Between

WILLIAM YATES and Sarah his wife, *plaintiffs*
and
ABRAHAM SALLE, Bernard Markham, Edward Moſeley, Benjamin Harris, and William Wager Harris, *defendents.*

BENJAMIN HARRIS, father of the plaintiff Sarah, of five other daughters, and of the defendents Benjamin Harris and William Wager Harris, ſeiſed of valuable lands, poſſeſſed of a number, between fifty and ſixty, of ſlaves, and intitled to credits, amounting to about one thouſand pounds, by his teſtament, in april, of the year one thouſand ſeven hundred and ſeventy ſix— after deviſing and bequeathing part of his eſtate to his wife, to be holden during her life, in ſatisfaction of her dower; after deviſing and bequeathing to his ſons his moſt profitable lands, and his ſlaves and perſonal eſtate, except the parts thereof given to his wife and daughters; and after bequeathing to his daughters Mary Spencer and Hinſon Wager Moſeley, who is ſuppoſed to be the wife of the defendent Edward Moſeley, each, one hundred pounds, current money, to be raiſed out of the profits of his eſtate, and four young negroes, and to Mary Spencer a bed and furniture, or ten pounds, current money,— bequeathed to his daughters, Phoebe, Edith, the plaintiff Sarah, and Nancy Hinſon Wager, each, one hundred pounds, current money, to be paid within

within twelve months after they ſhould reſpectively attain their ages of eighteen years, or marry, alſo two hundred pounds more, of like money, when they could be conveniently raiſed from the profits of his eſtate, to be paid at the diſcretion of his executors, alſo four young negroes, and a bed and furniture, or ten pounds; declared his will to be, that his ſon Benjamin pay to his ſon William Wager three hundred pounds, current money, in regard the eſtate given to the former was more valuable than that given to the latter; deviſed three lots of land in Mancheſter to his ſons, and ten thouſand acres of land in Tranſylvania to his eight children; directed all his eſtate to be kept together for paying off the money legacies, for maintenance of his family, and for education of his children, until his ſon Benjamin, or, in caſe of his death, until his other ſon ſhould attain the age of twenty one years; and appointed the defendents Abraham Sallè, Edward Moſeley, and Bernard Markham, with Samuel Nivins, of whom the laſt is ſuppoſed to be dead, becauſe, after proving the teſtament, nothing more appeareth to have been done by him, executors.

Before depretiation was perceptible the teſtator died; for, in ſeptember, 1776, a certificate for obtaining the probate of his teſtament was granted.

A few months afterwards, the plaintiff Sarah choſe

choſe the defendent Abraham Sallè her guardian, and, in auguſt 1777, attained the age of eighteen years.

The defendents Edward Moſeley and Bernard Markam voluntarily tendered to the guardian of the plaintiff Sarah, on the 12 day of ſeptember, 1778, one hundred pounds, and on the 31 day of Auguſt, 1779, two hundred pounds more, both in depretiated paper money, and required him to receive them in diſcharge of the money legacies to his ward. the defendent Edward Moſeley propoſed to tender Nancy Harris's legacy to her guardian Thomas Harris, who refuſed to receive it in paper money; and it was afterwards paid in ſpecie.

The guardian of the plaintiff Sarah was unwilling to receive the paper money, and wiſhed to have declined it, but thought himſelf compelled, by the laws of the country, to take it, when payment was offered; and received it accordingly. ſo ſoon as the money was paid to him, he lent out two hundred pounds upon intereſt, and was compelled, as he ſays, to receive them again, much againſt his inclination, and could not lend out the money afterwards. he offered the whole three hundred pounds to the plaintiff Sarah, when ſhe attained full age, which ſhe refuſed to accept. and then he funded the paper money.

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No other legatary, beſides the plaintiff Sarah, ſuſtained conſiderable, if any, loſs from depretiation.

The plaintiffs brought their bill for the wifes legacy, to be paid by the executors of her father, or by the ſons, whoſe eſtates were chargeable with it.

The executors, in their anſwer, admit the facts before ſtated, and the two, who tendered the paper money, ſay, 'they thought themſelves bound by their duty, and in obedience to the will of their teſtator, to tender the legacy ſo ſoon as the eſtate was in circumſtances to pay the ſame;' that the plaintiff Sarah, before they paid her legacy, informed them ſhe wiſhed to receive it, that ſhe might draw intereſt upon it; and that the defendent Bernard Markham adviſed her not to take it. * and they admit that they have bonds, belonging to the eſtate of their teſtator, ſtill in their poſſeſſion, to the amount of little more than two hundred pounds, and that they have given up tothe other defendents a large perſonal eſtate.

