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BILL OF COMPLAINT.

Filed June 29, 1922.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey: 10

The complainant, Anna B. Baker, executrix of the last will and testament of Richard S. Baker, late of the County of Sussex, deceased, of the Town of Morristown, Morris County, New Jersey, respectfully shows that:

1. Charles Soltau and Richard S. Baker, were in business together as equal partners trading under the partnership name of Soltau & Baker, at 184 Washington street, New York City, New York, where they conducted the business of wholesale jobbers in water cress. 20

2. Said partnership had continued for a long number of years.

3. That on September 26th, 1921, Richard S. Baker, one of the partners, died testate, a resident of the County of Sussex, in this State, a copy of his last will and testament is hereunto annexed and marked Schedule A.

4. That complainant Anna B. Baker duly qualified as executrix under his last will and testament to whom letters were duly issued by the Surrogate of the County of Sussex and who is now acting as such executrix. 30

5. That at the time of the death of the said deceased, there was a large sum of money on deposit in the name of the partnership and other assets, bills receivable due to the said partnership, which have been collected and received by the surviving partner, Charles Soltau.

6. The complainant has requested the said Charles Soltau to collect and receive the moneys due said part- 40

nership from its debtors and to account and pay over to complainant as such executrix the one-half share, to which she, as the representative of the deceased, is entitled.

7. That the said Charles Soltau has refused and neglected so to do, because Albert W. Baker mentioned in the codicil of the said Richard S. Baker claims that he, under and by virtue of the codicil to the last will and testament of the said deceased became and is entitled to one-half of all personal assets of the firm and is in no wise limited to the store fixtures, produce and supplies on hand, horse and wagon, one-half undivided interest in the cress beds, real estate and personal property at Bonny Brook and Spotsdam, in Cumberland County, Pa., the personal property at Mechanicsburg, Pa., and the one-half undivided interest in the real estate and personal property in Jefferson and Knox Counties, Tennessee, as mentioned in the will. By reason of the claim of the said Albert W. Baker, the said Charles Soltau has refused to account and pay over to complainant the one-half interest to which complainant is entitled of all the moneys on hand, accounts and bills receivable up to the time of the death of the said Richard S. Baker, deceased.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Charles Soltau and Albert W. Baker, who are the defendants in this suit may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due to complainant as such executrix from said partnership at the time of the death of said deceased.

3. That the defendant, Charles Soltau may be ordered and decreed to pay over to said complainant as such executrix the amount so found to be due as aforesaid.

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to

abide by such decree as this court may make in the premises.

KING & VOGT,
Solicitors and of Counsel with Defendant.

In the name of God Amen, I, RICHARD S. BAKER, of the Borough of Hopatcong, in the County of Sussex and State of New Jersey, do hereby make, publish and declare this present writing to be my last will and testament in manner and form following that is to say: 10

First, I order and direct the payment of all my just debts and funeral expenses.

Second, I give, devise, and bequeath all my estate, both real, personal and mixed (excepting real estate owned by Charles Soltau and me in the said Borough of Hopatcong, Sussex County, N. J., near Point Pleasant on Lake Hopatcong, which I expressly reserve from the operation of this item) unto my wife, Anna B. Baker, to her, her heirs and assigns forever. 20

Third. I give, devise and bequeath unto my sister, Nancy L. Ryerson, the use for life of my one-half interest in the real estate owned by Charles Soltau and me near Point Pleasant, Lake Hopatcong, Borough of Hopatcong, Sussex County, N. J., and upon her death, I give my said one-half, unto my brother a one-half part thereof; and unto Sylva L. Baker, widow of Sylvester G. Baker, and Jeremiah M. Baker and Alice Baker, children of said Sylvester G. Baker, deceased, the other half part thereof; to them their heirs and assigns forever. 30

Lastly I hereby nominate, constitute and appoint my said wife Anna B. Baker executrix hereof.

In witness whereof, I have hereunto set my hand and seal this first day of December, A. D. nineteen hundred and eleven.

RICHARD S. BAKER. (SEAL)

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Signed, sealed, published and declared by the said testator to be his last will and testament in our presence and we at his request, in his presence and in the presence of each other have hereunto set our names as attesting witnesses the day and the year above written.

HERBERT K. SALMON, Stanhope, N. J.
10 ELMER KING, Netcong, N. J.

I give, devise and bequeath to Albert W. Baker my one-half undivided interest in the firm of Soltau & Baker 184 Washington St. N. Y. consisting store fiixtures produce and suplies on hand, horse & wagon, my one-half undivided interest in our cress beds real estate and personal property at Bonnybrook and Spotsdam in Cumberland Co. Pa. also personal property at Mechanicsburg, Pa. also my one-half undivided interest in our real es-
20 tate & personal property in Jefferson and Knox Counties Tenn. December 12th, 1916.

RICHARD S. BAKER.

Signed, sealed and declared by the said testator to be his last will and testament in our presence we at his request in his presence and in presence of each other set our names as attesting witnesses.

WARNER G. TAYLOR, Stanhope, N. J.
30 FRANK HULSE, Stanhope, N. J.

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ANSWER.

Filed July 13, 1922.

IN CHANCERY OF NEW JERSEY.

Between ANNA B. BAKER, Executrix of the last Will and Testament of Richard S. Baker, deceased, *Complainant,* *and* CHARLES SOLTAU and ALBERT W. BAKER, *Defendants.*	*On Bill, &c.* *Answer of Defendants, Charles Soltau and Albert W. Baker.*

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The defendants, Charles Soltau and Albert W. Baker, answering the bill of complaint, say:

1. They admit paragraphs 1, 2, 3, 4 and 5.

2. They admit the complainant has requested the defendant, Charles Soltau, to render an account of the partnership and pay to the complainant a portion thereof, but they deny that she is entitled to any account, or to any portion of the partnership assets, because they say that by a fair interpretation of the codicil to the will of the said Richard S. Baker, the undivided one-half interest of the said Richard S. Baker in the firm of Soltau and Baker was given, devised and bequeathed to the said Albert W. Baker and rightfully belongs to him, and therefore he is the only one entitled to any portion of the money of the said firm other than the said Charles Soltau, and that it was the intent of the said Richard S. Baker that the said Albert W. Baker should step into the shoes of the said Richard S. Baker as a member of the firm of Soltau and Baker and have and receive all of

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the rights and interests therein which the said Richard S. Baker at the time of his death had.

3. They admit paragraph 7 of the bill of complaint, and they ask this Court to so construe the codicil to the will of Richard S. Baker as to carry out the intent of the said Richard S. Baker, as before stated, to the end that the assets of the said firm of Soltau and Baker may continue as firm assets with the substitution of Albert W. Baker for the said Richard S. Baker, deceased.

4. And the said defendants, further answering, say, that the said complainant has had a statement from the defendant, Charles Soltau, of the assets of the said firm of Soltau and Baker within the State of New York to enable the said complainant to have the transfer tax assessed by the State Comptroller of New York, and that thereafter the transfer tax was assessed against the defendant, Albert W. Baker, upon the whole share and interest of the said Richard S. Baker in the firm of Soltau and Baker, and that thereafter the said complainant did demand and receive from the defendant, Albert W. Baker, the amount of the tax so assessed and, by reason thereof, the complainant is estopped from claiming any portion of the estate and interest of the said Richard S. Baker in the firm assets of Soltau and Baker and from denying or disputing the title of the said Albert W. Baker thereto.

5. They deny that the complainant is entitled to the relief sought in the bill of compaint.

CHARLES A. RATHBUN,
Solicitor of the Defendants.

REPLY.

Filed July 18, 1922.

IN CHANCERY OF NEW JERSEY.

52-89

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Between ANNA B. BAKER, Executrix of the last Will and Testament of Richard S. Baker, deceased, *Complainant,* *and* CHARLES SOLTAU and ALBERT W. BAKER, *Defendants.*	*On Bill, &c.* *Reply.*

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The complainant joins issue on the answer of the defendant.

KING & VOGT,
Solicitors.

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IN CHANCERY OF NEW JERSEY.

Between ANNA B. BAKER, *Executrix &c.,* *Complainant,* 10 *and* CHARLES SOLTAU, *et al.,* *Defendants.*	*On Bill &c.*

Transcript of the testimony and proceedings taken stenographically in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Tuesday, September 19, 1922, at 10 o'clock in the forenoon, before his Honor John Bentley, Vice-Chancellor.

20 Appearances:

King & Vogt, by Elmer King, Esq., for the complainant.

Charles A. Rathbun, Esq., for the defendants.

Mr. King. If your Honor please, so far as the complainant is concerned there appears to be only a question of law. We contend that the codicil has a meaning against which the other side protests, and they want an accounting but refuse to do it because we have no right. I appear for the complainant, but counsel for the de-
30 fendant has set up some defense which I presume he wants to introduce.

Mr. Rathbun. I understand Mr. King admits that the codicil is in the handwriting of the testator.

Mr. King. I so admit.

Mr. Rathbun. We are concerned whether he died intestate if this really is his will. We accept it as a codicil for the purposes of this litigation, anyway. The chief point at issue is as to the question of certain moneys which
40 were on deposit in the bank in New York City in the

name of Soltau & Baker, of which Mr. Baker was a member, and whether the word "consisting" in the codicil limits the bequest to a certain interest in the property or whether it should be construed by supplying certain words immediately following which have been omitted. The firm did submit to Mrs. Baker, the executrix, or to Mr. King representing her, a statement of account, prepared by a certified public accountant in New York City, and I thought it might be well to offer that in evidence. 10

Mr. King. I object to the offer at this time on one ground only. I think the statement is fairly accurate, with the exception of the amount in the Irving National Bank. I have here a letter from that bank giving the figures somewhat at variance with those in the statement.

The Court. In view of the state of your pleadings I assume that you are not going to raise any question as to the execution of what is referred to as the codicil, are you? 20

Mr. King. No, not at all.

The Court. You are going to submit to a decision on the merits?

Mr. King. Yes, your Honor. Whatever the young man should receive we want him to have. Now, as to the amount, we can settle that between ourselves.

The Court. So you don't want to be bound by that particular item. It will be admitted with the understanding that the item of the bank account in the Irving National Bank is subject to be agreed upon by you and Mr. Rathbun. 30

(The same is marked Exhibit D. 1).

Mr. Rathbun. And I think Mr. King will also agree that this report of the certified accountant was the basis upon which the executrix, Mrs. Baker, made application for a transfer tax in New York City, and upon which the appraisers there made an appraisement. 40

Mr. King. I can't admit that. Our application to the comptroller is here and sets forth all we know about it.

Mr. Rathbun. Then you submit a copy of your application?

Mr. King. I will be very glad to do that, but I will say that that shows over there the same as it was in New Jersey, the value of a going business, and we gave them the amount of profits this company had earned during the preceding three years, that was contained in the statement that the accountant prepared under the direction of the surviving partner.

Mr. Rathbun. I offer it in evidence.

(Admitted and marked Exhibit D. 2).

Mr. King. I offer, in sequence, the demand on the Tax Department of the City of New York for the profit and loss statement filed before the decedent's death, and filed December 20, 1921.

(Admitted and marked Exhibit C. 1).

Mr. King. I also offer a notice from the appraiser to Mr. Baker, the defendant, stating, among other things, that he would sit to hear the appraisement on the 10th of February, 1922.

(Admitted and marked Exhibit C. 2).

Mr. King. I offer also a notice by the Surrogate that the amount assessed against Mr. Baker was $3,527.17 as his undivided half interest in the partnership and a tax of $176.36.

(Admitted and marked Exhibit C. 3).

The Court. There is an order here fixing the amount of the tax.

Mr. Rathbun. That is what I am asking for. Mr. King said it was among the other papers.

Mr. King. Unless there be some confusion, let me state that there were two reports. The first assessed the un-

divided interest at almost $7,000, and then an amended report came in fixing the amount thirty-five hundred odd dollars.

COMPLAINANT RESTS.

CHARLES SOLTAU, sworn on behalf of the defendants, testified as follows. 10

Direct examination by Mr. Rathbun.

Q Where is your place of business, Mr. Soltau? A 184 Washington street, New York.

Q What is the character of your business? A We are in the water-cress business there only.

Q Richard S. Baker was a partner of yours, was he not? A Yes, sir.

Q And the business was carried on under what name? A Soltau & Baker. 20

Q And how long had Mr. Richard S. Baker been a partner? A I think we started in 1898.

Q And continued down to the time of his death? A Yes, sir.

Q Do you remember the date of his death? A The 25th of September, last year, 1921; I think it was the 25th —either the 24th or 25th. It occurred during the midnight sometime.

Q Now, what did your business consist of? A The raising and selling of water-cress. 30

Q Where were the beds? A The beds are scattered from New Jersey to Tennessee.

Q Apart from Tennessee you had them in New Jersey, too? A We have one in New Jersey. I think there is only one there in Hackettstown, and then we go on down through Pennsylvania.

