notes or other evidence of their pretended debt and prove the same, and praying an injunction to restrain the said George Peter and his agents from selling or in any way disposing of or encumbering the real estate of the said David Peter in the District of Columbia, concluding with a prayer for general relief.

The injunction was granted, and on the coming in of the answer was ordered to be continued until the final hearing of the cause.

The answer of George Peter, the surviving executor, alleges that the principal management of the business of the estate was assumed by his co-executors; that believing Johns fully competent, and that he would attend to the business in a way best calculated to promote the interest of his sister and her children, he left it to them to settle the estate and to collect and dispose of the proceeds thereof and provide for the support and education of the children as they might think best, and that all this was well known to the complainant Beverly, who married the eldest daughter of the testator in the year

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1819. That he and his wife lived with her mother until within a year or two of her death.

That the debts due to the banks had been continued by renewed notes from time to time, drawn and endorsed by the executors in compliance with the rules of the banks and with the understanding that such arrangement was to continue as long as the banks were willing to indulge the estate or until the executors should be able to make sales for the payment of those debts; that this arrangement was well understood by Beverly and all the children who were old enough to understand anything of their affairs, and was often talked of by Beverly and Ramsay, who always spoke of the estate as liable to the banks for these debts. The surviving executor, to the charge of neglect in relation to the balance of the purchase money for the Dulin farm, alleges that Magruder, the purchaser, was sued upon the notes given for the balance, and became insolvent. That an ejectment was brought to recover possession of the land that it might be resold, no title having been given for the land, but only a bond for a deed according to the terms of the sale. That the ejectment was removed to the Court of Appeals in Maryland, where he believes it is still pending. That if there was any neglect or delay in recovering this land, it was the fault of the complainant Beverly, who undertook to attend to it, being then agent for the estate.

The answer of the banks refers to the answer of the surviving executor for the facts stated in relation to the arrangement between the executors and the banks, which it is averred was entered into to save the estate of the testator from a sacrifice and to continue the accommodation. That the executors and the banks, and the agents of the banks, one of whom was the complainant Beverly, always so understood it and looked to the trust estate as still liable to the banks. They exhibit statements showing the situation of the debts at the death of the testator, and the various renewals by the executors afterwards, in their private capacity, with the various payments which had been made, and showing the balance now due.

An amended bill was afterwards filed calling for an account of other moneys alleged to have been received by the executors and charging more particularly negligence in the executors in not having sued the endorsers of the notes of Magruder for the balance of the purchase money of the Dulin farm and the loss thereof by reason of such neglect.

To this amended bill the surviving executor answers, stating his

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knowledge and belief respecting the moneys for which he is called upon to account, denies the negligence imputed to him, and avers that if there was any negligence, it was that of the complainant Beverly, who, being interested in the estate and being a lawyer, undertook to attend to the recovery of the balance of the purchase money. That the endorsers were in very doubtful circumstances; that the land was considered by all parties interested as sufficient security for the balance of the purchase money; and that the counsel of the executors advised the resort to a resale of the land as the best remedy for the recovery of such balance, and for that purpose an ejectment was brought to recover the possession and a bill in chancery filed in Maryland under the direction and superintendence of Beverly, and that if any negligence occurred in the prosecution of these suits, it was attributable to him.

The cause was referred to the auditor to take and report an account of all sums of money received by the executors from the real and personal estate respectively and of the sums paid by them in the due course of administration and of any other sums paid by them for the maintenance of the family and the education of the children, stating them separately. The auditor reports a large balance due the executors, allowing them for the maintenance of the family and the debts paid by them. To this report the complainants excepted, and the exceptions were overruled, and at the March term of the circuit court in 1835, a final decree was entered confirming the report of the auditor and decreeing a perpetual injunction. From this decree of a perpetual injunction the defendants in the court below appealed, and from so much of the decree as confirmed the report of the auditor, the complainants appealed, and upon these cross-appeals the cause comes here for review.

In examining the various questions which have been made in this case, the most natural order seems to be to consider in the first place, the will of David Peter. Upon this depends in a great measure the rights of the banks as creditors of the

estate and the rights, duties, and responsibilities of the executors, and particularly those which devolve upon George Peter, the surviving executor.

David Peter died in the year 1813, shortly after making his will, leaving his widow with a family of five children, two daughters and three sons, the eldest about thirteen years of age, living in ease and supposed affluence, as appears not only from the pleadings and proofs in the case, but as fairly to be inferred from the provisions made for

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them by his will and the disposition made of his property. His primary object seemed to be that his family should remain together and live as they had been accustomed to live. And he accordingly, in the first place, directs that the proceeds of all his estate should be vested in his wife, Sarah Peter (who is made one of his executors) for the maintenance and education of his children. He directs that no appraisement or valuation should be had of any part of his property attached to his dwelling house, and that his sons should receive as good educations as the country would afford, and his daughters the best the place could furnish. The family accordingly remained together, except Mrs. Beverly, and were maintained and educated according to the directions of the will until the death of the said Sarah Peter in the year 1825. The testator directed his debts to be paid as speedily as possible, and for that purpose declared that the tract of land on which Dulin lived, together with all the personal property thereon, should be sold and applied to the payment of his debts, and in aid of that, as soon as sales could be effected, so much of his city property as should be necessary for the payment of his debts.

