

acquiesced in what had been done. She acquiesced in the exclusive management of the estate thereafter by St. James, and received the several annuities of 40,000 francs bequeathed her by the will from him, until his defalcation was discovered, and his power of attorney was revoked by James Berney in 1880. It is not alleged in the bill that she ever had any knowledge of the sale or exchange of the bonds which are the subject of this controversy by St. James, and the proofs do not indicate that she did have any information upon the subject. She had entire confidence in St. James, and relied implicitly upon his honor and fidelity, and was content to permit him to manage the affairs of the estate as he saw fit.

It does not seem necessary, in view of the decision of the supreme court, to consider the question whether the knowledge of the defendant of the acts of James Berney in procuring the Alabama letters testamentary, and authorizing St. James to sell the property of the estate, and her assent to or acquiescence in those transactions subsequently, is equivalent to a precedent authorization by her, and estops her from disaffirming what they have done. Upon the facts found to exist, conformably to that decision, the defendant is estopped from asserting that St. James was not authorized to make the exchange of registered bonds for coupon bonds which is assailed in the suit at law, and the estoppel operates against her in her representative capacity to the extent of her individual interest in the estate. One method of giving effect to this estoppel is by a decree restraining her from all proceedings to enforce the judgment, if one is obtained in the suit at law, beyond the difference between the amount of the recovery and the value of her interest as widow and legatee in the estate of her deceased husband. Inasmuch as she represents in the action at law the other beneficiaries under the will, it does not seem necessary that they should be parties to the accounting to ascertain the value of her interest in the estate. If they had been served with process it would have been proper to inquire whether they, or any of them, are also estopped by their acts and conduct from assailing the sale or exchange of the bonds by St. James. As they are not parties, and the present suit is against Louise Berney individually, the complainants cannot obtain the benefit of any supposed estoppel against them.

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DUCHESS D'AUXY v. SOUTTER *et al.*

(Circuit Court, S. D. New York. August 7, 1888.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING.

Where there has been no accounting between the executors of a testator and the executors of a legatee under his will, nor between the executors of the legatee and one claiming an interest in the legacy and original estate as next of kin and also as devisee of the legatee, the amount due such claimant cannot be determined in an action to which the only parties are the claimant and the executors of the original testator.

In Equity. On exceptions to master's report.

Action by Charlotte, Duchesse d'Auxy, against Agnes Gordon Soutter and William K. Soutter, executors of James T. Soutter, deceased, to recover an interest in the estate of the latter, which she claims as devisee of Robert Soutter, a legatee under the will, and also as next of kin of a daughter of Robert Soutter.

*Lewis Sanders*, for complainant.

*Vanderpoel, Greer & Arming*, and *Delos McCurdy*, for defendants.

LACOMBE, J. The defendants are the executor and executrix of the last will and testament of James T. Soutter, deceased, by which will his estate was given to his widow and five children, all of whom survived him. The complainant is not a legatee or devisee under said will, but claims a right to share in the estate as a devisee of Robert Soutter, himself a legatee under the original will, and as one of the next of kin of Robert Soutter's daughter Pauline. By the interlocutory decree, the master was directed to take and state the accounts of the executors, and the complainant was decreed to be entitled as devisee as aforesaid to one-twentieth undivided part of the estate of James T. Soutter, and as next of kin of Pauline Soutter, to the one one hundred and sixtieth part thereof, "and to recover the same of the defendants, less what part thereof she has already received." Robert left three children besides Pauline, and to the four he devised and bequeathed one-half of his property. Of all those who are entitled directly or by representation to share in the estate of James T. Soutter, only the defendants (his widow and one son) and the complainant (widow of another son) are parties.

The master reports that the amount to which the estate of Robert Soutter may be entitled cannot be ascertained on this accounting, nor reasonably approximated, for the reason that such amount can only be ascertained by an accounting had between Timothy H. Porter, as executor and trustee under the will of Robert Soutter, or an administrator *de bonis non* with the will annexed, and the executors of James T. Soutter; and, further, that the exact proportion of any amount which may be found to belong to the estate of Robert Soutter which would belong to the defendant cannot here be found, for the reason that the same can only be ascertained by an intermediate accounting between the said Timothy H. Porter, as executor and trustee of the estate of Robert, or the administrator *de bonis non* with the will annexed, and the complainant and her children, and the executor of the estate of James T. Soutter. In this finding he is undoubtedly correct. There is no obligation on the defendants to plead and prove payments to the complainant, for such payments were not made by them, but by the executor of Robert Soutter. There is not, therefore, sufficient before the court to warrant the entering of a decree in favor of the complainant for any specific sum of money.

As a judicial determination upon the questions raised by the presentation of the executor's accounts, the decree in this action would be but a rope of sand, binding no one but the parties to the action, and the court

should not be required to examine and pass upon them until all persons interested in such determination are before it. The objections to the master's report are therefore overruled.

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FARWELL *et al.* v. BROWN *et al.*

(Circuit Court, D. Indiana. July 21, 1888.)

JUDGMENT—RES ADJUDICATA.

Where, in foreclosure proceedings against the husband's property under a mortgage to the wife, his creditors are permitted to become parties defendant, and by cross-bill they seek to recover judgment against the husband, and to have the mortgage notes to the wife declared fraudulent and without consideration, and the court on the trial strikes out all the evidence on the question of fraud as not being properly raised on the pleadings, and decrees for the wife, the controversy between them becomes *res adjudicata*, and such creditors cannot maintain an action against her to annul the mortgage, and to hold her as a trustee for creditors of the proceeds of the mortgaged property.

In Equity. On plea to the bill.

The complaint is in the nature of a creditors' bill, whereby the complainants, J. V. Farwell & Co., of Chicago, and Woods, Perry & Co., of Boston, as creditors of Francis M. Brown, seek to have the defendant Cornelia Brown declared trustee for their use of moneys derived from the sale on foreclosure of goods mortgaged by said Francis M. Brown to the said Cornelia, his wife, on the alleged ground that the mortgage was made in fraud of the complainants and other creditors of the husband. The complaint shows that the complainants, upon their own motion, were admitted as parties defendant to the proceedings in foreclosure, which were had in the state court in the Muncie circuit, and that in that court they were given judgments for the respective amounts due them against Francis M. Brown, but it was held and adjudged by the court "that the question of the *bona fides* of the said mortgage as to these complainants was not in issue, and was not tried or adjudged in said proceedings, but the same remained open and undecided." In an amendment to the bill more specific references and statements in respect to the proceedings in the state court are made, to the effect that the question of the validity of the mortgage was excluded from consideration by the court. The complainants, it is also shown, appealed the case to the supreme court, which affirmed the judgment and decree of the circuit court. For the opinion, see *Bank v. Brown*, 14 N. E. Rep. 358. The plea sets out a transcript of the proceedings and judgment of the state court, and asserts that by force thereof the issues tendered here were finally adjudged, and the complainants estopped from their further presentation. It appears from the transcript that, having been admitted as defendants in the case, the complainants filed a cross-bill against Francis M. and Cornelia Brown and other parties, wherein, upon averments less full,