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Notice of Appeal

(Filed April 15th, 1935)

IN CHANCERY OF NEW JERSEY

Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants,

and

MARY E. MURPHY, *et als.,*
Defendants.

On Bill for
Construction
of a Will

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The defendants, Mary E. Murphy, individually and as Executrix of the Last Will and Testament of John Henry Murphy, deceased, and Henry A. F. Murphy, hereby appeal from the final decree made in the above entitled cause on the 9th day of April, 1935, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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The said final decree was made by the Chancellor on the advice of Vice Chancellor Alfred A. Stein.

Dated April 12th, 1935.

M. J. QUIGLEY,

Solicitor for and Of Counsel with Defendants, Mary E. Murphy, individually and as Executrix of the Last Will and Testament of John Henry Murphy, deceased, and Henry A. F. Murphy.

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Petition

I conceive there is good cause for appeal in the above entitled cause.

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M. J. QUIGLEY,
Solicitor for and Of Counsel with Defendants, Mary E. Murphy, individually and as Executrix of the Last Will and Testament of John Henry Murphy, deceased, and Henry A. F. Murphy.

Petition

(Filed April 24th, 1935)

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NEW JERSEY COURT OF ERRORS AND APPEALS

Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants-Respondents,

and

30

MARY E. MURPHY, *et als.*,
Defendants-Appellants.

On Appeal from
Court of
Chancery

To the Honorable, the Court of Errors and Appeals in the Last Resort in all Causes:

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The petition of Mary E. Murphy, individually and as Executrix of the Last Will and Testament of John Henry Murphy, deceased, and Henry A. F. Murphy, the appellants in the above stated cause, respectfully show that your peti-

Petition

tioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey (upon the advice of Vice-Chancellor Alfred A. Stein), bearing date the ninth day of April, 1935 in a certain cause in said Court of Chancery wherein Laurence C. Murphy and Charles L. Gaskill, Jr., were complainants and your petitioners were defendants, in this respect, that the said decree adjudges that, under the provisions of the second paragraph of the Last Will and Testament of John Henry Murphy, deceased, late of the Township of Maplewood, in the County of Essex and State of New Jersey, the said complainant, Laurence C. Murphy is entitled to receive a one-quarter interest, and the said complainant, Charles L. Gaskill, Jr., a one-quarter interest, and the said defendant, Henry A. F. Murphy, a one-half interest in and to the machinery and plant and stock in trade, good will and fixtures of the printing business conducted by the said testator at the time of his decease, and the cash on deposit at the date of testator's death in the checking account of said business, said cash being on deposit at the date of testator's decease with the Union National Bank of Newark, New Jersey, in a checking account in the name of "H. Murphy" and the accounts receivable less the accounts payable of said printing business.

And your petitioners hereby appeal from those parts of the decree of the Chancellor, which decree as aforesaid, upon the grounds that the same is erroneous, for that:

1. The words in the second clause of the will of John Henry Murphy, "I hereby give and be-

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Petition

10 queath my printing business and the machinery and plant and stock in trade, good will and fixtures" do not pass nor include the money on deposit in the Union National Bank of Newark, N. J., in the name of "H. Murphy" at the time of his death, nor do they pass, or include the accounts receivable of the said printing business, less the accounts payable of said business.

2. The said moneys on deposit in said bank and the said accounts receivable of said business pass to the widow under the fourth or residuary clause of the said will of John Henry Murphy.

20 3. There was no bequest or gift by implication of the said moneys on deposit in said bank nor of the said accounts receivable of the said business in the second clause of the will of John Henry Murphy.

4. The complainants are not entitled to a one-quarter interest each in the said moneys on deposit in said bank and in said accounts receivable of said business.

30 5. The money on deposit in the Union National Bank of Newark, N. J., under the name of "H. Murphy" was the personal account of said John Henry Murphy.

6. The accounts receivable of the printing business at the time of the death of John Henry Murphy are assets of the estate of the decedent; they are not assets of the printing business.

40 7. The words of said will are plain and unambiguous and require no consideration of sur-

Petition

rounding circumstances or ascribing to testator the common impulses of our nature.

8. The words "and the machinery and plants and stock in trade, good will and fixtures" in the second clause of the will of John Henry Murphy are words of enumeration and are intended to specify of what the printing business consisted.

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9. The complainants are entitled only to a one-quarter interest each in the printing business, consisting of the machinery and plant and stock in trade, good will and fixtures.

10. The Court below should have decreed that the money on deposit in the Union National Bank of Newark, N. J. in the name of "H. Murphy", at the time of his death, and the accounts receivable of the printing business at the time of his death, did not pass to the legatees under the second clause of his will.

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Your petitioners therefore pray that the said decree of the Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

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M. J. QUIGLEY

M. J. QUIGLEY

Solicitor for and Of Counsel with
Defendants-Appellants

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Bill of Complaint

Endorsed:

Service of a copy of the within
Petition of Appeal is hereby ac-
knowledged this 20th day of April,
1935.

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McDONOUGH & McDONOUGH
Solicitor for and Of Counsel with
Complainants-Respondents

Bill of Complaint

(Filed April 23, 1934)

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IN CHANCERY OF NEW JERSEY

*To the Honorable Luther A. Campbell, Chan-
cellor of the State of New Jersey:*

The complainants, Laurence C. Murphy, of the
City of Newark, and Charles L. Gaskell, Jr. of
the Town of West Orange, both in the County of
Essex and State of New Jersey, respectfully
show that:

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1. John Henry Murphy, late of the Township
of Maplewood, in the County of Essex and State
of New Jersey, died on August 7th, 1933, leaving
a last will and testament which was, on August
30th, 1933, duly admitted to probate by the Sur-
rogate of said County of Essex, and letters tes-
tamentary thereon issued to Mary E. Murphy,
the executrix therein named, who has taken upon
herself the burden of administering the said
estate. A true copy of said will is hereunto
annexed and made a part hereof.

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Bill of Complaint

2. In and by his said will the said John Henry Murphy, provided as follows:

“SECOND:—I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner, that is to say:—A one-half interest in the same to my son, Henry A. F. Murphy, a one-quarter interest in the same To Charles L. Gaskill and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever.”

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“FOURTH:—All the rest, residue and remainder of my Estate whether real, personal or mixed, and wherever the same is situate, including all building and loan stock whether in the name of H. Murphy, Harry Murphy, Henry Murphy or John H. Murphy, to my wife, Mary E. Murphy, to her, her heirs and assigns, forever.”

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3. The said John Henry Murphy, in his life time was engaged in the printing business and in connection therewith at the time of his death had certain machinery and plant and stock in trade, good will and fixtures, and in addition thereto, had a considerable quantity of cash on deposit in a checking account of said printing business, and also bills receivable and payable in connection with that business.

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4. Complainants are entitled under the provisions of aforesaid second paragraph of the last will and testament of the said John Henry Murphy, not only to a one-quarter share each of the

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Bill of Complaint

10 machinery and plant and stock in trade, good will and fixtures of said printing business, but in addition thereto, a one-quarter share each in cash on deposit in the checking account of said business, and in the bills payable and receivable in connection with said business.

5. The said Mary E. Murphy, executrix, as aforesaid, and individually as residuary legatee and devisee, claims that complainants are entitled only to a one-fourth share each of the machinery and plant and stock in trade, good will and fixtures of said printing business.

20 6. Henry A. F. Murphy who is entitled under said second paragraph of said last will and testament to a one-half interest in said machinery and plant and stock in trade, good will and fixtures, cash on deposit in the checking account, and the bills payable and receivable in connection with said printing business, and is therefore a proper party complainant to this bill, has refused to join with the complainants therein and is therefore made a party defendant.

30 Complainants are without adequate remedy in the courts of law, and therefore pray:—

1. That Mary E. Murphy, executrix of the last will and testament of John Henry Murphy, deceased, and Mary E. Murphy, individually, and Henry A. F. Murphy, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

40 2. That this court may construe the said last will and testament of John Henry Murphy, deceased, and declare complainants' rights thereunder.

Bill of Complaint

3. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

McDONOUGH & McDONOUGH,
Solicitors for Complainants. 10

ANDREW McDONOUGH,
Of counsel with complainant.

IN THE NAME OF GOD, AMEN.

I, JOHN HENRY MURPHY, of the Township of Maplewood, County of Essex and State of New Jersey,

Being of sound mind, memory and understanding, do make and publish this my last Will and Testament in manner following, that is to say:

20

FIRST:—I hereby order and direct that all my just debts and funeral expenses be paid as soon after my death as conveniently can be done.

SECOND:—I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner, that is to say:—A one-half interest in the same to my son, Henry A. F. Murphy, a one-quarter interest in the same to Charles L. Gaskill and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever.

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THIRD:—I hereby direct my executrix hereinafter named to expend two hundred (\$200) dollars for masses to be said for the repose of my soul.

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Bill of Complaint

10 FOURTH:—All the rest, residue and remainder of my Estate whether real, personal or mixed, and wherever the same is situate, including all Building and Loan stock whether in the name of H. Murphy, Harry Murphy, Henry Murphy or John H. Murphy, to my wife, Mary E. Murphy, to her, her heirs and assigns, forever.

20 FIFTH:—I hereby nominate, constitute and appoint my said wife, Mary E. Murphy, executrix of this, my Last Will and Testament, giving and granting unto my said executrix, full power and lawful authority to mortgage, sell and convey or otherwise dispose of any and all real estate of which I may die seized and to make good and sufficient conveyances in law therefor.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of July, nineteen hundred and twenty-six.

JOHN HENRY MURPHY (L. S.)

30 SIGNED, SEALED, PUBLISHED AND DECLARED, by the said Testator, as and for his last will and testament in our presence who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses.

Joseph J. Quinn, 738 Broad St., Newark, N. J.

B. J. Cummings, 738 Broad St., Newark, N. J.

Answer of Defendants, Mary E. Murphy, Personally and as Executrix of the Estate of John Henry Murphy, and Henry A. F. Murphy

(Filed May 10, 1934)

IN CHANCERY OF NEW JERSEY

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Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants,

and

MARY E. MURPHY, *et als.,*
Defendants.

On Bill, etc.

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The defendants, Mary E. Murphy, personally and as Executrix of the Estate of John Henry Murphy, deceased, and Henry A. F. Murphy, answering the bill of complaint say:

1. These defendants admit Paragraphs 1 and 2 of the bill of complaint.

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2. These defendants admit that the said John Henry Murphy, in his lifetime, was engaged in the printing business and in connection therewith at the time of his death had certain machinery and plant and stock in trade, good will and fixtures, used in connection with that business, but these defendants deny that any checking account or money on deposit was a part of the said busi-

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Answer of Defendants

ness, and these defendants contend that all bills receivable belong to the said Mary E. Murphy under the 4th paragraph of the Last Will and Testament of the said John Henry Murphy, deceased.

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3. These defendants deny that the complainants are entitled under provision of the afore-said 4th paragraph of the Last Will and Testament of the said John Henry Murphy to any part of any bank account or money on deposit in any banking institution, and deny that said complainants are entitled to the bills receivable in connection with said business.

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4. These defendants admit paragraph 5 of the bill of complaint.

5. These defendants deny that the said complainants are entitled to any cash on deposit in checking accounts or any bank accounts whatsoever, or to any part of the bills receivable and the said Henry A. F. Murphy admits that he has refused to join with the complainants herein.

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6. These defendants join with the complainants in requesting that the court may construe the Last Will and Testament of John Henry Murphy, deceased, and declare the rights of the parties hereunder, but charge and insist that a proper construction of the said Will so as to carry out the intent of the said John Henry Murphy, deceased, will deny to said defendants, any participation in any bank account or money on deposit in any banking institution belonging to the said decedent at the time of his death, and they deny that the complainants are entitled to the relief sought in the bill of complaint.

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M. J. QUIGLEY,
Solicitor for Defendants.

Reply

(Filed May 14th, 1934)

IN CHANCERY OF NEW JERSEY

101—698

Between LAURENCE C. MURPHY and CHARLES L. GASKELL, JR., <i>Complainants,</i> and MARY E. MURPHY, <i>et als.,</i> <i>Defendants.</i>	} On Bill, &c.	10
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Complainants, Lawrence C. Murphy and Charles L. Gaskell, Jr., replying to the answer of the defendants in the above entitled cause say that:—

The complainants join issue on the answer of defendants.

McDONOUGH & McDONOUGH,
Solicitors of Complainants. 30

Order of Reference

(Filed May 25, 1934)

IN CHANCERY OF NEW JERSEY

101—698

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Between

LAURENCE C. MURPHY and
 CHARLES L. GASKELL, JR.,
Complainants,

and

MARY E. MURPHY, *et als.*,
Defendants.

} On Bill, &c.

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This matter being opened to the court by McDonough & McDonough, solicitors of the complainants, and it appearing that Michael J. Quigley, solicitor for the defendants, has consented hereto:

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It is, on this 25th day of May, nineteen hundred and thirty-four, on motion of McDonough & McDonough, solicitors of the complainants, ORDERED that the above entitled cause be referred to Hon. Alfred A. Stein, one of the Vice-Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

LUTHER A. CAMPBELL,
 C.

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Order of Designation

I hereby consent to the entry of the foregoing Order.

M. J. QUIGLEY,
Solicitor of Defendants.

A true copy.

EDW. T. WHELAN,
Clerk.

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Order of Designation

(Filed June 4th, 1934)

IN CHANCERY OF NEW JERSEY

101—698

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Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants,

and

MARY E. MURPHY, *et als.,*
Defendants.

On Bill, &c.

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This matter being opened to the court by McDonough & McDonough, solicitors of the complainants, and it appearing that Michael J. Quigley, solicitor for the defendants, has consented hereto:

It is, on this fourth day of June, nineteen hundred and thirty-four, ORDERED that the first day of November, nineteen hundred and thirty-four, at the hour of ten o'clock in the forenoon, at the

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Opinion

Chancery Chambers, in the City of Newark, be designated as the time and place for the hearings of the above entitled cause.

ALFRED A. STEIN,
V. C.

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I hereby consent to the entry of the foregoing Order.

M. J. QUIGLEY,
Solicitor of Defendants.

Opinion

(Filed March 29, 1935)

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IN CHANCERY OF NEW JERSEY

Docket 101—698

Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants,

30

and

MARY E. MURPHY, *et als.,*
Defendants.

} On Bill, &c.

(Decided March 28th, 1935.)

Appearances:

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Messrs. McDonough & McDonough, Solicitors for Complainants.

Mr. Michael J. Quigley, Solicitor for Defendants.

Opinion

1. In construing a will, it is the prime duty of the Court to arrive at the intention of the testator which must be determined not by fixing the attention on single words in the will but by considering the entire will and the surroundings of the testator when he executed the same, and by ascribing to him, so far as his language permits, the common impulses of our nature.

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2. The words in the will of John Henry Murphy, "I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures" pass and include the money on deposit in the bank account used in connection with said business, and also the accounts receivable, less the accounts payable.

20

STEIN, V. C.

Complainants, Laurence C. Murphy and Charles L. Gaskill, Jr., two of the legatees named in the will of John Henry Murphy probated by the Surrogate of Essex County August 30th, 1933, bring their bill and pray for construction of the second paragraph contained in the will which reads as follows:

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"SECOND: I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner; that is to say: A one-half interest in the same to my son, Henry A. F. Murphy, a one-quarter interest in the same to Charles L. Gaskill and the remaining one quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever."

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Opinion

Complainants allege that under this bequest they are each entitled to a one-quarter interest in the cash on deposit in the checking account of said business which they say was maintained in the Union National Bank at Newark, and also in the bills receivable.

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The defendants, Mary E. Murphy, individually and as executrix, and the son, Henry A. F. Murphy, contend that the money on deposit in the Union National Bank to the credit of the deceased, and the accounts receivable, are no part of the business and that complainants are not entitled thereto under the will; that there was no business checking account; that said account in the Union National Bank was the personal account of the deceased and that complainants are entitled only to a one-quarter interest each in the business, machinery and stock in trade, as well as in the good will and fixtures.

20

The testator maintained a bank account in the Union National Bank at Newark in the name of "H. Murphy," in which there was a balance to his credit at the time of his death amounting to \$13,526.44. The checks used in withdrawing money from this account bore on their face the printed words "H. Murphy, Printer." There are also accounts receivable and accounts payable in connection with the printing business.

30

The business disposed of by the will is one of long standing. At the time of the execution of the will, Henry A. F. Murphy, son of the testator, was a minor with little or no experience in the business, while complainants were men of much experience and long association with the deceased. Laurence C. Murphy at the time of the testator's death, had been office manager for ten years past and associated with the busi-

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Opinion

ness for twenty-six years. Charles L. Gaskill, Jr. was the general supervisor and employed in the business for thirty-four years. The deceased did an extensive printing business in the conduct of which he sought and received the counsel and advice of complainants, the value of which the deceased in his life time attested by the fact that he semi-annually paid to each of them, in addition to their salary, a sum which he represented as a one-quarter share of the profits of the business.

10

The deceased maintained altogether six checking accounts and fifteen savings accounts, the total on deposit in all of which amounted to approximately \$90,000. Analysis of the checks drawn on the account in the Union National Bank shows that in the year 1931 the deceased drew for his personal use 178 checks amounting to \$25,853.57 and 716 checks, which were used distinctly for business purposes, totaling \$63,594.08; in the year 1932, he drew 1932 checks for personal use, totaling \$20,808.55, as against 652 checks exclusively for business purposes, totaling \$48,850.87, and in the year in which he died, 1933, up to August 9th, he drew 70 checks amounting to \$5,277.83 for personal use and 372 checks, totaling \$34,374.91, traceable to business purposes. This analysis was made by Israel M. Pogash, who in reply to the question how he knew which checks on this account were drawn for the personal use of the deceased said, "A check to Mrs. Murphy would ordinarily be a personal check, it wouldn't be a business check. A check for taxes for his home is a personal check, that is not a business check. I mean, many of them can be identified by that means."

