CHARLES A. WILLIAMSON, EX'R OF MARY ANN JONES
vs.
GEORGE C. MORTON ET AL.

MARCH TERM, 1851.

[EXECUTOR—ASSIGNMENT BY—RULES OF EVIDENCE.]

A party who was executor and devisee, acting in those capacities, assigned a mortgage debt, part of the assets of his testatrix, to certain assignees, to secure the payment of his own debt, due to the latter—HELD—

That the assignees, by taking such an assignment, were aiding the executor in committing a *devastavit*, and acquired no title thereby.

In order to defeat the title of the alienee of an executor, in a court of law, it is necessary to show actual collusion between the executor and the purchaser or creditor.

But in equity, an executor or administrator can make no valid sale or pledge of the assets, as a security for, or in payment of, his own debts; because the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty.

Though the courts are less disposed to disturb the title of an assignee, when the assignment is made for money advanced at the time, than when made for an antecedent debt, yet if it appears in the transaction itself, that the executor is about to misapply the money raised upon the assets of his testator, the mere circumstance that the advance of the money was cotemporaneous with the assignment, will not protect the lender.

When a person, dealing with an executor, must, from the very nature of the transaction, necessarily know that the executor was applying the assets to objects in conflict with his duty, he deals with him at his peril; and a transfer, or an assignment, made under such circumstances, will, in equity, be set aside at the suit of a creditor, a specific, residuary, or general legatee.

Quere, is not such a disposition of the assets prohibited by the act of 1843, ch. 304?

A party dealing with an executor, as such, has notice of the existence of the will, and of its contents: the will, in this State, being open to inspection upon the public records.

The court may very properly refuse to interfere actively in behalf of a party holding a security, and asking to have it made effectual, when the circumstances may not be strong enough to warrant a decree to compel him to surrender it.

The rule of evidence, that neither the husband or wife can be witnesses for or against each other, applies to a case in which the husband is offered to testify in favor of the wife, in reference to her separate estate.

This rule is founded, not on the ground of interest, but of policy, and extends to cases where the wife was afterwards divorced from the husband.

The only exception to this rule which was formerly recognized, was, where the husband commits an offence against the person of his wife, when, *ex necessitate*, the wife may make an affidavit against her husband.