payment of any legacies or legacy, or the residue of his or her personal estate, the Court, in which such suit shall be instituted, shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed." It happened that, in consequence of certain claims at that time existing against the assets of the Duke of *Queensbury*, the Court could not say whether ultimately there would be funds which the legatees would be entitled to receive; and it therefore could not interfere in the way I have alluded to. These claims have since been disposed of; and it is the duty of the [510] Court to put all parties as nearly as possible in the same situation, as if the legacies had been paid three months after the testator's death.

A certain sum has been appropriated to the satisfaction of the legatees, and the payment of the duty; for a sum appropriated for the legacies, must be considered as appropriated in part for the payment of the duty which attaches upon the legacies. It must be considered as so appropriated, from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, and a certain proportion of it would have belonged to the crown; and it appears to me to be the justice of the case, and not contrary to the acts of parliament, but rather consonant to their whole scope and spirit, that the legatees should have that part of the fund which they would have had, if the appropriation had been made at the time fixed by the will, and that the crown should have the full benefit of that part of the fund, which it would have been incumbent on the Court, at the same time, to have set apart for the discharge of the duty.

[511] SPODE *v.* SMITH. *August* 7, 1827.

If an executor, acting *bona fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at £4 per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.

Thomas Johnes of *Hafod*, by his will, dated the 16th of *February* 1815, bequeathed to his wife *Jane Johnes* a leasehold messuage and premises called *Langston*, with all the household goods and furniture, plate, linen, pictures, china ware, books, and all other goods, chattels, and effects which should be in or about it at the time of his death, and also all other his household goods and furniture, plate, linen, china, books, prints, pictures, household utensils, wines, spirits, liquors, and other household stores, and all his live and dead stock: and he appointed his wife and *Hugh Smith* his executrix and executor.

The testator died early in the following year; and, on the 29th of *July* 1816, the will was proved by *Hugh Smith* alone. The widow, not having acted in the execution of the trusts, renounced probate in *May* 1817.

The bill was filed by creditors of the testator for the administration of the assets. After a decree on further directions, the conduct of the suit had been taken from the Plaintiffs, on the ground that the same solicitor acted for them and for the Defendants, and had been given to other creditors; and, on the petition of these other creditors, the *Vice-Chancellor*, on the 20th of *March* 1826, made an order, directing that it should be referred to the Master to take an account of the personal estate of *Thomas Johnes* specifically bequeathed; and the Master [512] was to inquire and state what was become thereof, and whether any and what part of such personal estate was possessed or retained by the specific legatees with the assent of *Hugh Smith*, and under what circumstances; and after the Master should have made his report, such further order was to be made as should be just.

By his report, the Master found from the examination of *Hugh Smith*, that, immediately upon the death of the testator, his widow *Jane Johnes*, who was then residing in the house at *Langston*, took possession, as specific legatee, of the household goods and other effects in and about it; that she afterwards sold the leasehold and those effects for an annuity during her life, and for the sum of £4000: that

soon afterwards, possession of the personal estate and effects, which were at *Hafod House*, or on an adjoining farm which the testator had occupied, was taken on behalf of *Jane Johnes* by her sister *Eliza Johnes*, who went for that express purpose to *Hafod*, and sent some of the articles thence to the house at *Langston* : that, preparations being made for the sale of the rest of the articles specifically bequeathed, Mr. *Claughton*, who had purchased of Mr. *Johnes* the reversion in fee, expectant on his decease, of the mansion house at *Hafod*, and of Mr. *Johnes's* other estates in *Cardiganshire*, proposed to purchase every thing belonging to *Jane Johnes* in or about *Hafod House* and the farm : that, after some discussion, *Hugh Smith*, as the agent for that purpose of *Jane Johnes*, sold to *Claughton* certain classes of the articles specifically bequeathed for £2500, which he received and remitted to *Jane Johnes* : that *Claughton* agreed to take the residue of the articles at *Hafod*, being worth from £1500 to £2000, at a valuation, and they were set apart in places of security, till the valuation should be made : but that *Claughton*, having delayed to name a valuer, *Smith*, on the application of the widow, [513] had advanced her money on the credit of those articles to an amount greater than the price for which they would have been sold : that another legatee, to whom the testator had given a security on a turnpike road for a sum of £200, had been permitted to take possession of it, and had ever since received the interest ; and that the personal estate and effects specifically bequeathed had been retained or possessed by the specific legatees, with the knowledge, privity, assent, and concurrence of *Smith*, the executor.

The creditors now presented a petition, praying that the report might be confirmed ; that the Defendant might be charged with the value of the personal estate and effects specifically bequeathed, which, with his assent and concurrence, had been possessed or retained by the specific legatees, and with interest thereon ; and that it might be referred to the Master to ascertain the amount of such value and interest.