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Opinion

10 The total estate of the deceased amounted to about \$300,000. He was described by Philip H. Baldwin, publisher, business and advertising manager of the Newark Sunday Call who knew him since 1898, "as one of the keenest business men he ever ran across." The profits from the business and the size of his estate corroborate the accuracy of the judgment formed by Mr. Baldwin concerning decedent's business ability. Certainly, such a man maintained a business account with an average balance as working capital. Moreover, outstanding in aid of the determination that the account "H. Murphy, Printer," was considered by the deceased as his business account is the fact that the complainant, Laurence C. Murphy, who was the office manager, was intrusted the power of attorney to draw checks on this account.

20 The testimony further shows that neither of complainants were men possessed of means or capital wherewith to carry on this successful business. Certainly, the testator did not intend after his death that the machinery, stock in trade, fixtures and good will of the business should be divided between complainants and his son or sold and the proceeds divided one-half to his son and one-quarter to each complainant. Such a result it is not reasonable to presume was either intended or desired by the testator. He knew that the business could not be carried on without capital. What he intended was that the business be carried on by complainants and his son in the same way in which it was conducted by him in his life time substituting his son in his place and stead, and complainants as partners in fact with the son.

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40

Opinion

The facts and surrounding circumstances which existed at the time of the decedent's death, lead me to the inescapable conclusion that it was the intention of the deceased that the money in the Union National Bank and the accounts receivable (the working capital) should go to the complainants and the defendant son, together with the business, less the accounts payable. 10

In a situation not unlike the present, in re: Lowe, Supreme Court, Appellate Division, 134 N. Y. Sup. 537, Spring, J. reversing the Surrogate in construing a bequest of

“her printing office and bindery, together with all presses, bindery machinery, type, papers on hand, office furniture and equipment of every nature connected with said business” 20

held that:

“This successful business, it is fair to assume, she intended to transmit as a family heritage to her only child, to be carried on in her behalf without impairment of its efficiency or volume. To strip it of its bills receivable and the small amount of cash to its credit would destroy its working capital, and leave nothing connected with the business from which money could be derived to meet the weekly payroll of \$1,200 or over. It is unreasonable to believe that this mother designed to deprive her daughter of the fruits of this family patrimony so essential for its management and operation. We should not interpret the will in such a way as to make a serious invasion on the 30 40

Opinion

live assets of the business, unless the language of the bequest clearly calls for that construction. The only available assets were grouped in these due and accruing accounts and the small sum in cash. If the daughter was to carry on the business without these assets she must add a considerable sum in cash to it and practically commence anew without any working capital." Affirmed by the Court of Appeals, 206 N. ~~J.~~ 671, 99 N. E. 722, modifying the opinion to the extent only that the daughter was to pay the bills payable of the business.

20 The meaning and intention of the testator must be determined, not by fixing the attention on single words in the will but by considering the entire will and the surroundings of the testator when he executed the will, and by ascribing to him, so far as his language permits, the common impulses of our nature. *Torrey v. Torrey*, 70 N. J. L. 672½; 59 A. 450.

30 In *Coyle v. Donaldson*, 91 N. J. Eq. 138; 108 A. 308, the bill of complaint was filed to obtain, among other things, the construction of the words or phrases in the fourteenth clause of the will, "the coal business now owned by me" bequeathed to the testator's grandson, James W. Coyle, Jr., and his daughter Elizabeth C. Donaldson. The Vice-Chancellor before whom the case in the first instance was heard, decided the words included only the good will of the business, the leasehold interest of the land on which the coal business was conducted, the horses, 40 wagons and other equipment used by the tes-

Opinion

tator in carrying on the business of coal merchant. Our court of Errors and Appeals in reversing the Vice Chancellor held that the words in the will included in addition thereto coal on hand, cash and checks, cash on deposit in the checking account of the business and the difference between bills receivable and payable. The Court among other things, said:

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“If we put ourselves in the position of the testator, at the time of the execution of the will, and consider the circumstances he had in view in making the will, it seems quite clear, that the coal business was to pass, as it was then owned by the testator, as a whole, with all that pertained to it, as a going concern or business. Neither one of these two legatees had any means whatever, except what they received under the provisions of the will, and no one, perhaps, knew better than the testator himself that such a business could not be carried on successfully without some capital.”

20

Considering the language of the provisions in the will, the testator first bequeaths “my printing business” in what is a broad bequest, to which he adds “and the machinery and plant and stock in trade, good will and fixtures.” These are not words of restriction, but specify some of the chief tangible property in the plant. He bequeaths his printing business, together with the good will. He intended not to cut down the bequest but to make clear that in addition to the business in its entirety, these principal items, physically in the plant, should unmistak-

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Final Decree

ably pass with the business. The intention of the testator in this, as in every other case of like nature, must be drawn from the language used in the will, viewed in the light which the situation and surroundings connected with the property may shed upon it. Charles E. Francis, 10
 exr. etc. v. Elizabeth Breivogel, et als., Docket 101, page 562 (unreported).

Decree will be advised in accordance with the foregoing conclusions.

Final Decree

20 IN CHANCERY OF NEW JERSEY
 101—698

Between

LAURENCE C. MURPHY and
 CHARLES L. GASKELL, JR.,
Complainants,

and

30 MARY E. MURPHY, Executrix of
 the last Will and Testament
 of John Henry Murphy, de-
 ceased; MARY E. MURPHY, in-
 dividually, and HENRY A. F.
 MURPHY,
Defendants.

On Bill, &c.

40 This cause coming on to be heard in the pres-
 ence of McDonough & McDonough, solicitors of
 the complainants by Andrew V. McDonough of
 counsel with complainants, and Michael J. Quig-

Final Decree

ley, solicitor of the defendants, and the court having examined the pleadings, and having taken testimony in open court and heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the court that, by the true construction of the second paragraph of the last will and testament of John Henry Murphy, deceased, late of the Township of Maplewood, in the County of Essex and State of New Jersey, the complainant Laurence C. Murphy is entitled to a one-quarter interest, and the complainant Charles L. Gaskell, Jr. to a one-quarter interest, and the defendant Henry A. F. Murphy to a one-half interest in the machinery and plant and stock in trade, good will and fixtures of the printing business conducted by said testator at the time of his decease and the cash on deposit at the date of testator's decease in the checking account of said business, said cash being on deposit at the date of testator's death with the Union National Bank of Newark, New Jersey, in a checking account in the name of "H. Murphy," and the accounts receivable less the accounts payable of said printing business.

It is thereupon, on this *9th* day of April, 1935 ORDERED, ADJUDGED AND DECREED that under the provisions of the second paragraph of the last will and testament of John Henry Murphy, deceased, late of the Township of Maplewood, in the County of Essex and State of New Jersey, the said complainant, Laurence C. Murphy, is entitled to receive a one-quarter interest, and the said complainant, Charles L. Gaskill, Jr., a one-quarter interest, and the said defendant, Henry A. F. Murphy, a one-half interest in and to the

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Final Decree

10 machinery and plant and stock in trade, good will and fixtures of the printing business conducted by said testator at the time of his decease, and the cash on deposit at the date of testator's death in the checking account of said business, said cash being on deposit at the date of testator's decease with the Union National Bank of Newark, New Jersey, in a checking account in the name of "H. Murphy," and the accounts receivable less the accounts payable of said printing business.

20 It is further ORDERED that a counsel fee of *Five Hundred* dollars be allowed to McDonough & McDonough, solicitors of complainant, said counsel see, together with the costs of this suit to be paid by the defendant Mary E. Murphy, the Executrix of the said John Henry Murphy, deceased, out of the Estate in her hands.

LUTHER A. CAMPBELL,
C.

Respectfully advised,

30 ALFRED A. STEIN,
V. C.

Consented to as to form only.

M. J. QUIGLEY,
Solicitor of Defendants.

Case

IN CHANCERY OF NEW JERSEY

December 17, 1934.

Between

LAURENCE C. MURPHY and
CHARLES L. GASKILL, JR.,
Complainants,

and

MARY E. MURPHY, individually
and as executrix of the last
will and testament of John
Henry Murphy, *et als.,*
Defendants.

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Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alfred A. Stein, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. McDonough & McDonough for complainants; Michael J. Quigley for defendants.

30

The Court: Will you open your case?

Mr. McDonough: This case, your Honor, involves the will of John Murphy, who died August 7th, 1933, who leaves a last will and testament, which was duly admitted to probate.

During the testator's life he was engaged in the printing business in the City of Newark and in his will, in the second paragraph, he stated, "I hereby give and bequeath my printing busi-

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Case

10 ness and the machinery and plant, stock and trade, good will and fixtures in the following manner, that is to say, one-half to my son, Henry A. F. Murphy, a one-quarter interest to Charles L. Gaskill, and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever."

 In the fourth paragraph of the will, he devised the rest of his property to his wife.

 The complainants in this matter are the two parties, Charles Gaskill and Laurence Murphy, who were devised a one-quarter interest in the business.

20 It is the contention of the complainants that the one-quarter interest in the business included not only a one-quarter interest in the good will, the stock and trade and the fixtures but a one-quarter interest in the bank account of the testator, which amounted to—these bank accounts were peculiar to the business—amounted to about \$15,000, and they also included a one-quarter interest in the accounts receivable, as well as the bills payable.

30 The defendant in this matter does not dispute the fact that it includes a one-quarter interest in the accounts payable, but denies the fact that the complainants are entitled to a one-quarter interest in the bank account in the accounts receivable.

40 We intend to prove this, the two parties that are entitled to this one-quarter interest in the business were employees of long standing and that even during the lifetime of the decedent that he gave them an interest or gave them the one-quarter interest in the profits of the business while he was alive, and that it would have

Case

been his intention in his will to give them a one-quarter interest in the entire business.

The Court: You think testimony will help to construe what he meant?

Mr. McDonough: I think it will, your Honor. I want to prove—

The Court: In the face of the language? 10

Mr. McDonough: Yes. We will attempt to show that from all the surrounding circumstances at the time that he could not help but to give a one-quarter interest in the entire business to this Laurence Murphy and Charles Gaskill.

The Court: Well, of course, I am not deciding, I am only asking—

Mr. McDonough: Yes.

The Court: —you in view of this language— 20

Mr. McDonough: The language, your Honor—

The Court: —in which he is quite specific when he says, “bequeath my printing business and machinery and plant and stock and trade, good will and fixtures.”

Mr. McDonough: Yes. I want to point out to your Honor that when he said “printing” business that the balance of the words are not words of limitation. He does not say “consisting of so and so” but he says “and these other things” and it follows directly the case that we have *Coyle v. Donaldson*. 30

The Court: I will hear you.

Mr. McDonough: On all fours with the case of *Coyle v. Donaldson*.

The Court: I will hear your testimony.

Mr. McDonough: Mr. Laurence Murphy.

Laurence C. Murphy, direct

LAURENCE C. MURPHY, sworn for complainant.

Direct examination by Mr. McDonough:

Q. Mr. Murphy—

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Mr. McDonough: With your permission, Mr. Quigley, we will offer certified copies of the will.

(Certified copy of the will marked Exhibit C-1.)

Mr. McDonough: I am offering in evidence certified copy of the last will and testament.

(Paper already marked Exhibit C-1.)

20

Q. Mr. Murphy, you are the brother of John Henry Murphy— A. I am.

Q. —the testator in this matter. How long were you employed with him in his printing business? A. Since about 1909.

Q. And what was your position in the business? A. At what specific time?

Q. Well, within the last ten years. A. Office manager.

30

Q. Did you have any voice in the management of the business? A. Yes.

Q. Did you sign checks? A. Yes.

Q. Did you receive, during Mr. Murphy's lifetime, any share of the profits of the business?

A. For—yes.

Q. And your—

The Court: Do you mean by way of bonuses, or what?

40

The Witness: It was designated as a split of the profits at specific periods during the year.

Laurence C. Murphy, direct

Q. And who else received a share of the profits? A. Mr. Gaskill.

Q. And what was his proportion of that split?
A. We were told it was 25 per cent.

Q. Where did Mr. Murphy keep these bank accounts? A. The Union National Bank.

10

Q. Any other bank? A. Prior to that it was in the National Newark & Essex.

Q. And did you have power of attorney to draw checks on the account in the Union National Bank? A. Yes.

Q. And are these—is this the check book that was used? A. It is.

Q. Designated as “H. Murphy, printer.”

Mr. Quigley: Just a moment, please. That speaks for itself, if the Court please, and the signature on the check is in evidence “H. Murphy” not “H. Murphy, printer.” I would like to have the record kept straight.

20

The Witness: Right.

The Court: Do you offer it?

Mr. McDonough: I offer the book in evidence.

The Court: Any objection?

30

(No audible objection.)

(Check book marked Exhibit C-2.)

Q. Did Mr. Murphy keep a separate account in this same bank for his own personal business?
A. He did.

Q. And how was that account designated? A. “H. Murphy, special.”

Q. And did he draw any of his personal checks on this account?

40

The Court: Which account?

Laurence C. Murphy, direct

Q. On account of the printing business.

The Court: Marked what?

Mr. McDonough: Marked C-2.

The Court: Did he?

The Witness: No.

10

Q. Did he?

Mr. Quigley: Pardon me. I didn't get the answer to that.

The Witness: No.

Mr. Quigley: The answer was he did not draw any personal checks on the printing account.

The Witness: On the printing account.

20

Q. Now, Mr. Murphy, did you work for a salary? Did you receive a salary? A. I did.

Q. And what was your salary each week for the past ten years? A. It varied according to the rate of the union wage.

Q. But it was a union scale of wages? A. Right.

Q. Now, I show you these three checks. Can you identify those checks as—can you identify those checks? A. I do.

30

Q. And what are they? A. Splits on the profits.

Q. Were there more splits than just those three? A. Yes.

Q. And when was it the custom to receive these splits? A. Semi-annually. Around the first—the end of the year and the first of July.

40

Q. And have you been able to procure any more of the cancelled vouchers than these which I have presented? A. No.

Laurence C. Murphy, direct

Mr. Quigley: All drawn to his order.

Mr. McDonough: All drawn to his order and endorsed by him.

Mr. Quigley: All drawn to his order and endorsed by him.

Mr. McDonough: I will offer these checks. 10

(Three checks marked as Exhibit C-3.)

Q. Now, Mr. Murphy, you know Mr. Henry A. Murphy? A. I do.

Q. And he is the son of Henry Murphy? A. He is.

Q. And is he employed at the printing establishment? A. At the present time?

Q. Yes. A. He is the president of the company. 20

Q. And how long has he been employed there? A. I should say for the last ten or eleven years.

Q. And has he ever had any part in the executive management of the business? A. Meaning when?

Q. At any time. A. Since his father's death, yes.

Q. Prior to the time of his father's death. A. No. 30

Q. What is his position at the plant at the present time? A. He is the president of the company.

Q. What are his duties as president of the company, as far as the operation of the business is concerned? A. It is rather a general scope. He works inside and he works outside and takes care of things as they come up.

Q. Prior to the time of his father's death what were his duties at the shop? A. Compositor, actually, registered apprentice. 40

Laurence C. Murphy, cross

Q. In 1926 was he employed at the shop? A. 1926?

Q. Yes. A. Yes, I think he was.

Q. How old was he at the time? A. About 19.

Mr. McDonough: That is all.

10

Cross examination by Mr. Quigley:

Q. You say you were always paid the regular scale of union wages? A. I beg your pardon?

Q. You say during your employment you were always paid the regular scale of union wages? A. I would like to understand it more definitely.

Q. You testified, a few moments ago, that while you were employed there you received the regular scale of union wages. A. Yes.

20

Q. I am just asking you if that is so. A. I did.

Q. You did, eh. In making contracts for this business, in which you were employed by your brother, could you say "No" to the making of any contract? A. I could express my opinion on it. Whether my opinion carried or not was up to the consensus of opinion.

30

Q. It was up to him, wasn't it, Harry Murphy, the decedent, as to whether or not he would make the contract? Isn't that right? A. On some things, no.

Q. For instance, what couldn't he make a contract on? A. Well, he could make a contract on anything.

Q. Yes. And he fixed the wages, didn't he? A. No.

Q. Who did? A. The typographical union set the wages.

40

Q. Through the union? A. Through the union.

Laurence C. Murphy, cross

Q. Now, this word "printer" that you said this account was in the name of "Harry Murphy, printer." A. No.

Q. That is not so, is it? How was that account in the Union National Bank? A. The account—wait a minute—I wish to correct the statement, the account, the check is designated, "H. Murphy, printer"; the account is in the name of "H. Murphy." 10

Q. The account was "H. Murphy" and not "H. Murphy, printer"? A. It is designated on the check as "H. Murphy, printer," the name of the book is "H. Murphy."

Q. That is the signature, but the word "printer" is no part of the signature. A. No.

Q. And if the word "printer" was not on that check, it would be honored just the same wouldn't it? A. It would be honored. Any check with my signature or "H. Murphy" signature on that account would be honored. 20

Q. Whether it had the word "printer" on it or not? A. Right.

Q. So that "printer" was no part of the account, was it? A. It was no part of that bank account, no.

Q. The business when the decedent died in 1933, it was taken over by you and Mr. Gaskill and young Mr. Murphy. Isn't that right? A. That is right. 30

Q. And you formed a corporation known as "H. Murphy, printer." A. That is right.

Q. Since then you have been running the business very much the same as you had before the death of the testator. A. Right.

Q. Is that so? A. Right.

Q. And have you put any new money in for yourself? A. Yes. Invested in the business. I invested what was necessary at the start of the 40

Laurence C. Murphy, cross

business to furnish notes to keep the business going, which we did.

Q. How much? How much did you put in?

The Court: Is this since the death?

10 Mr. Quigley: Since the death, your Honor.

The Court: How is that material?