Q Where in Pennsylvania? A Well, the first one is in Mechanicsburg, and the next one is in Carlisle; and then we have some places which we haven't worked, and 40

one at Newville which has been abandoned—we still own it but we don't work it; then we go on down. We had a half a dozen in Virginia, but we abandoned those and sold them out or the leases expired; and then we went to Tennessee.

Q I am not talking of those you had disposed of at
10 the time of his death? A Oh, what we had at the time of his death?

Q Yes. A One at Hackettstown, one at Mechanicsburg, Penn., one at Carlisle. You can call it one or you can call it two; they come together. And then we have one at Newville, which we have discontinued the use of.

By the Court.

Q Did you have that at the time of his death a year ago? A Oh, yes, yes.

20 Q You say Newville, Penn.? A Newville, Penn. It is a mill site. Now then—I have forgotten what we did have. We have got only two places left in Tennessee now.

Q Now, in the codicil of his will he mentions Bonnybrook and Spotsdam. A That is in Pennsylvania. That is all one.

Q That is what you call Carlisle? A That is what we call Carlisle, yes. Bonnybrook and Spotsdam join together. They were bought separately, but they are now
30 one piece.

Q And that is what you have designated as Carlisle? A Yes.

Q And the property he mentions in Jefferson, Tenn., are the only two you have left in Tennessee? A Except these notes are against one of them that you have there.

Q Now, what personal property was there down in Tennessee? A The only personal property that was there when Mr. Baker died was some tools; that's all. We had disposed of and sold some of the places prior to
40 that.

Q Well, had you taken back any mortgage on any property that you had sold? A No mortgage excepting these notes that we had.

Q Were the notes secured by mortgage or vendor's lien? A I think that one of them had a vendor's lien. I don't know what kind of notes they were. We had lawyers down there and they had these notes drawn to fit the case and there is some sort of lien on it. I think it was a mortgage lien or some kind of lien. The notes themselves will tell. 10

Q Did the lawyers down there retain the papers or did they send them to you? A I don't remember. Mr. Baker had them in his hands. I wasn't here.

Q Now, what personal property is there at Bonnybrook and Spotsdam? A The personal property are mainly tools, wagons, horses, and things of that kind—farming implements, scrapers, and things like that in making these beds, and lumber. There was always lumber there, anywheres from two to three thousand feet that we had for dams. Always had that on hand. 20

Q Then you had a bank account in the firm name? A In New York, you mean?

Q Yes. A Yes, sir.

Q What bank was that? A Irving National Bank.

Q Is that the only bank in which the firm had an account? A That is the only bank that the firm had any account in in the last few years. 30

Q Just prior to Mr. Baker's death had there been any division between you and him of the profits? A Mr. Baker handed me a check for $2,500 one week before he died and he had one for himself just before he died, and he says—

Mr. King. One moment; I object to what he told you.

The Court. Don't say what he told you. 40

A (Continuing.) He gave me a check for $2,500 for my one-half share of the profits at that time.

Q Then there was other money left in the bank, was there, after you had drawn these two checks of $2,500 each? A Yes.

Q And what have you to say in reference to the business as between the summer season and the winter? A In the winter time we always had to put some money back in the business to carry it over to spring until the crops came on. Our experience has been that we had to carry a certain amount of money in the bank to tide over the winter.

Q Then the money that would be kept in the bank was working capital? A That was left there to keep the business running.

Mr. King. I think that is objectionable. I know of no law in this State which will permit the introduction of evidence by which the deceased can tell what the business profits were.

Mr. Rathbun. My point is this, your Honor: That when a man bequeaths an interest in a business in order to ascertain what was contemplated the Court has a right to take any evidence as to what the circumstances were relating to that. Now, in this case our contention is this: When the testator bequeathed an undivided one-half interest he intended to put it in such shape, or leave it in such shape, that the nephew would be able to go right on in the business with Mr. Soltau, the other partner, and therefore that the money which was left there and which was held for the purpose of carrying that business through the winter was intended to be covered by the bequest, and the Court, in order to clearly understand the attitude of the testator in that respect has a right to know the purposes of leaving it there and the general

conduct of the business, as well as the policy which had been pursued by them in the matter of maintaining the working capital during the winter time. I presume it is very seldom if ever that a case like this was ever in the court. I don't know of any just like it; I haven't found any. But it has been held in our courts that, in order to determine the intent of the testator at the time the will was made the Court will consider the circumstances the testator had in view. That is decided in 77 Equity, 345. Now, unless the Court has this testimony I don't see how the Court can place itself in the position of the testator. 10

The Court. Well, I suppose where there is a latent question of the intent of the testator, it is elementary law that all of the surrounding circumstances as to his station in life, business, and so forth, may be given. I don't know yet what construction I am going to place upon the codicil, so called. I think I will overrule your objection. 20

Q Now, had that been the policy during the term of the partnership between you and Mr. Baker?

Mr. King. I object to that question. Let him give the terms of the policy.

The Court. I think that is so, Mr. Rathbun. I will sustain the objection. 30

Q What was the condition of the cress beds in Tennessee and Pennsylvania at the time Mr. Baker died?

Mr. King. I object to that. The will speaks and a construction should be placed upon it as at the time of the codicil and not as of the time of his death. The codicil speaks of 1916 and this applies to that time.

The Court. I will sustain the objection. 40

Q Well, back in 1916 do you know what the condition of the beds was? A That's a good while back. I don't remember that now, because they vary so often. I couldn't tell you, not knowing what the conditions were during the flood periods. The floods were very destructive of our beds and I can't remember as far back as that now. We have periodical floods every two or three years, and whether it happened at that time I couldn't say.

Q Do you remember whether during the winter of 1917 it was necessary to make any repairs to those beds? A The only way I could determine that is by access to our records.

Q Have you examined those records for that purpose? A No, I have not.

Q Mr. Soltau, you spoke of a payment required to be made in the spring following the dull season in the winter; to whom were those payments made? A To whom were those payments made?

Q To whom were they made. A I don't quite understand.

Q Was it to your employees? A Yes.

Q How many employees have you? A Well, they vary from—

Q Now, just a moment; we can save a lot of time: When the winter season comes on your business goes down? A Yes.

Q How many people do you keep in your employ during the winter? A That varies again; that depends upon how much work we are going to do to the places in the winter time?

Q Then this money that you speak of is money that you reserve for the repair of the places? A Filling up ice-houses and repairing generally during the winter, which is the time that we always spend more money than we receive, and our records will show that for years back. It varies with the different seasons; sometimes it is only half as much and sometimes twice as much.

Q What would that average a year, the excess of your expenditures over the receipts? A Well, our expenses have been running from $1,500 to $2,500, along in that neighborhood, and we need that amount of money on hand to carry us.

Q Wait a minute; I haven't asked you that; I asked you how much the excess of expenditures is over the receipts? A All right, sir; anywheres from $1,500 to $2,500. It runs as high as $2,500 and then back along fifteen; in that neighborhood. That is approximately correct.

No cross examination.

ALBERT W. BAKER, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. Rathbun.

Q Where do you live, Mr. Baker? A Dover, N. J.

Q How old are you? A Thirty-nine.

Q And you are a nephew of Richard S. Baker, deceased? A Yes, sir.

Q Are you in business with Mr. Soltau? A Yes, sir.

Q How long have you been in that business? A It will be 20 years in December.

Q So you have been brought up in that business? A Nothing else.

Q And until the death of your uncle what position did you occupy? A As sort of manager, bookkeeper and general man around the store.

Q And you had been in that position how long before his death? A Well, about 19 years, I guess. I will be there 20 years in December and he died in September last. About 19 years, I guess.

Q Your uncle gave his personal attention to the business, too, didn't he? A Not very much in the last ten or twelve years.

Q Since his death you and Mr. Soltau have carried on the business in the same firm name? A Yes, sir.

Q Do you know what the partnership assets consisted of at the time of your uncle's death? A I have the accountant's report which I helped the accountant go over from the books.

10 Q Does that take in all the assets? A That takes in all the assets that he was connected with. There was a couple of places, which Mr. Soltau told you about,—this Hackettstown place, which belongs to Mrs. Baker and Mrs. Soltau.

Q But the property at Hackettstown belonged to Mrs. Baker, you say? A I should say so. There is no mention of that made in the codicil.

Q Have you seen the deeds of that property up there at Hackettstown? A Yes, I have seen them.

20 Q Well, the statement gotten up by the expert accountant does not mention real estate at all, does it? A No.

Q Well, that is what I mean. What real estate belonged to the firm?

Mr. King. Can't we admit that the property designated by Mr. Soltau, that is, the real estate, did belong to the firm? We don't dispute that. And the property at Hackettstown stood in the name of the two individuals, Charles Soltau and
30 Baker as partners.

The Court. All right; if that will be satisfactory.

Q Now, what have you to say with reference to the notes which were given for the property down in Tennessee?

Mr. King. We will stipulate that the property sold in Tennessee was not fully paid for and that it was purchased by notes secured by a mortgage
40 on the property.

Mr. Rathbun. That is all right.

Q Some of those notes had not been paid at the time of Mr. Baker's death? A Some are not paid yet.

Q A transfer inheritance tax was assessed against your interest in this firm, was it not, in New York? A Yes, sir.

Q And have you paid that tax? A Yes, sir. 10

Q You were notified of it by Mr. King? A Yes, sir.

Q Have you the letter from Mr. King? A Yes, sir.

Q Will you produce it? A You want the receipt?

Q Just the letter first. A (Witness hands paper to counsel).

Q Let me see the letter ahead of it notifying him.

(Paper handed to counsel.)

Mr. Rathbun. I first offer in evidence a letter of April 11, 1922, from Mr. King. 20

Mr. King. I want to object to it for the purpose of ascertaining the object of the offer. If it is for the purpose of showing what the deceased intended to do by his will it is inadmissible; if it is recognition of a payment assessed against him in New York City, we have nothing to do with it. This man had notices of the assessment, and if it is for the purpose of showing that he paid only $3,000 or $4,000 we have nothing to do with that; but I do not think these papers are admissible in this action. 30

The Court. In glancing through the answer I gather that the defense there set up is that there was a common consideration, that consideration being that the partnership assets in the bank in New York, half of them, were the property of this witness. Is that the fact?

Mr. Rathbun. Yes.

The Court. I think upon that ground it is admissible. 40

(The same is marked Exhibit D. 3.)

Mr. Rathbun. This letter is addressed to Mr. Albert W. Baker, 184 Washington street, New York, and is as follows:

Dear Sir:—

The amount of tax assessed on the property coming to you under the will of Richard S. Baker is as follows: Amount assessed against you $3527.17. Tax $176.36. Will you kindly enclose me a check for this amount, made payable to Anna B. Baker, Executrix, so that the title of this property may be vested in you.

Yours truly,

ELMER KING.

Mr. Rathbun. I now offer letter of April 21, from Mr. King, together with the cancelled voucher.

(Admitted, and the letter is marked Exhibit D. 4 and the cancelled voucher D. 5.)

Q At or about the time of your uncle drawing his codicil in December, 1916, did he have any conversation with you as to what he intended to do for you by his will?

The Court. Just a moment.

Mr. King. I object to that. I suppose the question is admissible if the witness answers yes or no.

The Court. Suppose you answer yes or no. Do you recall the question?

A Yes.

The Court. Suppose you answer it yes or no.

A He asked me—

The Court. No, you must answer yes or no.

A No.

Q Did he have any conversation with you at any time in regard to what he proposed to do for you by his will?

Albert W. Baker, cross.

The Court. Yes or no, Mr. Baker.

A No, sir.

Cross examination by Mr. King.

Q Mr. Baker, when did you first employ Mr. Rathbun to act as your counsel in this case? A I don't just remember now. 10

Q Was it about in January, sir? A I couldn't tell you.

Mr. Rathbun. He came to me sometime in November, 1921.

A I can tell you about.

Mr. King. I can avoid that. I offer to counsel on the other side a letter and ask him if that is his signature and the letter is in reference to this matter. 20

Mr. Rathbun. (After examining paper.) Yes.

Mr. King. This letter is dated January 25, 1922, and is addressed to me:

On behalf of Mr. Albert W. Baker I would advise you that he does not recognize the claim of Mrs. Richard S. Baker to one-half of any portion of the assets of the firm of Soltau & Baker. He claims that under the codicil to the will it was the intention of his uncle, Richard S. Baker, to give to him the one-half undivided interest in the firm which carried with it all the personal assets of the firm. We do not wish to appear in the role of being antagonistic or claiming anything which rightfully belongs to Mrs. Baker, and we would be very glad to join with you in expediting any proceedings which might be considered advisable in order to bring the matter to a speedy settlement. 30

Yours truly ,

CHARLES A. RATHBUN. 40

Q Now, prior to the time Mr. Rathbun wrote me this letter as your attorney you knew there was a dispute between yourself and Mrs. Baker concerning what you were to receive under the codicil of the deceased, did you? A Did I know there was a dispute?

Q Yes. A I didn't know that there was, but I thought possibly there might be.

