SLEEPER & a., *Ex'rs*, v. KELLEY.

A gift by will to one who owes the testator more than the legacy, a portion of the indebtedness being secured and the remainder not secured, shows an intention that the whole shall be paid; and to carry that intention into effect, equity will apply the legacy first to the unsecured portion of the debt.

WRIT OF ENTRY, to foreclose a mortgage given by the defendant to the plaintiffs' testator, James Crawford, to secure a note dated January 1, 1872, for $2,175, upon which there was due at his decease over $4,000. Crawford, by his will, gave the defendant a legacy of $4,000, and died June 27, 1884. At the time of his decease he held several unsecured notes, amounting to nearly $500, against the defendant, which are now in the hands of the plaintiffs as executors. The defendant claims, and about December 4, 1886, gave the plaintiffs notice in writing of his claim, to have the legacy applied first upon the mortgage note in discharge of the mortgage, and the balance, if any, upon the unsecured notes.

K. E. Dearborn and *Chase & Streeter*, for the plaintiffs.

Fling & Chase, for the defendant.

CARPENTER, J. It is not a question of the application of payments, but of the testator's intention—What of his demands against the defendant did he intend should be satisfied by his gift? It must be presumed that he knew the amount and character of the debts due to him. If the legacy was equal to or greater than the defendant's indebtedness, the testator's intention that the defendant should pay nothing would be certain. Inasmuch as the legacy is insufficient to satisfy the whole amount of the testator's demands, his intention that the defendant should pay the remainder is equally certain. In order that this intention may be effectuated, equity will apply the legacy first in satisfaction of the defendant's unsecured indebtedness. *Courtenay* v. *Williams*, 3 Hare 539, 553, 554; *Poole* v. *Poole*, L. R. 7 Ch. 17; *Cummings* v. *Bramhall*, 120 Mass. 552.

The plaintiffs may amend their pleading by filing a bill in equity (*Metcalf* v. *Gilmore*, 59 N. H. 417), rendering it unnecessary to determine whether the same result may be reached in the action at law. *Mahurin* v. *Pearson*, 8 N. H. 539, 542; *Concord* v. *Pillsbury*, 33 N. H. 310, 317.

Case discharged.

CLARK, J., did not sit: the others concurred.