Mr. Quigley: The Coyle case, which has been referred to by counsel, makes a point of the fact that the people to whom this business was left did not have money enough to carry it on, and for that reason the bank appropriated the substance of the business.

20 I want to show that particular phase of the Donaldson case does not apply here.

The Court: You mean, they have been able to borrow money?

Mr. Quigley: No. I mean that this gentleman, Gaskill, and young Mr. Murphy have contributed between them \$2,000 to the carrying on of the business in the last sixteen months.

30 The Court: I have not read the Donaldson case, but it does not hold what you say, does, it that—

Mr. Quigley: That was one of the arguments that was used in the disposition of the case.

The Court: That the person who got the business did not have any money—

Mr. Quigley: Yes, if your Honor please.

Mr. McDonough: I—

40 The Court: —the only thing that I can see—see if I am right or not, I have not read the case—

Mr. Quigley: The—

Laurence C. Murphy, cross

The Court: —it may be that the Donaldson case said something about it being unreasonable to suppose that they would be given the business without some capital to run it.

Mr. Quigley: And the reason for that was— 10

The Court: I can see, of course, how that might be.

Mr. Quigley: The reason for that was a drunkard and a dissolute son who could not be kept away from liquor and could not be trusted with any money.

The Court: Well, we will try this case.

Mr. Quigley: Yes. 20

Q. How much money, Mr. Murphy, did you put into the new business since you took it over in January—in August, 1933? A. \$500.

Q. \$500. How much did Mr. Gaskill put in? A. \$500.

Q. How much did young Mr. Murphy put in?

Mr. McDonough: I think this is immaterial, your Honor.

Mr. Quigley: You have got two-thirds of it in now. 30

The Court: I will hear it.

Q. How much did young Mr. Murphy put in? A. \$1,000.

Q. That is \$2,000 altogether? A. That is right.

Q. Do you know what the bank account, today, of the new business is, the balance? A. The balance, it should be approximately \$3,500.

Q. Yes. So that this \$2,000 is still in the bank. Is that right? A. Yes. 40

Laurence C. Murphy, cross

Q. Did you testify under direct testimony that your brother did not use this account for the payment of personal— A. I did.

Q. —debts? Didn't you just testify those three checks you got were personals?

10 Mr. McDonough: No, he did not.

A. I testified that they were splits of profits of the printing business.

Q. To you? Isn't it a fact that your brother paid the taxes on this house in Maplewood out of this account? A. Not that I know of.

Q. Didn't he pay building and loan accounts out of this thing?

20 The Court: Out of what thing?

Q. Out of this book, this firm account that I am talking about.

The Court: Business account?

Mr. Quigley: What they call the business account.

30 Q. Will you look at these checks—You say you had a power of attorney on this account—and see if they went through that account.

The Court: I think you want to be more specific. "Through that account" doesn't mean anything to me.

Q. Through the account "H. Murphy" in the Union National Bank.

The Court: And "H. Murphy, printer"?

40 Mr. Quigley: No, there was no account "H. Murphy, printer." At the top of the check they had the word "H. Murphy" and then "printer" but down below it was "H. Murphy" and no "printer."

Laurence C. Murphy, cross

The Court: Well, can you answer the question?

The Witness: I have never seen these checks before.

Q. The question was, were those checks put through that account as part of the account? A. I cannot state that they were put through that specific account. 10

Q. Doesn't the check tell you so? A. The check is signed "H. Murphy." This may be on the special account as far as I know. It is not on the business bank account check.

Q. "H. Murphy, special" would be signed "H. Murphy, special" wouldn't it? A. It should be.

The Court: Mark the check for identification. 20

Mr. Quigley: That whole bundle, your Honor.

The Court: Mark it as one exhibit.

(Bundle of checks marked D 1 for Identification.)

Q. In 1929 did you borrow from your brother the sum of \$5,000? A. I did.

Q. Did he draw the money out of this account? A. He drew it from the commercial account, from the business account. 30

The Court: From which account? There are two accounts.

Q. From which Murphy account, the one you are referring to as "printer"? Is that the account he drew that \$5,000 from? A. That is the account he drew it from. 40

Q. And he loaned it to you and you gave him a note in payment of it? A. That is right.

Laurence C. Murphy, cross

Q. Was that personally to your brother or to the business? A. At the time I received the loan I thought it was a loan from the business.

Q. But it was signed by your brother. A. It was signed by my brother.

10 Q. Yes. Now, this power of attorney which you had in this account was given to you as a matter of convenience to him, wasn't it? A. That is right.

Q. This 25 per cent. you spoke about, where did you get that amount fixed in your mind from? A. I was told by my brother that that was what it was.

Q. Did you ever check up on anything on the checks? A. No.

20 Q. To find out whether that was so or not? A. I had implicit faith in what he said.

Q. It was just such an amount he determined to give you and Gaskill. A. And stated it was 25 per cent. of the profits.

Mr. Quigley: Of course, the statement that he made should not be allowed in.

30 Q. You say you went to work for your brother in 1909, Mr. Murphy? A. That is right.

Q. And when did you quit after 1909? A. At the time of the war I was away from—from three to four years. I returned in 1922.

Q. You have been there continuously since 1922? A. That is right.

Q. Drawing wages and bonuses in accordance with your statement? A. Not bonuses. Splits of the profits.

40 Mr. McDonough: Nothing said about bonuses.

The Witness: Nothing was said about bonuses.

Laurence C. Murphy, redirect

Redirect examination by Mr. McDonough:

Q. Mr. Murphy, is the \$2,000 that was contributed to this new corporation, formed after your brother's death, enough capital to advantageously run the business?

Mr. Quigley: I object to that. That is too vague entirely. 10

The Court: Read the question.

Q. (Question read as follows: "Mr. Murphy, is the \$2,000 that was contributed to this new corporation, formed after your brother's death, enough capital to advantageously run the business?")

The Court: What is the objection? 20

Mr. Quigley: I don't think it makes any difference.

The Court: I will allow it.

A. No.

The Court: You brought it out.

Mr. Quigley: All right.

Q. At the time of your brother's death was the machinery at the plant in good condition? 30
A. It was in workable condition, not in what you would call good condition.

Q. Prior to your brother's death did he ever discuss with you the matter of—

Mr. Quigley: Well, I object to "prior" if your Honor pleases. That is strictly a violation of the evidence act.

The Court: Listen to the question, please. 40

Laurence C. Murphy, redirect

Mr. Quigley: It is a violation of the evidence act.

The Court: Do not answer the question. Go on.

10 Q. Did he ever discuss with you the matter of purchasing new machinery? A. Yes.

Mr. Quigley: I object to that for the same reason.

The Court: I will allow it. It doesn't go to the issue.

Q. And will you state—

20 Mr. McDonough: Merely for the purpose of rebutting the testimony brought out in reference to this capital.

Q. Will you state what the conversation was?

The Court: Before you state that, you were asked, before, whether the machinery was in good condition. You said you didn't know what he meant by that. Now you are testifying your brother discussed with you the condition of the machinery. Now, 30 did you know or didn't you know?

The Witness: Now, wait a minute.

Mr. McDonough: He said the machinery—

The Court: Please!

The Witness: I said, before, the machinery was in workable condition but not in good condition. I believe that was my answer, wasn't it?

40 The Court: No. Your answer was you didn't know what he meant by "good condition." Do you know? You are a printer, aren't you?

Laurence C. Murphy, redirect

The Witness: Yes, sir. I know what good condition is.

The Court: I should think so. You are trying your case before an old time printer. Go on.

The Witness: Now, what is it you want to know? 10

Q. I want to know the conversation had between yourself and your brother in reference to the condition of the machinery—or with reference to the purchase of new machinery.

Mr. Quigley: I object to that as a violation of the Evidence Act, Section 4, they have no right to testify to direct conversation with the deceased. 20

The Court: It doesn't affect the issue, does it? How does it affect the issue?

Mr. Quigley: It simply affects the issue in this way, it allows testimony to come in on which we have no means of rebuttal because the man who had the conversation is not here.

Mr. McDonough: Questions of that kind are admissible in a will case. 30

The Court: "Of that kind" you say?

I think I will sustain the objection, Mr. McDonough.

Mr. McDonough: That is all, Mr. Murphy.

The Court: That is all.

Charles S. Gaskill, Jr., direct

CHARLES S. GASKILL, JR., sworn for complainant.

Direct examination by Mr. McDonough:

10 Q. Mr. Gaskill, you were employed by H. Murphy, printer— A. Yes, sir.

Q. —prior to his death? And how long were you employed with him? A. About 34 years.

Q. Did you ever work for anybody else? A. Not steadily.

The Court: What difference does it make?

Mr. McDonough: I want to show his long connection with him.

20 The Court: He said he worked 34 years with this man.

Q. And when he started business did you contribute any money to him? A. Not when he started business.

Mr. Quigley: That is another transaction directly with the deceased, your Honor.

30 Q. What was your business at the plant? A. At the time of his death or right along?

Q. At the time of his death. A. At the time of his death I was general supervisor, everything that came in it was up to me to get it out.

Q. Did Mr. Murphy ever discuss with you matters concerning the management of the establishment? A. Yes, sir.

40 Q. Did Mr. Murphy ever give you any interest in the profits of the business? A. Yes, sir.

Mr. Quigley: That is a conclusion, I think, clearly.

Charles S. Gaskill, Jr., direct

The Court: Of course, your question interprets what he gave. Let him say what it was.

Q. What did Mr. Murphy give you? A. Why, Mr. Murphy gave me a quarter interest, as I understood it from his own statement. 10

The Court: In the will?

The Witness: No, sir.

The Court: Prior to his death?

The Witness: About nineteen—

The Court: Prior to his death?

The Witness: Yes, sir.

Q. When did he start making these payments to you? A. About 1918. 20

Q. And I show you these checks and ask you if you can identify the checks? Can you identify those?

The Court: How many are there? "I show you—I show you"—how many checks?

Mr. McDonough: There are five.

The Court: "I show you five checks." 30

Q. Can you identify those checks?

The Court: All you have to do is to say whether you can identify them.

The Witness: Yes, sir. I was just looking at them.

Q. And what do they represent? A. They represented a quarter interest in the business, of the profits of the business. 40

Mr. McDonough: Any objection?

Mr. Quigley: No objection.

Charles S. Gaskill, Jr., direct

Mr. McDonough: I offer these checks in evidence.

The Court: Five checks to be marked as one exhibit.

(Five checks marked Exhibit C-4.)

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Q. Were there more payments than these five represented by these checks? A. Yes, sir.

Q. About how often did you receive these payments? A. They generally happened about twice a year.

Q. And were they in addition to a weekly salary? A. Yes, sir.

Q. What salary did you receive? A. I received, before Mr. Murphy's death, \$71 a week.

20

Q. After Mr. Murphy's death, you contributed some capital to the carrying on of the business? A. Yes, sir.

Q. And in your mind was the capital contributed to the business sufficient to advantageously carry it on? A. No, sir, but it was the best I could do.

The Court: Why not? Had you gone behind?

30

The Witness: Well, no. The only reason I went ahead was because I don't draw the same salary that I used to draw, I took a cut in my salary and—to keep the business agoing.

The Court: To keep the business "agoing" or to accumulate capital, which?

40

The Witness: To keep the business agoing, that was my intention, because I worked over the shops and everything, that I wanted to keep the place open and kept it open. I had to go out and borrow

Charles S. Gaskill, Jr., direct

on a life insurance policy to get the money to put into this business.

The Court: That is not the question. You say you took a cut in salary in order to——

The Witness: Keep the business——

10

The Court: Wait a minute.

The Witness: Yes, sir.

The Court: Would it be that the business would not go on if you did not take a cut?

The Witness: Why, I was afraid it would not, yes.

The Court: What is the fact now that it has been running? Have your fears been dispelled?

20

The Witness: No, sir. No, sir. I still take the cut now.

The Court: How much of a cut?

The Witness: It amounts to \$17 a week.

The Court: Instead of \$71 a week you take now——

The Witness: \$53.

The Court: —\$53.

The Witness: Yes.

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The Court: And the \$17 a week has kept the business going?

The Witness: No, sir, but it helped accumulate a little capital.

The Court: That is what I asked you before.

The Witness: Yes, sir.

The Court: That is what you denied. So it was to accumulate capital.

The Witness: To accumulate some money.

40

Charles S. Gaskill, Jr., direct

The Court: Exactly.

The Witness: Yes, sir.

The Court: Capital in the bank.

The Witness: I didn't quite understand it in that way.

10

The Court: All right. Go on.

Q. Mr. Gaskill, are you familiar with the bank account that Mr. Henry Murphy had prior to his death? A. Well, I knew he had numerous bank accounts, but I was not—

Q. Were you familiar with the bank account that he used for the business? A. Yes, sir.

20

Q. And do you know whether or not he used an account in the Union National Bank upon which he drew on checks labelled "H. Murphy, printer" to be the business account? A. Well, that is what I always understood, yes.

Q. And do you know whether or not he carried another account in that bank? A. I knew he carried savings accounts.

Q. Do you know whether he carried an account labelled "H. Murphy, special"? A. Not until after he died I didn't know about that.

30

Q. Do you know whether or not he used the account upon which he drew against a check labelled "H. Murphy, printer" for his personal business? A. Well, whenever I paid his building and loan, he would give me a check out of the Weequahic Bank or Ironbound Trust or some other bank, and I can remember one conversation that I had with—

Mr. Quigley: Just a moment. Pardon me.

40

Mr. McDonough: There is an objection to my question, your Honor.

Charles S. Gaskill, Jr., direct

(Question and answer read as follows:
 “Do you know whether he used the account upon which he drew against a check labelled ‘H. Murphy, printer’ for his personal business? Answer: Well, whenever I paid his building and loan, he would give me a check out of the Weequahic Bank or Ironbound Trust or some other bank, and I can remember one conversation that I had with——”)

10

The Court: You mean with the deceased——

The Witness: No. With Laurence and the three of us at the time.

The Court: With the deceased.

The Witness: Yes, sir, with the deceased.

20

The Court: Well, that won't be permitted.

Q. You know Henry A. S. Murphy, the son of the testator? A. Yes, sir.

Q. And he is employed at the printing establishment? A. He is the president.

Q. How long has he been there? A. That I couldn't answer truthfully because I couldn't remember whether it is ten years or seven years—I never paid much attention to it.

30

Q. Prior to the time of Mr. Murphy's death, what were his duties at the plant? A. He performed the duties of a compositor, he was a registered apprentice in the union at the time.

Q. Did he have any part to do with the acts of management of the business? A. No, sir.

Q. What was the condition of the machinery at the plant at the time of Mr. Murphy's death?

40

Rosamond Gaskill, direct

A. The machinery was workable. It was in fair condition.

10 Q. Was it necessary to replace any of the machinery? A. Well, we should replace it, but business has been bad and we never—we can get along with what we have got.

Mr. McDonough: That is all.

Cross examination by Mr. Quigley:

Q. You say you can get along with the machinery as it is?

The Court: That is what he said.

A. Yes, sir.

20 Q. You say you are taking a cut in your wages, Mr. Gaskill? A. Yes.

Q. And it used to be \$71? A. Yes, sir.

Q. How much did you get last week? A. Last week I got \$70.

Q. How much did you get the week before? A. \$70.

Mr. Quigley: That is all.

The Court: Call your next.

30 Mr. Quigley: That is all.

Mr. McDonough: That is all. Mrs. Gaskill.

ROSAMOND GASKILL, sworn for complainant.

Direct examination by Mr. McDonough:

40 Q. Mrs. Gaskill, you are the wife of Mr. Charles Gaskill, who was just on the witness stand? A. Yes, sir.

Rosamond Gaskill, direct

Q. And do you know Mr. John Henry Murphy?

A. Yes, sir.

Q. And did you have any conversation with Mr. Murphy in reference to your husband's connection with the business? A. Many years ago—

Q. Just a minute.

10

Mr. Quigley: I want to object to that, if your Honor please.

The Court: With the deceased?

Mr. McDonough: With the deceased, but it has a direct bearing on the ambiguity of the will.

Mr. Quigley: The man is not here to contradict it. It should not be allowed.

The Court: In what way?

Mr. McDonough: To prove that the proportions in which he divided the estate on his death are the same proportions in which he always considered these men during his lifetime.

20

The Court: I think it violates the rule.

Mr. McDonough: I will withdraw the witness. I will take an exception.

The Court: You may have an objection.

Mr. Quigley: That is all.

30

The Witness: Dismissed?

Mr. Quigley: That is all.

The Court: You may have an objection.

Mr. McDonough: What is that?

The Court: You may have an objection.

Mr. McDonough: That is all. I have a witness here to prove the account at the bank.

Mr. Quigley: I will admit he had an H. Murphy account, the one they have been talking about as a printer's account, and the other—

40

Rosamond Gaskill, direct

10 Mr. McDonough: Will you go so far as to say that the account labelled "H. Murphy" at the Union National Bank was the account upon which he used this check book, and which the checks are designated "H. Murphy, printer"?

The Court: Well, they speak for themselves, don't they? They are on that bank?

Mr. McDonough: They are on that bank, yes, sir.

Mr. Quigley: And the Union National Bank, "H. Murphy, printer" but the account is "H. Murphy."

20 Mr. McDonough: Yes. The check on its face is "H. Murphy, printer," but the signature is "H. Murphy," only. In the other bank you admit there is an account "H. Murphy, special?"

Mr. Quigley: In the same bank?

The Court: In the same bank. All right.

Mr. McDonough: Yes. That is all.

Mr. Quigley: Mr. Dunkel, take the stand.

30 Mr. McDonough: I might say, your Honor, that I subpoenaed the executors of the estate. Mr. Quigley agrees to put him on to prove certain facts we want to get at in reference to the estate.

Mr. Quigley: Mrs. Murphy won't go on the stand. Mr. Murphy will go on the stand.

Mr. McDonough: All right, as long as he goes on.

40

William Dunkel, direct

WILLIAM DUNKEL, sworn for defendant.