Q Didn't you know there was? Hadn't you and I talked about it on the train prior to that time? A Yes, you claimed everything.

Q And then subsequent to our talk you saw Mr. Rathbun, and this letter followed? A I can tell you about the time I saw Mr. Rathbun first.

Q When did you see him? A This was a couple of days before November 17, 1921.

Q Then at that time you knew there was a dispute on concerning Mrs. Baker's right in the firm and yours, didn't you? A Yes.

Q You knew that Mrs. Baker claimed that all you got under that will was just the property that was mentioned in the codicil? A I didn't know anything about what Mrs. Baker claimed; I only know what the conversation I had with you.

Q Well, did I tell you what Mrs. Baker claimed? A I asked you what was coming to me and you said, as I understood you, "just as the will read."

Q And you claimed more than that, didn't you? A Claimed more than what?

Q Not only the items mentioned in the will but the undivided half interest in the whole partnership came to you, whether it was mentioned or not; that is what you claimed? A (The witness pauses.)

Q You claimed that you got an undivided half interest in the moneys in the bank, notes due in the partnership, and all of the real estate? A Naturally.

Q So that along in November you knew there was a dispute between Mrs. Baker and you concerning the true construction of this codicil? A What is the true construction?

The Court. Oh no, you musn't ask counsel questions.

10

Q (Question read by the stenographer.) You knew that, didn't you? A Well, there hadn't been any dispute yet at that time.

Q You knew that you and she weren't in accord with reference to the property you were to receive under the codicil? You knew that? A I don't know. I don't know how to answer that question.

Q Why did you employ Mr. Rathbun if you didn't know there was a dispute between the two of you? A To look out for my interest.

20

Q At any rate I told you what she claimed to own before you employed Mr. Rathbun? A No, you didn't.

Q Didn't you just testify to it, that I met you on the train and told you that she claimed all you got was what was set forth in the codicil? A I don't remember that it was said just in that way.

Q Now, when it came to the appraisement of the property in New York did you get notices from the Surrogate that it was to be appraised? A No.

30

Q Ever? A No, sir; not that I remember of.

Q Did you know that the property was being appraised in New York? A No, sir. You mean the appraisement of the business?

Q Yes. A No, I didn't know that there was any other appraisement, except the accountant and I went over the books and took it from the books.

Q Did you take care of the business in New York— A Yes, sir; mostly.

Q —of Soltau & Baker? A Yes, sir.

40

Q I show you a letter, addressed to Soltau & Baker, R. S. Baker Estate, November 15, 1921; did you receive the original of that letter? A I don't know about that.

Q Well, have you the letter here? A Have you got a copy of it?

Q I have got a copy of it.

10

The Court. He means that he would like to know the contents of it.

Mr. King. The letter is as follows:

> In order to secure a waiver of the New York State inheritance Tax Bureau it is necessary that you furnish the comptroller with a statement of the decedent's goods, wares, and merchandise physically in the State of New York at the time of his death. Will you kindly give us a memorandum of the goods, wares, and merchandise in your place of business and in the State of New York as of the day, of his death. We already have a memorandum of the property in the safe deposit box.
>
> We are also required to furnish a detailed and accurate book statement of decedent's business interest, copartnership interest, and collateral invested in the State of New York. Will you kindly also furnish us with this information.

20

Did you get that letter? A I believe I saw that.

30 Q And that was followed by a letter of December 5, 1921, as follows:

> Some time since I wrote a letter requesting information as to the value of the assets of this corporation in New York at the time of the death of Mr. Baker. It is impossible to do anything with the estate until this information is at hand.
>
> Will you kindly advise me whether you received my letter and if you are willing to furnish the information requested.

A I think I saw that. I was two or three of them.

40

Q And here is a letter dated December 20, 1921:

> Kindly send a profit and loss statement prior to decedent's death and a balance sheet as to that of the date of death of the business of Soltau & Baker, showing decedent's interest in the partnership. Also advise the ages of beneficiaries. Please send us a statement in triplicate of the debts, consisting of funeral, testamentary, and other debts in detail. I am enclosing our affidavit form in triplicate. Kindly fill them out and send to this office, with the schedules and copy of the will attached.

10

and that is signed "L. B. Gleason." Was the original of that letter sent you in a letter by us as follows:

> Date, December 22, 1921. Enclosed herewith we hand you letter of L. B. Gleason, Transfer Tax Attorney for New York County. You will note that he requires a profit and loss statement prior to the decedent's death and a balance sheet as of the date of the death, of the business of Soltau & Baker, showing decedent's interest in the partnership. Will you kindly enclose me such a profit and loss statement, returning this letter for our files.

20

Was the original of that letter sent to you in a letter by us? A I don't know; there were a number of letters that came there. I can't remember them all.

Q Here is a letter addressed to Charles Soltau, New York; did you open his mail? A No, sir.

30

Q Any letters addressed to Mr. Soltau you didn't open? A No, sir.

Mr. King. This is a letter to Charles A. Rathbun; have you any objection to this informal way of putting them in?

The Court. I haven't. It is the most expeditious way to put them in.

40

Mr. King. Here is a letter of January 26. I am offering it upon the theory that there was no adjustment between us:

I have your letter of January 25th, written in behalf of Albert W. Baker. Your client is entitled to the property given him by the deceased, and Mr. Baker accurately described this property. Your client now claims that notes given in part payment of a partnership property long since sold is given him by this codicil. I can see no justification for this position, nor can I find any just claim for any portion of the assets of the firm of Soltau & Baker.

Mr. Baker's uncle gave him his one-half interest in the firm of Soltau & Baker, consisting of store fixtures, produce, supplies on hand, horse and wagon, one-half undivided interest in the cress beds, real estate and personal property at Bonnybrook and Spotsdam in Cumberland county, Pa.; also personal property at Mechanicsburg, Pa.; also one-half undivided interest in real estate and personal property in Jefferson and Knox Counties, Tennessee. The limitation of the gift is described by his definite declaration of what should pass under this gift. If you have any different view about the matter will you kindly write me.

Yesterday we enclosed the State Tax Commission at New York $243 estimated tax due from this estate, and I suppose some portion of this tax is levied upon the interest of your client. As soon as the statement is received from Albany will advise you the amount due.

Yours truly.

Mr. King. Then a letter to Mr. Baker, dated March 23, 1922:

The New York appraiser in the estate of Richard S. Baker, has appraised your interest in the partnership of Soltau & Baker at $8,776.86, upon which a state transfer tax will be assessed in the State of New York. Inasmuch as you will be compelled to pay this tax, this is to give you notice that if you protest the amount of the

assessment you had better take it up at once. The State Appraiser is Mr. Albert J. Berwin, State Tax Department, Woolworth Building, New York.

Mr. King. And then another letter after the assessment had been amended April 11, 1922, and the tax is $176.36, made payable to Anna B. Baker. 10

The Court. That, I think, is already in evidence.

Mr. King. Yes; that is in, your Honor. To which he responded April 18, 1922, as follows:

Enclosed find check for $176.36 to cover New York State Inheritance tax, as requested in your letter of April 11th.

And that we enclosed to Mrs. Baker under date of April 21st; and April 21st is the acknowledgment—

The Court. That is already in as Exhibit D. 4. 20

Mr. King. I think that is all.

Mr. Rathbun. We rest.

Mr. King. May I argue the case now?

The Court. Yes. I would like to see those copies that you read, Mr. King, before you start your argument.

Mr. King. I suppose in duty bound to my client I ought to take the witness stand and testify. I am always against taking the stand. He first said 30 that I did and then he said I didn't talk with him or that he didn't remember whether I talked with him or not.

Mr. Rathbun. I thought he said Mr. King said everything.

The Court. Personally, I see no reason why you shouldn't testify, Mr. King. You may be somewhat surprised with the testimony of Mr. Baker.

Mr. King. More than surprised.

The Court. I see no impropriety in it. 40

ELMER KING, sworn on behalf if the complainant, testified as follows:

Direct examination as follows:

Immediately after Mr. Baker's death I was consulted by Mrs. Baker, and we came to New York and tried to get the will. The box was opened. The will was found in the box and the box resealed.

I think it was two or three weeks after that time that I met Mr. Baker on the train. I lived at Dover and I commuted from Morristown to Dover. I told him that Mrs. Baker claimed that under the codicil all he received was the items mentioned and that the balance of the partnership property went to her.

He disputed that and told me he had seen a lawyer in New York, and mentioned his name, and that this lawyer had given him advice as to a different construction.

Mr. Rathbun came to me, I imagine in the first part of November or the middle part of November, and told me that he had been employed by Mr. Baker and that he thought we could adjust the matter if we talked it over. We did talk it over as many as a half dozen times and it didn't result in anything; and then former Senator Rathbun sent me a letter, which is the one I read.

We had some conferences after that and both of us were wide apart as to the true construction, and I told him that he should file a bill for construction, and he said, "Why don't you do it?" and it eventuated in my filing this bill after we had agreed to disagree in order to put it before the Court for a construction.

Now, there has been at no time any talk with the senator, nor has there been any talk with Mr. Baker, where the rights of Mrs. Baker to claim anything except that mentioned in the codicil has been waived, and I had no authority to waive it, and I never did waive it. That is my statement.

No cross examination.

The Court. Mr. King, what about these letters; What do you want to do with them?

Mr. King. I am going to offer them in evidence.

The Court. Have you any objection, Mr. Rathbun, to the offering of those copies?

Mr. Rathbun. No, I haven't.

(Counsel for the complainant offers in evidence eight letters, dated, respectively:

Nov. 15, 1921,
Dec. 5, 1921,
Dec. 20, 1922,
Dec. 22, 1921,
Jan. 26, 1922,
Mar. 23, 1922,
April 18, 1922,
Jan. 25, 1922.

which are admitted in evidence without objection and marked as one, Exhibit C. 4.)

CASE CLOSED.

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Exhibit C. 1.

EXHIBIT C. 1.

(Letterhead State of New York Tax Department.)

December 20, 1921.

In Re Estate of R. S. Baker, deceased.
Late of N. J.

10

King and Vogt, Esqs.,
10 Washington Street,
Morristown, N. J.

Dear Sirs:

Kindly send us a profit and loss statement prior to decedent's death and a balance sheet as that of the date of death of the business of Soltau and Baker, showing decedent's interest in the partnership. Also advise the ages of the beneficiaries. Please send us a statement in triplicate of the debts, consisting of funeral, testamentary and other debts in detail.

20

I am enclosing our affidavit form in triplicate. Kindly fill them out, and send to this office, with the Schedules and copies of the will attached.

Very truly yours,

L. B. GLEASON.

30

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EXHIBIT C. 2.

SURROGATES' COURT.

COUNTY OF NEW YORK.

In the Matter of the Appraisal, under the Transfer Tax Law, of the Estate of *Richard S. Baker,* deceased. 10

You will please take notice, that, by virtue of an order of one of the Surrogates of the County of New York, made and dated the *10th* day of *February,* 192*2,* and pursuant to the provisions of the law relating to Taxable Transfers of property, I shall on the *2nd* day of *March,* 192*2,* at *10:45* o'clock in the *fore*noon of that day, at rooms Nos. 3105-7 Woolworth Building, 233 Broadway, 20 in the Borough of Manhattan, City of New York, proceed to appraise, at its fair market value, all the property of said above named decedent, late of ..... passing by the last Will and Testament or by the Intestate Laws of said State or by any transfer which is subject to payment of the tax imposed by the said law.

ALBERT J. BERWIN,
Appraiser.

30

New York, *Feb. 24, 1922.*
To *King & Vogt, Esqs.*
Nancy L. Ryerson
Charles A. Baker
Sylva L. Baker
Jeremiah M. Baker
Alice Baker
Albert W. Baker

40

Exhibit C. 3.

EXHIBIT C. 3.

SURROGATES' COURT.

COUNTY OF NEW YORK.

In the matter of the Transfer Tax upon the Estate of *Richard S. Baker,* deceased.	*Notice of Assessment of Tax.*

Albert W. Baker
c/o King & Vogt,
10 Washington St., Morristown, N. J.

You are hereby notified that I have, by order made the *12* day of *April,* 192*2,* assessed and fixed the cash value of such interest, estate, legacy or property as you are entitled to receive from or out of the estate left by said deceased, and the amount of the tax to which the same is liable under Chapter 483 of the Laws of 1885, and the acts amendatory thereof and supplemental thereto as follows:

Cash value thereof—*$3527.17*
Tax assessed thereon—*$176.36*

JOHN P. COHALAN,
Surrogate.

If the tax has not already been paid, it should be sent to State Tax Department at Albany, New York. This is usually done by the executor or administrator of the estate, and the amount deducted upon settlement with the parties in interest.

This notice is required by law to be sent whether the tax has or has not been paid.

EXHIBIT C. 4.

(8 letters.)

November 15th, 1921.

Messrs. Soltau & Baker,
184 Washington St.,
New York, N. Y.
R. S. Baker Estate.