And thoſe other defendents, the ſons, in their anſwer, clame the benefit of the payments to the guardian, conceiving the clame to be juſt, becauſe the eſtates, received from their father, had been injured, as they allege, by payments in paper money to the executors, about the time of diſcharging the legacy.

By

By accounts, to which the executors refer, the teſtators credits, by bonds and a note of hand, at the time of his death, amounted to ſeven hundred and ſeventy ſeven pounds five ſhillings and ſeven pence, ſuppoſed to be principal money. of theſe credits, the executors received from Hannah Eaſley, on the 5 day of march, 1777, two pounds, from John Short, on the 8 day of may 1779, ſixty one pounds and fifteen ſhillings, from James Harris, on the 25 day of june, 1780, one hundred and fifty pounds ten ſhillings and ſeven pence, and from John Scott, on the 8 day of december, 1785, ſixteen pounds and ten ſhillings. ſo that of the credits five hundred and forty ſeven pounds had not been received by the executors, and, according to their anſwer, the ſecurities for payment of that remainder, with many years intereſt, the firſt of them being dated in 1768, and the laſt of them on the 2 day of auguſt, 1776, were retained by the executors, or ' given up' to their friends the ſons. and the other credits, by payments of which in paper money the ſons pretended the eſtates given to them by their father to have been reduced, aroſe from ſales by his executors after his death; ſo that the eſtate, in the hands of ſuch thrifty managers, probably gained as much as it loſt by depretiation. two months before the tender of the two hundred pounds to the plaintiff Sarahs guardian, the executors received four hundred pounds for one horſe, ſold to John Harris, ſuppoſed to be the horſe valued by a witneſs at

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thirty-five pounds in ſpecie, and one month after that tender, received two hundred pounds for leſs than nine hundred and ſixty pounds of tobacco ſold to Francis Locket. but if the payments in paper money were detrimental to the eſtate, the contrivance of executors, entruſted for the benefit of all the children, to burthen one of them with nearly the whole loſs, was as nefarious, as the retention of the iniquitous gain by her brothers was rigorous.

The cauſe was heard on the firſt day of june, in the year 1792, when the opinion of the court was declared to be, that the plaintiffs were bound by the receipt of the guardian of the plaintiff Sarah of one hundred pounds, part of the three hundred pounds bequeathed to her; but that the plaintiffs were intitled to the reſidue of that legacy, with intereſt; and the court decreed the executors to pay to the plaintiffs two hundred pounds, with intereſt thereupon from the firſt day of january, one thouſand ſeven hundred and eighty two, and coſts.

The diſtinction in the decree between the payment of the one hundred pounds and the payment of the two hundred pounds was afterwards thought to be grounded on a falſe principle, unneceſſary to be here explaned; and,

On the 26 day of ſeptember, in the ſame year, the decree, by conſent of parties, was reviewed, and the court, partly reverſing it, decreed the executors,

executors, out of the eſtate of their teſtator, in their hands to be adminiſtered, to pay to the plaintiffs the whole three hundred pounds, bequeathed to the plaintiff Sarah by the teſtament of her father, after deducting therefrom the payments to the guardian, according to the true value thereof at the times of payment, with intereſt from the times when ſhe was intitled to receive her legacy. an account of the payments and intereſt was directed to be ſtated by a commiſſioner, upon whoſe report the ſons would have been decreed to pay ſo much of the legacy and intereſt as exceded the effects in the hands of the executors.

He who awarded this decree was not moved, in forming it, as hath been ſuppoſed, by compaſſion * for an orphan CONFESSED† to have been INJURED † by thoſe who ought to have protected her, but was moved by theſe conſiderations:

I. The money bequeathed to the plaintiff was intended by her father to be equal in value to the money current at the date of his teſtament, which was of the ſame value, or nearly of the ſame value, as the money current when the decree was pronounced. for

First,

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* *This motive was aſcribed to him when the decree was condemned.*

† *See decree of reverſal at the end.*

Firſt, he did not know that, between that time, and the times appointed for payment of the legacy, the comparative value of money would vary more than the comparative values of other commercial ſubjects; and