Direct examination by Mr. Quigley:

Q. Mr. Dunkel, what is your business? A. I am cashier of the Union National Bank in New-ark.

10

Q. You knew the decedent John Henry Murphy? A. I did.

Q. And you know about his account in that bank? A. Not—in a general way just in an ordinary way that would affect his relations with the bank.

Q. Do you know how many accounts he had there? A. He had two accounts.

Q. And what were they? A. One was called the "H. Murphy;" the other was "H. Murphy, special."

20

Q. I see. Do you know what the balance in that account was on August the—on July 17, 1926?

The Witness: In which account?

Mr. Quigley: "H. Murphy."

The Witness: An account "H. Murphy" in the checking department, the balance was \$2150.11 and in the savings account—

30

Q. We are not interested in that. Now, on these checks—

The Court: What was in the special account?

The Witness: I haven't the balance in the special account.

Mr. Quigley: They don't—there is no dispute about that—

40

The Court: Go on. Go on. Go on.

William Dunkel, direct

Mr. Quigley: —special account.

The Court: Go on.

Q. Now, you have just looked through this bundle of checks, Mr. Dunkel. A. Yes, sir.

10 Q. Did all of those checks wash through this account of "H. Murphy" in the Union National Bank? A. They did.

Q. They did. Do you know whether they ever looked for the word "printer" on these checks in order to pay them? A. No, it was not a part of the account at all.

Q. Not a part of the account. Do you know what the balance in that account was on August 9, 1933? A. May I have the date, again?

20 Q. August 9, 1933. A. The balance at that time was \$13,526.44.

Q. How well did you know Mr. Murphy? A. Why, I knew him since the inception or opening of the bank, both as a depositor and as a director.

Q. He was a director of the Union National Bank? A. He was.

Q. And on the board with you for a good many years. A. That is true.

30 Q. What kind of a business man was he? A. I always found him to be very capable in the management of his business and affairs.

The Court: Well, you have not yet said how many years that acquaintance covered.

The Witness: Ten years.

Mr. Quigley: That is all.

Mr. McDonough: No questions.

The Court: Call your next.

40 Mr. Quigley: Mr. Murphy.

Harry F. Murphy, direct

HARRY F. MURPHY, sworn for defendant.

Direct examination by Mr. Quigley:

Q. You are the son of John Henry Murphy, the decedent? A. I am.

Q. How long did you work with him? A. I have been working in the plants since 1926. Prior to that I worked for part time in the neighborhood of 1921 and 1922. 10

Q. Do you know anything about his bank accounts? A. I am familiar with them.

Q. At the time of his death, how many checking accounts did he have? A. He had six checking accounts.

Q. How many savings accounts? A. Fifteen. 20

Q. Who ran that business down there while your father was alive? A. Father was answerable to no one for his actions, although he did— 20

The Court: No. You are not asked that, now.

The Witness: Father ran the business.

The Court: Please. If you will confine yourself to the question that is put to you— 30

The Witness: Father ran the business.

The Court: —you will do very well.

Q. He ran the business without subjecting himself to the criticism of anybody. Is that it? A. That is it.

Mr. McDonough: Well, now, your Honor—

The Court: Well—

Mr. McDonough: The question is— 40

Harry F. Murphy, direct

Q. Was there anybody but your father who had any final say in the management or conduct of the business? A. No.

10 Q. And what kind of work did your father do himself? A. Father had a card in the typographical union. He solicited work, he could set type, he could thread the press and, if necessary, he went out to collect the bills.

Q. Did he do any proof reading? A. He did that.

20 Q. Did you, under my direction, make an analysis of the checks on this "H. Murphy" account in the Union National Bank for the purpose of determining how many checks had been used for the personal use of your father and how many had been used for business purposes? A. I did.

Q. Can you tell us what the result of that analysis was (handing witness paper)?

The Court: Sit down.

30 The Witness: In the year 1930 there were 95 personal checks drawn, and there is no business checks available to check against that. In 1931 there were 178 checks of a personal nature in the amount of 25—

Mr. McDonough: I object to this evidence, your Honor. It is not the best evidence.

The Court: It is not the best evidence, that is true.

Mr. Quigley: We have the checks here to submit.

40 The Court: Submit the checks, submit the checks now. They are the best evidence.

Harry F. Murphy, cross

Mr. Quigley: Then I offer these checks in evidence as being the result of that analysis, but I do not see how the court is going to get the total of them.

The Court: Which checks?

Mr. Quigley: The checks referred to in the testimony. 10

The Court: Have they been marked for identification?

Mr. Quigley: They have been marked.

The Court: You offer D-1 for Identification in evidence?

Mr. Quigley: Yes, I am offering D-1 as proof that this account was used for his personal use.

The Court: All right. 20

(Bundle of checks previously marked D-1 for Identification now marked Exhibit D-1.)

The Court: Next question.

Mr. Quigley: That is all.

The Court: Cross examine.

Cross examination by Mr. McDonough:

Q. Mr. Murphy, how old were you in 1926? 30
A. I was coming on 19. I was 19 September of that year.

Q. And that was the first year that you took up your employment with your father? A. No, it was not.

Q. Well, didn't you say that in 1926 you first became associated with him? A. In 1926 I tried to work in the composing room and later registered as an apprentice in the typographical union. 40

Q. Now, when you took up employment with your father what did you do? What was your

Harry F. Murphy, cross

duty at the plant? A. My duty was to learn the composition end of the business.

Q. And how many years did you spend at that? A. I started in 1926 and I got the union card in January of this year.

10 Q. And that incident dated your working in the shop? A. That did.

Q. Did you have anything to do with the executive management of the business during these years? A. No.

Q. Well, your duty was in the shop in the composing room? A. Not 100 per cent. confined to the composing room.

Q. Well, you didn't—

20 The Court: You are avoiding the question. It does not refer at all to your power of locomotion. I suppose you could walk all over the place if you wanted to. Now, you are an intelligent young man. Read that question to him, again.

Q. (Question read as follows: "Well, your duty was in the shop in the composing room?")

30 The Court: Is that so?

The Witness: Yes.

The Court: That is where your duty was. If you were in the place, I suppose you could walk all over it. Is that what you mean?

The Witness: No. I made deliveries and ran errands for father.

The Court: What else?

40 The Witness: Proof read during that time which was part of the apprenticeship.

The Court: All right. And then you can say that.

Harry F. Murphy, cross

Q. Did you ever make a practice of keeping the books for him? A. In 1921, 1922 I did keep the books.

Q. And you were how old at that time? A. At that time I was 14, I believe.

Q. And did you ever draw checks on the business account for the payment of bills? A. I have drawn checks, but I didn't sign them. 10

Q. And did you ever estimate the cost of any of the work at the plant? A. No.

The Court: What is all this leading to?

Mr. McDonough: I want to show, your Honor, that he had nothing to do with the executive management of the business, and that without the assistance of these other two men this business could not have been run. 20

The Court: I don't think he claimed he ran the executive end of the business.

I believe I denied that earlier.

Mr. McDonough: He certainly identified a lot of checks here.

The Court: Well, he might know about those.

Q. Now, you are familiar with the bank account that your father left at the time of his death? A. I am. 30

Q. How much cash money did he leave in the bank? A. In all the banks?

The Court: In all the banks.

Mr. McDonough: Yes.

The Witness: It amounted to, roughly to ninety thousand. 40

Q. There was an account in the National Newark—

Harry F. Murphy, cross

Mr. McDonough: Strike out that other question.

Q. What was the total inventoried value of your father's estate?

10

Mr. Quigley: I don't think that makes a particle of difference. I only asked—

The Court: This is cross now.

Mr. McDonough: I subpoenaed the executrix and I can put him back as my witness, of course, if I want to.

The Court: Have you completed your cross examination?

Mr. Quigley: Go ahead, go ahead. It doesn't make any difference. Go ahead.

20

The Court: I say, have you completed your cross examination?

Mr. McDonough: No, your Honor. No, I have not. He said he was familiar with his father's bank accounts. I want to go into that.

Q. Was there an account in the National Newark & Essex Bank? A. There was.

30

Q. And how much did that amount to? A. I believe, around \$2200.

Q. And that was the checking account? A. It was.

Q. And was it the account used for the printing business? A. No, not at the present time.

Q. It was a dormant account? A. That I can't answer truthfully.

40

Q. Now, Mr. Murphy, if you were in the composing room serving your time as an apprentice, how is it that you know, or how do you know that your father was answerable to no one and he ran the business entirely himself. A. At the end of every year—

Harry F. Murphy, cross

The Court: Well, now, let me understand you. This injects a thought that has been injected heretofore.

Is there any claim on the part of anybody that Mr. Murphy did not own this business?

Mr. McDonough: No. 10

The Court: Then he was not answerable to anybody.

Mr. McDonough: Except that he took these men into his confidence.

The Court: Well, that is something else.

Mr. McDonough: In the operation of the business.

The Court: He could give them all he wanted to, I suppose, in his lifetime. That is before. That has nothing at all to do with the real matter in dispute. 20

Q. Do you know whether or not your father took Laurence Murphy and Charles Gaskill into his confidence in the operation of the business?

A. He took counsel with them in the operation of the business.

Q. Mr. Murphy, how much business—what is the total volume of business done at this—at the plant in any one year? A. In any one year I believe the total has gone up to \$80,000. 30

The Court: Gross?

The Witness: Gross sales.

Mr. McDonough: That is all.

Examined by Mr. Quigley:

Q. Going through these checks that you went through, you checked each one of them and found 40

Israel M. Pogash, direct

out that it went to some purpose other than the business. Is that true? A. That is true.

Q. All of this bundle of checks?

The Court: All of this bundle of checks marked D—

10 Mr. Quigley: D-1, I think it is.

The Court: Mark it D-1, so that I can have them identified.

Mr. Quigley: Surely. That is all.

The Court: Now, do you rest, Mr. Quigley?

Mr. Quigley: No. I have some other witnesses.

20

ISRAEL M. POGASH, sworn for defendant.

Direct examination by Mr. Quigley:

30 Q. Mr. Pogash, did you make an analysis of the checks on this "H. Murphy" account in the Union National Bank for the purpose of determining how much—how many of the checks had been used for personal use and how many had been used in connection with the business? A. I did, yes, sir.

Q. And did you make an analysis of that kind? A. Yes, sir.

Q. Can you tell us the result of it? A. Yes.

Q. And the period? A. I have it.

40 Q. You have it? A. Why we analyzed the checks—I analyzed the checks for the year 1930 and found—the checks of the Union National Bank and found that 95 checks were issued for personal use totalling \$17,543.13 in dollars. Now the business checks for that period were not

Israel M. Pogash, cross

available. The year 1931 I found that 178 checks were used for personal, amounting to \$25,853.57 and 716 checks used for business purposes, totalling \$60,594.08. The year 1932 there were 132 checks used for personal purposes, totalling \$20,808.55 and 652 checks used for business, totalling \$48,850.87. In 1933 from—to August 9 there were 70 checks used for personal account, totalling \$5,277.83 and 372 checks used for the business, totalling \$34,374.91.

10

Mr. Quigley: That is all.

Cross examination by Mr. McDonough:

Q. How long did you know Mr. Murphy? A. Didn't know him at all.

20

Q. How do you know these checks were personal, business or private? A. I had the assistance of young Mr. Murphy in identifying them.

Q. He told you that? A. Yes, sir.

Q. And you cannot—from your own knowledge—say that any of these checks that you have testified to as being personal were actually personal?

A. Yes, I can.

Q. How can you? A. Well, just using my own knowledge and information about business, a check to Mrs. Murphy would ordinarily be a personal check, it wouldn't be a business check. A check for taxes for his home is a personal check, that is not a business check. I mean, many of them can be identified by that means.

30

Q. But many of them cannot? A. Well, we won't—

Q. You know which account they went through at the bank? A. Oh, yes.

Q. How do you know it? A. Why, I had the bank statement.

40

Israel M. Pogash, cross

Q. You have had the bank statement to show?

A. Yes.

10 Q. Did they go through the account marked "H. Murphy, special?" A. I could identify them if I had the bank statements. I think they were just marked "H. Murphy."

Q. You are not sure of that? A. No, sir. I don't remember.

Q. Do you know how many accounts Mr. Murphy had at the Union National Bank? A. No, sir.

Q. Did you analyze all of the business checks of Mr. Murphy? A. Yes, sir, in this Union National Bank account.

Q. Did you have all of the checks? A. Yes, sir.

20 Q. Are you sure you had them all? A. Well, we checked the checks against the bank statements.

Q. Did you look for some checks that were subpoenaed to be brought here to court today? A. I looked for no checks, no, sir.

30 Q. You looked for the checks—did you have the checks against the account of Mr. Murphy at the Union National Bank prior to July 1st, 1930? A. No, sir. I—in reading off the 1930 results I said there were 95 personal checks totalling \$17,543.13 and the business checks were not available.

Q. They were not available? A. I read that, I mean in reading—

Q. You couldn't find them? A. No, sir.

Mr. McDonough: That is all.

Mr. Quigley: That is all. Mr. Baldwin.

Philip H. Baldwin, direct

PHILIP H. BALDWIN, sworn for defendant.

Direct examination by Mr. Quigley:

Q. Mr. Baldwin, what is your business? A. I am a publisher, of the Sunday Call, business manager and advertising manager.

10

Q. You knew Harry Murphy, the decedent, John Henry Murphy? A. Since 18—1897 or 1898.

Q. And what kind of a business man was he? A. One of the keenest business men I ever ran across.

Q. Did you know him to be a proof reader? A. Everything that applied to the newspaper—to the news business and also to the newspaper business.

20

Mr. Quigley: That is all.

Mr. McDonough: That is all.

The Court: That is all.

Mr. McDonough: I have no questions.

The Court: No questions?

Mr. McDonough: No questions.

Mr. Quigley: Mr. Soemer.

FRANK A. SOEMER, sworn for defendant.

30

Direct examination by Mr. Quigley:

Q. How long do you know John Henry Murphy? A. About 26 years.

Q. What kind of a business man was he? A. Well, I would say he was a very, very shrewd business man, very capable.

Q. Was he on any boards of any kind?

40

The Court: Will you introduce the witness, please?

Frank A. Soemer, direct

Mr. Quigley: He was introduced.

The Court: I don't think he was.

Read the beginning of the testimony.
Read the direct testimony.

(Direct testimony read as follows:
10 "Question: How long do you know John
Henry Murphy? Answer: About 26 years.
Question: What kind of a business man
was he? Answer: Well, I would say he
was a very, very keen business man, very
capable. Question: Was he on any boards
of any kind?")

The Court: See. He was not.

What is your business?

20 The Witness: I am a salesman for
William A. Greenberg Company.

The Court: What business are they in?

The Witness: Sash doors and trim.

Q. Are you on any board—were you on any
board that Mr. Murphy was on during his life-
time? A. Building and loan board.

30 Q. Do you know if he was a member of any
other building and loan board except yours, the
one you were on? A. Well I knew that he was a
member of other building and loan boards. I
don't know which.

Mr. McDonough: I object to this as
being immaterial. We admit the keen
business ability of Mr. Murphy.

The Court: It is admitted upon the
record. All right.

(Witness withdrawn.)

Call your next. Do you rest?

40 Mr. Quigley: Yes.

Mr. McDonough: Mr. Murphy will you
take the stand again please?

Harry F. Murphy, direct

HARRY F. MURPHY, recalled.

Examined by Mr. McDonough:

Q. Mr. Murphy, you testified to an account in the National Newark & Essex Bank. How much money was in that account at the time of your father's death? A. In the neighborhood of \$2,000, a little more. 10

Q. Do you know the exact amount? A. I don't know it offhand. We can give you that information from—(witness stops of his own accord).

What account are you referring to now, please?

Q. The checking account in the National Newark & Essex Banking Company. A. On August 9, 1933, there was \$2,319.26.

Q. And the amount on deposit in the Union National Bank in the name of "H. Murphy?" A. \$13,049.59. 20

Q. What was the total inventoried value of your father's estate? A. In the neighborhood of \$300,000.

The Court: That is personal and real?

Mr. McDonough: Personal and real.

The Witness: Personal and real, there is two ways to look at that, the Federal appraisal or the State appraisal. 30

Q. Well, the appraiser—

The Court: The State appraiser.

Q. The appraisal—

The Witness: The State appraisal is in the neighborhood of \$300,000.

Q. Just a minute. Mr. Gaskill testified in the last two weeks that he had received \$70 in pay. 40

Harry F. Murphy, cross

How much had ^{he} you been receiving up to the last two weeks? A. \$53.

Q. Yes. And it was just the last two weeks he got \$70? A. That is right.

Cross examination by Mr. Quigley:

10

Q. What repairs were made down at the shop since your father's death?

The Court: Is that cross examination?

Mr. Quigley: All right. I won't press it. That is all.

Mr. McDonough: That is all.

The Court: Both sides rest?

Mr. McDonough: Yes.

20

The Court: I would like the testimony in this case, gentlemen; I would like you to furnish an additional brief, additional only insofar as your arguments might be concerned based upon the testimony.

Send that to me in addition to the briefs you have already sent me. The testimony will be written for my benefit. If you want a copy you can get it. I would like you also to give me a copy of the bill of complaint and copy of the memorandum before me—

30

Mr. Quigley: May I have those made?

The Court: And the exhibits.

Mr. Quigley: I only have one copy.

The Court: Well, send for the original file then.

Mr. McDonough: What is that?

The Court: Send for the original file and have it sent to me at Elizabeth.

40

Mr. McDonough: I believe the original file is here, your Honor.

Exhibit C-1

The Court: No, Mr. Salmon says not. He could not find it.

Mr. McDonough: Shall we have the original file?

The Court: You might inquire at the Sergeant-at-Arms office, and if it is not here, see that I get it. 10

Exhibit C-1

IN THE NAME OF GOD, AMEN.