10

Gentlemen:—

In order to secure the waiver of the New York State Inheritance Tax Bureau, it is necessary we furnish the Comptroller with a statement of the decedent's goods, wares and merchandise physically in the State of New York at the time of his death. Will you kindly give us a memorandum of the goods, wares and merchandise in your place of business and in the State of New York, as of the day of his death. We already have a memorandum of the property in the Safe Deposit Box.

20

We are also required to furnish a detailed and accurate book statement of decedent's business interest, co-partnership interest and collateral invested in business in the State of New York. Will you kindly also furnish us with this information?

Yours truly,

EK/MJ.

30

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Exhibit C. 4.

December 5th, 1921.

Messrs. Soltau & Baker,
184 Washington St.,
New York City, N. Y.

Dear Sirs:—

10 Some time since I wrote a letter requesting information as to the value of the assets of this corporation in New York at the time of the death of Mr. Baker. It is impossible to do anything with the estate until this information is at hand. Will you kindly advise me whether you received my letter, and if you are willing to furnish the information requested.

Yours truly,

EK/MJ.

Copy.

20 December 20, 1921.

In Re Estate of R. S. Baker, deceased.
Late of N. J.

King and Vogt, Esqs.,
10 Washington Street,
Morristown, N. J.

Dear Sirs:—

Kindly send us a profit and loss statement prior to de-
30 cedent's death and a balance sheet as that of the date of death of the business of Soltau and Baker, showing decedent's interest in the partnership. Also advise the ages of the beneficiaries. Please send us a statement in triplicate of the debts, consisting of funeral, testamentary and other debts, in detail.

I am enclosing our affidavit form in triplicate. Kindly fill them out, and send to this office, with the Schedules and copies of the will attached.

Very truly yours,

(Signed) *L. B. GLEASON,*

40

Exhibit C. 4.

December 22nd, 1921.

Messrs. Soltau & Baker,
184 Washington St.,
New York, N. Y.

Dear Sir:—

Enclosed herewith we hand you letter of L. B. Gleason, Transfer Tax Attorney for New York County. You will note that he requires a profit and loss statement prior to the decedent's death and a balance sheet as of the date of the date of the death of the business of Soltau & Baker, showing decedent's interest in the partnership. Will you kindly enclose me such profit and loss statement, returning this letter for our files?

Yours truly,

EK/MJ.
ENC.

January 26th, 1922.

Charles A. Rathbun, Esq.,
Morristown,
N. J.

Dear Sir:—

I have your letter of January 25th, written in behalf of Albert W. Baker. Your client is entitled to the property given him by the deceased, and Mr. Baker accurately described this property. Your client now claims that notes given in part payment for partnership property long since sold is given him by this codicil. I can see no justification for this position, nor can I find any just claim for any portion of the assets of the firm of Soltau & Baker.

Mr. Baker's uncle gave him his one-half interest in the firm of Soltau & Baker, consisting of store fixtures, produce, supplies on hand, horse and wagon, one-half undivided interest in the cress beds, real estate and personal

Exhibit C. 4.

property at Bonny Brook and Spotsdam, in Cumberland County, Pa., also personal property at Mechanicsburg, Pa.; also one-half undivided interest in real estate and personal property in Jefferson and Knox Counties, Tenn. The limitation of the gift is circumscribed by his definite declaration of what should pass under this gift. If you have any different view about the matter, will you kindly write me.

Yesterday we enclosed the State Tax Commission at New York, $243.00 estimated tax due from this estate, and I suppose some portion of this tax is levied upon the interest of your client. As soon as the statement is received from Albany will advise you the amount due.

Yours truly,

EK/MJ.

Exhibit C. 4.

March 23rd, 1922.

Albert W. Baker, Esq.,
184 Washington St.,
New York, N. Y.

Dear Sir:—

The New York Appraiser in the Estate of Richard S. Baker has appraised your interest in the partnership of Soltau & Baker at $8776.86, upon which a state transfer tax will be assessed in the State of New York. Inasmuch as you will be compelled to pay this tax, this is to give you notice that if you protest the amount of the assessment you had better take it up at once. The State Appraiser is Mr. Albert J. Berwin, State Tax Department, Woolworth Building, New York. 10

Yours truly,

EK/MJ.

20

Soltau & Baker
Growers, Dealers
Water Cress Produce
184 Washington Street,
New York.
C. Soltau
A. W. Baker

30

New York, Apr. 18, 1922.

Mr. Elmer King,
Morristown,
N. J.

Dear Sir:—

Enclosed find check for $176.36 to cover N. Y. state inheritance tax as requested in your letter of Apr. 11th.

Yours truly,

ALBERT W. BAKER.

40

Exhibit C. 4.

Charles A. Rathbun
Counsellor at Law
Morristown, N. J.
2 Washington Street.

Jan. 25, 1922.

Elmer King, Esq.
City.

Dear Sir:—

On behalf of Mr. Albert W. Baker I would advise you that he does not recognize the claim of Mrs. Richard S. Baker to one-half of any portion of the assets of the firm of Soltau and Baker. He claims that, under the codicil to the will, it was the intention of his uncle, Richard S. Baker, to give to him the one-half undivided interest in the firm which carried with it all the personal assets of the firm.

We do not wish to appear in the role of being antagonistic or claiming anything which rightfully belongs to Mrs. Baker and we would be very glad to join with you in expediting any proceedings which might be considered advisable in order to bring the matter to a speedy settlement.

Yours truly,
CHARLES A. RATHBUN.

EXHIBIT D. 1.

REPORT

on Partnership of Soltau & Baker
as at close of business
September 24, 1921
together with Schedules, etc. 10

N. Y. City, January 16, 1922.

Messrs. Soltau & Baker,
184 Washington St.,
New York, N. Y.

Dear Sirs:—

In accordance with your request, I am submitting herewith a financial statement of the condition of the business of the equal partnership composed of Charles Soltau and R. S. Baker (deceased), doing business under the firm 20 name of Soltau & Baker, at 184 Washington Street, New York City, as at the close of business September 24th, 1921.

The ASSETS were all verified as follows:

CASH, $4,658.09, consists of $4,189.06 balance to the credit of the partnership on deposit at the Irving National Bank; this amount was verified by balance as shown by the partnership check book and by a statement from the bank; cash and checks on hand at the office ready for deposit 30 amounting to $436.40, and collected by, and due from "Gus" $32.63, making a total of $469.03; (also at office in safe), carried as assets and considered collectible, were tickets for cash drawn for personal use—Charles Soltau, $18.75, drawn during the year 1918, and R. S. Baker, $75.00, drawn during the years 1919 and 1920; there was also in the safe a protested check for $16.40 signed by E. H. Harrington, many years old

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Exhibit D. 1.

and considered worthless; this item is not included as an asset.

ACCOUNTS RECEIVABLE, $1,338.97, consists of current accounts due from customers as detailed per Schedule A, attached to this report, all considered good and collectible. An item of $21.00 against Clark & Hutcheon for bill of 8/20/21 has been omitted, due to the payment of same having been disputed and refused. The books show this amount as unpaid, whereas Clark & Hutcheon claim that it is paid. It was decided to regard this bill as written off in preference to incurring the enmity of Clark & Hutcheon.

NOTES RECEIVABLE, $1,100.00, per Schedule B herewith attached, in detail. These are all considered good and collectible.

INTEREST ACCRUED, $154.33, is the amount of interest accrued on the foregoing Notes Receivable, as detailed per Schedule D attached.

INTEREST ACCRUED, $14.77, consists of the proportion of interest due the partnership from Irving National Bank, being 5/6 of the total amount of $17.72 credited by the bank on the daily balance of the partnership for the entire month of September, 1921.

RENTS RECEIVABLE, $55.00, due from Morris Keller for rent of loft.

INSURANCE UNEXPIRED, $10.42, is the amount calculated as paid in advance for current insurance, both compensation and fire.

CAPITAL STOCK, $100.00, consists of one share (par value $100.00) of the Capital Stock of the Bank of New Market, Tenn., made to Soltau & Baker as holders.

Exhibit D. 1.

INVENTORY, $753.60, consists of Merchandise on hand $112.50, Furniture & Fixtures $300.50, Office Stationery $10.00, Paper & Twine $258.00, and Equipment (14 pairs boots and 1 warehouse truck) $72.60, values all determined by an inventory.

The LIABILITIES are as follows: 10

ACCOUNTS PAYABLE, $802.79, is made up of current accounts unpaid as at date, per Schedule C attached.

CHARLES SOLTAU, PERSONAL, $318.71, amount due him to equalize his drawings with drawings made by Mr. Baker (deceased) during the years 1918, 1919 and 1920 for personal railroad fares, as per bill out in detail by Mr. Soltau.

WAGES ACCRUED, $98.00, consists of $72.00 due Mr. A. W. Baker and $26.00 due "Gus" at date, September 24, 1921 20

EXPENSES ACCRUED, $5.08, due "Gus" for expense moneys advanced by him during the week ending September 24, 1921.

To attempt to set up the yearly income for the past three years from the bookkeeping methods employed would involve considerable time and expense, and it was therefore decided to set up these figures from the Income Tax Statements filed for the 1918, 1919 and 1920 years as follows: 30

Year 1918,	$2,970.56
" 1919,	$3,723.34
" 1920,	$3,805.52

Total for the three years, $10,499.42, an average income of $3,499.81 per year.

40

Exhibit D. 1.

Summarizing the total assets as per Balance Sheet in the amount of $8,278.93 and deducting liabilities in the amount of $1,224.58, leaves the Net Worth of the partnership as $7,054.35, or $3,527.17 for each of the two partners.

Respectfully submitted

10 .....

Certified Public Accountant.

BALANCE SHEET

and

SCHEDULES

ASSETS:		
Cash in bank	$4,189.06	
20 " " safe	469.03	$4,658.09
Charles Soltau, personal		18.75
R. S. Baker, personal....		75.00
Accounts receivable (Schedule A)		1,338.97
Notes receivable (Schedule B)		1,100.00
Interest accrued, notes receivable (Schedule D)		154.33
30 Interest accrued, Sept. daily bank balance		14.77
Rent receivable, (Morris Keller)		55.00
Insurance unexpired		10.42
CAPITAL STOCK.		
One (1) share bank of New Market, New Market, Tenn., par		100.00

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Exhibit D. 1.

INVENTORY.			
Merchandise	112.50		
Furniture & Fixtures ...	300.50		
Office Stationery	10.00		
Paper & Twine	258.00		
Equipment	72.60	753.60	
LIABILITIES.			
Accounts payable (Schedule C)			802.79
Charles Soltau, personal.			318.71
WAGES ACCRUED.			
A. W. Baker	72.00		
"Gus"	26.00		98.00
Expenses accrued "Gus"			5.08
			1,224.58
Net worth			7,054.35
		$8,278.93	$8,278.93

SCHEDULE—A

ACCOUNTS RECEIVABLE

Fred Gunset	45.57
H. M. Noe & Co.	7.97
Rump Bros.	303.62
Clark & Hutcheon	119.87
M. J. Mulligen	80.25
Neuhaus & Thorman	13.02
E. VanWoert	17.18
John Buckle	22.50
H. Kelly & Son	94.50
Joseph Beck	1.92
P. A. Richmond	1.75

Exhibit D. 1.

Vesey Franckle	3.25
M. O'Brien & Son	21.76
J. H. Fraucke & Co.	16.59
Werblovsky	234.86
McCarren	8.19
W. G. Ihrig	21.00
A. Krayer	54.25
Waterman & Co.	63.87
M. Mergentime	48.99
S. E. Hunter	135.65
S. D. Woodruff	6.28
Charles Busner	16.13
	$1,338.97

SCHEDULE—B

NOTES RECEIVABLE

Name	*Dated*	*Payable*	*Amount*
S. E. White	January 1, 1921	September 1, 1921	$ 50.00
"	do	January 1, 1922	50.00
"	do	May 1, 1922	50.00
"	do	September 1, 1922	50.00
D. B. Hodges	January 15, 1919	3 years from date	300.00
"	do	4 " " "	300.00
"	do	5 " " "	300.00
			$1,100.00

Above notes all payable with interest at 6% per annum, and all payable at City National Bank, Knoxville, Knox Co., Tenn.

Exhibit D. 1.

SCHEDULES

and

Statement of Charles Soltau

SCHEDULE—C

ACCOUNTS PAYABLE

American Railway Express		$ 23.88	10
George C. Moyer:			
Expenses	42.07		
Wages	127.50	169.57	
New York Edison Co.		6.08	
New York Telephone Co.		10.90	
National Coal & Ice Co.		31.36	
A. B. Harnish (Feed, etc.)		25.54	20
Ira B. Lehman (Taxes)		16.62	
Western Union Telegraph Co.		2.12	
Charles Heppehammer:			
Wages	199.10		
Ice & Feed	48.14		
School Taxes	68.80		
Freight	1.12	317.16	
Cochren & Alcock (hardware)		7.05	30
Horace S. Ely & Co., (Rent for 1 5/6 months)		183.34	
Hauck Bros. (hardware)		1.75	
Garbage man		1.00	
Towel supply		1.12	
Gas		2.25	
Expense (A. W. Baker)		.75	
Plumber		2.30	
		$802.79	40

Exhibit D. 1.