The testator had a right unquestionably, so far as respected his children, to charge the payment of his debts upon any part of his estate, real or personal, as he might think proper and most advantageous to his family. And if the creditors were willing to look to the fund so appropriated to that object, no one would have a right to counteract or control his will in that respect. And he having thought proper to constitute his widow the trustee of the proceeds of all his estate, for the

maintenance and education of his children, thereby vesting in her an unlimited discretion in this respect so far as the proceeds of his estate would go; the surviving executor is not accountable for anything applied by her for that purpose, not even if she would be chargeable with a *devastavit.* For it is a well settled rule that one executor is not responsible for the *devastavit* of his co-executor, any farther than he is shown to have been knowing and assenting at the time to such *devastavit* or misapplication of the assets, and merely permitting his co-executor to possess the assets, without going further and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts and what he receives and applies, unless he joins in the direction and misapplication of the assets. Cro.Eliz. 348; 4 Ves. 596; 4 Johns.Ch. 23; 19 Johns. 427.



It is not intended to intimate that there was any *devastavit* or waste of the estate by Mrs. Peter. There is, indeed, no pretense in the bill of any misapplication of the estate by her or any other of the executors, and for the very purpose for which the proceeds of the estate were vested in her, to maintain and educate a family of young children, it was necessary to clothe her with a large discretion, and for this reason the testator directs that there should be no appraisement or valuation of any part of his property attached to his dwelling house. The proceeds of all his estate being vested in his widow would render it necessary, independent of any express direction in the will, that recourse should be had to the real estate for the payment of his debts.

And this leads, in the next place, to the inquiry whether George Peter, the surviving executor, has authority to sell the lots in the City of Washington.

With respect to the Dulin farm no doubt can exist. The testator gives positive directions for that farm to be sold and the proceeds applied to the payment of his debts. The executors in the sale to Magruder only gave a bond for a deed; the title was not to be given until the purchase money was all paid, and that not having yet

been done, no title has been conveyed, and it yet remains subject to be applied to the payment of debts, and a resale is necessary in order fully to carry into effect the will of the testator. It is a well settled rule in chancery in the construction of wills as well as other instruments that when land is directed to be sold and turned into money or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. This is the doctrine of this Court in the case of *Craig v. Leslie,* 3 Wheat. 577, and is founded upon the principle that courts of equity, regarding the substance and not the mere form of contracts and other instruments, consider things directed or agreed to be done as having been actually performed. But this principle may not perhaps apply in its full force and extent to the city lots. They are not positively directed by the will to be converted into money, but the sale of them was contingent, and only in aid of the proceeds of the Dulin farm if a sale of them should become necessary for the payment of debts. But independent of this principle, there is ample power in the surviving executor to sell. We find in the cases decided in the English courts and in the elementary treatises on this subject no little confusion, and many nice distinctions.



The general principle of the common law as laid down by lord Coke (Co.Lit. 112b) and sanctioned by many judicial decisions is that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. 553; 2 Johns.Ch. 19.

But the difficulty arises in the application of the rule to particular cases. It may perhaps be considered as the better conclusion to be drawn from the English cases on this question that a mere direction in a will to the executors to sell land, without any words vesting in them an interest in the land or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which third persons are interested and who have a right to call on the

executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate or a right in the subject over which the power is to be exercised that makes the interest in question. And when an executor, guardian, or other trustee is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. 1 Caines' Ca. in Er. 16; 2 Peere Wms.

In the American cases, there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power for the purpose of carrying into execution the intention of the testator and preventing the consequences that might result from an extinction of the power, and where there is a trust charged upon the executors in the



direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted in any event to fail for want of a trustee. This is the doctrine of Chancellor Kent in the case of *Franklin v. Osgood,* 2 Johns.Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts. 3 Atk. 714; 2 Peere Wms. 102, and is adopted and sanctioned by the Court of Errors in New York, on appeal in the case of *Franklin v. Osgood.* And Mr. Justice Platt in that case refers to a class of cases in the English courts where it is held that although, from the terms made use

of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell, yet if from its connection with other provisions in the will it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania in the case of the Lessee of *Zebach v. Smith,* 3 Binney 69. The court there considered it as a settled point that if the authority to sell is given to executors *virtute officii,* a surviving executor may sell, and that the authority given by the will in that case to the executors to sell was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law.

