

## No 4947 Equity

the mortgage debt, interest and costs, and the said judgment, belongs to him as executor under said will and not to any creditor of said deceased; and that having "duly qualified and bonded as executor and having, under said will a power of sale of the real estate, he is entitled to be awarded the proceeds aforesaid, to the end that they may be duly administered as required by law".

The wife of Basil Maynard did not join in the mortgage with her husband, and the mortgagee having sold the land subject to her right of dower, she, as the widow, has no interest in the proceeds of said sale.

The question raised by the petition of the mortgagee, and the answer thereto by the executor is whether this Court has jurisdiction to distribute said surplus in paying the general creditors of the deceased and then divide the balance between his two children, who are his only heirs at law, or whether said surplus should be awarded to the executor to be administered by him in the Orphan's Court.

By the will dated in November 1876 the executor is directed on the arrival at age of the youngest child to sell the land and distribute one third of the proceeds to the widow, and one third to each of his two children named in the will.

By the mortgage dated July 5<sup>th</sup> 1881 he directs, that in default of payment of the mortgage debt, the mortgagee shall sell the land, and after paying the mortgage debt, costs and commissions he shall pay the balance to "the said Basil Maynard his heirs or assigns." The mortgage not having been redeemed by the mortgagor in his life time, nor by the executor after his death, and the property having been sold by the mortgagee, the surplus proceeds, arising under such sale, must divided, or disposed of differently from what it would be, had this surplus arisen from a sale made by the executor under the power contained in the will. In this respect therefore, the mortgage may be said to work a revocation of the will, as to the disposition of the land. If the mortgagor were living the surplus would be awarded to him, but he being dead, by the terms of the mortgage, it must be paid over to his heirs, who are the son and the daughter before mentioned.

The provisions of Art. 64 of the Code in relation to mortgages and sales thereunder, confer no new or special jurisdiction on this Court; the jurisdiction exists under the power of its general Chancery jurisdiction, independently of the Code or Statutes. The foreclosure of mortgages and the execution of trusts, are matters peculiarly within the jurisdictional power of this Court, which is a tribunal of general common law and Chancery powers.

The Court of Appeals in *Cockley vs Code*, 28 Md. on page 284 in speaking of the provisions of article, as affecting the powers of the Circuit Courts, as Courts of Equity say: "But the provisions of the Statute upon which the proceedings (a sale under a power in a mortgage) in question were founded, profess to give no new jurisdiction, but only to prescribe a summary mode for the exercise of jurisdiction over the subject matter, of which the Court had full and ample cognizance, independent of the Statute provision".

The Executor contends that, the Orphan's Court only, has jurisdiction to administer this fund. If the fund were in the Orphan's Court, under a sale by the Executor that Court would undoubtedly have the power and right to dispose of it. The Orphan's Court is a tribunal of limited power and has only such jurisdiction as is conferred by statute, whereas the Equity Court is one of general jurisdiction, and as we have seen, had general cognizance of the foreclosure of mortgages and the execution of trusts, long before the Orphan's Court was in existence. This then, is a contest between a Court of general jurisdiction in possession of the subject matter in dispute, and one of an inferior and limited power, seeking to obtain control of the same matter.

If a Court of Equity has originally assumed jurisdiction over a particular class of cases, it would not as a general rule, be ousted from that jurisdiction simply because in the progress of common law improvement, a remedy comes to be subsequently attainable at law. *Bispham's Principles of Equity* 57. "One of the most important functions of a Court of Chancery, is the care of the rights and the property of infants, and the jurisdiction of these Courts to superintend the administration of assets, and decree distribution among legatees and distributees, is now fully established" *Barnes & Ferguson vs Compton's Admors* 8 Gill 397. *Davis Admors vs Claiborn's Exr* 30 Md. 511. *1 Story's Eq. Sec. 503.* "In cases of concurrent jurisdiction, the Court which has