Secondly, the teſtament itſelf exhibiteth a criterion for adjuſting the value of the money legacies, which indicates the value contemplated by the teſtator to have been the value of money current when he was beſtowing them. the parts of the teſtament, to which this obſervation alludeth, are thoſe by which were bequeathed a bed and furniture, OR TEN POUNDS, to one married daughter, and the ſame to each of the daughters unmarried; and by which the ſon Benjamin was enjoined to pay THREE HUNDRED POUNDS to his brother, in order that their ESTATES might be more nearly EQUAL IN VALUE. whence may be inferéd, that the teſtator intended, that every ten pounds of the portions to his daughters ſhould be equal in value to a bed and furniture; and that the three hundred pounds legacy to each daughter ſhould be equal to the three hundred pounds, to be paid by one of the ſons to the other; and did not intend that his ſon Benjamin, by payment to his brother, in december, 1781, of three hundred pounds, at that time worth, by legiſlative eſtimation, not more than a dollar, and, by vulgar eſtimation, nothing, ſhould diſcharge the obligation to make the eſtates of both equal.

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One may rationaly ſuppoſe, that the teſtator, if he had foreboded thoſe events, by which the comfortable proviſion, as he thought, for his daughter, became unworthy her acceptance, would have bequeathed to her portions of the fruits to be yielded by his eſtate, equal to the value of the money, by which he expected ſhe could procure thoſe fruits, which might have been effected, without impairing the capital funds devoted by him to the uſe of his other children; that he would have eſtimated the ſubſtitute for money by ſome ratio analogous with that obſerved in the inſtances of the bed and furniture, and of the difference in value between the eſtates given to the two ſons; or that he would have provided for her otherwiſe, in ſome ſuch manner as that ſhe, and of all his family ſhe only, ſhould not be deprived of more than half the portion which he wiſhed her to enjoy.

So that the executors, who ſay, ‘ they thought ‘ themſelves bound, by their duty, and in obe- ‘ dience to the will of their teſtator, to tender ‘ the ſaid legacy, ſo ſoon as the eſtate was in cir- ‘ cumſtances to pay the ſame,’ if they did think ſo, manifeſtly miſinterpreted that will. according to their interpretation, the teſtator, who, providing for the ſupport of a child, after ſhe probably would leave his family, where he had directed her to be maintained during the minority of his ſons, or one of them, bequeathed to her one hundred pounds, to be paid within twelve

months after ſhe ſhould be eighteen years old, and two hundred pounds more, ‘ when the ſame ‘ could be CONVENIENTLY RAISED from ‘ the profits of his eſtate, to be paid at the DIS- ‘ CRETION of his executors’—the teſtator willed that this child ſhould be defrauded of her portion;—that when the calamities of war and emergencies unforeſeen, without diminution of his eſtate, or the profits thereof, ſhould reduce the paper money, uttered after his death, to little more than a ſhadow of what it pretended to be, the teſtator willed thoſe executors, in their DISCRETION to ſham this child with a payment in that money, becauſe they could conveniently RAISE more of it than was ſufficient, by ſelling one of his beaſts, or a hogſhead and a half of tobacco.

II. The guardian, who was one of the executors, knew that his ward would be injured by receiving, for no other reaſon can be aſſigned for his unwillingneſs to receive, the paper money; another of them Bernard Markham adviſed the plaintiff Sarah not to take the paper money, which advice could only be juſtified by the like reaſon; and the other, who was the moſt eager and active of the triumvirate in this foul buſineſs, knew that ſhe would be injured by the payment of paper money, for he is proved by a witneſs to have avowed the deſign of payments to ſome of the daughters, in that manner, to have been, that thereby the ſons might get almoſt all the eſtate;

eſtate; which deſign was contrary to the maxim *jure naturae aequum eſt, neminem, cum alterius detrimento et injuria, fieri locupletiorem* (Dig. L. tit. XVII. reg. CCVI); was contrary to his duty, requiring him to be the friend of all the children equaly; and was the more blameable, if he were the huſband of one of the legataries, who appeareth, by the accounts before mentioned, to have received her legacy in 1776, and therefore not depretiated. when thoſe who are empowered to perform an act know that injuſtice will be done, injuſtice not foreſeen by their conſtituent, ariſing from cauſes exiſtence of which even in embryo were not contemplated by him, and injuſtice, againſt which, if he had foreſeen it, he would have provided, and when, on the other hand injuſtice will not happen from nonperformance, which appeareth to have been preciſely the caſe here, execution of the power ought to be ſuſpended until the cauſes, if they be temporary, ſhall ceaſe to operate, or, if they be permanent, until the difficulty can be ſolved by competent authority. if the zeal of the two executors would have ſuffered them to poſtpone, or the guardian had been as dexterous as Thomas Harris was in parrying, the tenders, for ſixteen months only, the young woman might have eſcaped the barbarous ſpoliation inſidiouſly meditated againſt her. and when execution of a power, in ſuch peculiar circumſtances, ſhall have intervened eſpecialy if fraud and oppreſſion ſhall have accompanied it, the court of equity, vacat-

