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NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN BLACK, surviving executor of Rachel Newbold, deceased, appellant, *and* SAMUEL WHITALL and LYDIA, his wife, respondents,	*On appeal.*

STATEMENT OF THE CASE.

To his Honor Oliver S. Halsted, esquire, Chancellor of the State of New Jersey, and Ordinary of the same.

Humbly complaining, show unto your Honor your orator, Samuel Whitall, of the District of Columbia, and your oratrix, Lydia Whitall his wife, that Rachel Newbold, widow of Daniel Newbold, deceased, late of the county of Burlington, in the state of New Jersey, deceased, being possessed of a very considerable real and personal estate, and being of sound mind, made her last will and testament in writing, signed, sealed, and published in the presence of three subscribing witnesses, and executed in due form of law to pass real and personal estate, bearing date on the seventh day of May, in the year of our Lord one thousand eight hundred and 10 twenty-four, and therein and thereby, after ordering all her just debts and funeral charges to be paid, and making divers bequests, did order, direct, and give as follows, *viz:* "Ninth, I do hereby direct, authorize, and empower my executors, herein after named, to make sale of all the residue of my estate, whatsoever and wheresoever, real, personal, and mixed, at such time as in their discretion they may think expedient for the advantage of my legatees, and to make, execute, and deliver to the purchaser and purchasers of my real estate sufficient deeds of conveyance for the same in fee simple absolute; and the whole residue of my estate, consisting of the resi- 20 due of my personal estate after the payment of my debts, funeral charges, and the legacies herein before given and bequeathed, of the proceeds of the sales of my real estate, and of the sum of three thousand dollars, by me heretofore advanced to my daughter Lydia Whitall, wife of Samuel Whitall, I order and direct to be divided into four equal parts: one equal fourth part whereof I give and be-

queath to my daughter Ann Stratton, one other fourth part thereof I give to my daughter Lydia Whitall, but the sum of three thousand dollars, already advanced to my said daughter Lydia Whitall, to be part of her share, and she to receive under this bequest only so much as the one equal fourth part of the residue of my whole estate, as above mentioned, may exceed the said sum of three thousand dollars. One other equal fourth part thereof I give and bequeath to my daughter Sarah Black, and the remaining fourth part thereof I give and bequeath to my son Caleb Newbold, his executors and admin-
10 istrators, in trust nevertheless, and to the uses, interests, and purposes herein after expressed of and concerning the same."

And your orator and oratrix further show unto your Honor, that the said Rachel Newbold, deceased, in and by her said last will, did nominate, constitute, and appoint her sons, Caleb Newbold and Charles D. Newbold, and her son-in-law, John Black, executors of her said last will and testament, as by the said last will and testament, or a copy thereof now in the possession of your orator and oratrix, and ready to be produced as this honorable court may direct, will more fully and at large appear.

20 And your orator and oratrix further show unto your Honor, that the said Rachel Newbold died on or about the ninth day of May, in the year of our Lord one thousand eight hundred and twenty-four, so seized and possessed of the said real and personal estate, without altering or revoking the said last will and testament, and that afterwards, to wit, on the sixteenth day of June, in the year aforesaid, the said last will and testament was duly proved by the said Caleb Newbold, Charles D. Newbold, and John Black, and probate thereof granted to them by Abraham Brown, esquire, then surrogate of the county of Burlington; and that they took upon
30 themselves the burthen of the execution thereof, and the same was regularly recorded and entered in the surrogate's office of the said county of Burlington, and affiled of record in the prerogative office at Trenton, agreeably to law.

And your orator and oratrix further show unto your Honor, that afterwards, on the sixteenth day of June, in the same year aforesaid, the said Caleb Newbold, Charles D. Newbold, and John Black, executors of the said Rachel Newbold, caused an inventory and appraisement to be made of the personal estate of the said deceased, which inventory and appraisement was duly proved and recorded
40 in the surrogate's office of the county of Burlington aforesaid, in Book B. of Inventories, page 429, as by the same, or an authenticated copy thereof, now in the possession of your orator and oratrix,

and to which for greater certainty they beg leave to refer, will more fully and at large appear.

And your orator and oratrix further show, that the said inventory and appraisement comprises and sets forth the following particulars and items, *viz:* "(1) Testatrix's purse and apparel, $540.00; (2) Bonds, $1806.62; (3) Household furniture and plate, $600.00; (4) Carriage and horses, $200.00; (5) Boards at Branin's mill, $150.00; making the sum total of the personal estate of the said testatrix to amount to three thousand two hundred and ninety-six dollars and sixty-two cents. And your orator and oratrix charge and insist that 10 there is fraud and mistake on the face of the said inventory, in this, that the said executors of the said Rachel Newbold fraudulently and unlawfully omitted to set forth and include therein, as part of the estate of the said testatrix, (as in the said will it was expressly declared to be) the said sum of three thousand dollars advanced by the said testatrix in her lifetime to your oratrix, the said Lydia Whitall, or to take any account thereof whatever, as in and by the said will they were directed and required.

And your orator and oratrix further show that, on or about the seventeenth day of January, in the year of our Lord one thousand 20 eight hundred and twenty-nine, the said Charles D. Newbold departed this life, leaving the said Caleb Newbold and John Black his survivors.

And your orator and oratrix further show unto your Honor, that the said Rachel Newbold died seized and possessed of several tracts of valuable land and real estate, situate in the county of Burlington aforesaid, and that the said Caleb Newbold and John Black, two of the executors as aforesaid, entered into the possession thereof, and took and received the rents, issues, and profits of the same; and that the said executors afterwards, during the lifetime of the said Charles 30 D. Newbold, and the said Caleb Newbold and John Black, his survivors after his death, under the authority contained in the will of the said testatrix, at different times sold and conveyed the whole of the said land and real estate and timber, and that the said Caleb Newbold and John Black took and received themselves the whole of the prices and considerations of the said several sales, and that they, the said Caleb Newbold and John Black, as executors as aforesaid, received themselves the whole amount of the personal estate of the said deceased into their own hands, excepting the said sum of three thousand dollars advanced to your oratrix as aforesaid, 40 and the whole amount of the proceeds of the said real estate, and that the same was more than sufficient to answer and satisfy all the

testatrix's just debts, funeral and testamentary expenses, and legacies.

And your orator and oratrix further show unto your Honor, that afterwards, *to wit*, in the term of November, in the year of our Lord one thousand eight hundred and thirty-three, the said Caleb Newbold (by the name of Caleb Newbold, jun.,) and John Black, surviving executors as aforesaid, exhibited an account of their said executorship in the Orphans' Court of the county of Burlington aforesaid, who decreed an allowance thereof, by which it was made
10 to appear that there was a balance of the estate of the testatrix, amounting to the sum of thirteen thousand nine hundred and ninety-two dollars and thirty-five cents, as in and by the said account, now affiled of record in the surrogate's office of the county of Burlington aforesaid, or a certified copy thereof, in the possession of your orator and oratrix, and ready to be produced, as this honorable court may direct, will fully appear.

And your orator and oratrix further show unto your Honor, that afterwards, *to wit*, in the term of August, in the year of our Lord one thousand eight hundred and thirty-six, the said Caleb Newbold
20 (by the name of Caleb Newbold, jun.,) and John Black, as surviving executors as aforesaid, exhibited another account (praying therein an allowance for an alleged error in their first account) in the Orphans' Court of the said county of Burlington, who decreed an allowance thereof, by which it was made to appear that there was a balance of the said estate in their hands of thirteen thousand three hundred and eight dollars and seventy-four cents, and a balance due to your oratrix, on account of her share of the residue of the said estate, over and above the said sum of three thousand dollars advanced to her as aforesaid, of only three hundred and twenty-seven
30 dollars and eighteen cents, as by the said account, affiled of record in the surrogate's office aforesaid, or a certified copy thereof, now in the possession of your orator and oratrix, and ready to be produced, as this honorable court may direct, will more fully appear.

And your orator and oratrix further show unto your Honor, that there is fraud and mistake in the statement of the said accounts in the Orphans' Court of the county of Burlington aforesaid, in this, that neither in the first or last account, as settled by the said Caleb Newbold and John Black, as surviving executors as aforesaid, was there any mention made or account taken, of or by them, of the said
40 sum of three thousand dollars advanced by the said testatrix in her lifetime to your oratrix, the said Lydia Whitall as aforesaid, and expressly mentioned and declared by the said testatrix to be a part

of her estate, and expressly directed by her, together with other the residue of her estate, consisting of the residue of her personal estate after the payment of debts, funeral charges, and the legacies in her will before mentioned and given, and of the proceeds of the sales of her real estate to be divided into four equal parts, and given and disposed of as in the said will is particularly mentioned; and that the said Caleb Newbold and John Black, surviving executors as aforesaid, fraudulently and unlawfully omitted to set forth the same in the said accounts respectively, or to render any account thereof whatever, as by the provisions of the aforesaid will they 10 were required, and as in justice and equity they ought to have done.

And further, that they fraudulently and unlawfully omitted to charge themselves, in the said last account so settled by them as aforesaid, with any amount or sum for interest which had accrued upon the sum of thirteen thousand three hundred and eight dollars and seventy-four cents, (that being alleged by them, in their last account, to be the true balance of the said estate in their hands and with which they were chargeable) or upon any other sum or sums, from the time of the settlement of their first account, in the term of 20 November, in the year of our Lord one thousand eight hundred and thirty-three, as aforesaid, up to the time of exhibiting the said last account, in the term of August, in the year of our Lord one thousand eight hundred and thirty-six, as in justice and equity they ought also to have done.

