

upon the will of Ann Maccauley were introduced as evidence in this cause.

Upon this state of facts, the question is presented, and has been argued, whether in case of a sale or division of the remaining trust property, the insolvent trustee of Richard W. Higgins can be admitted to a participation until he shall have first accounted for that portion thereof which it is apparent, from his own testimony, he has received and applied to his own individual benefit?

In the event which has happened, the death of Mrs. Ann Higgins in the lifetime of her husband, her children, the two complainants, and Higgins, one of the defendants, were to receive share and share alike the property bequeathed by Mrs. Maccauley and its increase, such being the express language of the will, and it is therefore perfectly obvious that if the defendant, Higgins, should be allowed to retain that which he has already appropriated to his own use, and to receive his share of what remains equally with the other children, he will have enjoyed a larger portion of the proceeds than he is fairly entitled to, and the provisions of the will must be disregarded and frustrated.

Against a consequence so unjust, the principles settled by the orders of the late Chancellor, in the case of *Harwood's estate*, are in decided opposition, and without some controlling authority overruling them, I could not bring my mind to a different conclusion. Here is a trust fund under the control of the court, which it is asked to distribute among the parties entitled, and it appears by the evidence of one of them, who was constituted also trustee for the others, under the authority of this court, that whilst acting in that capacity he received and applied to his own use a large part of the trust fund, and in the face of that confession on his part, it is proposed that he shall be allowed to come in equally with the other *cestui que trusts* in the division of what remains, without accounting for that which he has already received.

It is said, however, that before any notice can be taken of the proceedings of the defendant, Richard W. Higgins, under