I, JOHN HENRY MURPHY, of the Township of Maplewood, County of Essex, State of New Jersey.

Being of sound mind, memory and understanding, do make and publish this my last will and testament in manner following, that is to say: 20

FIRST:—I hereby order and direct that all my just debts and funeral expenses be paid as soon after my death as conveniently can be done.

SECOND:—I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner, that is to say:—A one-half interest in the same to my son, Henry A. F. Murphy, a one-quarter interest in the same to Charles L. Gaskill and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever. 30

THIRD:—I hereby direct my executrix hereinafter named to expend Two hundred (\$200.00) Dollars for masses to be said for the repose of my soul. 40

Exhibit C-1

10 FOURTH:—All the rest, residue and remainder of my Estate, whether real, personal or mixed, and wherever the same is situate, including all Building and Loan stock whether in the name of H. Murphy, Harry Murphy, Henry Murphy or John H. Murphy, to my wife, Mary E. Murphy, to her, her heirs and assigns forever.

20 FIFTH:—I hereby nominate, constitute and appoint my said wife, Mary E. Murphy, executrix of this, my Last will and Testament giving and granting unto my said executrix, full power and lawful authority to mortgage, sell and convey or otherwise dispose of any and all real estate of which I may die seized and to make good and sufficient conveyances in law therefor.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of July, Nineteen hundred and twenty-six.

JOHN HENRY MURPHY (L. S.)

30 SIGNED, SEALED, PUBLISHED AND DECLARED, by the said testator, as and for his last will and testament in our presence who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses.

Joseph J. Quinn, 738 Broad St. Newark N. J.
B. J. Cummings 738 Broad St Newark N. J.

STATE OF NEW JERSEY

ESSEX COUNTY SURROGATE'S COURT

40 I, ANDREW J. WHINERY, Surrogate of the County of Essex and Clerk of the Surrogate's Court of said County, do hereby certify the fore-

Exhibit C-2

going to be a true copy of the last will and testament of John Henry Murphy, deceased, as the same was regularly proved and recorded in this office.

WITNESS MY HAND AND SEAL OF OFFICE, this Twenty-ninth day of October, in the year of our Lord, one thousand nine hundred and thirty-four.

10

ANDREW J. WHINERY
Surrogate and Clerk.

(SEAL)

Exhibit C-2 *D.I.*

UNION NATIONAL BANK

20

In Newark, New Jersey

No. _____ Newark, N. J. Jan 2 1932

Pay to the
order of David J. Sullivan \$13 40/100
Thirteen and 40/100.....Dollars
H MURPHY

H. MURPHY
PRINTER

30

No. 1899 Newark, N. J. June 4 1932

Pay to the
order of Hayes Circle Nat Bank \$1000 00/100
One ThousandDollars

H. MURPHY
H Murphy

UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

40

See Stipulation Printed Herein

Exhibit C-3

H. MURPHY
PRINTER

No. 2265 Newark, N. J. Dec 22 1932

10 Pay to the
order of L C Murphy \$1000 00/100
One ThousandDollars

H. MURPHY
H Murphy

UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

20 H. MURPHY
PRINTER

No. 1906 Newark, N. J. June 8 1932

Pay to the
order of L C Murphy \$1000 00/100
One ThousandDollars

H. MURPHY
H Murphy

30 UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

H. MURPHY
PRINTER

No. 1553 Newark, N. J. Dec. 23 1931

40 Pay to the
order of L C Murphy \$1000 00/100
One ThousandDollars

H. MURPHY
H Murphy

UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

Exhibit C-4

H. MURPHY

PRINTER

No. 1551 Newark, N. J. Dec 21 1931

Pay to the order of Charles G Gaskell \$700 00/100
Seven HundredDollars 10

H. MURPHY
H Murphy

UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

UNION NATIONAL BANK 20
In Newark, New Jersey

No. ——— Newark, N. J. June 20 1931

Pay to the order of C G Gaskell \$1500 00/100
Fifteen HundredDollars

H. MURPHY

30

40

Stipulation

(Filed April 26, 1935)

NEW JERSEY COURT OF ERRORS
AND APPEALS

10

Between

LAURENCE C. MURPHY, *et als.*,
Complainants-Respondents,

and

MARY E. MURPHY, *et als.*,
Defendants-Appellants.

} On Appeal

20

It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled cause, that instead of printing in the State of the Case all the checks which were offered in evidence on behalf of the defendants marked Exhibit D-1, there shall be printed one check on which the word "printer" appears, and one check printed on which the word "printer" does not appear; it being hereby agreed that said specimen checks shall take the place of the printing of all the checks offered in evidence as Exhibit D-1, and that the following checks shall be offered to wit:

30

UNION NATIONAL BANK
in Newark New Jersey

No. Newark, N. J. Jan. 2, 1932.

40

Pay to the
order of David J. Sullivan \$13 40/100
Thirteen and 40/100.....Dollars

H. MURPHY.

Stipulation

H. MURPHY
PRINTER

No. 1899 Newark, N. J. June 4, 1932.

Pay to the
order of Hayes Circle Nat. Bank \$1000 00/100 10
One ThousandDollars

H. MURPHY
H. Murphy

UNION NATIONAL BANK
in Newark, New Jersey
NEWARK, N. J.

It being further stipulated and agreed that
said checks offered in evidence consisted of 79 20
checks on which the word "printer" appears,
and 390 checks on which the word "printer" does
not appear. This stipulation is not intended to
agree that no other checks were drawn by de-
cedent on this account.

And it is further stipulated and agreed that
Exhibit C-2, the check book, need not be printed
as part of the State of the Case.

McDONOUGH & McDONOUGH, 30
Solicitors for and of Counsel with
Complainants-Respondents.

M. J. QUIGLEY,
Solicitor for and of Counsel with
Defendants-Appellants.

01

02

03

04



BAR PRESS, INC., 47 WEST STREET, NEW YORK. BO. 9-0157-8

[5543]

90 MAY. T. 1935

New Jersey Court of Errors and Appeals

Between

LAURENCE C. MURPHY and CHARLES
L. GASKILL, JR.,
Complainants-Respondents,

and

MARY E. MURPHY, *et als.*,
Defendants-Appellants.

ON BILL, &C.

ON APPEAL FROM
THE COURT OF
CHANCERY

BRIEF OF DEFENDANTS-APPELLANTS

Statement of Facts

This is an appeal from a decree of the Court of Chancery, made on the advice of Honorable ALFRED A. STEIN, Vice Chancellor, in construing the second paragraph of the will of John H. Murphy, late of Essex County, N. J.

Complainants-respondents, Laurence C. Murphy and Charles L. Gaskill, Jr., two of the legatees named in the will of John Henry Murphy, probated by the Surrogate of Essex County August 30th, 1933, brought their bill and prayed for a construction of the second paragraph contained in the will, which reads as follows:

“SECOND: I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner, that is to say; a one-half interest in the same to my son,

Henry A. F. Murphy, a one-quarter interest in the same to Charles L. Gaskill and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever."

Complainants-respondents alleged that under this bequest they are each entitled to a one-quarter interest in the cash on deposit in the checking account hereinafter referred to and which was maintained in the Union National Bank of Newark in the name of "H. Murphy," and also in the bills receivable.

The defendants-appellants, Mary E. Murphy, individually and as executrix, and the son, Henry A. F. Murphy, contended that the money on deposit in the Union National Bank to the credit of the deceased, and the accounts receivable, are no part of the business and that complainants are not entitled thereto under the will; that there was no business checking account; that said account in the Union National Bank was the personal account of the deceased and that complainants-respondents are entitled only to a one-quarter interest each in the business, machinery and stock in trade, as well as in the good-will and fixtures.

The testator maintained a bank account in the Union National Bank at Newark in the name of "H. Murphy," in which there was a balance to his credit at the time of his death amounting to \$13,526.44.

The defendants-appellants contend that the money in said account was not intended to be given under this second paragraph of the will of John Henry Murphy, but was disposed of by the fourth or residuary paragraph in the said will, where the decedent gave:

“All the rest, residue and remainder of my estate, whether real, personal or mixed, and wherever the same is situate, including all building and loan stock, whether in the name of H. Murphy, Harry Murphy, Henry Murphy or John H. Murphy, to my wife, Mary E. Murphy, to her heirs and assigns forever.”

and therefore belongs to the said Mary E. Murphy, widow of the decedent.

Point I

Effect must be given to every part of the will, and the clearly expressed intention should not yield to a doubtful construction.

Words are to be used in their ordinary signification.

The clear import of the words must control.
See:

Sites v. Eldridge, 45 N. J. Eq. 632.

In England, *Re Kindalls Trust*, 14 Beav. 608, 611, the Court said:

“As a general rule I should consider that where a testator expresses that he gives to A everything he dies possessed of, and afterward enumerates what it is that he intends to give, the bequest would be confined to the specific enumeration. The objection is, that if he intends to give everything, an enumeration would be unnecessary, when the first words are sufficient to amount to a residuary bequest.”

Rowlings v. Jennings, 13 Ves. 39 (1806);
Newman v. Newman, 26 Beav. 220 (1858).

In the United States, it has been held, where there is a general bequest followed by an enumeration, the enumeration governs.

Clark v. Hyman, 12 N. C. 382.

In re Creamer v. Harris, 90 Ohio St. 610, 106 N. E. 967 (1814):

“It is a rule of presumption that when there is such an enumeration the testator intended only those things to pass. ‘All words of the will are to be taken into view and not a part of them only; as every word is employed to develop the intention of the testator and all of them taken in connection, exhibit a transept of his mind.’”

The enumeration following a general bequest will be given effect even though it will cause the testator to die intestate as to part of his property.

Appeal of Howe, 126 Pa. 233, 17 A. 588:

“I do order that all my property consisting of Bonds, Mortgages, grounds, rents, stocks and personal effects in the State of Pennsylvania be sold.”

The Court held that the real property owned by the testator in Pennsylvania and not mentioned in the will does not pass, but vests in the heirs-at-law under the intestate laws.

The Court:

“But in ascertaining such intention (Testator’s) the words he has chosen must be read according to their plain and ordinary meaning, and the interpretation must be in conformity with the meaning of the words rather than some supposed meaning of the testator.”

If we retain all the words in this will and give each their ordinary meaning, the legatee will receive the firm property limited and described by deceased.

Point II

The bank account in the Union National Bank, in the name of "H. Murphy" was his personal account and not a "business account."

This is evidenced by an analysis of the use of said account for about three years, which is as follows:

ANALYSIS OF ACCOUNT OF HARRY MURPHY IN THE UNION NATIONAL BANK OF NEWARK

Year	<i>Personal Checks</i>		<i>Business Checks</i>	
	No.	Amount	No.	Amount
1930	95	\$17,543.13	Not available	
1931	178	25,853.57	716	60,594.08
1932	132	20,808.55	652	48,850.87
1933 to Aug. 9	70	5,277.83	372	34,374.91

See testimony of Israel M. Pogash, pages 62 and 63 of State of the Case. The average monthly balance on deposit in this account, from July 31, 1930, to August 16, 1933, was \$15,267.02.

If the money in this account were found in the pocket of decedent, no question would arise. The presence of it in his personal bank account, "H. Murphy," is no different than if found in his pocket.

That it was a personal account is shown by the fact that on the 7th day of December, 1929, a loan to Laurence Murphy, one of the complainants-respondents, was made from said account, for which Laurence Murphy gave his note, and Charles Gaskill, Jr., has repeatedly received bonus checks from said account.

It is also clearly shown to be a personal account by the fact that so great a part of it was used to pay taxes, water bills, building and loan association accounts, dues, etc.

The attention of the Court is respectfully called to the testimony of Laurence C. Murphy, one of the complainant-respondents, which appears on page 35, line 1, of the State of the Case, and which is as follows:

“Q. Now, this word ‘printer’ that you said this account was in the name of, ‘Harry Murphy, printer.’ A. No.

“Q. That is not so, is it? How was that account in the Union National Bank? A. The account—wait a minute—I wish to correct the statement, the account, the check is designated, ‘H. Murphy, printer’; the account is in the name of ‘H. Murphy.’

“Q. The account was ‘H. Murphy’ and not ‘H. Murphy, printer’? A. It is designated on the check as ‘H. Murphy, printer,’ the name of the book is ‘H. Murphy.’

“Q. That is the signature, but the word ‘printer’ is no part of the signature? A. No.

“Q. And if the word ‘printer’ was not on that check, it would be honored just the same, wouldn’t it? A. It would be honored. Any check with my signature or ‘H. Murphy’ signature on that account would be honored.

“Q. Whether it had the word ‘printer’ on it or not? A. Right.

“Q. So that ‘printer’ was no part of the account, was it? A. It was no part of that bank account, no.”

Attention is also called to the testimony of William Dunkel, cashier of the Union National Bank in Newark, N. J., wherein the H. Murphy account was kept, as the same appears on page 54 of the State of the Case, on line 7, as follows:

“Q. Now, you have just looked through this bundle of checks, Mr. Dunkel. A. Yes, sir.

“Q. Did all of these checks wash through this account of ‘H. Murphy’ in the Union National Bank? A. They did.

“Q. They did. Do you know whether they ever looked for the word ‘printer’ on these checks in order to pay them? A. No, it was not a part of the account at all.

“Q. Not a part of the account. Do you know what the balance of that account was on August 9, 1933? A. May I have that date, again?”

No claim is made that either of the complainant-respondents had any control of said account or that any accounting was ever made to them or either of them.

That it was a personal account seems to be admitted by the fact that both complainants worked for decedent and were paid union wages out of said account by decedent’s checks.

That one of the complainant-respondents (brother) had a power of attorney on said account was a mere matter of convenience, as appears from the testimony of said Laurence C. Murphy on page 40 of the State of the Case, line 10, as follows:

“Q. Yes. Now, this power of attorney which you had in this account was given to you as a matter of convenience to him, wasn’t it? A. That is right.”

The attention of the Court is further directed to the statement contained in the opinion of the learned Vice Chancellor that: “the testator maintained a bank account in the Union National Bank at Newark, in the name of ‘H. Murphy,’ in which there was a balance to his credit at the

time of his death amounting to \$13,526.44. The checks used in withdrawing money from the account bore on their face the words 'H. Murphy, Printer.''' The Court evidently is in error on this point, as the stipulation which appears on page 75 of the printed State of the Case clearly shows that there were 390 checks offered in evidence on which the word "printer" does not appear and which were used on this account. And further, from the testimony in the case, it clearly appears that the word "printer" was no part of this account and that the checks were honored by the bank without any question being raised whether or not the word "printer" appeared thereon, and the word "printer" was no part of the signature, nor of the name in which the account was kept.

The learned Vice Chancellor, in his opinion, on page 19 of the State of the Case, cites: "Analysis of the checks drawn on the account in the Union National Bank shows that in the year 1931 the deceased drew for his personal use 178 checks amounting to \$25,853.57 and 716 checks, which were used distinctly for business purposes, totaling \$60,594.08; in the year 1932 he drew 132 checks for personal use, totaling \$20,808.55, as against 652 checks exclusively for business purposes, totaling \$48,850.87."

This analysis clearly shows that this was a personal bank account and not purely a business bank account, said analysis being more fully set out herein, and the conclusion of the learned Vice Chancellor, that said facts show it to be a business account, is clearly unwarranted.

The learned Vice Chancellor therefore erred in his opinion on page 20, line 16, wherein he says: "Moreover, outstanding in aid of the determina-

tion that the account 'H. Murphy, Printer,' was considered by the deceased as his business account is the fact that the complainant, Laurence C. Murphy, who was the office manager, was intrusted the power of attorney to draw checks on this account." The designation of the account of "H. Murphy, Printer," is inaccurate, as the account was "H. Murphy," and not "H. Murphy, Printer," and from the aforementioned testimony of Laurence C. Murphy, on page 40, line 10, of the State of the Case, the power of attorney was clearly declared to be a matter of convenience for the decedent.

1. The complainants had nothing to do with the profits.
2. Nor with checking out the money except as a convenience to the decedent.
3. Nor with the checking up or verification of said bank account.
4. These matters were all personal to decedent.
5. In the *Coyle* case, the decedent had "John Coyle, Coal," printed on checks, thus identifying the account with the coal business. There is no such arrangement by this decedent, but an entirely different course was followed so as to keep the account a purely personal one. It was the account of "H. Murphy."

Point III

The decedent enumerated specifically the things which he desired should pass by the second paragraph of his will when he says:

"I hereby give and bequeath my printing business and the machinery and plant, and

stock in trade, good will and fixtures in the following manner," etc.

In the case of *Burroughs v. Jamieson*, 62 N. J. E. 651, the Court says:

"This case says that 'where a gift by will is phrased in language which is clear and conclusive, expressing a single meaning, without ambiguity, and not impossible of fulfillment, a court will not, under profession of construction, vary the expressed intent of the testator by interpolating an additional condition.' Par. 2 of Syl. 651."

Page 655. The Court said:

"That the testator has himself plainly said what he intended. No Court, under profession of the construction of his will, should defeat his expressed purpose by interpolating an additional or varying condition."

When there is a clear enumeration of particulars importing on their face to be designed as qualifications of a preceding general description, words of general devise must yield, and the maxim, "Falsa Demonstratio non nocet," does not apply, but rather the maxim, "Ex praecedentibus et consequentibus optima fiat interpretatio."

Groscom v. Evans, 40 N. J. L. (402, 29 Am. Rep. 251).

For cases from other States, see

49 Cent. Dig., "Wills," par. 1266.

When there is an enumeration of particulars which on their face purport to be designed as qualifications or restrictions of a preceding general description, there the general description must yield to the particular description.

Kanouse v. Slockbower, 48 N. J. E. 42;
reversed in 49 N. J. E. 592.

Under the case of *Evens v. Griscom*, 42 N. J. Law 579, 36 Am. Rep. 542, and the cases cited by Chief Justice BEASLEY, there can be no question that the testator intended to restrict the interest bequeathed to the specific items mentioned by him.