And your orator and oratrix further show, that if the said Caleb Newbold and John Black, as surviving executors as aforesaid, had accounted for the said sum of three thousand dollars, which, by the will of the testatrix, was expressly ordered to be taken as a part of the residue of her estate, and to be divided into four equal parts as 30 aforesaid, the true balance and residue of the estate of the testatrix, to be divided among the four residuary legatees therein named, would have been the sum of sixteen thousand three hundred and eight dollars and seventy-four cents, with interest thereon, or upon all except the said sum of three thousand dollars, from the time of the settlement of the first account, instead of the sum of thirteen thousand three hundred and eight dollars and seventy-four cents aforesaid; and your orator and oratrix, under the said will, would have been entitled to receive on the face of the said account, as they are in fact, the one fourth part thereof, (the sum of three thou- 40 sand dollars advanced to your oratrix being a part of her said share, and she being entitled to receive only so much as the one equal

fourth part of the residue of the estate of the said testatrix might exceed the said sum of three thousand dollars,) which your orator and oratrix expressly charge is the sum of one thousand and seventy-seven dollars and eighteen cents, with interest thereon from the time of the settlement of the first account as aforesaid.

And your orator and oratrix further show unto your Honor, that being at a great distance from the town of Mount Holly, the place where the Orphans' Court of the county of Burlington is held, they received no notice whatever of the settlement of the two aforesaid accounts by the said Caleb Newbold and John Black, as surviving executors as aforesaid, and were entirely ignorant of the mode in which they were respectively settled, and of the amount of the balance decreed to be in the hands of the said surviving executors to be distributed and applied according to the directions contained in the will of the said testatrix; and that they remained in such ignorance until about the beginning of the autumn of the year eighteen hundred and forty-five, when your oratrix, being on a short visit to Mount Holly, discovered, from searching the records of the surrogate's office of said county, the mode in which the said accounts had been respectively settled, and the amount of the several balances decreed to be due thereon, which your orator and oratrix respectfully insist are erroneous, illegal, fraudulent and unjust, and so operate upon their rights and interests in the premises. And your orator and oratrix further show that the said Caleb Newbold named as one of the executors in the said will, and the said Caleb Newbold, jun., are one and the same person, and not other and different.

And your orator and oratrix being (as they are advised) entitled to the aforesaid sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars advanced by the said testatrix, in her lifetime, to your oratrix, with interest thereon from the sixth day of November, in the year of our Lord one thousand eight hundred and thirty-three, they have at divers times and in a friendly manner applied unto the said Caleb Newbold and John Black, and requested them to pay and satisfy unto your orator and oratrix the said legacy or sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars, so as aforesaid advanced, together with the interest thereon from the time aforesaid, agreeably to the intention of the said testatrix, in and by her said will declared and expressed.

And your orator and oratrix well hoped that such their reason-

able requests would have been complied with, as in equity and justice they ought to have been; but now so it is, may it please your Honor, that the said Caleb Newbold and John Black, combining and confederating with divers persons at present unknown to your orator and oratrix, but whose names, when discovered, your orator and oratrix pray may be inserted herein, with apt and proper words to charge them as defendants hereto, absolutely refuse to pay unto your orator and oratrix the said legacy, or sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars, so as aforesaid advanced, with the interest thereon as aforesaid, or any part thereof, or even the sum of three hundred and twenty-seven dollars and eighteen cents, which is due to them upon the face of the last above mentioned account, as settled by them in the Orphans' Court as aforesaid, sometimes pretending that the said testatrix never made and executed her last will and testament of such date, purport, and effect as herein before mentioned and set forth, or any other last will and testament, the contrary whereof your orator and oratrix charge to be true; and at other times they pretend that the whole of the personal and real estate of the said Rachel Newbold, deceased, hath been by them, the said Caleb Newbold and John Black, as surviving executors as aforesaid, appropriated to the payment of the debts of the said testatrix, and that they had no assets in their hands out of which to pay the legacies in the said will, whereas your orator and oratrix expressly charge, that there was sufficient estate which came to the hands of the said Caleb Newbold and John Black, as surviving executors as aforesaid, to pay off and satisfy all the said debts and legacies. And at other times they pretend there never came into their hands more assets of the estate of the said testatrix than were barely sufficient to pay off the debts and legacies, and that, after paying and satisfying the same, there was no residue of the estate of the said testatrix left to be divided, as in the said will is directed; whereas your orator and oratrix expressly charge, that there was a clear evidence of the estate of the said testatrix, after paying all the debts and legacies, amounting, on the sixth day of November, in the year of our Lord one thousand eight hundred and thirty-three, to the sum of sixteen thousand three hundred and eight dollars and seventy-four cents, to be divided and disposed of as in the said will is directed.

And at other times they pretend that they have duly settled, before the Orphans' Court of the county of Burlington aforesaid, a final account of the administration of the said estate, and that by

the said account, so settled, your orator and oratrix are entitled to receive, from the residue of the estate of the said testatrix, nothing over and above the said sum of three thousand dollars advanced to your oratrix as aforesaid, and that the said account is final and conclusive against the claim of your orator and oratrix, or any claim they may have; whereas your orator and oratrix expressly charge, that they are entitled to receive the aforesaid sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars so as aforesaid advanced, with
10 interest thereon as aforesaid, and that both the said accounts were erroneously, fraudulently, and illegally settled, and therefore no bar whatever to the rights of your orator and oratrix in the premises.

But nevertheless, under such other like pretences as aforesaid, or some other equally unjust and unreasonable, the said Caleb Newbold and John Black, surviving executors as aforesaid, refuse to pay to your oratrix the said legacy or sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars, so as aforesaid advanced, or any part thereof, or any part of the interest thereof.

20 All which actings, doings, and pretences are false and contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator and oratrix—In consideration whereof, and forasmuch as your orator and oratrix can only have adequate relief in the premises in a court of equity, where matters of this kind are properly cognizable and relievable, to the end, therefore, that the said Caleb Newbold and John Black, and their confederates, when discovered, may, upon their several and respective corporal oaths or affirmations, to the best and utmost of their several and respective knowledge, remembrance, information,
30 and belief, full, true, direct, and perfect answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same were herein repeated, and they and every of them distinctly interrogated thereto.

And that the provisions and intents of the will of the said testatrix may be fully carried into effect and established, and that the said Caleb Newbold and John Black may, by the decree of this honorable court, be required to pay to your orator and oratrix the said legacy or sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dol-
40 lars, advanced as aforesaid, with the interest thereon as aforesaid; and that if it be deemed necessary for the purpose of effecting this object, then that the two respective decrees of the Orphans' Court

of the county of Burlington, by which the two aforesaid false, fraudulent, and erroneous accounts were allowed and passed, may, by the decree of this honorable court, be vacated, set aside, annulled, and for nothing holden; and that the said accounts, settled in the Orphans' Court as is herein before stated, may be opened, and that the said Caleb Newbold and John Black, if they shall admit assets, may be decreed to pay to your orator and oratrix the said sum of one thousand and seventy-seven dollars and eighteen cents, over and above the said sum of three thousand dollars, so as aforesaid advanced to your oratrix, with interest thereon as 10 aforesaid; and if the said Caleb Newbold and John Black shall not admit of assets of the said testatrix sufficient to answer the same, then that an account may be taken, by and under the direction of this honorable court, of the personal estate and effects of the said testatrix, and of the rents, issues, and profits of her real estate, and of the proceeds of the sales of the said real estate and timber, and also of the testatrix's funeral expenses, debts, and legacies, and that the clear residue of the real and personal estate of the said testatrix may be ascertained, and that such share thereof as shall appear to belong and be due to your orator and oratrix 20 may be paid to them or to your orator in right of your oratrix; and that your orator and oratrix may have such other and further relief in the premises as to your Honor shall seem meet and the nature of the case may require.

May it please your Honor, the premises being considered, to grant unto your orator and oratrix a writ or writs of subpœna of the state of New Jersey, to be directed to the said Caleb Newbold and John Black, surviving executors of Rachel Newbold, deceased, and their confederates, when discovered, therein and thereby commanding them, and each of them, at a certain day and un- 30 der a certain penalty, therein to be expressed, personally to be and appear before your Honor in this honorable court, then and there to answer the premises, and to stand to, abide, and perform such order and decree in the premises as to your Honor shall seem meet, &c. And your orator and oratrix will ever pray, &c.

JN. C. TEN EYCK,
Solicitor and of counsel with complainant.

The joint and several answers of John Black and Caleb Newbold, surviving executors of the last will and testament of Rachel Newbold, late of the county of Burlington, deceased, defendants, to the bill of complaint of Samuel Whitall and Lydia Whitall his wife.

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit and advantage which may or can be had, by exception or otherwise, to the many errors, uncertainties, and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as they are advised it is material or necessary for them to make answer unto, say—

That they admit the said Rachel Newbold, in the said bill of complaint mentioned, being possessed of a considerable personal
10 estate, and also seized and possessed of a considerable real estate, and being of sound mind, made her last will and testament in writing, signed, sealed, and published in the presence of three subscribing witnesses, and executed in due form of law to pass real and personal estate, of such date, and containing such a clause and item, and such orders, directions, and bequests, as in the said bill is in that behalf stated and alleged; and that the said testatrix did, in and by her said will, nominate, constitute, and appoint these defendants and her son, Charles D. Newbold, executors thereof, as in the said bill is in that behalf also alleged; but for greater certainty,
20 as to the date and contents of the said will, these defendants crave leave to refer to the same, when produced.

And these defendants further answering say, they admit it to be true that the said Rachel Newbold, being so seized and possessed of the said real and personal estate, died on or about the time mentioned in the said bill, without altering or revoking her said will; and that thereupon, on or about the time in the said bill of complaint set forth, these defendants and the said Charles D. Newbold, the executors named in the said will, duly proved the same, and took upon themselves the burthen of the execution thereof, in the
30 manner in the said bill set forth.

And these defendants further answering say, they admit that these defendants, the said Caleb Newbold and John Black, and the said Charles D. Newbold, as executors of the said Rachel Newbold, and on or about the time in the said bill stated, did cause an inventory and appraisement to be made of the personal estate of the

said Rachel Newbold, deceased, of such contents, and of such purport and effect, as in the said bill is in that behalf stated, and that the same was duly proved and recorded as in the said bill is stated; but for greater certainty, as to the date and contents of the said inventory and appraisement, these defendants crave leave to produce the same, and to refer thereto when produced.