SCHEDULE—D
INTEREST ACCRUED ON NOTES RECEIVABLE

8 months, 25 days on S. E. White, 200.00, ...	$ 8.83
2 years 8 months 10 days on D. B. Hodges, 900.00..	145.50
	$154.33

10

New York, N. Y., September 24, 1921.

Statement of Charles Soltau, of Soltau & Baker $318.71
To equalize Charles Soltau's personal drawings in the years 1918, 1919 and 1920 with personal drawings of R. S. Baker (deceased). Mr. Baker made these drawings for his personal carfares. The records in his own writing in the firm's possession are as follows:

1918			
	June	R. R.	$ 14.40
	Sept.	"	14.40
	Oct.	"	14.40
	Nov.	"	14.40
	Dec.	"	9.60
1919			
	Jan.	R. R.	9.60
	Apr. 1,	R. R. Tickets	14.32
	May 2,	"	14.32
	June 1,	"	14.32
	July 1,	"	14.32
	Aug. 1,	"	14.32
	Sept. 1,	"	14.32
	Oct. 1,	"	14.32
	Nov. 1,	"	14.32
	Dec. 3,	"	14.91

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30

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Exhibit D. 1.

1920

Apr.	1,	R. R.	.....	14.32
May	3,	"	.....	14.32
June	1,	"	.....	14.32
July	2,	"	.....	14.32
Aug.	3,	"	.....	14.32
Sept.	8,	"	.....	3.27
"	15,	"	.....	3.27
"	22,	"	.....	3.27
"	29,	"	.....	3.27
Oct.	1,	"	.....	17.19
Nov.	1,	"	.....	17.19
Dec.	2,	"	.....	12.34
				$337.67

Against this amount, 337.67 Mr. Baker drew to the amount of $318.71

Leaving a balance of ..... $ 18.96 which the records do not show that he drew.

EXHIBIT D. 2.

This Form to be Used Only in Cases Where Death Occurred on or Subsequent to May 14, 1919.

SURROGATE'S COURT—NEW YORK COUNTY.

10

IN THE MATTER OF The Transfer Tax Upon the Estate of *Richard S. Baker,* Deceased.	Affidavit for Appraisal Non-Resident.

STATE OF NEW JERSEY,
COUNTY OF MORRIS.

ANNA B. BAKER, being duly sworn, deposes and says:

20 I. That she resides at Borough of Hopatcong, Sussex County, N. J.

II. That said decedent died on the 26th day of September, 1921, a resident of Borough of Hopatcong, Sussex County, State of New Jersey, testate and letters testamentary were issued on the 7th day of October, 1921, by the Surrogate of the County of Sussex, State of New Jersey.

III. That deponent was appointed the Administrator
30 Executor
of this estate.

IV. That the decedent died seized and possessed of no real estate in the State of New York, and no goods, wares or merchandise physically in the State of New York, except as stated in Schedule A, hereto attached.

V. That decedent died possessed of no stock of corporations organized under the laws of the State of New York, or stock of national banking associations located in the State of New York, except as stated in Schedule A.
40

Exhibit D. 2.

VI. That decedent died possessed of no shares of stock in foreign corporations, joint stock companies and associations, and the bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized, if such stock, bonds, notes, etc., are represented by real estate in New York State, except as stated in Schedule A. (Shares of stock, bonds, etc., of such corporation, joint stock company or associations being in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation, as defined and classified by the laws of the State of New York, need not be listed.)

VII. That decedent died possessed of no interest in any partnership business conducted wholly, or partly, within the State of New York, and was not possessed of any money or capital invested in business in the State of New York, either as principal or partner, except as stated in Schedule A.

VIII. That decedent made no transfer by deed, grant, bargain, sale or gift in contemplation of death or intended to take effect in possession or enjoyment at or after death of real property, or of goods, wares, and merchandise within the State of New York; or of shares of stock of New York Corporations or of National Banking Associations located in the State of New York, or of property evidenced by or consisting of shares of stock referred to above in paragraph VI hereof; or of any interest in a partnership business conducted wholly or partly within the State of New York, except as stated in Schedule A.

IX. That at the time of decedent's death there was no property held in the joint names of said decedent and any other person, or by decedent and another as tenants by the entirety, or in the joint names of decedent and another payable to either or the survivor, or held by the

Exhibit D. 2.

decedent in trust for any other person, except as stated in Schedule A.

X. That decedent had no power of appointment under any will, deed, or other instrument, except as stated in Schedule A.

XI. That the following are the names, relationship and amount of interest of the persons among whom this estate is distributable,

Name and Relationship	Address	Age of Life Tenant	Amount of Interest
Anna B. Baker,	Landing, N.J.		Residuary.
Nancy L. Ryerson,	Landing, N.J.		Use for life property in N. J.
Charles A. Baker,	Kenvil, N.J.		Int. ¼ in property in N. J.
Sylva L. Baker,	Kenvil, N.J.		do.
Jeremiah M. Baker,	Kenvil, N.J.		do.
Alice Baker (now Alice Baker King)	"		do.
Albert W. Baker,	Dover.		½ business Soltau & Baker in New York.

XII. That the fair market value of decedent's entire estate at the time of death wherever situated is $62,000 of which $54,000 represents the value of decedent's personalty, wherever situated.

XIII. That the estimated amount of debts due New York creditors and for New York Administration expenses is $425; and the amount of other debts and administration expenses is $4,753.40.

XIV. That Schedule B, heretofore attached, contains a list of the deductions claimed, the nature of each deduction being briefly stated.

Exhibit D. 2.

XV. The facts showing the decedent to be a non-resident of the State of New York at the time of his or her death are as follows:

He has lived in Morris and Essex Counties, New Jersey, all his life. He was a councilman of the Borough of Hopatcong, Sussex County, New Jersey, when he died. His business was that of produce merchants, 184 Washington St., New York, as a partner with Charles Soltau, under the partnership name of Soltau and Baker. 10

XVI. That the decedent did not dwell or lodge in the State of New York during and for the greater part of any period of twelve consecutive months in the twenty-four next preceding his or her death except as above stated.

XVII. That this affidavit is made for the purpose of inducing the Tax Commission of the State of New York to issue waivers for the transfer of the following property: 20

A one-half interest was owned by deceased in the produce merchant business in New York conducted at 184 Washington St., New York.

ANNA B. BAKER.

Sworn to before me this 6th
day of December, 1921.

MARY L. JAMIESON,
Notary Public of N. J. 30

NOTE. Attach copy of decedent's will, if any.

40

Exhibit D. 2.

SCHEDULE "A"

Containing (1) a list of all Real Property in the State of New York, with the Assessed Value of each parcel for tax purposes, for the year of decedent's death; also, the estimated Market Value thereof, and an affidavit of appraisal thereof by a competent real estate appraiser.

10

(2) A statement of decedent's goods, wares and merchandise physically in the State of New York.

(3) A statement of stock of New York corporations, giving par value, and amount of stock issued, and of national banking associations located in New York.

20

(4) A statement of shares of stock, bonds, etc., mentioned in Paragraph VI of attached affidavit.

(5) A detailed and accurate book statement of decedent's business interest, co-partnership interest, or capital invested in business in the State of New York.

(6) A statement of property transferred in contemplation of death, or to take effect at or after death as mentioned in Paragraph VIII of attached affidavit.

30

(7) A statement of property of decedent held jointly with or in trust for another as mentioned in Paragraph IX of attached affidavit.

40

Exhibit D. 2.

SCHEDULE "B"

Containing a list of the deductions claimed, the nature of each deduction being briefly stated.

None.

In the name of God, Amen, I, RICHARD S. BAKER, of the Borough of Hopatcong in the County of Sussex and State of New Jersey do hereby make, publish and declare this present writing to be my last will and testament in manner and form following that is to say:— 10

First. I order and direct the payment of all my just debts and funeral expenses.

Second. I give, devise, and bequeath all my estate both real personal and mixed (excepting real estate owned by Charles Soltau and me in the said Borough of Hopatcong, Sussex County, N. J., near Point Pleasant on Lake Hopatcong, which I expressly reserve from the operation of this item) unto my wife Anna B. Baker, to her, her heirs and assigns forever. 20

Third. I give, devise and bequeath unto my sister Nancy L. Ryerson, the use for life of my one half interest in the real estate owned by Charles Soltau and me near Point Pleasant, Lake Hopatcong, Borough of Hopatcong, Sussex County, N. J., and upon her death, I give my said one half, unto my brother a one half part thereof; and unto Sylva L. Baker, widow of Sylvester C. Baker, and Jeremiah M. Baker and Alice Baker, children of said Sylvester G. Baker deceased, the other half thereof; to them their heirs and assigns forever. 30

Lastly I hereby nominate, constitute and appoint my said wife Anna B. Baker Executrix hereof.

In Witness Whereof I have hereunto set my hand and seal this first day of December, A. D. nineteen Hundred and eleven.

RICHARD S. BAKER. (SEAL) 40

Exhibit D. 2.

Signed, sealed, published and declared by the said Testator to be his last will and testament in our presence and we at his request, in his presence and in the presence of each other have hereunto set our names as attesting witnesses the day and year above written.

HERBERT K. SALMON, Stanhope, N. J.
10 ELMER KING, Netcong, N. J.

I give devise and bequeath to Albert W. Baker my one-half undivided interest in the firm of Soltau & Baker, 184 Washington St. N. Y. consisting of store fixtures produce and suplies on hand, horse & wagon, my one-half undivided interest in our cress beds real estate and personal property at Bonnybrook and Spotsdam in Cumberland Co. Pa. also personal property at Mechanicsburg, Pa.
20 also my one half undivided interest in our real estate and personal property in Jefferson and Knox Counties, Tenn. December 12th, 1916.

RICHARD S. BAKER.

Signed, sealed and declared by the said testator to be his last will and testament in our presence we at his request in his presence and in presence of each other
30 set our names as attesting witnesses.

WARNER G. TAYLOR, Stanhope, N. J.
FRANK HULSE, Stanhope, N. J.

40

Exhibit D. 2.

SCHEDULE A.

Paragraph No. 1.

A list of all real property in the State of New York, with the assessed value of each parcel for tax purposes, for the year of decedent's death also, the estimated market value thereof, and an affidavit of appraisal thereof by a competent real estate appraiser. 10

None.

SCHEDULE A.

Paragraph No. 2.

The following is a statement of decedent's goods, wares and merchandise physically in the State of New York:

10 barrels of water cress	$112.50
Cash register	100.00
Safe & desk	100.00
Desk	25.00
16 coils of twine	208.00
Electric motor	60.00
6 bales of paper	42.00
Paper bags	8.00
14 pair of boots	70.60
Hand truck	2.00
Stationery	10.00
Clock	7.50
Stove	8.00
	$753.60

20

30

Mr. Baker's interest in the goods, wares and merchandise aforesaid was one-half thereof, or $376.80.

See Affidavit attached.

40

Exhibit D. 2.

State kind where incorporated					*Lowest selling price on Sept. 27, 1921 (Unless otherwise stated)*
	Pref.	700	shares	Fred B. Holden Lime & Products Corp. par $10...	No record.
Del.	"	70	"	Dupont Chemical R. S. Baker, par $5.00.....	Sold 7¾ Sept. 28/21
	Com.	15	"	American Zinc & Slate R. S. Baker par $100.....	Address A. B. Borries, Joplin, Mo.
	Pref.	15	"	American Zinc & Slate R. S. Baker par $100.....	
	"	66	"	Lime & Stone Products Corp. par $10.....	1 share of preferred with 50% bonus of common offered at $9 March 1921.
	Com.	50	"	Lime & Stone Products Corp. par $10.....	
	"	25	"	Assoc. Industrials R. S. B. par $100.....	No record.
Va.	"	25	"	Tennessee Agricultural Chemical par $5.....	Offered at $.30 August 1921.
New York	"	10	"	American Tel. & Tel. (Nancy L. Ryerson) par $100	107⅜
"	"	12	"	American Tel. & Tel. (Anna B. Baker) par $100..	
N. Jersey	"	100	"	International Nickel Co. A. B. Baker, par $25.....	13½
Del.	Pref.	50	"	Atlas Powder Co. par $100.....	Bid 66½ asked 67
N. York	"	2	"	Ameri. Tel. & Tel. (Nancy L. Ryerson) par $100..	107⅜
N. York	"	10	"	Amer. Tel. & Tel. R. S. Baker par $100.....	
N. J.	Com.	6¼	"	Lake Hopatcong Park Assoc. par $100.....	No record.
N. Y.	Pref.	112	"	Am. La France Fire Eng. Co. par $100.....	Bid 73 asked 80
N. J.	Com.	16	"	Lake Musconetcong Land Co. par $100.....	No record.
N. J.	"	5	"	Lake Hopatcong Country Club, par $100.....	No record.
Del.	"	76	"	E. I. Dupont DeNemours par $100.....	Bid 112 asked 115
Delaware		100	"	Gen. Motors, debenture par $100.....	6% sold 65¼ 7% sold at 74
"	Com.	100	"	Gen. Motors, debenture par $100.....	10⅜
Organized in Texas as a Trust Estate		69	shares	Hercules Petroleum par $10.....	50c asked, no bid
Delaware	Pref.	10	"	Hercules Powder, par $100.....	80½
"	"	11	"	Hercules Voting common par $100.....	Bid 130, asked 134
Arizona		400	"	Canario Copper Co., par $10.....	Address Cameron Michel Co. 8 W 40 St. N. Y. not listed, unable to locate market.