At the date of the general report made in the cause, which was in *July* 1821, there was due to unsatisfied specialty creditors £1927 ; and to unsatisfied simple contract creditors £16,950. The simple contract debts, which carried interest at £5 per cent., were under £4000. All these debts still remained unpaid.

In 1814, Mr. *Johnes* had contracted to sell to *Claughton* all his estates in the counties of *Cardigan* and *Montgomery*, for the sum of £90,000 : as to part of the estates, the immediate fee was to be conveyed to the purchaser ; and as to others of them, the reversion expectant on the death of Mr. *Johnes* : and £35,000 of the purchase-money was to be paid in 1815, and the remaining £55,000, by instalments falling due within the three years next after Mr. *Johnes's* death. Had this contract [514] been performed, the purchase-money, agreed to be paid by *Claughton*, would have afforded ample funds for the discharge of all the testator's debts, without resorting to the property specifically bequeathed ; and, for some time after the testator's death, there was no reason to apprehend that the completion of the purchase would be resisted or delayed. Mr. *Claughton* had entered into possession of the property ; had expressed himself satisfied with the title, after the delivery of the abstract ; and had exercised various acts of ownership, and even advertised the estate for sale. Subsequently, however, it appeared that some of the lands were not included in the abstracts which had been delivered ; objections were taken to the title to those lands ; and *Claughton* refused to perform the contract. A bill for specific performance was then filed, in which the Plaintiffs insisted that *Claughton* had accepted the title ; but, on the hearing of the cause in 1824, a limited order of reference as to title was made by the *Vice-Chancellor*. That suit was still pending : and, in the meantime, a commission of bankrupt had issued against *Claughton*.

The questions on the petition were,—Whether, in case the assets should ultimately prove insufficient for the payment of the testator's debts, the executor, *Smith*, would be personally answerable for the value of the specific legacies which he had permitted the specific legatees to possess themselves of, or to retain ? and whether, while it was uncertain whether there would be a deficiency of general assets, any proceedings should now be taken with a view to his alleged contingent liability ?

July 5. The *Master of the Rolls* [Sir John Leach] confirmed the report, and dismissed the rest of the petition.

From this order the petitioners appealed.

[515] Mr. *Heald* and Mr. *Spence*, for the appeal. The personal assets actually available at the time of the testator's death, including the articles specifically bequeathed, constituted a fund, which, both at law and in equity, was applicable to the payment of his debts, and was not more than sufficient for that purpose. The executor, in giving up part of the assets to the legatees, before the creditors were satisfied, was guilty of a *devastavit*, and must be answerable to those who have been injured by his acts. The creditors had a right to immediate payment out of the first assets which were at the disposition of the executor: it was not his business to speculate on the supposition that other funds would probably come into his hands, out of which the debts might ultimately be paid; and it is altogether immaterial, whether, at the time when the legatees received their specific legacies, he had or had not just reason to suppose, that *Claughton's* purchase-money would soon be received, and that the creditors would sustain no injury by what he then did. The specific legatees could never have been permitted to say, especially to creditors whose debts did not carry interest, "You shall wait for a dozen years before your debt is paid, in order that the articles, bequeathed to us, may remain ours in specie:" and the executor could not give the legatees, at the expense of creditors, an advantage which they could not have claimed for themselves. The delay to which the creditors have been already exposed, is a great injury which they have sustained through the act of the executor; and they have a right to charge him immediately with the amount of the assets which he has improperly parted with, in order that their debts may be forthwith satisfied, so far as the fund will extend. At any rate, he must be answerable, if there should ultimately be a deficiency of assets. Now, it is by no means clear, that there will not be such a deficiency; the probability is the other way; and if [516] the contract with *Claughton* should not be completed, the deficiency will be considerable. It is in vain to say, that, as Mr. *Smith* acted with perfect *bona fides*, the creditors must go against the legatees: the possession of the legatees, with the executor's consent, is the possession of the executor. It is against the executor that the creditors have to assert their rights; and he may seek compensation from the legatees.

Mr. *Sugden* and Mr. *Simpkinson*, *contra*. It is the duty of an executor, as far as possible, to give effect to his testator's specific bequests; and if Mr. *Smith* had applied, in payment of Mr. *Johnes's* debts, the articles specifically bequeathed by that gentleman, he would have been guilty of a breach of duty. *Clarke* v. *Lord Ormond* (*Jacob*, 108). In 1816, there was a moral certainty that funds would be immediately available, far exceeding the amount of the testator's debts. It did not occur to the executor, or to any of the creditors, that there could be a deficiency of assets; the very transaction of selling to Mr. *Claughton*, on behalf of the widow, a great part of the articles specifically bequeathed, was a step proceeding upon and confirmatory of the contract of 1814, the fulfilment of which would necessarily increase the personal assets by £55,000 at the least. Under such circumstances, *Smith*, in allowing specific legatees to retain or possess themselves of the articles bequeathed to them, acted fairly and honestly, and without negligence or improvidence. No complaint was made against him in 1816. If such a complaint had been then made, it would have appeared most unreasonable and extravagant; and if he was not blameable at that time, he cannot be blameable now. Even if the assets should be ultimately deficient, the [517] deficiency will have been occasioned by unforeseen and improbable events: and the creditors ought not, under such circumstances, to have any relief against the executor, who has acted with perfect honesty, and a fair degree of prudence. They ought to be left to seek their remedy against the specific legatee.