Point IV

A gift by implication will only be adopted where the probability of such intention is so apparent that the contrary cannot be supposed to exist. *Post v. Hoover*, 33 N. Y. 593. The proper rule to apply in this case is that laid down by V. C. VAN FLEET, *Barnhart v. Barlow*, 50 N. J. E. 133 (reversed on other grounds in 51 N. J. E. 620), when he says:

“A devise or bequest may arise from implication but to justify the conclusion that a gift has been made in this way, the implication in favor of the gift must rest on a probability of an intention so strong that an intention contrary to that which is thus imputed to the testator cannot be supposed to have existed in his mind.”

Cites

Denise v. Denise, 37 N. J. E. 163-169;
Bishop v. McClelland, 44 N. J. E. 450-452.

A construction in favor of a bequest by implication should never be adopted except in cases where, after a careful and full consideration of the whole will, the mind of the Judge is convinced that the testator intended to make the bequest.

Denise v. Denise, supra, at page 170,
citing
McCourty's v. Leek, 14 N. J. E. 70;
Holten ads. White, 23 N. J. L. 330;
Harman v. Dickenson, 1 Bros. C. C. 91.

Court of Chancery, in the case of *Bishop v. McClelland*, 44 N. J. E. 450, says, at the bottom of page 452:

“A bequest may undoubtedly arise from implication but to warrant the court in so declaring there must be something more than conjecture to support those declarations. The implication must be a necessary one. The probability of an intention to make the gift implied must appear to be so strong, that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind.”

Citing

Denise v. Denise, supra.

The fundamental rule applicable to such a situation has been stated to be that courts, both in law and in equity, will construe words according to their strict and primary acceptation unless from the immediate context or from the intention of the parties apparent *on the face of the instrument* the words appear to have been used in a different sense; or unless in their strict sense they are incapable of being carried into effect.

Ordinarily, the Court will understand words used in their popular sense.

Pollock C. B. Mallon v. May, 13 M. & W.
511;
Hallowell v. Morrell, 1 Scott N. B. 309;
Marshall's Executors v. Hadley, 50 N. J.
E. 547;

Stoute v. Cook, 77 N. J. E. 153;
Bennett v. Van Riper, 47 N. J. E. 563.

A bequest of "my entire stock of groceries and business * * * together with all accounts, credits and debts due and owing me growing out of said business," to the legatees absolutely, was held not to embrace bank deposits, although they had arisen wholly from the business and being nothing in the will clearly indicating that the words "used" were employed in a sense different from the ordinary acceptance.

Wyatt v. Norris (1910), 66 W. Va. 667,
 66 S. E. 1016.

In *Re Long Island Loan & T. Co.*, 92 App. Div. 5, 87 N. Y. Supp. 318, it was held that an equal, undivided one-half of my share and interest in stock of goods in a certain store "and in the good will of the general drug business therein conducted," could not be construed as intent to carry debts to the firm at the testator's death.

In *Gries v. Coleman*, 1 Woodward (Dec.) Pa. 413, where the testator owned "forge property," provided: "I give and devise my forge property * * * including the land, belonging to said forge * * *, said forge being called 'Heckler Forge' unto my partner C. now living on said property," it was held that the will passed nothing to the partner but the realty.

In *Johnson v. Goss*, 128 Mass. 433, a bequest of:

" $\frac{1}{2}$ of my interest in lands and machinery and effects in the Sash & Blind Factory in C. 'was held not to pass any interest in a debt due from a corporation to the testator,

it being said that the language used did not evidence an intention to include the debt, and that an independent bank account does not pass with bequest of a butchering business.' ”

See

Kass v. Kastleberg (1900), 98 Va. 278,
26 S. E. 377.

In the *Northrup Will Case*, 89 N. Y. Supp. 319, it was held that the legatees could not claim bills receivable.

The rule is: “When certain things named are followed by a phrase which need not, but may be construed to mean other things, it will be confined to articles of the same general character as those enumerated.”

In *Re Saugage*, L. R. A. 1917 D, page 429, inside column:

The gift of the business, American Drug Store, was a legacy of a specific thing, an established drug store and contents and its appurtenances necessary for the conduct of the same.

The legacy did not carry with it the bank account kept by the late proprietor of the drug store in the name of “American Drug Store,” nor did it carry with it the debts due to him, arising out of his administration of the drug store.

In *Barfield-Goodwin v. Childs*, 84 Law Times, N. S. 28, the Court held:

“The testator by his language in his will seemed to consider the capital as being part of his estate, separate from the business.”

Point V

The case of *Coyle v. Donaldson*, decided by the Court of Errors and Appeals, 91 N. J. E. 138, is not a parallel case.

Judge BLACK, in deciding this opinion in 1919, held:

“the word ‘business’ is a word of extensive significance. It is an uncertain and equivocal expression.”

This was a suit to obtain a construction of the meaning of the phrase “the coal business now owned by me.”

That the words included only the good will of the business, the leasehold interest of the land on which the coal business was conducted, the horses, wagons and other equipment used by the testator, in carrying on the business of coal merchant was held by the lower court.

The Court of Errors and Appeals said:

“We think this construction too narrow. These words or this phrase in the Will included in addition thereto the following items: Coal on hand valued at \$7,054.38; cash and checks \$775.34; cash on deposit in check account ‘James Coyle, Coal’ \$1,978.12; difference between bills receivable and payable; i. e. for coal sold and delivered, \$5,873.73; total in dispute \$15,681.57.”

The decree of the Court of Chancery was reversed and the money in the bank was held to be a part of the business.

This case is clearly distinguishable from the *Murphy* case, because, first: in the *Donaldson*

case the son was a drunkard, irresponsible and the parent was endeavoring to form something of the nature of a spendthrift trust for him. In the present *Murphy* case, the son has ample funds to carry on his share of the expense of operating the business, and lived in perfect harmony with the decedent.

In the *Coyle* case the checks were marked "John Coyle, Coal," while in this case the account was carried in the personal name of "H. Murphy" with nothing to identify it as belonging to the business, or to make it anything but the personal account of the decedent.

In the *Murphy* case, the decedent was an educated man, alert in business, keen of mind, interested in many projects, unusually successful and disposed of his entire estate by this will, and in the language clearly and easily followed.

In the case of *Coyle v. Donaldson*, the Court was influenced to some extent by the argument that the business required capital for its perpetuation and that the legatees therein were financially unable to carry on the business, without the capital which was in the bank account.

This argument does not apply to the present case, as the testimony of Laurence C. Murphy, as the same appears in the printed State of the Case, on page 37, line 20, is as follows:

"Q. How much money, Mr. Murphy, did you put into the new business since you took it over in January—in August, 1933? A. \$500.

"Q. \$500.00. How much did Mr. Gaskill put in? A. \$500.

"Q. How much did young Mr. Murphy put in?

"Mr. McDonough: I think this is immaterial, your Honor.

“Mr. Quigley: You have got two-thirds of it in now.

“The Court: I will hear it.

“Q. How much did young Mr. Murphy put in? A. \$1,000.

“Q. That is \$2,000.00 altogether? A. That is right.

“Q. Do you know what the bank account, today, of the new business is, the balance? A. The balance, it should be approximately \$3,500.

“Q. Yes. So that this \$2,000.00 is still in the bank. Is that right? A. Yes.”

The learned Vice-Chancellor in his opinion on page 20, line 32, of the State of the Case, referring to the testator, “he knew that the business could not be carried on without capital” but it is respectfully contended, in this case, that the complainants-respondents were not without funds and were in every sense capable of financing the business.

In the case of *Coyle v. Donaldson*, the testimony of Miss Sutherland, one of the witnesses, shows that Coyle, whenever he drew money from the “James Coyle, Coal” account for his personal use, charged himself with a withdrawal on the books of the coal business.

In the case referred to by the learned Vice-Chancellor, on page 21 of the opinion (of the State of the Case), *In re Lowe*, Supreme Court, Appellate Division, 134 N. Y. Sup. 537, the situation was where a mother was giving the business to her daughter who was clearly without funds and the Court therein determined that because of the relationship between the parties and the necessity for the continuance of the business, that the testator intended the money in the account to go in the business, but this is clearly

distinguishable from the case now before the Court because there is nothing to show that the complainant-respondents were without funds or that the son, Harry A. Murphy, was not financially able to finance his share of the said business. And said complainant-respondents are not children of decedent.

In the *Coyle v. Donaldson* and the *Lowe* cases, the beneficiaries selected to receive the funds were children of the testator and in the present case, the complainant-respondent Laurence C. Murphy is a brother of the decedent, while the complainant-respondent Charles L. Gaskill, Jr., is no relation at all to the decedent, and there is no reason why the moneys of the testator should be given to these complainant-respondents.

Point VI

The phrase "My printing business and machinery and plant, and stock in trade, good will and fixtures," clearly excludes any and all bank accounts and bills receivable and bills payable.

BUSINESS

Corpus Juris, Vol. 9, page 1101:

"That which occupies the time, attention and labor of men for the purpose of a livelihood or profit."

Bouvier Law Dictionary, 85 Conn. 289, 41 L. R. A. 615, and other cases cited:

"That in which one engages for the purpose of a livelihood, profit or the like."

Hewin v. Atlanta, 121 Georgia, 723-67 L. R. A. 795, 2 Ann. Cases 296:

“That which one does for a livelihood. That which busies or that which occupies the time, attention or labor of one as its principal concern whether for a longer or shorter time. Also used as synonymous with trade, mercantile transactions, financial dealings, buying and selling. The word is of large signification and in its broader sense includes nearly all the affairs in which either an individual or a corporation can be actors.” 9 C. J. 1104.

The New Jersey Court of Errors and Appeals in the case of *Braeutigan v. Edwards*, 38 N. J. E., page 542, says on page 545:

“besides, business does not mean stock or machinery or captial and the like. While business cannot be done without these, in commercial language it is as distinct from them as labor is from capital. In speaking of the business that may be done by a merchant, banker or railroad company, the mind does not contemplate or dwell upon the character or quality of the means used, but of the operations, whether great or small, complex or simple, numerous or few, for one or the other of these conditions may arise from much or little stock or capital. In other words, ‘business’ does not mean dry-goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business.”

Lawyers’ Reports Annotated, 1917 D., at page 435, takes up a discussion of the word “Business.” And in the first paragraph on page 435 says:

“suffice then, for present purposes, to say that the answer is generally dependent upon the intent of the testator, and that each case

is practically a law to itself, and that precedents are of comparatively little value except for purposes of illustrating the various rules of construction."

In the case of *Delaney v. Dalaney*, I. R. L. R. 15 Eq., page 55, a devise and bequest reading:

"my said business and the good will thereof with the premises in which the same will be carried on,"

were held not to pass either the capital including debts due the business, or the stock in trade, but to pass as part of the business, sacks, horses and drays used solely for the purpose of the business, which therefore formed part of the implements of trade, which business was that of a corn and wool factory. In reaching this conclusion, the Court said:

"Ordinarily speaking, business is synonymous with trade, and means, in my opinion, the process of buying and selling, or manufacturing, or the like, without comprehending the capital employed or the stock in trade, whether of material or manufactured goods. It would, therefore, require something in the context to include these extraneous subjects, or any of them."

In the following cases it was held that the respective gifts under consideration did not pass the book accounts, accrued profits, or bank accounts as the case might be:

Stender v. Stender (1914), 181 Mich. 648, 148 N. W. 255;

Kelly v. Richardson (1892), 100 Ala. 584, 13 So. 785;

Haigh (1907), 51 Sol. Jo. (Eng.) 343;

3 *Butterworth's Dig.*, col. 1119;

- 28 *Laws of England* (Halsbury), p. 700;
Wyatt v. Norris (1910), 66 W. Va. 667,
 66 S. E. 1016;
Long Island Loan & T. Co. (1904), 92
 App. Div. 5, 87 N. Y. Supp. 318;
Teller (1912), 75 Misc. 592, 136 N. Y.
 Supp. 457;
Gries v. Coleman (1867), 1 Woodw. Dec.
 (Pa.) 413;
Beard (1888), 57 L. J. Ch. N. S. (Eng),
 887, 58 L. T. N. S. 629, 36 Week. Rep.
 519;
Johnson v. Goss (1880), 128 Mass. 433;
Koss v. Kastelberg (1900), 98 Va. 278,
 26 S. E. 377.

The following cases in which the circumstances were very similar to the ones now before the Court expressly held that money in bank and bank accounts did not go with the business.

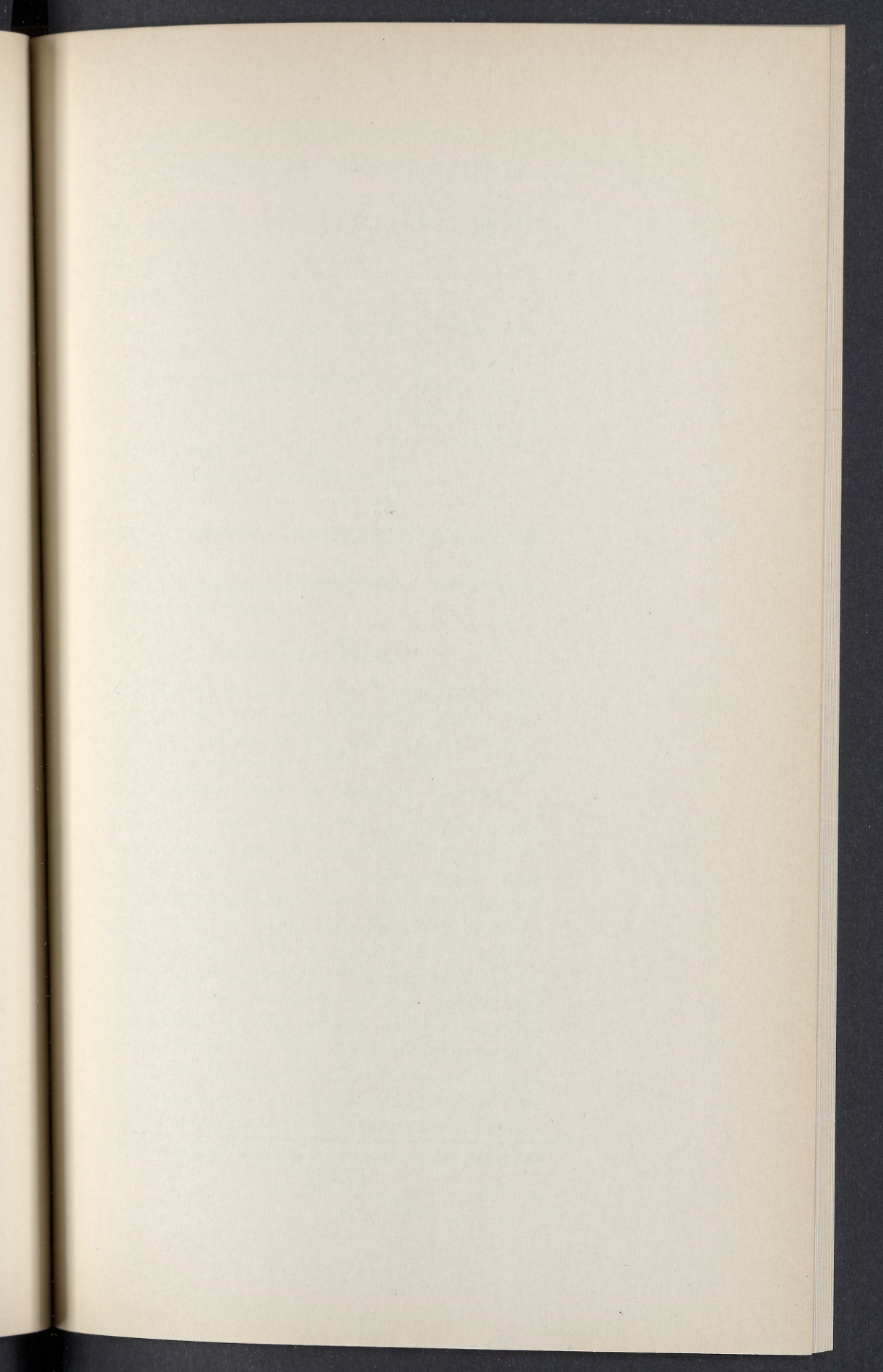
Thus, a bequest of testator's "cigar manufacturing business" was said, in *Stender v. Stender*, 181 Mich. 648, not to include a bank account used in connection with the said business. Also, in *Kelly v. Richardson*, 100 Ala. 584, in relation to a stock of merchandise, books, etc. *Wyatt v. Norris*, 66 W. Va. 667, a bequest of "my entire stock of groceries and business—together with all accounts, debts due and owing to me, growing out of said business to be legatees absolutely," was held not to embrace bank deposits, although they had arisen wholly from the business, there being nothing from the will clearly indicating that the words used were employed in a sense different from their ordinary acceptations.

Conclusion

It is therefore, respectfully submitted that the bank account, bills receivable and bills payable should be excluded from the operation of the second paragraph of the will of John Henry Murphy, deceased, and the decision of the Court below be reversed.

Respectfully submitted,

M. J. QUIGLEY,
*Solicitor for and of Counsel
with Defendants.*



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New Jersey Court of Errors and Appeals

Between

LAURENCE C. MURPHY and
CHARLES L. GASKELL, JR.,
Complainants-Respondents,

and

MARY E. MURPHY, *et als.*,
Defendants-Appellants.

On Bill, &c.

*On Appeal
from the
Court of
Chancery.*

BRIEF OF COMPLAINANTS-RESPONDENTS.

The Complainants-Respondents respectfully show unto your Honors:

Statement of Facts.

John Henry Murphy died on August 9th, 1933, leaving a Last Will and Testament which was admitted to probate by the Surrogate of Essex County on August 30th, 1933, and letters testamentary thereon issued to Mary E. Murphy.

