

Flagler has introduced himself into this case, by his petition; and prayed to have his claim considered and satisfied, as the creditor and assignee of the defendant Lewis Helms.

There can be no doubt, from the pleadings and proofs, that the \* executors must be decreed to account and to pay over this residuary legacy. But for whose benefit? Whether to the **560** husband, or to the wife exclusively? or to both in certain proportions? or to their assignees? These are important and preliminary questions. In this respect, this has the aspect of a bill of interpleader between this husband and wife, to determine their rights, while the executors stand by as stakeholders, ready to account and to pay as they may be ordered.

As to what must be considered as embraced by this residuary legacy. It was formerly an established general rule, that unless the legatee survived the testator, the legacy was extinguished; which has been altered by an Act declaring that no devise or bequest shall lapse by reason of the death of the devisee or legatee, in the life-time of the testator; but shall take effect as if he had survived the testator. 1810, ch. 34, s. 4. Still, however, if a legacy be so given, that the legatee's right depends on his being alive at the time fixed for its payment; or if the legacy be charged upon the real estate, and the legatee dies after the death of the testator, but before the time of payment, the legacy is lost. *Williams' Exrs.* 767, 780. Here, however, there has been no such lapsing of any legacy given by this testator. But it is a well established rule in the construction of wills, that wherever the testator has given the whole residue of his personalty to an individual, such residuary legatee, will take all the personal estate which is not otherwise well and sufficiently disposed of, whether a legacy falls in by lapse or as being void in law; or in other words, where a legacy fails as to a particular object, it will not go the next of kin, but must pass to those entitled under the residuary clause. *Brown v. Higgs*, 4 *Ves.* 709; *S. C.* 5 *Ves.* 501; *Dawson v. Clark*, 15 *Ves.* 417; *Rothmahler v. Myers*, 4 *Desau.* 215.

In this case it has been very satisfactorily shewn, that the testator's sister, — Bauers, of Bremen, never had but two children. One of whom, Anna G. Bauers, only he has named in his will; of the other, Catherine, although living at the time of his death, he has taken no notice; and the four others, whom he names, never had any reality or existence. Consequently the bequests of those four legacies being utterly void, they pass to this plaintiff Anna, as the residuary legatee; and must be accounted for, and paid by the executors, as a part of that legacy accordingly.

\*The conflicting claims of this husband and wife present the next subject of inquiry, and the adjustment of them will **561** require some care and attention.

According to our law, the marriage contract so strictly and intimately unites husband and wife, that they form, as it were, but one