Doyle share and share alike upon condition that he Thomas Boyer be permitted to occupy it during his life free of rent excepting that he keep it in good repair. if he however shall and will not live in the house, then I direct my Executor to rent the lot and improvement to some person and after deducting repairs from the rent to apply the balance to the Education of the children of Thomas Boyer aforesaid."

For the purpose of sustaining the third point suggested in the Exceptions, it is said that at the time of Jacob Boyers death Thomas his son had only two children then in esse, and that as the bequest was to a class the two children only who were born at the death of the testator derived an interest or title under the will. It would be sufficient to say that the fact of Thomas having only two children at the time of the testator does not appear by any evidence or fact in this cause. But assuming the fact to be so, how can this objection effect the legal title of the purchaser, if the legal right or title be vested in any one or more of the defendants or complainants whose rights are decreed to be sold and consequently covered by the decree as they will be by the deed of the trustee? It is true the Court under the act of 1816 ch 154 and the act of 1818 ch 133 Sec 2 is authorised upon it appearing to the Court in the mode pointed out by those acts that it will be for the interest and advantage of such infants that their lands should be sold, to decree the sale thereof. This is the requisition of the acts creating the power Court, that the Court should be satisfied in the mode pointed out, that the interest of the infants demands the sale of their real estate. This appearing to the satisfaction of the Court, the authority to decree the sale is complete. In this case the Commissioners have in due form acting under a commission issued from this Court made their report assigning their reasons why it would be for the interest of the infants, that their real estate in question should be sold. Had the reasons assigned by the commissioners in their report proved unsatisfactory to this Court, then it would have been its duty to examine other testimony so as satisfactory to arrive at the fact that the interest of the infants would in truth be promoted by the sale. In this case however the Court is fully satisfied with the reasons assigned by the Commissioners in their report and which would be equally satisfactory whether there be two or more of the children of Thomas Boyer entitled under the will of their grandfather Jacob Boyer, the third reason assigned in the objections therefore cannot prevail. The second objection suggested is involved in the first and third.

In disposing of these two objections the second will also be decided. The attention of the Court will now be briefly directed to the first objection assigned why the sale should not be ratified this objection is, that the legal title is in the Executor appointed by the last will and testament of Jacob Boyer and that the Executor is in no way made a party to the bill. In the discussion of this point the doctrine of devise to uses & trusts has been presented for consideration, It is certainly true that when a devise is to the use of A in trust for B independant of the question of intention the legal Estate is in A, by virtue of the devise even tho no duty is assigned him which requires that he should have the estate; when however the Estate is devised to A and his heirs to the use of or in trust for B and his heirs. The question whether A does or does not take the legal title depends on the fact whether the testator has imposed upon him any trust or duty, which

requires the Estate should be vested in him; If he has not, the use is executed in B the beneficial legatee. The fact that the person to whom real Estate is devised is made an agent in the application of the rents is insufficient to give him the legal title. As a devise to A upon trust to pay the rents to B invests the legal title in A because he must hold the property as necessary to the execution of the trust reposed in him. In these cases it will be observed the bequests were made directly to the trustee for the uses declared but it must be admitted that the authorities have carried this doctrine still further, and have declared it immaterial in such cases that the devise is not made directly to the trustee, if the intention can be gathered from the will, that such was the real design of the testator. Hence a devise to the intent that A shall receive the rents and pay them over to B clearly vests the legal estate in A. Because the intention is clear upon the face of the will, and such is the case of Hoffman vs Hamfray & Adolphus & Ellis Reported in 33d Common Law reports so much relied upon by the objectors Counsel. In the case under consideration there is no direct devise to the Executor and the question whether he takes any Estate under the will of the testator, must depend upon the intention of the testator gathered from the will. How can this intention be fairly derived from the Will! There is no devise to the intent that he shall receive and pay over rents &c. But the devise is directly to the children of Thomas Boyer subject to the rights of occupancy of Thomas during his life; under the will nothing is assigned for the Executor to do only in case Thomas refused to occupy the property. The proceedings in this case shews that Thomas Boyer is in the occupation and enjoyment of the rights under the will and has determined to do so. Under these circumstances, it is not perceived what estate can be derived to the executor from the will of Jacob Boyer. The testator may have designed in a certain contingency to create a kind of testamentary guardian for his children, but could never have intended to vest the Executor with any title in the property under consideration.

R H Marshall

It is on this 26th day of February 1849 by the authority of Frederick County Court sitting as a Court of Equity ordered, adjudged and decreed that the objections filed in this cause be and is hereby overruled, and the sale made and reported by the Trustee be and is hereby finally ratified and confirmed no sufficient cause having been shewn to the contrary, The Trustee is allowed for his Commission & Expenses eighty one dollars. It is further ordered that this case be and is hereby referred to the Auditor for distribution.

R H Marshall.

Trustee 2d Report of Sales

Henry Lorentz pro ami of Jacob M Boyer and others.
vs
Same and Thomas Boyer.

Filed 20 Feby 1849.

No. 2464 Equity
In Frederick County Court sitting as a Court of Equity

To the Honorable the Judges of Frederick County Court sitting as a Court of Equity.

The 2d report of John Sifford appointed Trustee in this cause to make sale of certain real estate therein mentioned res-