

But, apart from these considerations, this clause can have no direct bearing upon the present controversy. This is not a suit against the executors of the late Ann Russell, or one in which the validity and operation of the will is questioned in any way whatever; on the contrary, it is founded upon an admission of the will in all respects, and claims the fulfilment of its provisions of the trustee to whom, and to a suit of this nature, requiring disputed matters to be referred to the nominated arbitrators, cannot have been intended to apply; because the testatrix has distinctly contemplated the responsibility of the trustees Dawson and Clerk, according to a regular judicial proceeding, by her express declaration, that they should only be answerable for gross negligence; and it is the alleged negligence and mismanagement of the surviving trustee which is the cause of this suit, not any dispute about the will.

I therefore conceive, that there is no foundation for this first objection, and that this suit may well be sustained notwithstanding this clause requiring certain matters therein specified to be referred to arbitration in case of any dispute.

The next preliminary objection is as to the want of parties. It is urged, that Ann Russell Contee, the wife of the defendant Philip A. L. Contee, had a direct interest in this matter; and that her legal representatives, the bill stating her to be dead, ought to have been made parties. If the interest of Ann R. Contee in this \* legacy became vested as it did by her attaining her full age, **282** or by her marriage before or after the death of her mother, it was a *chose in action* belonging to Ann R. Contee; and as all personal things are under the power of the husband, he may either release or forfeit them; *Cleaver v. Spurling*, 2 P. Will. 528; it is, therefore, upon that ground sufficient, that the husband alone as defendant has appeared, and by his answer admitted, that this claim, to which he had so become entitled in right of his wife, had been satisfied.

But it is objected, on behalf of the defendant Eleanor Dawson, that the answer of the defendant Philip A. L. Contee has not been sworn to in the manner required by the course of the Court; and therefore cannot be considered as an answer for any purpose; and is certainly not such an answer as will bind him and his wife so as to justify Eleanor Dawson, as executrix of the trustee, in distributing the assets in payment of the proportions to which the other legatees are entitled; since she has not assets sufficient to satisfy all. This objection involves two inquiries; first, whether the answer of the defendant Philip A. L. Contee is such an one as must be received as effectual so far as it can operate for or against his co-defendants; and secondly, whether Eleanor Dawson has in truth alleged and shewn a deficiency of assets.