Although the clause in the will now under consideration does not name the executors as the persons who are to sell the land, yet it is a power vested in them by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors, and it follows as a matter of course that the testator intended his executors should make the sale to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his Treatise on Powers, page 167, on the authority of a case cited from the year books, lays it down as a general rule that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of chancellor Kent in the case of *Davoux v. Fanning,* 2 Johns.Ch. 254. The will in that case, as in this, directed the real estate to be sold for certain purposes therein

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specified, but did not direct expressly by whom the sale should be made, and he held, as lord Hardwicke did in a case somewhat similar, 1 Atk. 420, that it was a reasonable construction that the power was given to the executors; that it was almost impossible to mistake the testator's meaning on that point. So in the present case it is impossible to draw any other conclusion than that it was the

testator's intention that the sale should be made by his executors. *Jackson v. Hewitt,* 15 Johns. 349, is a case very much in point on both questions. That the power in this case is coupled with an interest, and survives, and that by implication it is to be executed by the surviving executor. The testator, said the court in that case, directed that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom, and one of the executors only undertook the execution of the will, and sold the land, and the court held that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts.

It has been thought proper to dwell a little more at large upon the construction of this will and the power given to the executors to sell than would have been deemed necessary had it not been supposed and urged at the bar that the Court of Appeals in Maryland had given a different construction to the will than the one we have adopted. This will was brought under the consideration of that court in the ejectment suit for the recovery of the Dulin farm already referred to, 4 Gill & Johnson 323, and it is true the court does say that the power given in the will to sell is a mere naked power. But this was not the main point before the court. The question seemed to turn upon the demises in the declaration, and whether the legal estate in the land was in Mrs. Peter and her children, so as to enable them to maintain an action of ejectment. As the clause in the will directing a sale of the land did not direct it to be made by the executors, it became a question whether the executors had that power by implication, or whether it was a case coming within the Maryland law of 1785, which provides that if a person shall die leaving real or personal estate to be sold for the payment of debts or other purposes, and shall not appoint a person to sell and convey the property, the chancellor shall have the power to appoint a trustee for that purpose. And the court seemed to think the will now in question came within that provision. But this case, however respectable the authority may be, cannot be admitted to control the decision in

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the case now before the Court, where the lands in question lie in the City of Washington, and we entertain a very decided opinion that the power to sell given

by this will is a power coupled with an interest which survives and may be executed by the surviving executor.

The next inquiry is whether there is any subsisting debt due from the estate of David Peter to the banks. It is contended on the part of the complainants in the court below that this debt has been extinguished by the notes given by the executors, and no longer remains a debt due from the estate. There is no pretense that these debts have in point of fact been paid, and if not, the trust has not been executed and the land still remains charged with it. If the executors have paid the debt to the banks or the banks have accepted their notes in payment in place of the notes of the testator, so that the executors became the debtors and personally responsible to the banks, the only effect of this is that the executors became the creditors of the estate instead of the banks, and may resort to the trust fund to satisfy the debt. 2 Peere Wms. 664, note; 7 Har. & John. 134; 4 Gill & Johns. 303; 2 Pick. 567.

But there is no ground for considering the debt of the banks extinguished. David Peter, at the time of his death, was largely indebted to these banks upon endorsed notes discounted by them, and to prevent these notes from lying under protest, an arrangement was made between the banks and the executors to substitute notes drawn by Sarah Peter and endorsed by Leonard H. Johns and George Peter, and the notes of David Peter were retired by this substitution, and passed as credits to the executors in the orphans' court as paid, when in truth and in fact they were not paid. The substitution of the notes of the executors was only by way of renewal and to comply with the rules of the banks, and thus to continue the debts by the indulgence of the banks until the executors should be able to make sales for the payment of them, without any intention or understanding by any of the parties that the substituted notes were offered or received as payment of the debts. That such was the arrangement made respecting these debts and so understood by Beverly, at least, is established by the most clear and satisfactory evidence, and there is good reason to believe, that this was well understood in the family by all the children who were of an age sufficient to understand the business and concerns of the estate. This arrangement under such circumstances cannot in any manner be

considered an extinguishment of the debt. The law on this subject is well settled, and the

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principle well and succinctly laid down in the case of *James v. Hackly,* 16 Johns. 277. It is, said the court, a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt unless it is expressly agreed that it is received as payment. It is unnecessary in the present case to carry the principle so far as to say there must be an express agreement for that purpose in order to operate as payment, but the evidence must certainly be so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties. And the rule to this extent is settled by the most unquestioned authority. 11 Johns. 513; 14 John. 404; 2 Gill & John. 493; 7 Har. & John. 92.