And these defendants further answering admit, that the said Charles D. Newbold died at or about the time set forth in the said bill of complaint, leaving these defendants him surviving.

And these defendants further answering say, they admit that the 10 said Rachel Newbold died seized of several valuable tracts of land and real estate situate in the county of Burlington, in the state of New Jersey, and that, by virtue of the authority given by the said will, the same were sold and conveyed, at various times, to different purchasers, in the manner in the said bill of complaint in that behalf stated and alleged.

And these defendants further answering say, they admit that the said John Black, one of these defendants, took and received the rents, issues, and profits of the real estate of the said testatrix; and also took and received, and possessed himself of the whole of the 20 prices and considerations and proceeds of the sales of the said real estate, as well as the whole amount of the personal estate of the said testatrix, not including therein or taking as part thereof the said sum of three thousand dollars in the said bill of complaint mentioned, and thereby alleged and charged to have been advanced by the said testatrix to the said Lydia Whitall; but these defendants deny that any portion of the said rents, issues, and profits, or any part or portion of the proceeds and prices and considerations of the said real estate, or any part or portion of the said personal estate of the said testatrix, or any part or portion of the money or pro- 30 ceeds arising from the sale and disposition thereof, ever came to the hands or possession of this defendant, the said Caleb Newbold, as executor of the said Rachel Newbold, deceased, or otherwise, save only and excepting a legacy of one thousand dollars, given to him, the said Caleb Newbold, by the will of the said testatrix, and paid to him by the said John Black, and that portion of the residue of the estate of the said testatrix, in and by her last will and testament given and bequeathed to him, the said Caleb Newbold, in trust for Rachel Newbold Whitall, a daughter of the said testatrix.

And these defendants further answering say, that the said John 40 Black has been the acting executor in the execution of the said will, and in the administration, management, and settlement of the

estate of the said testatrix, the said John Black collecting the proceeds and settling the accounts of the said estate, and paying the debts and legacies, the said Charles D. Newbold and this defendant, Caleb Newbold, in the lifetime of the said Charles D. Newbold, and this defendant, Caleb Newbold, since the decease of the said Charles D. Newbold, acting only for conformity, and without intermeddling with the moneys arising from the real and personal estate of the said Rachel Newbold, deceased.

And these defendants further answering, the said John Black, of
10 his own knowledge, and the said Caleb Newbold, upon information which he believes to be true, say, that some time in the month of May, in the year of our Lord one thousand eight hundred and twenty-two, the said Samuel Whitall, one of the complainants in the said will named, and for a long time previous, had been embarrassed and straightened in his circumstances, and that the said Samuel Whitall and his estate were, and for a considerable period previous had been insolvent and unable to pay his debts and liabilities; that while the said Samuel Whitall remained in this situation, the said complainants made several applications to the said Rachel
20 Newbold, in her lifetime, for a loan or advancement of money; that their applications were for a long time unsuccessful.

And these defendants further answering say, that they have been informed, and believe and trust they will be able to prove, that one great cause of the ill success of the said applications was, that the said Rachel Newbold refused to advance to the said complainants, or either of them, any money, except upon the express condition that the said Samuel Whitall should pay interest to her, the said Rachel Newbold, for the use of the same; and, knowing the insolvent condition of the said Samuel Whitall and his estate, that
30 the said Rachel Newbold insisted that the said Samuel Whitall should give to her, to secure the payment of the said interest money as it became due, some other and better security than the mere personal security of the said Samuel Whitall; that the said Samuel Whitall was ready and willing, and tendered himself ready and willing, to pay to the said Rachel Newbold interest for the use of the said money, if the same should be advanced by the said Rachel Newbold; but that, to give the security required as aforesaid by the said Rachel Newbold, the said Samuel Whitall was unable or unwilling.

40 And these defendants further answering, the said John Black, of his own knowledge, and the said Caleb Newbold, upon information that he believes to be true, say, that after considerable negotiation,

and on or about the twenty-first day of August, in the year of our Lord one thousand eight hundred and twenty-three, the said Rachel Newbold was induced to make to the said complainants, or to one of them, a loan or advancement of three thousand dollars, and that the said sum of three thousand dollars was paid and delivered, by the said Rachel Newbold, to the said complainants, or one of them; but, as these defendants have been informed, and believe and hope to prove, the said loan or advance was made, and the said money paid by the said Rachel Newbold to the said complainants, or to one of them, upon the express condition that the said Samuel Whitall should pay interest to the said Rachel Newbold for the use of the said money so loaned or advanced, and that the said Samuel Whitall expressly promised and agreed, to and with the the said Rachel Newbold, in consideration of the said loan or advancement, to pay her interest for and upon the same; and, as a proof that such was the understanding and agreement between the said parties, these defendants, further answering in manner last aforesaid, say, that on or about the same twenty-first day of August, in the year last aforesaid, the said Samuel Whitall made, and signed and delivered to the said Rachel Newbold, his promissory note or agreement in writing, of the terms and effect following, that is to say: I promise to pay Mrs. Rachel Newbold, on or before the fifteenth day of August, two hundred and ten dollars, being one year's interest on three thousand dollars, which Lydia Whitall has received from her mother, and which money is to be realized on account of the said Lydia N. Whitall; that the said promissory note or agreement in writing was signed by the said Samuel Whitall, and dated "Georgetown, August 21st, 1823," as by the said promissory note or agreement in writing, now in the custody of these defendants, or one of them, and ready to be produced and proved, when and where this honorable court may direct, will fully appear, and to which, when produced, these defendants for greater certainty refer themselves.

And these defendants, further answering in manner last aforesaid, show that the said Lydia N. Whitall, named in the said promissory note or agreement in writing, is the same person as the said Lydia Whitall, one of the complainants in the said bill, and not other or different. And these defendants, further answering in manner last aforesaid, say, that on or about the tenth day of January, in the year of our Lord one thousand eight hundred and sixteen, the said Samuel Whitall became and was indebted to the said Rachel Newbold in the sum of five hundred and thirty-nine dollars and thirty

cents, for five thousand three hundred and ninety-three pounds of pork, sold and delivered to him, the said Samuel Whitall, by the said Rachel Newbold, at his request; and being so indebted, the said Samuel Whitall made, and signed and delivered to the said Rachel Newbold, his promissory note or agreement in writing in words and figures following, that is to say: "Received, January 10, 1816, of Mrs. Rachel Newbold, 5393 lbs of pork, at $10 per hundred, making $539.30, to be paid 25th March next," as by the said promissory note or agreement in writing, signed by the said Samuel
10 Whitall, and now in the custody of these defendants, and ready to be produced and proved when and where this honorable court may direct, will more fully appear, and to which, when produced, these defendants for greater certainty pray leave to refer themselves.

And these defendants further answering in manner last aforesaid say, that after the making of the said last mentioned promissory note or agreement in writing, and in the spring of the year eighteen hundred and nineteen, the said complainants, with their family, removed from the state of New Jersey, and ceased to be residents of the said state, and have not, at any time or for any period since the
20 said last mentioned month of May, resided in the said state, nor has the said Samuel Whitall, since his said removal, been at any time within the limits of the said state, save once, to the knowledge of these defendants, but during the whole interval has continued to reside in the District of Columbia. And these defendants further answering in manner last aforesaid say, that the said complainants have not, nor hath either of them or any other person or persons, ever paid any portion of the interest money accruing upon the said sum of three thousand dollars, so loaned or advanced as aforesaid to the said Rachel Newbold, or to any person or persons for her
30 use, in her lifetime, or to the executors of the said Rachel Newbold, or to either of them, or to any other person or persons for their or either of their use, since the death of the said Rachel Newbold, saving only and excepting the interest money accruing for the first year on the said loan or advancement, and to secure the payment whereof the said Samuel Whitall made and delivered the said promissory note or agreement, herein before first set out, to the said Rachel Newbold as aforesaid; and that the said complainants have not, nor hath either of them, or any other person or persons, ever paid or satisfied to the said Rachel Newbold, or to any other per-
40 son or persons for her use, during her lifetime, or to her said executors, or to any or either of them, or to any person or persons, for their or either of their use, since her decease, the said principal

sums of money intended to be secured by the said two promissory notes or agreements in writing herein before set out, or any part thereof, or the interest money due and payable thereon, or any part thereof, but that the same and every part thereof remain unpaid and unsatisfied.

And these defendants further answering, deny that any fraud was intended, designed, or practised by these defendants, or by either of them, in the making and stating of the inventory and appraisement of the personal estate of the said Rachel Newbold, deceased, which was exhibited by them and the said Charles D. Newbold, 10 deceased, as executors of the said Rachel Newbold, deceased, to the surrogate of the county of Burlington, and proved before him, and by him recorded, as in the said bill is in that behalf stated and alleged; and they deny that they omitted to bring into the said inventory and appraisement the said sum of three thousand dollars, so loaned or advanced as aforesaid, and to take any account thereof, from any fraudulent or improper motive or design whatsoever; and further answering they say, that if the said sum of three thousand dollars ought to have been included in the said inventory and appraisement, the omission on the part of these defendants to in- 20 clude the said sum of three thousand dollars in the said inventory arose from the fact, that it did not occur to these defendants, or to either of them, nor were they informed that it was proper to embrace the said sum of three thousand dollars in the said inventory and appraisement, and not from any unjust or unlawful design or intention to benefit themselves, or either of them, or to aggrieve, injure, or defraud the said complainants, or either of them, or any other person or persons whomsoever.

And these defendants further answering admit, that at the term of November, in the year of our Lord one thousand eight hundred 30 and thirty-three, as in the said bill is set forth, an account was stated and audited by Charles Kinsey, then being surrogate of the county of Burlington aforesaid, and was by him reported to the Orphans' Court of the said county for allowance and settlement, which account purported to be the account of Caleb Newbold, jun., and John Black, surviving executors of the last will and testament of the said Rachel Newbold, deceased; but, in the making and stating of the said account, this defendant, Caleb Newbold, was not concerned, nor did he join or assist, neither was the same sworn or affirmed to by him, the said accounts having been made 40 and stated by the said surrogate, with the co-operation and through information and vouchers furnished to him by this defendant, John

Black, alone, by whom all the moneys, effects, and estate of the said testatrix had been reduced into possession, and by whom all the disbursements and payments out of the same had been made, and by whom the estate of the said testatrix had been administered, and the debts and legacies paid.