Del.		5	"	Copper Exploration Co. par $10 ..... } Unable to locate
"	Pref.	15	"	Copper Exploration Co. par $10 ..... } any market
Organized in Texas as joint Stock Asso.		50	shares	Ajax Oil Temp. Cer. par $10 ..... 50c asked, no bid
Del.		36	"	E. I. DuPont DeNemours par $100 ..... Bid 112, asked 115
N. J.	Com.	250	"	International Nickel par $25 ..... 13½
	Pref.	15	"	American Zinc & Slate, par $100 ..... Address given above.
Montana		50	"	Anaconda Copper Mining Co. 26¾
N. J. Charter void 1910 for non-payment of taxes				
		15	shares	Pyrites Mining & Reduction Co. $10 ..... Doubtful value.
		500	"	The Agnacate Mines, par $5 ..... No record.
N. J.		10	"	Press Printers & Publishers, par $10 ..... No record.
N. Y.	Com.	15	"	Buffalo Potash & Cement, par $100 ..... Company sold in bankruptcy, 1918
N. Y.	Pref.	10	"	Buffalo Potash par $100 .....
Organized in Texas as a Trust Est.		18	shares	Hercules Petroleum $10 ..... Asked 50c no bid
Delaware Pref.		2	"	Atlas Powder par $100 ..... Bid 67, asked 73 September 1921
"	Com.	17	"	Atlas Powder par $100 ..... Bid 112, asked 119 Sept. 1921.

BONDS

New Jersey.	1-1000	McEwan Bros. 7% 1929 1/22 $1000 ..... Sale on Sept. 22, 1921 at 95
	1-1000	Atlas Powder Co. 7½-1936-Feb & Aug. $1000 ..... Bid 99 asked 99¼
	5-100	Third Liberty 4¼ 1928, Sept. 1921, $500 ..... 93.78 Low on Sept. 27.
	1-100	Victory Liberty 4¾ 1923 June 1921, $100 ..... 99.42 Low on Sept. 27.
	1-50	Third Liberty 4¼ '28 Sept. $50 ..... 93.78 Low on Sept. 27.
	3-100	4th Liberty 4¼ '38 Oct. $300 ..... 90.40 Low on Sept. 27.
	3-1000	2nd Liberty 4¼ '42 Nov. $3000 ..... 90.26 Low on Sept. 27.

Exhibit D. 2.

STATE OF NEW JERSEY
COUNTY OF MORRIS } *ss.*

NANCY L. RYERSON, of full age, being duly sworn on her oath, according to law, deposes and says:

I am a sister of Richard S. Baker, late of the Borough of Hopatcong, in the County of Sussex and State of New Jersey, deceased. At the time of his death, he had a safe deposit box in the Mercantile Safe Deposit & Trust Company, 115 Broadway, New York, N. Y. As I had no safe deposit box of my own, my brother kept for me in this box twelve shares of the American Telegraph & Telephone Co. This stock was purchased by me, and I gave my brother the money for it. All the dividends on these shares of stock have been paid to me during his lifetime.

NANCY L. RYERSON.

Sworn and subscribed to before me this 15th day of December, A. D. 1921.

MARY L. JAMIESON,
Notary Public of N. J.

Exhibit D. 2.

STATE OF NEW JERSEY }
COUNTY OF MORRIS } *ss*

ANNA B. BAKER, of full age, being duly sworn, according to law, on her oath, deposes and says, I am the widow of the late Richard S. Baker, who died a resident of the Borough of Hopatcong, in the County of Sussex and State of New Jersey. My husband died September 26th, 1921. At the time of his death, he had a safe deposit box in the Mercantile Safe Deposit & Trust Company at 115 Broadway, New York City. I had no safe deposit box of my own, and my husband kept my stock for me in his box in New York. At the time of his death, I had in this box twelve shares of the American Telegraph & Telephone Co. stock, which was in an envelop marked Anna B. Baker. I also had fifty shares of Atlas Powder Company stock, a Delaware Corporation which was likewise held by my husband in this box. There was also in this box 100 shares of International Nickel Co. stock which likewise belonged to me. The purchase was made fifty shares at a time. On the first fifty shares I received a dividend, but after the purchase of the other fifty shares, the company ceased paying dividends, and I have had no dividends on any of the International Nickel Co. stock since. All these stocks were mine, and I have always received the dividends on them, except the International Nickel Co. stock above noted. I also own a Liberty Bond of $50 and one for $100 in the said deposit box rented by my husband.

ANNA B. BAKER.

Sworn and subscribed before me this 9th day of December, A. D. 1921.

NORA C. PRUDEN,
Notary Public of N. J.

Exhibit D. 2.

SCHEDULE A.

Paragraph No. 3.

The following is a statement of the stock of New York Corporations giving par value and the amount of stock issued and of National Banking Associations located in New York.

10

		Selling price Sept. 27, 1921
N. Y.	10 Shs. American Tel. & Tel (Nancy L. Ryerson) par $100	107⅜
"	12 Shs. American Tel. & Tel. (Annie B. Baker) par $100	
N. Y.	2 Shs. American Tel. & Tel. (Nancy L. Ryerson) par $100	
	10 Shs. American Tel. & Tel. R. S. Baker, par $100	107⅜
N. Y. Pref.	112 Shs. Am. La France Fire Eng. Co. par $100	Bid 73 asked 80
N. Y. Com.	15 Shs. Buffalo Potash & Cement, par $100	Company sold in Bankruptcy, 1918.
N. Y. Pref.	10 Shs. Buffalo Potash, par $100	

20

30

SCHEDULE A.

Paragraph 4.

The following is a statement of the shares of stocks, bonds, etc., mentioned in Paragraph VI of attached affidavit.

None.

40

Exhibit D. 2.

SCHEDULE A.

Paragraph No. 5.

Following is a detailed and accurate book statement of decedent's business interests, co-partnership interest or capital invested in business in the State of New York.

10

STATE OF NEW JERSEY,
COUNTY OF MORRIS. } *ss.*

CHARLES SOLTAU, of full age, being duly sworn, on his oath according to law, deposes and says:

I reside in the Borough of Hopatcong, in the County of Sussex and State of New Jersey.

I was one of the firm of Soltau & Baker, consisting of myself and Richard S. Baker, who died September 26th, 1921, a resident of the State of New Jersey.

Mr. Baker and I were in business at 184 Washington St., New York City, at the time of his death. 20

A statement of all the decedent's goods, wares and merchandise physically in the State of New York at the time of Mr. Baker's death, or in which he had any interest is as follows:

10 barrels of water cress	$112.50
Cash register	100.00
Safe & desk	100.00
Desk	25.00
16 coils of twine	208.00
Electric motor	60.00
6 bales of paper	42.00
Paper bags	8.00
14 pair of boots	70.60
Hand truck	2.00
Stationery	10.00
Clock	7.50
Stove	8.00
	$753.60

30

40

Exhibit D. 2.

Mr. Baker's interest in the goods, wares and merchandise aforesaid was one-half thereof, or $376.80.

The business conducted by Mr. Baker and myself was the business of water-cress produce; we kept no stock of goods on hand in New York, and the foregoing statement is a true itemization of all the goods, wares and merchandise of the firm of Soltau & Baker physically in the State of New York, in which Mr. Baker had any interest.

CHARLES SOLTAU.

Sworn and subscribed to before me this
eighth day of December, A. D. 1921.

MARY L. JAMIESON,
Notary Public of N. J.

SCHEDULE A.

Paragraph No. 6.

Following is a statement of property transferred in contemplation of death, or to take effect at or after death as mentioned in Paragraph VIII of attached affidavit.

None.

SCHEDULE A.

Paragraph No. 7.

A statement of property of decedent held jointly with or in trust for another as mentioned in paragraph IX of attached affidavit.

None.

Exhibit D. 2.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } *ss.*

ANNA B. BAKER, of full age, being duly sworn, according to law, deposes and says: I have made careful investigation of the ages of the persons interested in the estate of Richard S. Baker, deceased, and they are as follows: 10

Nancy L. Ryerson,	aged	61
Charles A. Baker,	"	69
Sylvia L. Baker,	"	59
Jeremiah M. Baker,	"	30
Alice C. Baker, now Alice C. King,	"	29

Deponent further says that the following is a list of the debts due from the deceased at the time of his death and paid by this deponent as Executrix:

Oct. 1st, Note due for Stock Kelsey Motor Co...	$ 425.00
Oct. 2nd, Gillen & Young Co. (Undertaker).....	647.25
Nov. 9th, Thomas King, Digging & bricking grave	47.00
Nov. 14th, Stidworthy Garage.....	2.25
Nov. 14th, Benson's Garage.....	14.70
Oct. 8, Cigars order and received previous to death	5.40
	$1141.60

20

ANNA B. BAKER.

30

Sworn and subscribed to before me this
28th day of December, A. D. 1921.

MARY L. JAMIESON,
Notary Public of N. J.

40

Exhibit D. 2.

STATE OF NEW JERSEY,
COUNTY OF MORRIS. } *ss.*

ELMER KING, of full age, being duly sworn, on his oath, according to law, deposes and says, that he is a practicing attorney of the State of New Jersey, with offices in Morristown. I am familiar with the testamentary expenses in this State.

There will be no inventory or accounting.

The personal estate being over $50,000 the maximum commissions of 5% is usually allowed. The commissions therefore will approximate $2,500.00. Incidental expenses, say, car fare, &c., $25.00; publishing notice to creditors $11.80; attorney's fees $1500.

ELMER KING.

Sworn and subscribed this
day of December, A. D. 1921.

EXHIBIT D. 2.

Rubber stamped: State Tax Department Transfer Tax Bureau, Woolworth Building, Barclay 8080—Mar 22 1922 The report of the Appraiser, of which this is a copy, will be filed within two days from above date, unless the estate asks that it be withheld.

10

SURROGATES' COURT.

COUNTY OF NEW YORK.

In the Matter of the Appraisal, Under the Transfer Tax Law of the Estate of RICHARD S. BAKER, deceased.

20

To the Surrogates' Court of the County of New York:

I, Albert J. Berwin, who was by an order of Hon. James A. Foley, one of the Surrogates of the County of New York, made and entered on the 10th day of February, 1922, certified copy of which order is hereunto annexed, directed to act as Appraiser, pursuant to Chapter 908 of the Laws of 1896, and the Acts amendatory thereof and supplemental thereto, do respectfully report:

1st: Having filed my oath of office, pursuant to Chapter 173 of the Laws of 1901, in the office of the State Comptroller, I gave notice by mail, postage prepaid, to all persons known to have or claiming an interest in property of said deceased, to wit, to the following persons named in the petition presented on the application for said order. The time and place were duly set forth in said notice at which I would appraise such property of the above-named decedent as might be subject to the payment of the transfer tax; a true copy of said notice is hereto attached:

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40

Exhibit D. 2.

Second: I further report that Richard S. Baker died on the 26th day of September, 1921, a resident of the State of New Jersey, leaving a Last Will and Testament, a copy of which is hereto annexed and made a part hereof, which was duly admitted to probate by the Surrogate of the County of Sussex, State of New Jersey, and that thereafter on the 7th day of October, 1921, letters testamentary were duly issued by the said Surrogate to Anna B. Baker, of Hopatcong, New Jersey, as Executrix.

Third: I further report the following appearances before me in this proceeding:

Lafayette B. Gleason, Esq.,
Attorney for State Tax Commission,
233 Broadway, New York City.
Messrs. King and Vogt,
Attorneys for Executrix,
10 Washington Street,
Morristown, New Jersey.

Fourth: I further report that on the 2nd day of March, 1922, at No. 233 Broadway, in the Borough of Manhattan, in the City, County and State of New York, I appraised the taxable assets of the Estate of Richard S. Baker, Deceased, within the State of New York, at their fair market value as of the 26th day of September, 1921, the date of his death, as follows:

Real estate in New York State.....none

Taxable Personalty within the State of New York:

112 shs	Am. LaFrance Fire Eng. Co. pfd. at	77½	$ 8,680.00
10 "	Am. Tel. & Tel. Co.....	107⅜	1,073.75
25 "	American Locomotive Co. com	90	2,250.00
10 "	Buffalo Potash, pfd	.....	.....
15 "	Buffalo Potash, com.	.....	.....
	One-half interest in partnership of Soltau and Baker, appraised at.....	.....	8,776.88
	Gross New York Taxable Assets....	.....	20,780.63

Exhibit D. 2.