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ing the act, and reſtoring all parties to the ſtate in which they would have been, if the agents had remained quieſcent, fullfills one of the main purpoſes of its inſtitution, and doth not tranſcend the limits of its province

III. If the teſtator did intend the legacies to his daughters to be paid in money, equivalent to the money current in his day the legataries had a right in equity to ſuch portions of his perſonal chatels, and profits of his whole eſtate, both of which were in terms chargeable with the legacies, as were equal to that value; and if the executors, willing to act juſtly, towards all the children, had diſcharged the legacies by delivering thoſe portions of the goods, and of the ſpecific profits, when the one could be ſpared, and the other could be conveniently raiſed, the court of equity would, as is conceived, have applauded their diſcretion—conceived, becauſe the court, upon a previous application by them, would probably have authorized the adjuſtment, unleſs it ſeemed precipitate; and will ſanctify what it would have authorized, if a ſtranger be thereby not injured. be this as it may, the court of equity would not, as is believed, have directed the guardian, againſt his will, to receive the paper money, according to its nominal value at the time of the tenders, and ought not to ratify the receipt, at moſt no farther than to grant him a *quietus* from any demand againſt him, in that character, by his ward, leaving her at liberty to ſeek ſatisfaction from thoſe who injuriouſly withold it.

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IV. Legal compulſion, an apology which was urged by the defendent Abraham Sallè to juſtify his conduct in receiving the paper money, did not exiſt. he was not compellable by law to receive it. the ſtatutes, by authority of which the paper money of this commonwealth had been generated, and that of Congreſs had been adopted, which declared that it ſhould paſs current in all payments, trade, and dealings, and be equal to the ſame nominal ſum in ſpaniſh milled dollars, which inflicted penalties upon thoſe who eſtimated the metalic and paper monies differently, and which enacted that the paper money ſhould be a lawful tender in payment of all public and private debts—theſe ſtatutes did not COMPEL any one, whether he would or not, to receive the paper money,—did not, for that purpoſe, authoriſe corpuſcular violence,—did not declare the duty to be cancelled by refuſal,—but proceeded no farther than to make the refuſal an extinction of the right to intereſt. If the guardians fear to incur to popular *odium*, prevailing over his fortitude, compelled him to concur with his colleagues in this flagitious tranſaction, they, who, practiſing upon his puſillanimity, led or terrified him into the dilemma, violated their duty, in defeating the deſign of their teſtator, and were partial in ſuffering the guardian of another legatary to elude the ſame injury meditated againſt her; and the conduct of all three was a ſubject meet for praetorian animadverſion.

V. That

V. That paragraph of the act of general assembly, passed in the november session of the year 1781, intituled 'an act directing the mode of adjusting and settling the payment of certain debts & contracts, and for other purposes,' which provided, 'that in all cases of payments, in paper cur-'rency, of any DEBT, CONTRACT, or OB-'LIGATION WHATSOEVER, the PAR-'TY paying, or upon whose ACCOUNT the 'money shall have been paid, shall have full cre-'dit for the nominal amount of the payment,' perhaps doth not comprehend the case of a legacy; for

A legacy is not a debt of the testator. it is, with respect to him, a beneficence, to exaction of which from him the law did not intitle the legatary. the testator might have revoked it, which he could not have done, if a legacy were synonymous with a debt. Besides the right of the legatary, before the testator's death, is not perfect. the testator then was not a debitor whilst he lived; and with his existence his power to become a debitor ceased. a legacy is not the debt of an executor. a debt originates *ex contractu*, which doth not exist between him and the legatary. the executor, by wasting the testators goods, may be responsible indeed, for the value of them, to an unsatisfied legatary; but here the legacy is not, but reparation for mal-administration in his office, is the thing demanded from the executor, the right to demand it originating *ex maleficio*, although

though the legacy is the meaſure of that reparation. the words *debitum in praesenti solvendum in futuro,* often uſed in caſes where the queſtion is whether a legacy was lapſed or not, do not deſcribe the nature of a legacy, but relate only to the time when the legatary's right became or would have become complete. obligation, the other term occurring in the paragraph cited, the extent of which is ſuppoſed to be defined by the following words, 'PARTY paying or on whoſe ACCOUNT the payment ſhall have been,' includes an obligation which the party who paid, or on whoſe account an agent paid, the money, was originaly under obligation to pay the money; but the teſtator was not under obligation to pay the legacy.