And this defendant, John Black, severally answering for himself says, and this defendant, Caleb Newbold, believes it to be true, that this defendant, John Black, having collected in the estate of the said Rachel Newbold, deceased, and paid and satisfied the debts
10 and funeral expenses of the said testatrix delivered, and having paid all the specific and pecuniary legacies given by her will, except only the bequests made to her residuary legatees, and nearly the whole of the said residuary legacies, as will be herein after stated, prepared to have his accounts audited and stated, using the name of this defendant, Caleb Newbold, for conformity's sake alone, the said Caleb Newbold having received none of the estate of the said testatrix, as executor as aforesaid nor otherwise, except as is herein before set forth, and having made no payments or disbursements for or on account of the same; and that this defendant, John
20 Black, for the purpose of having the said accounts stated and audited as aforesaid, proceeded to the said surrogate, and submitted to him the papers and vouchers relating to the estate of the said testatrix; and among the papers submitted, as aforesaid, were the said two promissory notes or agreements in writing herein before recited and set forth, made and signed by the said Samuel Whitall, this defendant, John Black, at the same time calling the attention of the said surrogate to the will of the said Rachel Newbold, deceased, and especially to the provisions therein relating to the said advancement or loan made to the said Lydia Whitall, and
30 informing him, the said surrogate, that the money due upon the said promissory notes, or any part thereof, could not be collected or recovered, in consequence of the insolvency of the maker, the said Samuel Whitall; and it appearing to the said surrogate, as it had long before appeared to this defendant, John Black, that the amount due from the said Samuel Whitall to the estate of the said Rachel Newbold, deceased, including the interest due upon the said advancement or loan, and the moneys due upon the said promissory notes or agreements in writing, and the said loan or advancement of three thousand dollars, would greatly exceed in
40 amount the one-fourth part of the residue of the estate of the said Rachel Newbold given and bequeathed by her said will to the said Lydia Whitall, even if the said loan or advancement and the said

several sums of money, so due and owing from the said Samuel Whitall as aforesaid, were added to the said accounts; and that with the said loan or advancement of three thousand dollars, and the amount due and owing from the said Samuel Whitall as aforesaid, the said complainants would have in their possession a larger sum than the amount to which the said Lydia Whitall was entitled under and by virtue of the provisions of the said will, as stated in the said bill, it was considered by this defendant, John Black, and the said surrogate that the three other residuary legatees named in the will of the said Rachel Newbold would be entitled to receive 10 the whole residue of the estate; and by the advice and with the concurrence of the said surrogate, the said sum of three thousand dollars, and the amounts due and owing from the said Samuel Whitall, as aforesaid, were omitted from and kept out of the said accounts, the said surrogate at the same time giving as a further reason for the omission that the addition of the said sum of three thousand dollars would swell the amount of the said estate and of the said account to no purpose, and would give these defendants, as surviving executors as aforesaid, commission upon a large sum of money that had never passed through their hands or come into 20 their possession.

And these defendants further answering say, that they admit that the Orphans' Court of the said county of Burlington decreed an allowance of the said accounts, as stated and audited by the said surrogate, with the omission aforesaid, and that it appeared that the balance of the estate of the said testatrix in the hands of these defendants, as surviving executors as aforesaid, for distribution amounted to the sum of thirteen thousand nine hundred and ninety-two dollars and thirty-five cents, as in the said bill is in that behalf alleged. 30

And this defendant, John Black, further severally answering for himself says, that he denies, and this defendant, Caleb Newbold, believes such denial to be true, that any fraud was intended, designed, or practised in the making and stating of the said accounts, or that the said omissions were fraudulently made in the said accounts, or made from any fraudulent or improper motive or design whatever; and the said John Black, further severally answering for himself says, and this defendant, Caleb Newbold, believes it to true, that if the said loan or advancement of three thousand dollars, and the said moneys so due and owing from the said Samuel 40 Whitall as aforesaid, or any or either of them, or any part thereof, ought to have been included in, and taken account of in the said

accounts, and to have formed part thereof. The omission to include the said omitted several sums in the said accounts arose from, and was caused by the facts, motives, and reasons above assigned, and from the conviction and belief on the part of this defendant, John Black, that it was not right or proper to include the said several omitted sums of money in the said accounts, and that they did not properly form part thereof, and not from any unjust, inequitable, or unlawful design or intention either to benefit himself, or to aggrieve, injure, or defraud, or deprive of their just rights, the said complain-
10 ants, or either of them, or any other person or persons whomsoever.

And the said Caleb Newbold, severally answering for himself says, that he denies, and this defendant, John Black, believes such denial to be true, that, in the making and stating of the said accounts, this defendant, Caleb Newbold, designed, intended, or practised any fraud or deceit whatever, or that he fraudulently made any omissions in the said accounts, or that he omitted to charge any item or items, sum or sums of money, in the said accounts, from any fraudulent or unlawful design or intention whatever, either to benefit himself, or to aggrieve, injure, or defraud, or
20 deprive of their just rights, the said complainants, or either of them, or any other person or persons whomsoever.

And this defendant, John Black, further severally answering for himself says, that he admits, and this defendant, Caleb Newbold, believes such admission to be true, that, at or about the time in the said bill alleged, a second and supplemental account of the estate of the said Rachel Newbold, stated and audited by the surrogate, purporting to be the accounts of these defendants, as surviving executors of the last will and testament of the said Rachel Newbold, deceased, by which said last mentioned account, after an allowance
30 to these defendants of six hundred and seventy-three dollars and sixty-one cents, for an error in their previous account, it appeared that the balance of the estate of the said Rachel Newbold in the hands of these defendants, as surviving executors as aforesaid for distribution under the said will, was thirteen thousand three hundred and eight dollars and seventy-four cents, and that an allowance of the said supplemental account was decreed by the said Orphans' Court, as by the said bill of complainant is stated and alleged, but for greater certainty these defendants pray leave to refer to the same, when produced.

40 And these defendants further answering say, that the said John Black acted without the interference or co-operation of this defendant, Caleb Newbold, in the making and stating of the said supple-

mental accounts, the name of this defendant, Caleb Newbold, being used for conformity only, and that, so far as concerns or relates to the action, interference, or connection of this defendant in the making and stating of the said supplemental account, the same was made and stated, as was the said account first above mentioned, for the same reasons as are herein before given why this defendant did not join, act, aid, or interfere in the making and stating of the said first account.

And this defendant, John Black, further answering for himself denies, and this defendant, Caleb Newbold, believes such denial to be true, that any fraud was designed, intended, or practised in the making and stating of the said supplemental account, or that the said advancement or loan of three thousand dollars, or the said several sums of money due and owing from the said Samuel Whitall as aforesaid, or any or either of them, or any part thereof, were fraudulently omitted in the said supplemental account, or were omitted from any fraudulent design or intent whatever; and this defendant, John Black, further answering severally for himself says, and this defendant, Caleb Newbold, believes it to be true, that this defendant, John Black, was induced to omit the said several last sums of money in the said supplemental account by the same facts, reasons, and motives as caused him to omit the same sums in the said first account, and herein before set forth, and not by any unjust, fraudulent, or inequitable design or intention either to benefit himself or to injure, aggrieve, defraud, or deprive of their rights the said complainants, or either of them, or any other person whomsoever.

And the said Caleb Newbold, further answering for himself says, that he denies, and this defendant, John Black, believes such denial to be true, that in the making or stating of the said supplemental accounts, or in the said supplemental account itself, this defendant, Caleb Newbold, designed, intended, or practised any defraud or deceit whatever, or that he fraudulently made any omissions in the said supplemental account, or that he omitted to charge any item or items, sum or sums of money, in the said supplemental account from any fraudulent or unlawful intent or design whatever, either to benefit himself, or to injure, aggrieve, defraud, or deprive of their rights the said complainants, or either of them, or any other person or persons whomsoever.

And this defendant, John Black, further answering severally for himself says, and this defendant, Caleb Newbold, believes it to be true, that this defendant, John Black, finding that the residue of the

estate of the said Rachel Newbold would be considerable, commenced, as early as they ear one thousand eight hundred and twenty-five, to make payments to the said Anna Stratton and to this defendant, Caleb Newbold, as trustee of Rachel N. Whitall, and to retain an account of Sarah Black, wife of this defendant, John Black, three of the residuary legatees named in the will of the said testatrix, on account of their said residuary legacies, and continued, at different times, to make such payments, as funds came into his hands from the rents, issues, and profits of the real estate, and from
10 the sale of the real and personal property; and that as early as the month of January, one thousand eight hundred and twenty-nine, this defendant, John Black, had paid to this defendant, Caleb Newbold, as trustee as aforesaid, the sum of two thousand and sixty-four dollars and eighty cents, and continued to pay interest to the said Rachel N. Whitall upon the balance, which it was supposed would be payable to the said Caleb Newbold, as trustee as aforesaid, under the residuary clause in the will of the said Rachel Newbold, until on or about the twenty-third of July, eighteen hundred and thirty-six, when this defendant, John Black, paid to the said Caleb
20 Newbold, as trustee as aforesaid, the sum of one thousand and nine hundred and forty dollars and thirty-three cents, which, with the payments previously made as aforesaid to the said Caleb Newbold, as trustee as aforesaid and to the said Rachel N. Whitall, amounted to the sum of four thousand four hundred and thirty-six dollars and eighteen cents, being only six cents less than one-third of thirteen thousand three hundred and eight dollars and seventy-four cents, the amount appearing and decreed to be in the hands of these defendants, as executors as aforesaid, in the said supplemental account; and that, as early as the fifteenth day of June, in the year
30 of our Lord one thousand eight hundred and thirty-three, this defendant, John Black, had paid to John L. Stratton, the husband of the said Anna Stratton, another residuary legatee named in the will of the said testatrix, the sum of four thousand four hundred and twenty-three dollars and ninety cents; and that some time in the month of August, eighteen hundred and thirty-six, this defendant, John Black, paid to the said John L. Stratton, on account of the legacy of the said Anna Stratton, the balance necessary to make up the full sum of four thousand four hundred and thirty-six dollars and twenty-four cents. And this defendant, John Black, retained in
40 his own hands a similar sum of four thousand four hundred and thirty-six dollars and twenty-four cents on account of his wife, the said Sarah Black, another residuary legatee named in the said will.