In fact, however, there will not be a deficiency of assets; there will be funds sufficient for the payment of all the creditors; and that result will be a convincing proof, that the executor has acted properly. At all events, it is premature to take any proceedings against the executor, until it is certain that the claims of the creditors cannot be provided for otherwise.

The *Lord Chancellor* [Lyndhurst]. I have no doubt that the conduct of Mr. *Smith* in this case was perfectly *bona fide*, and that, at the time when he allowed Mrs. *Johnes* to take possession of the property bequeathed to her, he was quite satisfied that there were assets sufficient to pay all the debts: and if I could see, with

absolute certainty, that there will be a fund equal to the payment of the debts, I should agree entirely with the *Master of the Rolls*. But I do not see my way, with absolute certainty, to the conclusion, that, independently of the property specifically bequeathed, there will be a fund equal to the payment of the debts: and, if there be a deficiency of assets, I think, on the facts as they at present stand, there is enough to charge Mr. *Smith*. An account, therefore, must be directed of the value of the specific legacies which have been received by the specific legatees with the consent of the executor, and interest must be computed at 4 per cent.; unless Mr. *Smith* will give security.

[518] Mr. *Sugden*, on behalf of Mr. *Smith*, declined to give security.

The order was as follows: "His lordship doth order that the order, bearing date the 5th day of *July* 1827, be reversed, so far as it dismisses that part of the petition which prays that it may be referred to the Master to ascertain the amount and value of the personal estate specifically bequeathed, and interest: and it is ordered, that the Master do take an account of the value of the specific legacies received by the legatees thereof with the consent of the said Defendant *Hugh Smith*, and compute interest at the rate of 4 per cent. per annum on such value, from the time when the specific legatees possessed or received the same legacies."

[519] PERRY *v.* WELLER. *August* 16, 1827.

A Plaintiff cannot move *ex parte* for an injunction, after he has served the Defendant with *subpœna*, and the Defendant has appeared.

Sir *Charles Wetherell* and Mr. *Spence* moved *ex parte* for a special injunction to restrain the Defendants from publishing a certain secret relating to what was alleged to be an important improvement in the art of instruction.

It was stated, as an objection to the motion, that the Defendants had entered an appearance.

Mr. *Spence* cited *Aller* v. *Jones* (16 *Ves.* 605), to shew that a Defendant could not, by appearing before the motion, prevent an injunction from issuing *ex parte*.

In answer to this it was stated (and the fact was not denied), that the Plaintiff had served the Defendants with *subpœnas*: he had thus called upon them to appear; and he could not move against them, except upon notice. In *Aller* v. *Jones*, the Defendant must have appeared *gratis*, before the service of *subpœna*.

The *Lord Chancellor* [Lyndhurst]. It is true that the Defendant cannot, by his own voluntary act—by appearing *gratis*—defeat the Plaintiff's application for an injunction *ex parte*. But the Plaintiff, if he serves the Defendants with *subpœnas*, puts, by his own act, the latter in a situation which entitles them to notice of any application made against them. Under these circumstances, I cannot entertain this motion.

[520] COOK *v.* COLLINGRIDGE. *August*, *October* 30, 1827.

Premises, held under distinct leases, ordered to be sold in one lot, upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots.

The question in this case arose upon exceptions to the Master's report. The circumstances are stated in the judgment.

The *Lord Chancellor* [Lyndhurst]. This was a question respecting the most advantageous mode of dividing and allotting certain premises with a view to a sale by public auction. It came on upon exceptions to the Master's report. The Master was of opinion, that "the dwelling-houses, shop, warehouses, and buildings, with the yards and grounds forming the plant and principal accommodation of the capital coachmaking concern carried on upon the said premises, and being marked as lots 5 and 6 in the plan produced before him by the Plaintiff, should, whether the same be held under one or more leases, be sold together in one lot; and that the remaining leasehold messuages and dwelling-houses, and other tenements, with their several and respective appurtenances, should be sold separately in distinct lots, each messuage or tenement, with its appurtenances, forming a lot by itself."

I have read the evidence, and agree with the Master in thinking that it will be