But this paragraph, if it do comprehend the caſe of a legacy generaly, can apply to the caſe only, where the payment and receipt being fair, and therefore ſuppoſed to be valid acts, the queſtion between the parties, is, how much credit ought to be allowed for the payment; not to ſuch a caſe as this, where the money tendered unneceſſarily, injuriouſly, contrary to the manifeſt intention of the teſtator, money tendered by one entruſted in ſome meaſure with the care of all his teſtators children and their eſtates, but prompted by an eagerneſs to enrich ſome of them by half ruining another, was accepted by her guardian, againſt his conſent, impelled by a falſe notion, craftily infuſed, or negligently embraced, that he

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was by law bound to accept it, or terrified into an apprehenſion that he durſt not refuſe it;—to ſuch a caſe as this, the caſe of an infant, who ought not, in vain, to ſupplicate relief in a court of equity.

Upon theſe conſiderations, the decree was thought to be ſo righteous a ſentence as that it would be approved, even in that tribunal where a

Quaeſitor Minos urnam movet,

until its damnation was ſolemnly announced by this act:

At a court of appeals, held at the capitol, in the city of Richmond, the 2 day of November, 1793.

Abraham Sallè, Bernard Markham, and Edward Moſeley, executors of Benjamin Harris deceaſed, and Benjamin Harris and William Wager Harris, appellants, againſt William Yates and Sarah his wife, appellees.

Upon an appeal from a decree of the high court of chancery, pronounced the twenty ſixth day of September, 1792,

This day came the parties, by their counſil, and the court, having maturely conſidered the tranſcript of the record, and the arguments of the

counſil

counſil, is of opinion, that the three hundred pounds current money legacy, deviſed to the appellee Sarah, by the will of her father Benjamin Harris, was diſchargeable in paper money, at the times the reſpective ſums of one hundred pounds and two hundred pounds were to be paid, according to the will, and the executors of the ſaid will, having actualy paid the ſame accordingly to the guardian of the ſaid Sarah, although the paper was then in a ſtate of depretiation, which rendered the payment very injurious to her, yet ſhe was deprived of any relief by the ſubſequent act of general aſſembly, intituled 'an 'act directing the mode of adjuſting and ſettling 'the payment of certain debts and contracts, and 'for other purpoſes,' which directs, that in all caſes where actual payments had been made, by any perſon, or perſons, of any ſum or ſums of the aforeſaid paper currency, at any time or times, either to the full amount, or in part payment, of any debt, contract, or obligation whatſoever, the party paying the ſame, or upon whoſe account ſuch ſum or ſums of money had been actually paid, ſhould have full credit for the nominal amount of ſuch payments, which ſhould not be reduced; that the guardian of the appellee Sarah, being compellable by law to receive the ſaid paper money, and it not appearing that he uſed the ſame for his own purpoſes, but kept part of it by him, and lent other part out at intereſt, which, on its being returned, he alſo kept, until it was funded, according to another

act

act of aſſembly, ought not to be ſubject to the loſs by further depretiation, ſubſequent to his receipt of the money from the executors, and conſequently that the ſaid decree, as alſo the decree of the firſt day of June, 1792, are erroneous: therefore it is decreed and ordered, that the ſame be reverſed and annulled, and that the appellees pay to the appellants their coſts by them expended in the proſecution of their appeal aforeſaid here. and this court, proceding to make ſuch decree, as the ſaid high court of chancery ſhould have pronounced, it is further decreed and ordered that the bill be diſmiſſed, as to the appellants Bernard Markham, Edward Moſeley, Benjamin Harris, and Wm. Wager Harris, and that the parties bear their own coſts. and the cauſe is remanded to the ſaid high court of chancery, as to the appellant Sallè, the guardian, for an account to be taken of the ſaid money ſo received by him, according to the principles of this decree which is ordered to be certified to the ſaid high court of chancery.