And this defendant, John Black, further answering severally for himself says, and this defendant, Caleb Newbold, believes it to be true, that he admits that no interest was charged in the said supplemental account against the defendants, as surviving executors as aforesaid, upon the said sum of thirteen thousand three hundred and eight dollars and seventy-four cents, or upon any other sum; and he further says, that the reason why the same was omitted to be charged, was because he had paid and distributed, to and among the said three residuary legatees, nearly the whole of the said sum of thirteen thousand three hundred and eight dollars and seventy-four 10 cents, and was paying interest, as aforesaid, for and upon the balance remaining in his hands, as aforesaid; and these defendants, further answering, deny that there was any fraud designed, intended, or practised in the omission to charge themselves with interest on the said supplemental account.

And these defendants further answering, the said John Black of his own knowledge, and the said Caleb Newbold upon information that he believes to be true, say, that the said several accounts allowed by the Orphans' Court, as aforesaid, were respectively settled and allowed after notice had been given according to law, and that 20 the said complainants did not file their bill in this honorable court until the month of December, one thousand eight hundred and forty-six, a period of more than thirteen years from the time of the settlement of the first account, as aforesaid, and of more than ten years from the time of the settlement of the said supplemental accounts; and that although the said complainants resided out of the state of New Jersey, yet that the said Lydia Whitall had friends and relations residing at Mount Holly, where the said accounts were settled, during the whole of the said period: and these defendants, further answering, respectfully submit that the conduct of the said complain- 30 ants, in delaying to present their claims against these defendants, as surviving executors of the said Rachel Newbold, for so long a period of time, and waiting until the whole residue of the estate had passed from the hands of these defendants, as executors as aforesaid, and had been distributed, would impose great hardship upon these defendants, if at this late day the said accounts, or either of them, should be opened and should prevent this honorable court from viewing with a friendly eye so stale a claim; and they further respectfully submit, that the long acquiescence of the said complainants, although they were in circumstances far from affluent, in the mode in which the 40 said accounts were settled and allowed, and their failure and neglect to take any step whatever to inquire into and ascertain the mode in which the said accounts had been settled and allowed, and

the balance that had been decreed to remain in the hands of these defendants, as surviving executors as aforesaid, until the autumn of the year one thousand eight hundred and forty-five, as in the said bill is stated, furnish strong evidence that the said complainants knew that they already possessed and had received the full share to which they, or either of them, were or was entitled under the will of the said testatrix.

And these defendants further answering say, that if this honorable court should be of opinion that there is any error or mistake in the
10 said accounts so settled and allowed as aforesaid, or either of them, and that the same, or either of them, should be opened, then these defendants further answering say and respectfully submit, that although by the will of the said Rachel Newbold, deceased, she bequeathed to the said Lydia Whitall, wife of the said Samuel Whitall, and not to the said Samuel Whitall himself, the equal one-fourth part of the residue of the estate of the said testatrix, after deducting therefrom the said loan or advancement of three thousand dollars, yet the bequest so made to the said Lydia Whitall being of personal estate, it is in law a chose in action to which the said Samuel Whitall is
20 entitled, and which he has full and legal right to make his own exclusive property, by reducing the same into possession; and that these defendants, as surviving executors as aforesaid, should be permitted to charge the said complainants or the said Samuel Whitall with the said several sums of money so due and owing from him as aforesaid to the estate of the said Rachel Newbold, deceased, for interest upon the said loan or advancement of three thousand dollars, and for the moneys due and owing upon the said two promissory notes or agreements in writing herein before mentioned, or with some or one of them; and that if the said accounts, or
30 either of them, should be opened, and the said sum of three thousand dollars added thereto, then these defendants further say, and respectfully submit, that there should be added to the said account or accounts so opened and surcharged the said several sums of money so due and owing from the said Samuel Whitall to the estate of the said Rachel Newbold, deceased, or some or one of them, and if any thing should be found due to the said complainants, or either of them, upon such accounting and surcharging, that then these defendants should be permitted to deduct from the amount so found due to the said complainants, or either of them, the
40 amount of the said several sums of money so due and owing from the said Samuel Whitall, as aforesaid, to the estate of the said Rachel Newbold, deceased, and to pay to the said complainants the

balance only, if a balance should be found due to the said complainants, or either of them; but if a balance should be found due the estate of the said Rachel Newbold, that the said Samuel Whitall should be decreed to pay the same, or that these defendants should receive an allowance thereof.

And this defendant, John Black, further answering severally for himself says, and this defendant, Caleb Newbold, believes it to be true, that this defendant, John Black, has frequently, to and in the presence of the solicitor of the complainants, tendered himself ready to account with the said complainants for and concerning the 10 estate of the said Rachel Newbold, and concerning the said accounts settled in the Orphans' Court as aforesaid, and concerning the bequest given to the said Lydia Whitall, in and by the will of the said testatrix, provided the said complainants or the said Samuel Whitall would account with the defendants concerning the said several sums of money so due and owing as aforesaid from the said Samuel Whitall to the estate of the said Rachel Newbold, and would allow these defendants or the said estate, upon such accounting, the amount thereof, but to do so the said complainants, through their solicitor, have wholly refused, and still refuse so 20 to do.

And these defendants further answering say, they admit that this defendant, John Black, had in his hands, or had paid and distributed as aforesaid, in the month of August, in the year one thousand eight hundred and thirty-six, the sum of thirteen thousand three hundred and eight dollars and seventy-four cents, and that the same constituted and were assets of the estate of the said Rachel Newbold, deceased, to be distributed under the residuary clause in the said will, as set forth in the said bill of complainants; and they further admit, that if the said sum of three thousand dollars 30 ought to have been added to the said account, the residue of the estate of the said Rachel Newbold, at the said last mentioned date, would have been the sum of sixteen thousand three hundred and eight dollars and seventy-four cents.

And these defendants further answering say, that it appears, by the complainants' bill, that the said Rachel Newbold, in and by her said will, has given one fourth part of the said residue of her estate to Anna Stratton, one other fourth part thereof to Sarah Black, and one other fourth to this defendant, Caleb Newbold, as trustee of the said Rachel N. Whitall, and that the said Anna 40 Stratton, if living, or her personal representatives, if she be deceased, is or are interested in the said residuum or residue: and

these defendants further answering say and respectfully submit, that the said Anna Stratton, if living, or her personal representative or representatives, if she be deceased, should be made a party or parties to the said bill of complaint, and unless brought in and made a party or parties thereto, that these defendants cannot safely perform any decree that may be made by this honorable court; and they further submit, whether the said Sarah Black should not be made a party to the said bill of complainant, and the said Caleb Newbold, as trustee of the said Rachel N. Whitall.

10 And these defendants deny all and all manner of combination or confederacy, wherewith they are charged in the said bill of complaint, without this, that any other matter or thing in the said bill contained, and not herein well and sufficiently answered unto, confessed or avoided, traversed or denied, is true, to the knowledge or belief of these defendants.

All which matters and things these defendants are ready to aver, prove, and maintain, as this honorable court may direct, and they pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

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ROBT. D. SPENCER,
Solicitor for and of counsel with defendants.

Examination of witnesses on behalf of the defendants, October 17, 1851.

Clayton Newbold, of the township of Springfield, in the county of Burlington, a witness produced on the part of the aforesaid defendants, John Black and Caleb Newbold, surviving executors of Rachel Newbold, deceased, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declares and says—I have known Samuel Whitall; his present wife is Lydia N. Whitall, daughter of Daniel and Rachel Newbold; he has been married twice; I first knew him in the year eighteen hundred and eighteen; he then resided in Deptford 30 township, Gloucester county, New Jersey, at the "Grove farm," four miles below Woodbury. My father, William Newbold, purchased that farm; he purchased it in the spring of eighteen hundred and nineteen. Joseph W. Newbold, son of William, moved on the farm in the spring of eighteen hundred and nineteen. When Joseph W. Newbold moved on the farm, in the spring of 1819, Samuel Whitall left there, and moved to the District of Columbia—

at any rate he left the state of New Jersey. I have understood that he has always since then resided out of the state of New Jersey. I was at his house in Georgetown, in the District of Columbia, when he was there keeping house and residing in the winter of 1832 and 1833. I was also at his house in July, 1848; he was still residing and keeping house at the same place in Georgetown. Shortly after Samuel Whitall left New Jersey, he became insolvent, and his creditors received a dividend; my father received a dividend as one of the creditors.

CLAYTON NEWBOLD. 10

Before JOSEPH F. BURR, *M. C. C.*

James Eakin, of the township of Northampton, in the county of Burlington, and state of New Jersey, a witness produced on the part of the aforesaid defendants, John Black and Caleb Newbold, executors of Rachel Newbold, deceased, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declares and says—I have lived in the District of Columbia; I moved there in June, 1800; I moved there at that time to reside there; I continued to reside there till the month of June, eighteen hundred and forty-five; during that period of time 20 I was very intimately acquainted with Samuel Whitall; part of the time I have mentioned Samuel Whitall resided in the District of Columbia. I am under the impression that he resided in the District of Columbia thirty years—it may have been a year or two over; he continued to reside there up to 1848; he has never during that period resided any where else. I was very well acquainted with his son Benjamin G. Whitall. I was present at the marriage of Benjamin G. Whitall; he married Rachel Newbold, a daughter of Daniel and Rachel Newbold; the marriage took place at Mount Holly, in the county of Burlington; it took place after the removal 30 of Samuel Whitall to the District of Columbia; I should suppose it was some three or four years subsequent to his removal to the District of Columbia; during the time of his and my residence in the district, I was very often in the habit of visiting his family, I suppose about monthly; the present wife of Samuel Whitall was Lydia Newbold, daughter of Daniel and Rachel Newbold.