Deductions: Debts, funeral and administration expenses $2,678,40 p. r.	$1,030.65	
Commissions on N. Y. assets	310.04	1,340.69
Net New York Taxable Estate.....		$19,439.94

Fifth: I further report all the beneficiaries entitled at the time of decedent's death to an interest in this estate pursuant to the provisions of Law, and of the said decedent's Last Will and Testament, the relationship of such persons to decedent, the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth, all of said beneficiaries being of full age and sound mind except as otherwise designated.

Beneficiaries		Exempt Amt. of Interest	Taxable Amt. of Interest
Albert W. Baker, nephew:			
Specific bequest of interest in partnership of Soltau and Baker	$8,776.88	0.	$8,776.88
Anna B. Baker, widow:			
Residuary estate.....	10,663.06	$5,000	5,663.06

Respectfully submitted,

Appraiser.

Dated: New York, N. Y.,
1922.

(Rubber Stamp)

Exhibit D. 2.

Second: I further report that Richard S. Baker died on the 26th day of September, 1921, a resident of the State of New Jersey, leaving a Last Will and Testament, a copy of which is hereto annexed and made a part hereof, which was duly admitted to probate by the Surrogate of the County of Sussex, State of New Jersey, and that thereafter on the 7th day of October, 1921, letters testamentary were duly issued by the said Surrogate to Anna B. Baker, of Hopatcong, New Jersey, as Executrix.

Third: I further report the following appearances before me in this proceeding:

Lafayette B. Gleason, Esq.,
Attorney for State Tax Commission,
233 Broadway, New York City.
Messrs. King and Vogt,
Attorneys for Executrix,
10 Washington Street,
Morristown, New Jersey.

Fourth: I further report that on the 2nd day of March, 1922, at No. 233 Broadway, in the Borough of Manhattan, in the City, County and State of New York, I appraised the taxable assets of the Estate of Richard S. Baker, Deceased, within the State of New York, at their fair market value as of the 26th day of September, 1921, the date of his death, as follows:

Real Estate in New York State			none
Taxable Personalty within the State of New York:			
112 shs	Am. LaFrance Fire Eng. Co. pfd. at	77½	$ 8,680.00
10 "	Am. Tel. & Tel. Co	107⅜	1,073.75
25 "	American Locomotive Co. com	90	2,250.00
10 "	Buffalo Potash, pfd	.....	.....
15 "	Buffalo Potash, com.	.....	.....
One-half interest in partnership of Soltau and Baker, appraised at		.....	3,527.17
Gross New York Taxable Assets		.....	15,530.92

Exhibit D. 2.

Deductions: Debts, funeral and administration expenses $2,678,40 p. r.	$1,030.65	
Commissions on N. Y. assets	310.04	1,340.69
Net New York Taxable Estate.....		$14,190.23

Fifth: I further report all the beneficiaries entitled at the decedent's death to an interest in this estate pursuant to the provisions of Law, and of the said decedent's Last Will and Testament, the relationship of such persons to decedent, the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth, all of said beneficiaries being of full age and sound mind except as otherwise designated.

Beneficiaries		Exempt Amt. of Interest	Taxable Amt. of Interest
Albert W. Baker, nephew:			
Specific bequest of interest in partnership of Soltau and Baker	$3,527.17	0.	$3,527.17
Anna B. Baker, widow:			
Residuary estate.....	10,663.06	$5,000	5,663.06

Respectfully submitted,

Appraiser.

Dated: New York, N. Y.,
1922.

Exhibit D. 2.

At a Surrogate's Court held in and for the County of New York at the Hall of Records, in the Borough of Manhattan, City of New York, on the day of 19

PRESENT:

10 HON.

SURROGATE.

IN THE MATTER OF

The Transfer Tax Upon the Estate of

RICHARD S. BAKER,

Deceased.

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Upon reading the report of the appraiser, Albert J. Berwin, Esq., duly filed herein on the 7th day of April, 1922, wherein it appears that said decedent died on the 26th day of September, 1921, and upon motion of Lafayette B. Gleason, Attorney for the State Tax Department,

IT IS ORDERED AND ADJUDGED

That the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property and the tax to which said transfers are liable is as follows:

30

Beneficiary	*Amount Received*	*Amount of Exemption*	*Taxable Amount*	*Tax Assessed*
Albert W. Baker, nephew	$3,527.17	0	$3,527.17	$176.36
Anna B. Baker, widow	10,663.06	$5,000	5,663.06	56.63

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EXHIBIT D. 3.

(Letterhead King & Vogt, Counsellors at Law)
Morristown, N. J.

April 11th, 1922.

Albert W. Baker, Esq.,
184 Washington St.,
New York, N. Y.

10

Dear Sir:—

The amount of tax assessed on the property coming to you under the will of Richard S. Baker is as follows: Amount assessed against you $3527.17, tax $176.36. Will you kindly enclose me a check for this amount made payable to Anna B. Baker, Executrix, so that the title of this property may be vested in you.

Yours truly,

20

ELMER KING,

EK/MJ.

30

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EXHIBIT D. 4.

(Letterhead King & Vogt, Counsellors at Law)
Morristown, N. J.

April 21st, 1922.

10 Albert W. Baker, Esq.,
184 Washington St.,
New York, N. Y.

Dear Sir:—

This is to acknowledge receipt of check Soltau & Baker, payable to you for $176.36, and endorsed by you, payable to Anna B. Baker, Executrix. This check is in payment of the collateral inheritance tax assessed by the State of New York against your interest in the business of Soltau & Baker.

20 Yours truly,

ELMER KING.

EK/MJ.

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EXHIBIT D. 5.

(Check)

New York, April 18, 1922. No. 9325

IRVING NATIONAL BANK 1-67 Æ

Aetna Office 10
West Broadway and Chambers Street

Pay to the order of Albert W. Baker $176.36/100
One hundred Seventy Six and 36/100 Dollars
Payable through New York Clearing House.
SOLTAU & BAKER.

Soltau & Baker,
Water Cress Produce,
184 Washington St.

Endorsement: 20

Pay to order of Anna B. Baker, executrix.
Albert W. Baker
Anna B. Baker, Ex.
Anna B. Baker.

Received payment through the New York Clearing House. Prior endorsements guaranteed. Apr. 25, 1922, No. 2. Federal Reserve Bank of New York. N.
Pay any Federal Reserve Bank or order. The National 30
Iron Bank, Morristown, N. J. Lewis D. Kay, cashier.

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MEMORANDUM OF CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between ANNA B. BAKER, *Complainant,* *and* CHARLES SOLTAU, *et al.,* *Defendants.*	*On Bill, &c.*

The bill in this case is filed by the executrix of Richard S. Baker, deceased, for the construction of an attempt to draw a holographic codicil, to the sufficiency of this no question is presented by either of the parties. The instrument is question is as follows:

> I give devise and bequeath to Albert W. Baker my one-half undivided interest in the firm of Soltau & Baker 104 Washington St. N. Y. consisting store fixtures produce and supplies on hand, horse & wagon, my one-half undivided interest in our cress beds real estate and personal property, at Bonnybrook and Spotsdam in Cumberland Co. Pa. also my one-half undivided interest in our real estate and personal property in Jefferson and Knox Counties, Tenn. December 12th, 1916.

The complainant claims the decedent's one-half interest in the firm bank account under the preceding language as the residuary legatee.

The answer of the defendants admits all of the allegations in the bill, but asks for a construction of the codicil that will result in the one-half interest in the bank account going to the defendant, Albert W. Baker, and a further defense which, in substance, recites that the complainant called upon the defendant for the sum of $176.36, being the amount of the defendant Baker's share of the

inheritance transfer tax to the State of New York, which sum was paid by him to the complainant and accepted by her, wherefrom an estoppel is claimed.

It seems to me clear that the language of the codicil following the word "consisting" is descriptive of the extent of the one-half undivided interest in the firm that was bequeathed by the decedent. While this instrument was very inartificially drawn, I think there can be no question of the propriety of drawing the inference that the testator meant to write "consisting of store, fixtures, produce," etc. In fact, defendants' counsel see no objection thereto, either in his oral argument or in the brief subsequently submitted by him.

Under the case of *Evens* v. *Griscom* (42 Law, 579), and the cases cited by Chief Justice Beasley, there can be no question that the testator intended to restrict the interest bequeathed to the specific items mentioned by him.

Counsel refer to the language of Vice-Chancellor Pitney in *Sites* v. *Eldredge* (45 Eq., 632), which I do not think is a parallel case. In that instance the testator undertook to give to his wife "all my real and personal estate, consisting of clothing, jewelry, money" and a number of other items of personal property. The question in that proceeding was to determine whether or not the subsequent demonstration necessarily excluded the devise of his real estate, and the Vice-Chancellor very readily and easily decided that it did.

It is apparent that no assistance is obtained from that opinion, and it might be pointed out that in the last paragraph the Vice-Chancellor wandered into the realm of speculation merely by way of illustration, inasmuch as his own opinion alluded to the elementary principle that such was no way to construe the language of a testamentary instrument. Counsel have both quoted authorities as to the distinction between the word "consisting" and the word "including." There can be no serious difference of

opinion that they are not synonymous, and that where a bequest is subsequently qualified by an inventory headed by the phrase "consisting of" it is determinative of the extent of the bequest; whereas a similar provision followed by the word "including" would not by necessary implication exclude items other than those mentioned.

10 With regard to the second defense of estoppel, I was first somewhat impressed until the proceedings before the New York Transfer Tax attorney were explained. It appears that it was necessary to make a return to the New York authorities of all the property of the testator in the State of New York, including his interest in the firm of Soltau & Baker. For that purpose there was secured from the defendants a statement of an accountant, and that was submitted to the Transfer Tax attorney. He, not the executrix, then apportioned the tax as 20 between her and the defendant Baker and submitted a copy thereof to counsel for the complainant. He, acting for the complainant, then communicated with the defendant who, notwithstanding that the proofs show there was a controversy as to the effect of the codicil in this case between him and the complainant, sent his check to her, which was accepted by her. I do not think that he can now expect to set this up by way of estoppel against her claim.

30 Estoppel is defined in Pomeroy's Equity Jurisprudence (Sec. 804) as follows:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

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It must be apparent that the facts in this case do not bring the conduct of either of the parties within the language quoted. I am inclined to the belief that the defendant Baker was in no manner misled by the complainant and had quite as much information and knowledge of the transaction as she had. On the argument complainant's counsel practically admitted, as I think he should, that the defendant Baker is entitled to recover back from the complainant the said sum of $176.36 so paid by him to her under a mistake.

I will advise a decree in accordance with the conclusions of this memorandum.

Since the foregoing part of this memorandum was written, a very earnest supplemental brief on behalf of the defendants, dealing with the argument of the complainant on the defense of estoppel, has been received; but after equally earnest attention to the argument therein I see no reason to change my opinion.

The defendant says that there was no foundation in the proofs for complainant's argument, that when the defendant Baker sent his check previously mentioned "he intended to use the fact of such payment as an estoppal," and the further allegation "that he made it with the purpose and design of bettering his own position and to plead his own act as an estoppel against the complainant."

It seems to me that the testimony of Mr. King was ample ground from which he might argue as indicated, and I feel compelled to come to the same conclusion that he urges. His testimony was that almost immediately after the death of the testator, as I recall it, although it is of no particular moment, even before this defendant had engaged counsel, he urged the construction of the codicil for which he now contends, and that in April, six months later, he should have complied with the request for the sum of money sent by him is not consistent with

his present demand, when it is recalled that neither Mrs. Baker nor her counsel with whom the defendant had discussed the matter had changed their respective views in the slightest.

I am firmly convinced that Baker, who is not as unsophisticated as counsel would like him to appear, acting upon his own impulse, cheerfully subscribed $176.36, for the purpose of securing to himself half of a very considerable amount of money in bank. It is beyond me to understand, in view of the complete knowledge this defendant had of the subject, how the determination of the Transfer Tax attorney or the Surrogate in New York can be binding upon this Court in the construction of the instrument that is at the bottom of the issue here. This seems so clear to me as to require neither citation of authorities nor the presentation of argument.

Notwithstanding the supplemental brief of the learned counsel for the defendant Baker, I see no reason to alter the conclusions hereinabove expressed.

FINAL DECREE.

Filed October 19, 1922.

IN CHANCERY OF NEW JERSEY.

