

and divide the property to be set apart for her use. Now, can it be supposed that her mother designed that she should exercise the power thus conferred upon her in her *minority*? It is more than probable that the mother did not anticipate the contingency of her own death during the minority of her daughter, but it is, I think, manifest that she did not in any event intend that this portion of her estate should be separated from the residue, until her daughter should attain an age competent to exercise the discretion which she conferred upon her. It is very clear that if the defendant Donnell, and the trustee, Howard, immediately upon the death of the mother, in April, 1839, selected persons to ascertain and appraise the property to be set apart for the complainant, she being then a minor, and incapable of making a selection, that she might, upon attaining her majority, have repudiated the Act, and insisted upon a new ascertainment and appraisement. By the express terms of the instrument, she was to appoint one of the persons to perform this duty, and she could not, as I conceive, be bound, unless, being capable, she made the appointment in the first instance, or gave her subsequent sanction to it.

There was nothing in the circumstances or prospects of the complainant Mary, which could have induced her mother to direct that she should have the immediate use of this property. She was by the terms of her father's will, entitled to a full moiety of his estate upon attaining the age of eighteen years, and in the mean time ample provision was made for her maintenance and education. In this state of things, it is not reasonable to suppose that her mother was so peculiarly solicitous to secure to her the immediate enjoyment of this fund, as to force upon her a legal capacity to act before the general rule of law she could possess that capacity.

In view, therefore, of all the circumstances of this case, and giving due weight to the acts of the parties since the death of Mrs. Donnell, I am of opinion, that the claim for interest, or rents and profits in lieu of interest, set up by this bill cannot be maintained, and therefore decide the first question against the complainant.