JAMES EAKIN.

Before JOSEPH F. BURR, *M. C. C.*

Robert W. Ogden, of the county of Philadelphia, in the state of Pennsylvania, a witness produced on the part of the aforesaid de-

fendants, John Black and Caleb Newbold, executors of Rachel Newbold, deceased, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declares and says—I resided for many years in the city of Camden, in the county of Gloucester, in the state of New Jersey, and also for many years upon a farm in the township of Waterford, in the same county. I was acquainted with Samuel Whitall; I knew him from the year eighteen hundred and twelve to his removal to the District of Columbia. In 1812, Samuel Whitall resided in Dept-
10 ford township, in Gloucester county, state of New Jersey; he lived upon a farm there; I think he resided there until he removed to the District of Columbia; he removed upwards of twenty or thirty years ago to the District of Columbia, I presume it was somewhere in the neighborhood of eighteen hundred and nineteen, about that time; from eighteen hundred and twelve up to the time of his removal, I was in the habit of seeing him very frequently; he was a director of the state bank at Camden. I was clerk of that bank during that period; our official intercourse brought us together once or twice a week during that period; I have seen him
20 write; I have seen him attach his signature to checks and notes; I think I should recognise his signature; part of the time I was teller of the bank, and part of my duty was to become familiar with signatures; it was part of my duty to ascertain as to the genuineness of signatures; I have seen him sign his name more than once; I have repeatedly seen him sign checks at the bank.

A letter being produced, marked *Exhibit A.* on the part of the defendants, John Black and Caleb Newbold, surviving executors as aforesaid, and being shown to the witness, he says—I should have no hesitation in saying that the signature to that letter is the
30 signature of Samuel Whitall, and the body of the letter I believe to be in his handwriting also. A letter, marked *Exhibit B.* on the part of the said defendants, being shown to the witness, he says—I have no doubt that the signature to that letter is the signature of Samuel Whitall; I believe the body of the letter to be in his handwriting also. A letter, marked *Exhibit C.* on the part of the said defendants, being shown to the witness, he says—I believe the signature and that letter to be the signature of Samuel Whitall, and that the body of the letter is his handwriting. A letter, marked *Exhibit D.* on the part of the said defendants, being shown to the
40 witness, he says—the signature of that letter is the signature of Samuel Whitall, and the body of the letter is in his handwriting. A letter, marked *Exhibit E.* on the part of the said defendants,

being shown to the witness, he says—that the signature to that letter is the signature of Samuel Whitall, and the body of that letter is in the handwriting of Samuel Whitall. A deed of conveyance from Samuel Whitall to John Black, Marked *Exhibit F.* on the part of the said defendants, being shown to witness, he says—the signature to the said deed is the proper signature and handwriting of the said Samuel Whitall. This Samuel Whitall married Lydia Newbold, a daughter of Daniel and Rachel Newbold.

R. W. OGDEN.

Before JOSEPH F. BURR, *M. C. C.* 10

FINAL DECREE.

This cause coming on to be heard at a regular term of the Court of Chancery of New Jersey, held at Trenton on the 26th day of May, A. D. eighteen hundred and fifty-two, in the presence of the counsel of the parties respectively, and the pleadings, depositions, exhibits, and proofs having been duly read, and the arguments of the counsel on both sides being heard and considered, and the Chancellor having taken time to advise thereon, and now, on this twentieth day of October, A. D. eighteen hundred and fifty-two, it satisfactorially appearing to the court, as well by the pleadings as by the proofs in the cause, that John Black and Caleb Newbold, the 20 then surviving executors of Rachel Newbold, deceased, did, on the fifteenth day of August, A. D. eighteen hundred and thirty-six, settle their accounts, as such surviving executors, in the Orphans' Court of the county of Burlington, in said state, and by which settlement there appeared to be a balance then in the hands of said surviving executors of Rachel Newbold, deceased, as ascertained by the decree of said court, of thirteen thousand three hundred and eight dollars and seventy-four cents; and it further appearing that Rachel Newbold, deceased, in and by her last will and testament, dated the seventh day of May, A. D. eighteen hundred and twenty 30 four, ordered and directed that the whole residue of her estate, consisting of the residue of her personal estate, after payment of her debts, funeral charges, and legacies therein before given and bequeathed of the proceeds of the sale of her real estate, and of the sum of three thousand dollars, by her theretofore advanced to her daughter Lydia Whitall, one of the complainants, be divided into four equal parts, and the one fourth part thereof she then gave to her said daughter Lydia, but the sum of three thousand dollars, already

advanced to the said Lydia to be a part of her share, and she was
to receive, under said bequest, only so much as the one equal fourth
part of the residue of the testatrix's whole estate might exceed the
sum of three thousand dollars; and it further appearing to the satis-
faction of said court, that in ascertaining said balance or residue in
the hands of the said surviving executors, as fixed and ascertained
by the Orphans' Court aforesaid, no notice was taken of the said
sum of three thousand dollars referred to in said will, and as is par-
ticularly specified and set forth in the complainant's bill of com-
10 plaint; and it further appearing that, since the filing of the bill in
this case, Caleb Newbold, one of said defendants, hath departed this
life, and that John Black, his co-executor, (and against whom said
suit is continued) is now the sole surviving executor of Rachel
Newbold, deceased, and chargeable with the duty of fulfilling and
carrying into effect the said last will of the deceased, and that the com-
plainants are entitled to relief in the premises against the said John
Black, surviving executor as aforesaid, it is now, on this said twen-
tieth day of October, A. D. eighteen hundred and fifty-two, at Tren-
ton aforesaid, by the said Chancellor, ordered, adjudged, and de-
20 creed, that to the said sum of thirteen thousand three hundred and
eight dollars and seventy-four cents, ($13,308.74) the balance or re-
sidue named in said account filed in the Orphans' Court of Burling-
ton county as aforesaid, there be added the further sum of three
thousand dollars, as directed by said will, and the further sum of
two hundred and ten dollars, ($210) with interest from August 15th,
A. D. 1824, up to August 15th, A. D. 1836, being the amount of
the promissory note or agreement of said Samuel Whitall, dated
August 31st, 1823, claimed as a set-off, and more particularly de-
scribed in the answer of said surviving executors, and which said
30 sum, together with the interest from August 15th, A. D. 1824,
amounts to three hundred and sixty-one dollars and twenty cents,
(361,20) and the aggregate amount of which several sums is sixteen
thousand six hundred and sixty-nine dollars and ninety-one cents
($16,669.91) the one fourth part of which last named sum, with in-
terest from August 15th, A. D. 1836, after deducting therefrom the
three thousand dollars *advanced*, and the said debt of three hundred
and sixty-one dollars and twenty cents, is the sum of fifteen hundred
and eighty-eight dollars and ninety cents, which sum last named re-
mains due and owing from the said John Black, surviving executor
40 as aforesaid, to the said complainants.

And it appearing to the Chancellor to be equitable and proper,
under the circumstances of the case, that the costs of the said sur-

viving executor in this suit should be paid out of the residuary estate aforesaid, and the said costs having been taxed at the sum of fifty-two dollars and seventy-eight cents, it is therefore further ordered, that the sum of thirteen dollars and nineteen cents, being the one fourth part of the said costs, be deducted from the said sum of fifteen hundred and eighty-eight dollars and ninety cents. And it is ordered, adjudged, and decreed, that the said John Black, surviving executor as aforesaid, pay to the said complainant the sum of fifteen hundred and seventy-five dollars and seventy-one cents, which is the sum due after deducting as aforesaid the costs as aforesaid, within 10 thirty days after service upon him of a certified copy of this decree.

B. WILLIAMSON, *C.*

Court of Errors and Appeals.

JOHN BLACK, surviving executor of Rachel Newbold, deceased, appellant, *and* SAMUEL WHITALL and LYDIA, his wife, respondents,	*On appeal.*

To the Honorable the Court of Errors and Appeals in all causes of law. 20

The humble petition of John Black, surviving executor of Rachel Newbold, deceased, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree, made in the Court of Chancery, bearing date on the twentieth day of October, in the year of our Lord one thousand eight hundred and fifty-two, in a certain suit, wherein Samuel Whitall and Lydia his wife were complainants, and your petitioner and others were defendants, in this, to wit:

1. That in and by said decree it is declared and ordered that the sum of three thousand dollars, mentioned in the complainants' bill and in the will of Rachel Newbold, deceased, shall be added to 30 the sum of $13,308.74, the balance or residue set forth in the account filed by the said John Black, and Caleb Newbold, deceased,

then the surviving executors of the said Rachel Newbold, deceased, in the Orphans' Court of the county of Burlington, on the 15th August, 1836.

2. That the said complainants are not charged with interest on the said sum of three thousand dollars, as ought to be done by said decree, in case the said $3000 are brought in and added to the said account.

3. That in and by said decree it is determined that the said settlement of the accounts of said executors, so made as aforesaid, on the 15th of August, 1836, was not acquiesced in and agreed to by said complainants, as a final settlement of said estate and as a family arrangement between the parties.

4. That in said decree it is further declared, that the amount of a certain bill for pork sold and delivered by the said Rachel Newbold to the said Samuel Whitall, bearing date January 10, 1816, and amounting to the sum of $539.30, as set forth in the answer of the said John Black and Caleb Newbold, surviving executors as aforesaid, with the accruing interest, should not be allowed by way of set-off in favor of the estate of said Rachel Newbold, deceased, and the said executors, or the survivor of them, against any claim of the complainants seeking to charge the estate of said Rachel Newbold or the executors of said estate.

5. That in and by said decree the final account of said executors, as rendered and settled in the Orphans' Court of the county of Burlington, are opened, or altered and changed, when by law the said account was final, and not liable to be altered or changed, or opened, for any of the causes mentioned and assigned in the said bill or decree.

And your petitioner humbly appeals from the said decree, and from such parts thereof as are above set forth and specified, on the ground that the same are erroneous.