Testator in his lifetime was engaged in the printing business and in connection therewith at the time of his death had certain machinery and plant and stock in trade, good will and fixtures. An account in the Union National Bank of Newark, New Jersey, in the name of "H. Murphy" was used for the operation of the business. Most of the checks used for drafts on this account had on the face of each the printed designation "H. Murphy, Printer." The complainant-respondent Lawrence C. Murphy had a Power of Attorney to draw checks on this account, and in the operation of the business did draw checks on the account.

There was also in connection with said business at the time of the death of testator accounts receivable and bills payable. The existence of these is admitted by the pleadings and the right of complainants-respondents to share in the bills payable is not denied by defendants-appellants. Defendants-appellants say, however, that the accounts receivable passed to the Defendant, Mary E. Murphy, under the residuary clause of testator's will.

In and by his Last Will and Testament testator provided as follows:—

“Second:—I hereby give and bequeath my printing business and the machinery and plant and stock in trade, good will and fixtures in the following manner, that is to say:—A one-half interest in the same to my son, Henry A. F. Murphy, a one-quarter interest in the same to Charles L. Gaskill and the remaining one-quarter interest to Laurence C. Murphy, to them, their executors, administrators and assigns forever.”

Complainants-respondents are two of the legatees in said second paragraph named and say that under a true and proper construction thereof they are entitled not only to a one-quarter share each of the machinery and plant and stock in trade, good will and fixtures of said printing business, but in addition thereto a one-quarter share each in the cash on deposit in the aforesaid account in the Union National Bank of Newark, New Jersey, and in the bills payable and receivable in connection with said business.

The Chancellor decreed that under a proper construction of said Last Will and Testament the complainants-respondents are entitled not only to a one-quarter share each in the machin-

ery and plant and stock and trade, good will and fixtures of said printing business but in addition thereto a one-quarter share each in the cash on deposit at the date of testator's death in the checking account in the Union National Bank of Newark, New Jersey, which account is in the name of "H. Murphy" and in the accounts receivable of said printing business less the accounts payable and from that decree the defendants-appellants have appealed to this Honorable Court.

Complainants-respondents respectfully submit that the decree of the Chancellor in the respects aforesaid should be affirmed for the following reasons:

POINT I.

By considering the entire Will and the surroundings of the testator when he executed it, and by ascribing to him, so far as his language permits, the common impulses of our nature the decree of the Chancellor was proper.

"Whether such was the testator's meaning and intention, to use the language of this court, as written by Mr. Justice Dixon in the case of *Torrey v. Torrey*, 70 N. J. L. 673, must be determined not by fixing the attention on single words but by considering the entire Will and the surroundings of the testator, when he executed the Will, and by ascribing to him, so far as his language permits, the common impulse of our nature." *Coyle v. Donaldson*, (Errors and Appeals 1919), 91 N. J. Eq. 138.

See also *McGill v. Trust Co. of New Jersey*, 94 N. J. Eq. 657 at page 675; *Foley v. Devine*, 95 N. J. Eq. 473 at page 476; *Crocker v. Crocker*, 112 N. J. Eq. 203 at page 205; *Sadler v. Berg-*

strom, 113 N. J. Eq. 567, at page 570; *Garrabrant v. Callaway*, 113 N. J. Eq. 424 at page 428.

“The circumstances, situation and surroundings of the testator may be shown by oral evidence to place the Court in the situation in which the testator was when he made his will, and thus enable it to understand the meaning and application of the language he has adopted.” *Barnard v. Barlow*, 50 N. J. Eq. 131, citing *Griscom v. Evens*, 40 N. J. Law 402 at page 407.

An examination of the testimony taken at final hearing shows that the business of testator was one of long standing, that complainants-respondents have long been associated with and in the counsel of testator. It shows further that at the time of the execution of the will the defendant-appellant Henry A. F. Murphy, the son of testator, was a minor, having very little experience in the printing business and none at all in the executive end of the same. Complainants-respondents on the other hand were men of long experience in the printing business, the complainant-respondent Lawrence C. Murphy being office manager and the complainant-respondent Charles L. Gaskell, Jr., being general supervisor. That the business was a large one is apparent from the testimony. That testator was a keen business man is certain from the testimony of defendants-appellants' own witnesses. Could it then have been the intention of the testator to separate the machinery and stock from the capital of the business and devise it to those three trusting to them to raise sufficient capital to carry on the business? No one perhaps knew better than testator that a business requires capital. He had every reason to fear that a business of that size suddenly divorced from its accounts receivable and cash capital in the bank

might collapse. And then too he must have considered the interests of his son who certainly could not have carried on the business alone or at least not as successfully as he might with the aid and counsel of complainants-respondents who had assisted testator in making the business the success that it was. Could it then have been the intention of testator to saddle these two with a one-quarter interest each in mere machinery and stock and fixtures with no capital to meet payrolls, etc., and what is more with an inexperienced partner to consume one-half of the income? There would under such an arrangement be nothing to induce the three legatees to remain together in business. The complainants-respondents could take their share of the machinery and plant and stock in trade and fixtures and open up in another location. Then, although they would have to scrape up capital, they would not be saddled with a partner whose chief asset, he being inexperienced as aforesaid, consisted of a share in machinery and stock and fixtures, and whose liability to them was a one-half share in the profits, which would be out of all proportion to the value of his share in the business as defendants-appellants would define it. Certainly testator, in his natural regard for his son, would not create a situation that might well result in his being left alone without the aid and counsel of complainants-respondents which testator had found so valuable and with nothing but a few odd pieces of machinery and stock and fixtures to console him.

In a similar case, *In re Lowe*, 134 N. Y. Supp. 537, Spring, J., reversing the Surrogate in construing a bequest of "her printing office and bindery, together with all presses, bindery machinery, type, paper on hand, office furniture and

equipment of every nature connected with said business," held that:

"This successful business, it is fair to assume, she intended to transmit as a family heritage to her only child, to be carried on in her behalf without impairment of its efficiency or volume. To strip it of its bills receivable and the small amount of cash to its credit would destroy its working capital, and leave nothing connected with the business from which money could be derived to meet the weekly payroll of \$1,200 or over. It is unreasonable to believe that this mother designed to deprive her daughter of the fruits of this family patrimony so essential for its management and operation. We should not interpret the will in such a way as to make a serious invasion on the live assets of the business, unless the language of the bequest clearly calls for that construction. The only available assets were grouped in these due and accruing accounts and the small sum in cash. If the daughter was to carry on the business without these assets she must add a considerable sum in cash to it and practically commence anew without any working capital. (This case was affirmed in 206 N. Y. 67, 99 N. E. 722, modifying the opinion to the extent only that the daughter was to pay the bills payable of the business.)

So, in the case *sub judice*, it is unreasonable to believe that this father, after spending his lifetime in building up the printing business, designed to deprive his son of the capital thereof so essential for its management and operation. The will should not be interpreted in such a way as to make a serious invasion on the live assets of the business, *unless the language of the bequest clearly calls for that construction*. If the son and the complainants-respondents were to carry on the business without the capital thereof, they must add a considerable sum in cash to it

and practically commence anew without any working capital. It is fundamental, and testator as a keen business man must have known, that a person in entering into business relations with others offers either experience or capital. The testimony shows that in the knowledge of testator complainants-respondents had experience and the defendant son did not. It is not shown that he had capital, and it is entirely unlikely that a youth of his years whose only occupation was that of printer's apprentice had any capital, nor did testator by any other provision of his will bequeath him any. In this respect the case *sub judice* is even stronger than *In re. Lowe, supra*, for in that case testatrix by a subsequent provision of her will bequeathed her daughter the sum of \$5,000. Certainly, then, there was nothing to induce complainants-respondents to continue with the son, the relations which they had to testator and which to him had proved so successful as is evidenced by the size of his estate and business. It is unreasonable to assume that testator meant to leave his son in such a position. True, complainants-respondents and the son have, through strenuous efforts, continued that relation, but in view of this action brought to construe testator's will, is it not reasonable to assume that the fibre holding them together was a well founded belief that a proper construction thereof would pass the capital and accounts of the business?

The uncontradicted testimony shows that in his lifetime testator had given to each of complainants-respondents a one-quarter share in the profits. The logical deduction is that he intended that that arrangement which had proved so successful should be carried on, he merely devising his own one-half which he had reserved to himself in his lifetime to his son.

The case is strikingly similar to that of *Coyle v. Donaldson*, (Errors and Appeals, 1919), 91 N. J. Eq. 138, wherein Black, *J.*, in an opinion unanimously concurred in, enlarged upon the interpretation of the Vice-Chancellor and said that:

“The learned Vice-Chancellor, before whom the case in the first instance was heard, reasoning from analogy, decided the words included only the good-will of the business, the leasehold interest of the land on which the coal business was conducted, the horses, wagons and other equipment used by the testator in carrying on the business of coal merchant. We think this construction is too narrow. These words or this phrase in the will include in addition thereto the following items: Coal on hand, valued at seven thousand fifty-four dollars and thirty-eight cents (\$7,054.38); cash and checks, seven hundred and seventy-five dollars and thirty-four cents (\$775.34); cash on deposit in check account ‘James Coyle Coal,’ one thousand nine hundred and seventy-eight dollars and twelve cents (\$1,978.12); difference between bills receivable and payable, i. e., for coal sold and delivered, five thousand eight hundred and seventy-three dollars and seventy-three cents (\$5,873.73); total in dispute, fifteen thousand six hundred and eighty-one dollars and fifty-seven cents (\$15,681.57). Whether such was the testator’s meaning and intention, to use the language of this court, as written by Mr. Justice Dixon, in the case of *Torrey v. Torrey*, 70 N. J. Law 673, must be determined, not by fixing the attention on single words, but by considering the entire will and the surroundings of the testator, when he executed the will, and by ascribing to him, so far as his language permits, the common impulses of our nature. If we put ourselves in the position of the testator, at the time of the execution of the will, and consider the circumstances he had in view in making the

will, it seems quite clear, that the coal business was to pass, as it was then owned by the testator, as a whole, with all that pertained to it, as a going concern or business. Neither one of these two legatees had any means whatever, except what they received under the provisions of the will, and no one, perhaps, knew better than the testator himself that such a business could not be carried on successfully without some capital. To assume that the testator intended or desired to separate the stock from the business, in which it was more valuable than it possibly could be in the possession of the executrices, is both unnatural and unreasonable."

The testimony shows that testator kept an account in the Union National Bank of Newark, New Jersey, in the name of "H. Murphy" for the conduct of his printing business, and kept said account separate and apart from his personal accounts. That, just as the checks on the account in *Coyle v. Donaldson, supra*, were marked "James Coyle, Coal" so that checks on the account in the Union National Bank were marked "H. Murphy, Printer"; that just as the personal account of the testator in the *Coyle* case was marked "James Coyle Special" (see Chancery opinion 90 N. J. Eq. 122 at page 126) so the personal account of testator in the same bank (Union National Bank of Newark, New Jersey) in the case *sub judice* was marked "H. Murphy Special." That testator took pains to distinguish the two accounts in the same bank is apparent. In the *Coyle* case the amount on deposit in the Special account was relatively small in proportion to that on deposit in the business account as is so in the case *sub judice*. This case, however, is strengthened by the fact that testator had, as shown by the testimony, roughly \$90,000.00 in various banks, which fact would clearly

rebut any inference that his personal accounts were impoverished to support the business. Defendants make much of the fact that although the checks drawn on the business account bore the designation "H. Murphy, Printer" that the account itself was in the name of "H. Murphy." The exact situation, however, prevailed in the case of *Coyle v. Donaldson*, *supra*, and did not alter the decision (see Chancery opinion 90 N. J. Eq. 122 at page 126). So also in the case of *Francis Exr. etc. v. Breivogel, et als.*, docket 101, page 562 (unreported), and embodying similar language as hereinafter more fully shown, the account in question was in the name of "P. J. Breivogel."

An additional strengthening feature not existing in the Coyle case is the fact that testator gave complainant-respondent Lawrence C. Murphy a power of attorney to draw checks on the business account in the Union National Bank and that Lawrence C. Murphy drew most of the checks for the conduct of the business. It is unlikely that testator would give complainant-respondent a power of attorney upon an account which testator did not consider was a part of the business. He did not do so on the Special Account nor on any of his other accounts.

Defendants make much of the fact that testator drew on the account in question for personal matters. The testimony does not make certain that he did so, but let us assume for the moment that he did. Complainants-respondents have never denied that testator was the sole owner of the business, nor that he could have exhausted the account for personal needs if he so desired. The important fact is that he did not do so, but on the contrary kept the account separate and apart from his personal account in the same

bank by making the latter account "H. Murphy, Special" and giving to his brother Lawrence a power of attorney on the other account only. Testator as a business man, and according to the testimony of defendants-appellants' own witnesses a very keen business man, knew the amount of capital required for his business and kept a sufficient amount on deposit in the account in dispute to meet that requirement. He knew what the business would need during slack periods, what bills he had to pay, what machinery might need replacement.

If he had \$50,000 in the account and felt that \$25,000 was sufficient for the operation of the business there was nothing to prevent him from paying out the other \$25,000 to pay taxes, invest in building and loan or for any personal requirement or to divide the same as profits. Even the testimony of complainants-respondents shows that the profits of the business were split and that testator took one-half thereof. It might well be that testator disbursed his one-half directly, either to himself, his wife, to replenish his personal accounts, to pay taxes or to make investments. The important thing is that he maintained a balance of a size commensurate with that of his business and took pains to distinguish it from his other accounts.

This fact is strengthened when it appears that the average monthly balance on deposit in the account in question from July 31st, 1930, to August 16th, 1933, was \$15,267.02 (see appellants' brief, Point II, page 5), a figure in the neighborhood of the balance remaining in the account the date of testator's death.

Even in *Coyle v. Donaldson, supra*, (see Chancery opinion 90 N. J. Eq. 122 at page 126) checks

were drawn on the business account to pay taxes and to replenish testator's special account, and moneys were drawn from the business account for investment.

At the hearing an effort was made to distinguish between the complainants-respondents as legatees in the case *sub judice* and the legatees in the case of *Coyle v. Donaldson, supra*, by showing that the business has continued without any capital supplied by testator. There was, however, no showing that complainants-respondents are or were men of means such as to distinguish them from the legatees in the *Coyle* case and in fact it developed at the hearing that complainant-respondent Gaskell was obliged to borrow \$500.00 on his life insurance and to take a substantial loss in his salary in order that the business might accumulate capital. It might well be that the business through strenuous efforts might continue, but with what degree of success is not shown. Testator had built up a large business. Could it have been his intention to pass on to his son a substantial interest in that business and at the same time retard its progress, even set it back, by divorcing it from its capital? Such an interpretation does not portray the ordinary impulses of one's nature.

POINT II.

The decree of the Chancellor should be affirmed in consideration of the language of the clause in question.

Now looking at the language itself. "My printing business and the machinery and plant and stock in trade, good will and fixtures." These words should be given their usual mean-

ing unless some other intention appears from the context.

“It will be presumed that the words which are used in a will are used in their usual and popular meaning, unless it appears from the context that some other meaning is intended.

If testator uses words which have a definite and well understood technical meaning, the prima facie presumption will be he intended to use them in this sense. *Supp v. Second National Bank & Trust Co.*, 130 Atl. 549; 98 N. J. Eq. 242; *Marshall v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325.

The words of a will should generally be given their common and ordinary meaning unless there is something in the text which requires that a different meaning be given them. *Holcombe v. Lake*, 24 N. J. Law 686; *Stout v. Cook*, 77 N. J. Eq. 153; *Woodruff v. White*, 79 N. J. Eq. 225.”

That the strict and usual meaning of the word “and” is “as well as” or “in addition to” is too apparent for argument. (See Words and Phrases, First Series).

Therefore in the absence of anything in the context which requires a different meaning the word “and” following the word business means “as well as” and not “consisting of” or some such other descriptive term as defendants would seek to give it.

“While a cardinal rule of the construction of wills is to arrive at the testator’s intention, in seeking that intention the language of the will must be construed in the light of the interpretations adopted by the courts.”

Wills v. Wills, 73 N. J. Eq. 733.

“The testator is presumed to have framed his bequest in view of the general rules of construction established by the courts, and any intention at variance therewith to be

recognized, must be clearly indicated, and is not to be imputed from assumed purposes or a fancy as to what the testator really meant, formed from other provisions." *Bonnell v. Bonnell*, 47 N. J. Eq. 540.

Now, if we take away "the machinery and plant and stock in trade, good will and fixtures" there is nothing else that the word "business" could mean, except the money, the capital, for there are no other elements in a business as we ordinarily understand it, and what is more that interpretation has been given the word "business" by the court in the case of *Coyle v. Donaldson*, *supra*, and in the case of *In re. Lowe*, *supra*, a strikingly similar provision was involved as follows:

A gift of "printing office and bindery together with all the presses, bindery, machinery, type, paper on hand, office furniture, and equipment of every nature connected with the business" and the court held

"Let us consider the provision itself. She first bequeaths the bindery business and plant in a broad bequest. She then adds 'together with all the presses' etc., not words of restriction but specifying some of the chief tangible property in the plant. She did not intend to cut down or limit the large bequest, but to make clear that in addition to the plant and business in its entirety these principal items physically in the plant should unmistakably pass with the business. She then added the clause, going again from the definite to the general, 'office furniture and equipment of every nature connected with said business.' It seems to me she had in mind disposing of the entire business and plant as she had regarded and treated it. She did this by the sweeping transfer and then in order to identify a few of the big features of the movable property actually in the plant, she hitched them on to the general bequest."

It was not held that the words following "printing office" and linked to it by the word "and" or linked to the word "bindery" by the words "together with" were descriptive, as defendants-appellants in the case *sub judice* would seek to construe the words following the word "business" and connected to it by the word "and".

On the contrary, testator, as did testatrix in *In re. Lowe, supra*, first made a sweeping transfer of "my printing business" and then in order to identify the big features of the property of the business, hitched on to the general bequest, the words "and the machinery and plant and stock in trade, good will and fixtures."