In the original bill, the complaint against the executors for not having collected the balance of the purchase money can hardly be considered a charge of negligence, and much less of that gross negligence which ought to make the executor personally responsible. It barely alleges that this balance ought to have been received if the executors had only used reasonable diligence in regard to the collection. But after the answer and explanation of the executor to this charge came in, an amended bill was filed, charging the executor with gross negligence in this respect. This seemed to be an afterthought, and rather a stale allegation. But the answer and explanation of the executor, uncontradicted in any manner, fully exonerates the executors from all culpable negligence. Magruder was prosecuted for the balance of the purchase money; he became insolvent, and no further payment could be obtained from him. An ejectment was brought to recover possession of the land, that it might be again sold; the cause was tried in the county court and removed to the Court of Appeals, where the judgment was reversed and a *procedendo* awarded. This business was principally under the care and direction of the complainant Beverly, and if there was any want of due diligence in prosecuting the suit, it is chargeable to him, and not to the executor. And besides, the executor in the whole of this business acted under the advice of counsel, which shows satisfactorily that he acted in entire good faith, and would go

very far to exonerate him from the charge of negligence even if there were circumstances leading to a contrary conclusion. 2 John. 376.

From this view of the case we are satisfied that the direction in the will of David Peter to sell a portion of his real estate for payment of his debts, created a power coupled with an interest that survives. That the surviving executor is, by necessary implication, the person



authorized to execute that power and fulfill that trust. That the debt due the banks has not been extinguished by the notes substituted by the executors as renewals in the bank, or the estate of the testator in any way discharged from the payment of the debt. That the executors are not chargeable with negligence or misapplication of the personal estate that ought to render them personally responsible for these debts, and that no reason has been shown why satisfaction of these debts should not be had out of the lands appropriated by the testator for that purpose.

It remains only very briefly to notice the exceptions which were filed to the report of the auditor, and most of these have been disposed of by the principles laid down in the foregoing opinion. It is proper here to observe that from the report of the auditor upon the accounts exhibited by the executors and allowed by him, there has at all times been and now is a considerable balance in favor of the executors against the estate.

With respect to the first and second exceptions, it is true that the auditor has not charged the executors with the inventories, and he ought not, according to the principles upon which he makes his statement, the object of the reference to him being to ascertain whether the executors were indebted to the estate or the estate to them, and for this purpose he examined the several statements made by the executors with the orphans' court, and extracted from them the several sums received and paid by them. In the account with the orphans' court, the executors are charged with the amount of the inventory of the personal estate, both in the

District of Columbia and in Maryland, and as far as any proceeds of the personal estate came into the hands of the executors, they are charged in the statement of the auditor; but they are not charged with what the widow and heirs retained in their hands and for their own use, and this was correct, according to the provisions in the will, for the maintenance of the family and the education of the children.

The $4,552 mentioned in the third exception was properly omitted in the statement of the account against the executor. It was a portion of that part of the estate which was put into the hands of the widow, attached to the dwelling house, and with respect to which the testator directed that no appraisement or valuation should be made.

The fourth and fifth exceptions relate to the notes taken from Magruder for the balance of the purchase money of the Dulin farm.

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The executors, as has been already shown, are not chargeable with those notes. No negligence is imputable to them which ought to make them personally responsible. No title has been given for the farm, and it may yet be resorted to for payment of this balance of the purchase money.

The auditor has properly given credit to the executors for the taxes on the real estate. There is no suggestion that the taxes were not due and paid by somebody. The amount appears to have been paid according to the account of the register, and it is fairly to be presumed that they were paid by the executors, although no regular vouchers are produced for such payment. This may be accounted for, in some measure at least, by the circumstances stated in the answer of George Peter of the destruction by fire of the books and accounts of his co-executor, Leonard H. Johns, who had the principal management of the estate.

The allowance of $6,000 for the expenses of the family for twelve years must certainly be a very moderate charge. It was a proper subject of inquiry for the auditor, and there is no grounds upon which this Court can say the allowance is exceptionable. From the nature of the expenditure for the daily expenses of the

family, it could hardly be expected that a regular account would be kept, and especially under the large discretion given by the testator in his will in relation to the maintenance of his family.

The amount paid by the executors for the curtails and discounts on the notes running in the banks were properly allowed to their credit. These were debts due from the estate, and whatever payments were made were for and on account of the estate.

These are all the exceptions taken to the report of the auditor, and we think they were all properly overruled by the court below. But the court erred in decreeing a perpetual injunction.

The decree of the circuit court must accordingly be

*Reversed, the injunction dissolved, and the bill of the complainants dismissed.*

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 Washington, and was argued by counsel, on consideration whereof it is ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled. And

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this Court, proceeding to render such decree as the said circuit court ought to have rendered in the premises, doth order, adjudge and decree that the injunction in this cause be, and the same is hereby dissolved, and that the bill of the complainants be, and the same is hereby dismissed, and that this cause be, and the same is hereby remanded to the said circuit court with directions to said court to carry this decree into effect.

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