Your petitioner therefore prays that the said decree may be, in the particulars aforesaid, reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

ROBERT D. SPENCER,

Solicitor and of counsel with appellant.

EXHIBITS.

The following papers were proved, and marked exhibits in the cause in the Court of Chancery, and are herein before referred to, in pages 26 and 27, *to wit:*

On the part of the defendants, John Black *and* Caleb Newbold.

The following letters from Samuel Whitall to John Black:

The 1st, dated Georgetown, May 25th, 1822, and marked *Exhibit A.* on the part of the said defendants.

The 2d, dated Georgetown, June 25th, 1822, and marked *Exhibit B.* on the part of the said defendants.

The 3d, dated Georgetown, May 22d, 1823, and marked *Exhibit C.* on the part of the said defendants.

The 4th, dated Georgetown, December 16th, 1823, and marked *Exhibit D.* on the part of the said defendants.

The 5th, dated Georgetown, May 9th, 1824, and marked *Exhibit E.* on the part of the said defendants.

Also, 6th, the draft of the conveyance of certain property in trust, by Samuel Whitall to John Black, dated in May, A. D. 1822.

The following papers and exhibits were read, and used upon the argument in the Court of Chancery, by agreement between the parties, as if proved before a master in chancery, subject to all legal exceptions, *to wit:*

On the part of the said defendants.

1st. A certain paper, set forth in the answer of the said defendants, dated Georgetown, August 21st, 1823, made and executed by the said Samuel Whitall to the said Rachel Newbold, to secure the sum of $210, with interest, and which paper is marked *Exhibit G.* on the part of the said defendants.

2d. A paper, set forth in the answer of the said defendants, dated January 10th, A. D. 1816, from the said Samuel Whitall to the said Rachel Newbold, to secure the payment of the sum of $539.30, and which is marked *Exhibit H.* on the part of the said defendants.

On the part of the complainants, Samuel Whitall *and* Lydia Whitall.

1st. A certified copy of the last will of the said Rachel Newbold, deceased, dated May 7th, A. D. 1824, and marked *Exhibit A.* on the part of the said complainants.

2d. A certified copy of the inventory of the estate of the said Rachel Newbold, deceased, dated June 16th, 1824, and marked *Exhibit B.* on the part of the said complainants.

3d. A certified copy of the account of John Black and Caleb Newbold, surviving executors, &c., of the said Rachel Newbold, deceased, as settled in the Orphans' Court of the county of Burlington, at November term, A. D. 1833, and marked *Exhibit C.* on the part of the said complainants.

4th. A certified copy of the supplemental account of the said John Black and Caleb Newbold, as surviving executors as aforesaid, as settled in the said Orphans' Court, at the term of August, A. D. 1836.

SAMUEL WHITALL and LYDIA, his wife, v. JOHN BLACK, surviving executor of Rachel Newbold, deceased,	*Chancellor's opinion.*

Rachel Newbold having, by her last will and testament, ordered certain legacies to be paid out of her personal estate, disposed of all the residue of her estate, both real and personal, as follows: "I do hereby direct, authorize, and empower my executors, herein after named, to make sale of all the residue of my estate, whatsoever and wheresoever, real, personal, and mixed, at such time as in their discretion they may think expedient for the advantage of my legatees, and to make, execute, and deliver to the purchaser and purchasers of my real estate sufficient deeds of conveyance for the same in fee simple absolute; and the whole residue of my estate, 10 consisting of the residue of my personal estate after the payment of my debts, funeral charges, and the legacies herein before given and bequeathed, of the proceeds of the sales of my real estate, and of the sum of three thousand dollars by me heretofore advanced to my daughter Lydia Whitall, wife of Samuel Whitall, I order and direct to be divided into four equal parts, one equal fourth part whereof I give and bequeath to my daughter Ann Stratton, one other fourth part thereof I give to my daughter Lydia Whitall, but the sum of three thousand dollars, already advanced to my said daughter Lydia Whitall, to be a part of her share, and she to receive under this bequest only so much as the one equal fourth part 20 of the residue of my whole estate, as above mentioned, may exceed the said sum of three thousand dollars; one other equal fourth part thereof I give and bequeath to my daughter Sarah Black, and the remaining fourth part thereof I give and bequeath to my son Caleb Newbold, his executors and administrators, in trust," &c., &c.

The surviving executors, Caleb Newbold and John Black, who are two of the defendants in the original bill, settled their accounts in the Orphans' Court of the county of Burlington, in the August term, 1836, of that court. By the account stated by the surrogate, and allowed by the court, the balance of the estate in the hands of 30 the executors was $13,308.74.

The object of this bill is, that the complainants may recover of

the surviving executors of Rachel Newbold that portion of the residue of the estate which the testatrix bequeathed to her daughter Lydia Whitall, one of the complainants.

The complainants, in their bill, charge that the defendants committed a fraud in the settlement of their accounts in the Orphans' Court. The fraud alleged is, that the executors did not carry into their accounts the sum of three thousand dollars advanced to the complainant Lydia by the testatrix, and which, by her will, the testatrix ordered should make and constitute a part of her estate.

10 The complainants insist that, by the will of the testatrix, the sum of $3000 is to be added to the sum of $13,308.74, which would make in the hands of the executors, instead of the latter sum, as appears by the stated accounts, the sum of $16,308.74, and that the complainant Lydia, being by the will entitled to the one fourth, her proportion, after deducting from the one fourth, as directed by the will, the sum of $3000, would be the sum of $1,077.13, and not $327.18, which would be all she would receive, if the stated accounts are correct. There is no dispute between the parties as to the construction of the will. The defendants admit that the estate

20 should be settled upon the principle contended for by the complainants, but resist the payment to the complainants of any thing under the will upon other grounds, which will be noticed hereafter.

The bill is answered by John Black and Caleb Newbold, who were then the surviving executors, and against whom the bill was originally filed. Caleb Newbold has since deceased. They deny the fraud with which they are charged in the bill, and give a very satisfactory statement how it happened that the accounts were stated in the manner they were. They had in their possession, as executors, the obligations, or evidences of debt, of a large amount

30 due from the complainant Samuel Whitall, the husband of the legatee, to the testatrix. They were advised, by the surrogate, that they had a right to deduct the indebtedness of the husband from the legacy to the wife, and to charge interest, likewise, on the advancement of $3000. If this advice was correct, there was no necessity of carrying into the accounts the said sum of $3000 nor the amount which Samuel Whitall owed the estate. He was insolvent. The amount of his indebtedness to the estate, together with the interest on the advancement, would exceed his wife's interest in the residue. In this view, no one was prejudiced by the mode in which the ac-

40 counts were stated. I do not think there is any ground for charging the executors with fraud, nor do I believe they intended to commit any, in stating their accounts as they did. I do not see any neces-

sity in the case of imputing fraud to the executors. If the complainants are entitled to any thing from these executors under the will of the testatrix, their rights are in no way affected by the mode in which the executors have stated their accounts in the Orphans' Court, nor by the allowance of those accounts by the court.

The defendants, in their answer, resist the claim of the complainants upon several grounds.

First. They insist that the action of the Orphans' Court was final, and, there being no fraud or mistake, this court cannot open the accounts. 10

It is not necessary to open the accounts, or to interfere with any action of the Orphans' Court, in order to ascertain the complainants' rights, or to give them the relief they seek, if they are entitled to it. The accounts, as stated and allowed, do not in any way involve the adjudication of the complainants' rights by the Orphans' Court. The result of these accounts and the adjudication of that court ascertain the residue of the estate in the hands of the executors. That residue was to be disposed of according to the directions of the will. The complainants now claim the portion of that residue which, by the will, was given to the complainant Lydia Whitall, 20 and what that portion should be, was a question which was not in any shape before that court. The directions of the testatrix are plain. To that residue is to be added the sum of $3000, in the hands of Lydia, and then the amount is to be divided into four portions. The result is the same as if the $3000 had been carried into the accounts stated before the court. It might have been more correct so to have stated the accounts, but because they were not so stated does not involve the necessity of opening them or of interfering with them as they were passed by the Orphans' Court. The defendants do not pretend that the Orphans' Court made any adju- 30 dication upon the matters involved in the controversy between the parties, or that the court passed the accounts, in the shape they appear, for the purpose of concluding the complainants in the claims which they make in this suit.

It is not necessary, therefore, to decide the question discussed by counsel, whether this court will, in the exercise of its jurisdiction over the accounts of executors and administrators, interfere with a final settlement made by them in the Orphans' Court upon any other ground than that of fraud. The propriety of the court's interfering in cases of fraud was conceded. 40

The defendants, as a further defence, insist that, at the death of the testatrix, Samuel Whitall, one of the complainants, was largely

indebted to her estate; that the amount of that indebtedness very much exceeded the proportion of the residue to which his wife was entitled under the will; that they, the executors, set off the one against the other, and upon that principle settled with the other residuary legatees; that the complainants have agreed to such settlement of the estate, and have acquiesced in it, as a family arrangement. The only evidence of agreement or acquiescence on the part of the complainants, is the fact, that they took no legal steps to enforce the claim which they now make until the filing of
10 the bill in this cause, which was a period of ten years from the settlement in the Orphans' Court. During this whole time the complainants were residing in the District of Columbia, and I do not think this delay is sufficient evidence, of itself, of any such acquiescence or family arrangement as is insisted.

But the important question in this controversy is, whether the court will decree that the surviving executor of Rachel Newbold shall pay to the complainants the legacy left to Lydia Whitall, without allowing the executor to set off the indebtedness which he alleges to be due from the husband of the legatee to the estate of
20 the testatrix.

The defendant insists that the fund out of which the legacy is to be paid is constituted, in part, of the debt which the husband of the legatee owes the estate; and as the object of this suit, and its legal effect, is to reduce the legacy into the absolute power and control of the husband, it is equitable that he should take in payment that part of the fund made up of his own debt.