And in the case of *Charles E. Francis, Exr. etc. v. Elizabeth Breivogel, et als., supra*, a construction of a bequest of a business "including all office furniture and fixtures, machinery, tools, accounts receivable, good will, and trade marks (but subject to accounts payable and other liabilities of the business)" was involved and it was contended that the bequest passed a bank account used by the testator in connection with and as a part of the business in question, which account was deposited in the name of "P. J. Breivogel" and the court held that it seemed clear that

"The testator was giving to his son the going business theretofore carried on by himself, out of which he had been making his livelihood, and with the intent and expectation that the son would continue to carry on that business for the benefit of himself and of testator's widow. As a matter of common knowledge a certain amount of cash capital is required in the conduct of such a business. The proofs show that it was required and had been used in the conduct of

this business. The cash balance was not in excess of the usual amount for the previous four or five years, but rather the contrary."

And so in the instant case it appears (see the average cash balance in the account as stated on page 5 of appellants' brief) the cash balance was not in excess of the usual amount for the few years preceding testator's death, but rather the contrary; and it would certainly appear from a consideration of the whole case that a business of the size of that in question required capital.

Now, the draftsman was an experienced one and if the intention was not to include the bank account and the accounts receivable such important exceptions would be made in specific language or at least the draftsman would have modified the words "printing business" by the words "consisting of" as in the case of *Baker v. Soltan*, (Errors and Appeals 1922) 94 N. J. Eq. 544.

Complainants-respondents respectfully submit that by considering the language of the will and the surroundings of the testator when he executed it and by ascribing to him so far as his language permits the common impulses of our nature, that the entire business as it was constituted at the time of testator's death including the accounts receivable, bills payable and cash in the bank was to pass.

POINT III.

The brief of defendants-appellants discloses no reasons for reversal.

We may divide the points raised therein into three classes viz: Points II and V which treat of the evidence produced at the final hearing in the court below; Points I, III and IV which seek to interpose rules of construction other than those followed by the court below; and Point VI which embodies a collection of cases purporting to cover similar clauses in other cases.

Treating first of Points II and V.

Point II dwells exclusively on the nature of the bank account in question. Appellants attempt to show that the learned Vice-Chancellor found that the account was held in the name of "H. Murphy, Printer," for they say at the bottom of page 8:

"The learned Vice-Chancellor theretofore erred in his opinion on page 20, line 16, wherein he says: 'Moreover, outstanding in aid of the determination that the account "H. Murphy, Printer," was considered by the deceased as his business account * * *'"

That such reference to the account in the quoted portion of the opinion was made solely for the purpose of convenience in distinguishing the account in question from other accounts mentioned in the case and not under a misapprehension as to the name in which the funds were deposited becomes manifest when we read a preceding portion of the opinion, see State of Case page 18, line 24, in which the Vice-Chancellor states:

"The testator maintained a bank account in the Union National Bank at Newark in

the name of 'H. Murphy,' in which there was a balance to his credit at the time of his death amounting to \$13,526.44. The checks used in withdrawing money from this account bore on their face the printed words 'H. Murphy, Printer'."

And in *Coyle v. Donaldson*, *supra*, the Court of Errors and Appeals did likewise, referring to the account as the "James Coyle, Coal" account and probably for the same reason (to distinguish it from the Special Account) whereas Chancery opinion 90 N. J. Eq. 122 shows the account was in the name of "James Coyle" while the checks bore the designation, "James Coyle, Coal."

Appellants also urge that the Vice-Chancellor erred in finding that the checks bore the printed designation "H. Murphy, Printer," when there were 390 checks in evidence which did not bear the word "Printer."

No claim has ever been made in this case that decedent could not, had he so desired, draw checks on a pocket check book, or draw counter-checks at the bank on the account in question and it has never been contended that the word "Printer" was any part of the account. The account, and of this fact the Vice-Chancellor was aware as heretofore shown, was in the name of "H. Murphy" and any check bearing his signature would be honored. But the majority of the checks bore the word Printer, as did all of the checks drawn from the check book Exhibit C-2, and were taken in evidence to show that this "H. Murphy" account in the Union National Bank, was the decedent's business capital as distinguished from the "H. Murphy, Special" account in the same bank or any "H. Murphy"

accounts in other banks. These checks bearing the word "Printer" were paid only through that particular "H. Murphy" account in the Union National Bank. Therefore, we may assume, that the misstatement, if such it were, in the opinion, did not influence the decision of the Vice-Chancellor.

Also under Point II, bottom of page 5, appellants say that Charles L. Gaskell, Jr., has repeatedly received bonus checks from said account, whereas the uncontradicted testimony produced at final hearing shows that both Gaskell and Lawrence C. Murphy semi-annually received a one-quarter share of the profits, and not bonuses.

At the close of Point II, page 9, appellants seek to distinguish the account in question from the account in *Coyle v. Donaldson, supra*. In that case, the account was in the name of "James Coyle," while the checks bore the printed designation "James Coyle, Coal" just as most of the checks in the instant case bore the printed designation "H. Murphy, Printer."

Respondents have previously covered the balance of the material under Point II of appellants' brief, in the arguments contained under Point I of respondents' brief relative to the personal checks drawn on the account in the Union National Bank.

Under Point V appellants again attempt to distinguish the instant case from the case of *Coyle v. Donaldson*. First they say that in the *Coyle* case the son was a drunkard, irresponsible and the parent was endeavoring to form something in the nature of a spendthrift trust for him. A careful reading of the opinion in the

Coyle case fails to disclose any mention of a drunkard son or a spendthrift trust, but on the contrary shows that the decision was based upon entirely different considerations. They say that in the instant case, the son had, as distinguished from the legatee in the Coyle case, ample funds to carry on the business and lived in perfect harmony with the decedent. There is no evidence produced showing that the son, Henry Murphy, had ample funds. No other provision of the will left him anything, and being a very young man, having no income except that from his apprenticeship as a printer, the inference would be more likely that he had no means except what he might obtain from his mother through his father's bequests to her. Perhaps that is where he obtained the \$1,000.00 referred to under Point V as capital for the new business. Nor is there anything in the Coyle case to show that the legatee was not in harmony with the testator and in fact the opinion shows that he had been employed by the testator in the coal business since leaving school in 1909, to the satisfaction and with the confidence of the testator.

Nor does the testimony in the instant case show that either of the respondents were or are men of means, but on the contrary shows that the respondent Gaskell was obliged to borrow \$500.00 on a life insurance policy to provide his share of the capital for the business, and if at the end of the year the business had a small bank balance it was only through the strenuous efforts and reductions in salary taken by the respondents.

Some reference is made by appellants under Point V, page 17, to the testimony of one of the witnesses in the Coyle case. There is no mention

of that testimony in the reported opinion, and the testimony of the Coyle case was not read into or put in evidence in the case *sub judice*.

Next under Point V, the appellants attempt to distinguish *In re. Lowe*, 134 N. Y. Sup. 537 (set out fully under Point I of this brief) from the case *sub judice*, and say at the bottom of page 17, that it was a case where a mother was giving the business to *her daughter who was clearly without funds* and the court determined that because of the relationship between the parties and the necessity for the continuance of the business, that the testator intended the money in the account to go in the business. Looking at the reported opinion, we find that the daughter was *not clearly without funds*, but in fact received a pecuniary bequest of \$5,000 by the same will. And as far as relation to the testator is concerned, it must be remembered that the respondent Lawrence Murphy is a brother and the appellant Henry Murphy who is a legatee (whether he wants to be or not) under the clause in question, is the only son of the testator.

Treating next of Points I, III and IV.

Appellants seek to interpose the rule of *Griscom v. Evens*, 40 N. J. Law 402 at 413 to the end that the enumeration of articles following the word business was intended as a specification and limitation of what was to pass under the gift of the business.

But in the case of *Charles E. Francis exr. etc. v. Elizabeth Breivogel, et als.*, Docket 101, page 562 (Chancery of N. J.—unreported) Buchanan, V. C. in construing a bequest of “busines including all office furniture and fixtures, machinery,

tools, accounts receivable, good-will, and trade marks," held that:

"This argument is that the enumeration of articles in the 'including' clause was intended as a specification and limitation of what was to pass under the gift of the business; and *Griscom v. Evens*, 40 N. J. L. 402 at 413 is relied on. That is by no means a controlling or apposite authority under the language in the instant case. Of course where it appears that an enumeration of particular items is *intended* as a *limitation* of a word or phrase of general import, such effect is to be accorded to it. But an enumeration of particulars, accompanying a general word or phrase, may or may not be intended as a limitation. Where the enumeration commences with the word 'including' the natural meaning of the language is not that of limitation. cf. *Snegon v. Consolidated &c. Co.*, 117 N. J. Eq." p. 325.

"So in the instant case, it seems clear that the enumeration was not intended as a limitation. The testator was giving to his son the going business theretofore carried on by himself, out of which he had been making his livelihood, and with the intent and expectation that the son would continue to carry on that business for the benefit of himself and of testator's widow. As a matter of common knowledge a certain amount of cash capital is required in the conduct of such a business. The proofs show it was required, and had been used, in the conduct of this business. The cash balance was not in excess of the usual amount for the previous four or five years, but rather the contrary."

While the word following business in the case *sub judice* is the word "and" and not "including," both are words of addition and not limitation and the principle of the above cause should apply, more especially as in the case *sub judice*

the surrounding facts and circumstances, which are even stronger than those referred to in the case last cited, indicated that a limitation was not intended.

And in *In re. Lowe, supra*, where the bequest was "her printing office and bindery, together with all presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business," the rule of *Griscom v. Evens* was not followed and the court held:

"Let us consider the provision itself. She first bequeaths the bindery business and plant in a broad bequest. She then adds 'together with all the presses' etc., not words of restriction but specifying some of the chief tangible property in the plant. She did not intend to cut down or limit the large bequest, but to make clear that in addition to the plant and business in its entirety these principal items physically in the plant should unmistakably pass with the business."

Under Point IV, appellants seek to interpose the decisions in respect to gifts by implication. A gift by implication is where a testator disposes of his property, *not by any formal disposition in his will*, but by necessary implication from his will taken as a whole. Page on Wills, Vol. I Sec. 819, page 1393. The question in the instant case is what the testator meant by an *express provision* in his will.

It will be noted that the decisions pertaining to gifts by implication were not considered in *Coyle v. Donaldson, supra*, nor in *Francis, exr. etc. v. Breivogel, et als., supra*, and the New York Court in *In re. Lowe, supra*, did not consider the decision pertaining to gifts by implication as expressed in *Post v. Hover*, 33 N. Y. 593 (Cited under Point IV, page 11 of appellants' brief).

Appellants under Point IV, page 13, cite—*Wyatt v. Norris*, (1910), 66 W. Va. 667, 66 S. E. 1016, as a case where the language was held not to pass the bank account.

An examination of that case shows that the language involved was “my entire stock of groceries and business conducted by me at No. 1033 Third Avenue in the City of Huntington, West Virginia, together with all accounts, claims and debts due and owing me, growing out of said business.”

And that the construction of the word “business” was not raised, but on the contrary, the question was whether the words “all accounts, claims and debts due and owing me, growing out of said business,” embraced the bank account and the court, giving to the words their popular signification held that:

“The words ‘all accounts, claims and debts’ do not ordinarily signify money on deposit in bank, * * * In common acceptation, money in bank is considered as ready money, not as an account, claim or debt due to the depositor.”

And the court also considered the fact that testator left specific monetary bequests which could not be paid if the money went with the business.

Appellants also cite on page 13, *In re. Long Island Loan & Trust Co.*, 92 App. Div. 5, 87 N. Y. Supp. 318 also cited as *In re. Northrups Will*, as involving a construction of a bequest of a share in a drug store business. An examination of that case discloses no reference to a drug store, but on the contrary shows the following clause to be in question, “all my law business, lawbooks, papers, safe, bookcases and office fur-

niture, and all my property pertaining to my business," and the court refused to pass two claims for legal services due to testator because there was nothing in the case to indicate a reason for any purpose in the mind of the testator to devise choses in action by language which describes choses in possession. And in determining this, the fact that the legatee was not admitted to the bar at the time of the preparation of the will, and was not admitted until some time after the testator's death, was taken into consideration.

Appellants also cite on page 14 *Koss v. Kastelberg*, (1900) 98 Va. 278, 36 S. E. 377. There, a bequest of "all horses, harnesses, wagons, machinery, and all other personal property used in my butchering business, including all choses in action," was involved and the court refused to pass the bank account, it appearing the account was unnecessary to the business, that there were other motives for opening the account growing out of a contemplated visit abroad, and that there were accounts due by customers to the butcher business satisfying the provision as to choses in action, and that while a bank deposit is technically a chose in action, the common acceptance of the words does not include ready money in the bank.

The distinction between that case and the present one is obvious.

In re Savage, L. R. A. 1917 D. page 429, cited by appellants on page 14 is also clearly not in point. There the question was whether a legacy of the American Drug Store carried with it the bank account kept by the late proprietor of said drug store and the debts due to him arising out of his administration of the drug store and

the Louisiana Supreme Court held that it did not pass the account and the debts due, basing its decision upon a statute of that state and said that:

“These things are explicitly excepted under Article 840 of the Civil Code, which says: ‘The sale or gift of a house’ with all that is in it ‘does not include the money nor the credits or other rights, the titles of which may be in the house; all other movable effects are included’.”

Turning now to Point IV.

Appellants offer various definitions of the word business. These, respondents, submit are entitled to little consideration. In *Coyle v. Donaldson, supra*, (Errors and Appeals) it was held:

“The definition of the word ‘business,’ or the construction given to it by the courts in other cases, is of little aid in ascertaining the intention in this case. The word is an uncertain and equivocal expression. (Citing cases). It is a word of extensive signification under any legal or general definition of the term. *White v. Rio Grande Western Ry. Co.*, 25 Utah 346, 349. A word of large signification. *Goddard v. Chafee*, 84 Mass. 395,” and

“Whether such was the testator’s meaning and intention, to use the language of this court, as written by Mr. Justice Dixon, in the case of *Torrey v. Torrey*, 70 N. J. Law 673, must be determined, not by fixing the attention on single words, but by considering the entire will and the surroundings of the testator, when he executed the will, and by ascribing to him, so far as his language permits, the common impulses of our nature.”

Appellants conclude Point VI by citing a number of cases purporting to cover similar clauses. (Pages 20, 21).

The first of these, *Stender v. Stender*, (1914), 181 Mich. 648, 148 N. W. 255, is clearly not in point. The clause was "remainder of his personal property including his cigar business."
Held

"The learned circuit judge decreed to Carl Stender, under clause 4, \$1,100 that being the amount of the commercial bank account in connection with the cigar manufacturing business, the time the will was made. In this we think, he was in error. But, inasmuch as the heirs have not appealed from the decree and do not question its propriety in that regard, that question requires no consideration."

While no reason for the error was set out, we might assume that the error was in passing the account as it existed at the time the *will was made*, since it is fundamental that a will speaks as of the time of death.

Kelly v. Richardson, 100 Ala. 584, 13 S. 785, next cited is also clearly not in point. There a bequest to K. of all of testator's personal property, except a stock of merchandise, books, accounts, notes, store fixtures, and everything in a certain store, which was given to C. was followed by a bequest of \$500 in cash to each of certain persons, and it was *held* that the bequests to K. and C. excluded all money in the store and all money in hand, as otherwise there would be no fund from which to pay the pecuniary legacies.

Wyatt v. Norris, 66 W. Va. 667, 66 S. E. 1016 involved solely the question whether a bank deposit was included in "all accounts, claims and debts due and owing me" and the court held

"In common acceptation, money in bank is considered as ready money, not as an account, claim or debt due to the depositor."

“And further testator left specific monetary bequests which could not be paid if the money went with the grocery business.”

Long Island Loan & T. Co., 92 App. Div. 5, 87 N. Y. Supp. 318 and *Koss v. Kastelberg*, 98 Va. 278, 36 S. E. 377 were previously treated in this brief.

In re Teller, 75 Misc. 592, 136 N. Y. Supp. 457 is clearly not in point. There the clause was “equal undivided one-half of my share and interest in the stock of goods in said store, No. 117 Genesee street, and in the good will of the general drug business therein conducted” and *held*

“There is nothing to enlarge the ordinary meaning of the terms used. The expression ‘stock of goods’ cannot be claimed to include accounts receivable, cash, or other evidence of debt; and the phrase ‘good will’ has never been construed to mean anything except what the name purports.”

And the court took into consideration the fact that if the money went with the interest in the business, there would not be enough personal property left to pay a general legacy of \$5,000 given to decedent’s daughter.

CONCLUSION.

Complainants-respondents respectfully submit that the decree of the Chancellor was proper both upon the law and the facts.

Respectfully submitted,

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"And further, certain legal security hypothecary mortgages which would not be paid if the money went with the grocery business."

Long Island Loan & T. Co., 37 App. Div. 2, 2 N. Y. Supp. 313 and 314; E. L. S. v. E. L. S., 278, 30 S. E. 377, were previously treated in the brief.

In re Teller, 35 Misc. 592, 108 N. Y. Supp. 41 is clearly not in point. There the plaintiff's legal title to one-half of my wife's interest in the stock of goods in and of right to the Genesee street, and to the good will of the general doing business therein, was sold."

"There is nothing in evidence to indicate the meaning of the terms used. The plaintiff's stock of goods should be charged to include accounts receivable, inventory, and other items of value, and the purchase price of the goods sold should be subtracted to show the net amount left what the net proceeds."

And the court took into consideration the fact that if the money went with the grocery business, there would not be enough property left to pay a marital homestead claim given to defendant's daughter.

CONCLUSION

Comprehensive investigation conducted by the court in the Chamber was held, and the facts were both upon the law and the facts.

Respectfully submitted,

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