The statement of the proposition shows that its proper solution depends upon the intention of the testatrix. If by her will, the husband's debt constitutes, in part, the fund to pay the legacy to
30 the wife, and there are no circumstances inconsistent with the fact of such being the testatrix's intention, this court ought not to aid the husband to reduce the legacy into his possession, without, at the same time, compelling him to take his own debt in part payment.

There is no technical difficulty in the way of the court's making such a decree, if it is equitable to set off the debt against the legacy.

As a general rule, courts of equity conform to the principles of law, in its application of the doctrine of set-off, and will not allow
40 debts accruing in different rights to be set off against each other. But where an equity is created under particular circumstances, a

court of equity will interpose where courts of law are not justified in doing it. *Story's Eq. Jur.* § 1437, and *note* 2.

What is the equity of the case before us? This must depend upon the nature of the debts due from the husband to the estate, the attending circumstances of their contraction, and the character of the bequest. If, from these considerations, we can come to a satisfactory conclusion as to the intention of the testatrix upon the matter in controversy, that intention ought to prevail.

In the case of *Gallego* v. *Gallego's Executors*, 2 *Brockenbrough's Rep.* 286, in which C. J. Marshall gave the opinion of the court, 10 the suit was on behalf of the wife of Henry Newman, by her next friend, to recover from the defendant a legacy which had been left to her by the will of a near relation, of whom she was an heir. The husband executed an instrument of writing, by which he transferred his marital rights in the legacy to the wife, and gave her full authority to receive it. The defendants set up that the legatee's husband was indebted to the testator, and that this debt ought to be deducted from the legacy. The court decided that where the testator advanced money in his lifetime to a *husband* whose wife was a relation, and would be at his death an heir and distributee of the 20 testator, and directed that the husband should be debited with the amount, that it might be deducted after the testator's death "from the share coming to the family," and the testator *afterwards* made his will bequeathing a legacy to the *wife*, *non constat*, that the testator designed that the advance made to the *husband* should be deducted from the legacy bequeathed to the *wife;* and the court decreed the whole legacy to be paid to the wife, without discounting the husband's debt. The case itself, together with the form of its prosecution, differs somewhat from the one we are now considering, but it is important, as showing that the case was decided upon re- 30 sorting to the intention of the testator, derived from the will, the nature of the debt due from the husband, and the circumstances attending the contracting the debt.

What was the intention of the testatrix in the case before us? It was manifestly her intention that her daughter Lydia should receive *something* from her estate, and yet she was aware that if the indebtness of her daughter's husband, as insisted upon now by the executor, should be appropriated to the payment of the legacy, his wife never could get one farthing, for that indebtedness amounts to a much larger sum than the one-fourth of the residue. If she in- 40 tended that the residue of her estate should be divided, as the executor insists, and as he with his co-executor did divide it, why did

she not say so? There was no necessity, if such was the testatrix's intention, of the particularity observed in the will, as to what should constitute the residue of her estate, and as to the manner in which the $3000 was to be carried into the accounts. Had her views corresponded with those of the executors, she would have concluded, as they did, that it was a useless expenditure of money and waste of time to have her estate settled in the particular manner she directed. As her daughter Lydia, under those circumstances, could have no interest in it, she would at once have di-
10 vided it between her three other daughters.

Let us examine the nature of the several debts sought to be deducted.

First. The executor insists upon deducting the sum of $539.30, with interest from the 25th of March, 1816, a debt of more than eight years' standing when the will was made. In the case of Gallego's executors, before referred to, C. J. Marshall remarks, "If it was perfectly clear that the testator, at the time of making his will, or at the time of his death, intended this advance to the husband to be set off against the legacy of the wife, the court would feel great
20 difficulty in disappointing such intention. But this is not perfectly clear: the debt is due from Newman, the legacy is given to his wife; the debt therefore, may still exist, and yet not be a set-off against the legacy. Had the money been advanced subsequent to the date of the will, there would have been more reason for considering it as satisfaction in part of the legacy, but even then it would not necessarily be so considered. But this advance, being made anterior to the will, gives countenance to the opinion that the testator did not intend it as a deduction from the legacy. The will being subsequent, and to a different person, furnishes proba-
30 bility to the opinion, that if a provision for the debt had been in the mind of the testator, his will would have given some indication of his intention respecting it." The will in that case was only three years subsequent to the time when the debt was contracted.

Here was a stale debt; upon the face of it, it was barred by the statute of limitations. The debtor was insolvent. The testatrix knew that, looking to the debtor's personal responsibility, her estate never would realize any part of the debt. She had the opportunity of securing it to her estate by her will, but did not see proper to do so. I do not think that the testatrix regarded that debt as
40 any part of the fund out of which any of her legacies were to be paid.

With regard to the debt of $210, the circumstances connected

with it are very different. When the testatrix made the advancement of $3000 to her daughter, she took from her husband the following writing:—"I promise to pay Mrs. Rachel Newbold, on or before the fifteenth day of August, two hundred and ten dollars, being one year's interest on three thousand dollars, which Lydia N. Whitall has received from her mother, and which money is to be realized for and on account of Lydia N. Whitall.—Sam. Whitall.—Georgetown, August 31st, 1823."

This writing is evidence that the testatrix intended that one year's interest, at least, should be paid on the advancement made to her daughter. It is true that the testatrix knew, at the time she took the writing, that Whitall was insolvent; but still her taking it showed her intention, that she meant he should account for the amount the writing called for. She confided in his future ability to pay it. She made no especial reference to it in her will. When she made her will the debt was not due. Unlike the other, upon the face of it, it was a valid subsisting debt due to her, and which she relied upon realizing for the benefit of her estate. It constituted a part of her estate which was to make up the residue, a fourth part of which she bequeathed to her daughter. There is another circumstance connected with her estate which she did not foresee, and which makes it equitable that this debt should be considered as part of the residue of the estate which should be appropriated, in part to the payment of this legacy. It is manifest that the testatrix intended her ~~three~~ four daughters, of whom Lydia, the complainant, was one, should each have a like portion of her property. Had the estate been settled within a short time after her decease, by carrying this debt into her estate and deducting it from Lydia's portion, this intention would have been carried out. But such was the nature of the property left in the hands of the executors, that the residue, which was to be divided between her ~~three~~ four daughters, was not ascertained until twelve years afterwards. Of this delay no complaint is made in the bill, nor by any one interested in the estate; and the delay seems to have been unavoidable. The consequence is, that Lydia has the benefit of the interest on the $3000 advanced to her for twelve years, and has the advantage over her three sisters to the amount of three-fourths of that interest, upwards of $1500, in the distribution of the estate. I cannot believe the testatrix ever contemplated such a result, and yet it appears to me unavoidable, as there is no principle of law which will authorize the court to charge Lydia with interest on the $3000. There seems, under these circumstances, a manifest equity, where the husband is

seeking to reduce the legacy into his absolute possession with the consent of the wife, and without her asking the interference of the court to protect the legacy for her benefit, to compel the husband to take in part payment his own debt, constituting, by the intention of the testatrix, in part, the fund out of which the legacy is to be paid. If the complainant, Samuel Whitall, is not compelled in this suit to discharge the debt, it is entirely lost to the estate; and the husband, in right of his wife, will receive that much more, in the distribution of the estate, than the three daughters of the testatrix, 10 who were each to receive an equal share with his wife.

As to charging the complainants with interest on the $3000, upon what principle can it be done? It cannot be done, unless the testatrix has so directed by her will. It may appear to us proper and just that the complainants should be charged with the interest. And yet, if we knew the reasons and motives which operated upon the testatrix's mind in the testamentary disposition of her property, we might readily appreciate the wisdom of the testatrix, in not charging her daughter with interest on this advancement. What influence did the misfortunes and pecuniary embarrassments of the 20 husband, and the necessities or wants of this daughter over her other children, exert over the mind of the testatrix, in the distribution of her estate? But we cannot speculate or decide this case upon our judgment of the justice or propriety of this particular devise. The only question with the court is, what is the devise? and not, what ought it to have been? We cannot *make* a will for the testatrix. What is written we must give effect to according to law.

I do not see room for doubt about this matter. If the testatrix had said nothing of the $3000 in her will, it could not have been brought into the estate at all, unless it could be made to assume 30 the shape of a debt due to the estate. That could not be. An *advancement* to a daughter could under no circumstances be converted into a *debt* due from the husband. It could not be a debt due from the daughter. She, being a married woman, could not contract a debt. Had Rachel Newbold died intestate, her daughter Lydia's portion of her mother's estate would have been chargeable with the $3000, as an *advancement.* In such case, it is admitted no interest could have been charged upon it. But the testatrix, by her will, has directed the $3000 which she has advanced to her daughter—but not the interest—to be charged against her daughter. The 40 court is now asked to do more than the testatrix directed, and to charge not only the $3000, but interest on it also. How shall it be charged? upon what principle? It was an *advancement* to the wife.

The testatrix so declares it. The husband is not liable for interest on it. The principal is not a debt due from the husband, and, of course, he cannot be called upon for the interest. If the husband is not in law liable for the interest, and the testatrix has not, by her will, directed it to be charged against her daughter, it is difficult to perceive by what authority or with what propriety this court can allow it as a charge against the complainants.

I am of opinion that this debt of $210 should be carried into the accounts, and that in distributing the residue, as directed by the will of the testatrix, it should be deducted from the portion to which 10 Lydia Whitall is entitled. In ascertaining the amount due to the complainants, the calculation is a simple one, and there is no necessity of the expense or delay of a reference.

The amount ascertained by the accounts is $13,308.74. To this sum is to be added the $3000, as directed by the will, and the further sum of $210, with interest from August 15, 1824, up to August 15, 1836, when the accounts were settled and the residue ascertained for distribution, which would be $361.20. The amount of the three several sums makes $16,669.91, one-fourth of which the complainants are entitled to receive, with interest from August 15, 20 1836, after deducting therefrom the $3000 advancement and the debt of $361.20.

The principal sum will be found to be $806.27, and the interest, up to October 20, 1852, $782.65, making due to the complainants, October 20, 1852, the sum of $1588.92.

The counsel can make the calculation, and point out any inaccuracy that may exist, which will be corrected.