Between ANNA B. BAKER, *Complainant,* *and* CHARLES SOLTAU and ALBERT W. BAKER, *Defendants.*	*On Bill, &c.* *Final Decree.*

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This cause coming on to be heard on the nineteenth day of September, A. D. One Thousand Nine Hundred and Twenty-two, at the Chancery Chambers in the City of Jersey City, before the Hon. John Bentley, the Vice-Chancellor to whom the said cause was referred to be heard for the Chancellor, in the presence of Messrs. King & Vogt, solicitors for and of counsel with the complainant and Charles A. Rathbun, Esq., solicitor for and of counsel with the defendants, and the pleadings and proofs having been read and heard, and the argument of the respective counsel having been considered; and it appearing to the Court that Charles Soltau and Richard S. Baker, were in possession together as equal partners trading under the partnership name of Soltau & Baker, at 184 Washington street, New York City, New York, that said partnership had continued for a long number of years; that on September 26th, 1921, Richard S. Baker, one of the partners died testate resident of the County of Sussex in this State; that complainant Anna B. Baker, the executrix therein named duly qualified as such, to whom letters were duly issued by the Surrogate of the County of Sussex and who is now acting as such executrix;

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that at the time of the death of the said deceased there were moneys on deposit in the name of the partnership and other assets and bills receivable due to the said partnership; that the complainant had requested Charles Soltau, the surviving partner to collect and receive the moneys due the said partnership from its debtors and to account and pay over to the complainant the one-half share to which she, as the representative of the said deceased was entitled.

And it further appearing to the Court that the said defendants allege that by the true construction of the codicil of said deceased, reading as follows:

> "I give, devise and bequeath to Albert W. Baker my one-half undivided interest in the firm of Soltau & Baker 184 Washington St. N. Y. consisting store fixtures produce and supplies on hand, horse & wagon, my one-half undivided interest in our cress beds real estate and personal property at Bonny-Brook and Spotsdam in Cumberland Co. Pa. also personal property at Mechanicsburg, Pa. also my one-half undivided interest in our real estate and personal property in Jefferson and Knox Counties, Tenn. December 12th, 1916."

the complainant is not entitled to any relief because all the partnership assets of the firm were devised and bequeathed to said defendant, Albert W. Baker, and further that the complainant is estopped because the transfer tax assessed by the State of New York against the defendant, Albert W. Baker was upon the whole share and interest of the said Albert W. Baker in the firm of Soltau & Baker, and that after the same had been so assessed, the complainant did demand and receive from the defendant Albert W. Baker, the amount of the tax so assessed.

It is, thereupon, on this day of October, One Thousand Nine Hundred and Twenty-two, by Edwin Robert Walker, Chancellor by virtue of the power and authority of this Court, doth hereby order, adjudge and

decree, and this Court doth declare that in and by the codicil to the last will and testament of said Richard S. Baker, deceased, the testator by the language thereof, following the word "consisting" describe the extent of the one-half undivided interest in the firm that was bequeathed by the decedent to the said Albert W. Baker, and the said testator restricted the interest devised and bequeathed to the specific items therein mentioned by him.

It is further ordered, adjudged and decreed, that the defendant, Albert W. Baker, is entitled to have and receive from the complainant, and the complainant is ordered and directed to pay to the defendant, Albert W. Baker, the sum of $176.36 paid by him to her to cover the said transfer tax assessed against the undivided one-half interest in the firm of Soltau & Baker.

It is further ordered, adjudged and decreed, that the complainant is not estopped for the relief prayed for by her in said will.

It is further ordered, adjudged and decreed that the complainant is entitled to an accounting prayed for by her in said bill of complaint, and that the said Charles Soltau one of the said defendants do within
days from the date hereof account for and pay over to the complainant a full undivided one-half of all the partnership and other assets of the said partnership of Soltau & Baker, excepting the specific items devised and bequeathed to the said Albert W. Baker in said codicil of said deceased as herein defined and declared.

I approve the above decree as to form.

CHARLES A. RATHBUN,
Solicitor of Defendant.

NOTICE OF APPEAL.

Filed October 23, 1922.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ANNA B. BAKER, Executrix,
Complainant,

and

CHARLES SOLTAU, *et als.,*
Defendants.

Notice of Appeal.

The defendants hereby appeal from so much of the final decree made in this Court in the above-entitled cause, as 20 decreed, that in and by the codicil to the last will and testament of Richard S. Baker, deceased, the testator, by the language thereof, following the word "consisting" describe the extent of the one-half undivided interest in the firm that was bequeathed by the decedent to the said Albert W. Baker, and the said testator restricted the interest devised and bequeathed to the specific items therein mentioned by him, and also to so much thereof as decreed that the complainant was not estopped for the 30 relief prayed by her in said bill; and also so much thereof as decreed that the complainant is entitled to an accounting prayed for by her in said bill of complaint, and that the said Charles Soltau, one of the defendants, should, within ten days from the date thereof, account for and pay over to the complainant the full undivided one-half of all the partnership and other assets of the said partnership of Soltau and Baker excepting the specific items devised and bequeathed to the said Albert W. Baker in said codicil of said deceased, as in said decree defined 40 and declared; and also that portion of the decree which

adjudged that the defendant, Albert W. Baker, is entitled to have and receive from the complainant the sum of $176.36 paid by him to her to cover the transfer tax assessed against the undivided one-half interest in the firm of Soltau and Baker, to the Court of Errors and Appeals in the last resort in all causes.

CHARLES A. RATHBUN,
Solicitor for and of Counsel with the Defendants.

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Dated October 20, 1922.

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

CHARLES A. RATHBUN,
Of Counsel with Defendants.

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Service of the within notice is hereby acknowledged this 21st day of October, 1922.

KING & VOGT,
Solicitors of Complainant.

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PETITION OF APPEAL.

Filed October 27, 1922.

New Jersey Court of Errors and Appeals

ANNA B. BAKER, Executrix, *Complainant and Respondent,* *vs.* CHARLES SOLTAU and ALBERT W. BAKER, *Defendants and Appellants.*	*Petition of Appeal.*

To the Honorable The Court of Errors and Appeals in the last resort in all causes:

The petition of Charles Soltau and Albert W. Baker, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the day of October, 1922, wherein the said Anna B. Baker, Executrix, was complainant and the said Charles Soltau and Albert W. Baker were defendants, in this respect, *to wit:*—that the said decree adjudges that in and by the codicil to the last will and testament of said Richard S. Baker, deceased, the testator by the language thereof, following the word "consisting" describe the extent of the one-half undivided interest in the firm that was devised and bequeathed by the decedent to the said Albert W. Baker, and the said testator restricted the interest devised and bequeathed to the specific items therein mentioned by him; and further adjudges that the defendant, Albert W. Baker, is entitled to have and receive from the complainant the sum of $176.36 paid by him

to her to cover the transfer tax assessed against the undivided one-half interest in the firm of Soltau and Baker; and further adjudges that the complainant is not estopped for the relief prayed for by her in said will; and further adjudges that the complainant is entitled to an accounting prayed for by her in said bill of complaint, and that the said Charles Soltau, one of the said defendants do within ten days from the date hereof, account for and pay over to the complainant a full undivided one-half of all the partnership and other assets of the said partnership of Soltau & Baker, excepting the specific items devised and bequeathed to the said Albert W. Baker in said codicil of said deceased as herein defined and declared.

And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that the testator, Richard S. Baker, deceased, intended and, in fact, did devise and bequeath his undivided one-half interest in the partnership of Soltau and Baker to his nephew, Albert W. Baker, and the construction to the contrary placed thereon by the Chancellor is erroneous; and also the decree adjudging that Albert W. Baker is entitled to have and receive from the complainant the amount of transfer tax assessed against the undivided interest in the firm of Soltau and Baker, for that the said undivided one-half interest was devised and bequeathed to the said Albert W. Baker by the will of said Richard S. Baker, and he was therefore legally bound to pay the same; and also that complainant was estopped, both by her conduct in demanding from the defendant, Albert W. Baker, the transfer inheritance tax assessed in the State of New York upon the entire undivided one-half interest of the said Richard S. Baker in the firm assets within the State of New York of the firm of Soltau and Baker, and in her permitting the said entire interest of said Richard S. Baker in the said firm of Soltau and Baker to be

assessed against the said Albert W. Baker; and that she is estopped further by the record of the proceedings in the said transfer tax proceedings, the said record disclosing that she appeared in person, or by counsel, and the tax appraiser and Surrogate of New York City then and there having jurisdiction over the property of the deceased
10 situate in New York City for the purposes of determining the transfer inheritance tax to be paid to the State of New York, did construe the will of the testator to devise and bequeath to the said Albert W. Baker the entire interest of the said Richard S. Baker in the firm of Soltau and Baker situate in the City of New York, and did assess the tax accordingly, and that no appeal has ever been taken from such adjudication and assessment by the complainant, but the complainant accepted the same as correct and did accordingly demand from the said Albert W.
20 Baker the tax so assessed.

And the said decree of the Chancellor is further erroneous in adjudging that the complainant is entitled to an accounting as prayed for by the bill of complaint and directing the defendant, Charles Soltau, to make such account, because the complainant has no estate or interest of, in and to the partnership assets of the firm of Soltau and Baker, but the estate and interest of the said Richard S. Baker belong to the said Albert W. Baker.

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

CHARLES A. RATHBUN,
Solicitors for and of Counsel with Appellants.

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ANSWER.

Filed November 2, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANNA B. BAKER, Executrix, &c., *Complainant and Respondent,* *vs.* CHARLES SOLTAU and ALBERT W. BAKER, *Defendants and Appellants.*	*On Petition of Appeal.*

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The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was made and entered in the Court of Chancery as mentioned in said petition, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

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And this respondent is advised and believes that the said decree is agreeable to equity and she prays that the same may be affirmed with costs to be adjudged this respondent.

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KING & VOGT,
Solicitors and of Counsel with Respondent.

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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

New Jersey Court of Errors and Appeals.

Between ANNA B. BAKER, Executrix, Complainant and Appellee, *and* CHARLES SOLTAU, *et als.*, Defendants and Appellants.	**On Bill.** **On appeal from decree in Court of Chancery.**

BRIEF ON THE PART OF APPELLEE.

The questions raised by the appeal may be fairly classified as follows:

(1) What is firm property?

(2) Does the word "consisting" appearing in the codicil, limit and restrict the gift of firm property to the specific items therein mentioned?

(3) Is the appellee estopped from the relief prayed for in the bill and granted by the decree?

I.

What is firm property?

The codicil to the last Will and testament of the deceased (4) is as follows:

> "I give, devise and bequeath to Albert W. Baker, my one half undivided interest in the firm of Soltau & Baker, 184 Washington St. N. Y. consisting of store fixtures, produce and supplies on hand, horse and wagon, my one-half undivided interest in our cress beds, real estate and personal property at Bonnybrook and Spotsdam in Cumberland Co. Pa., also personal property at Mechanicsburg, Pa. also my one-half undivided interest in our real estate and personal property in Jefferson and Knox Counties, Tenn."

Firm property is everything which is contributed by any partner to the capital stock of the firm, either upon its organization or thereafter; and so do the profits of the business, as well as all things acquired with partnership funds or credit, or in the exercise of partnership rights, including the good will of the partnership business; in the absence of statutory provision, regulating the title * * * the intention of the parties, if clearly disclosed, will determine whether property connected with a partnership business is owned by the firm, or by its individual members.

Cyclopedia of Law & Procedure, Vol. 30, pages 424, 426;
Bowker vs. *Gleason,* 8 A. R. 885.

Among the other assets was a bank account of some Four Thousand Dollars on deposit in a New York bank in the name of Soltau & Baker.

All the real estate at Bonnybrook, Spotsdam and in Jefferson & Knox Counties was held in the names of Richard S. Baker and Charles Soltau as *individuals.*

This real estate was used as water cress beds, the cress being sold by "Soltau & Baker" at 184 Washington Street, New York.

There was no written agreement impressing this real estate as firm property, such "an interest in or concerning the same" must be reduced to writing and signed by the party to be charged.

We, therefore, insist that the words "my one-half interest in the *firm* of 'Soltau & Baker' " would not act as a devise of the one-half interest in the real estate owned by deceased and specifically devised by his codicil.

If the word *consisting* and the words following excised from the will, then the respondent Baker would receive very much less than the deceased, by the written words of his will, declared he should receive.

II.

Does the word "consisting" appearing in the codicil limit and restrict the gift of firm property to the specific items therein mentioned?

Consisting is defined by Webster as "the parts or material of which a thing is composed" and in Black's Law Dictionary as "being composed or made up of". This word is not synonymous with including, for the latter, when used with a number of specified objects, always implies that there may be others which are not mentioned.

6 Mo. Appeals, page 331.

It is also a canon of construction that

(1) The clear import of the words must control.

(2) Effect must be given to every part of the will.

(3) Clearly expressed intention not to yield to a doubtful construction, and

(4) Words are to be used in their ordinary signification.

The word consisting has received judicial interpretation in

Sites vs. *Eldredge,* 45 Equity, page 638,

where the words were

> "I give and devise to my wife, Jeannie M. Eldridge, all my real and personal estate *consisting* of clothing, jewelry, money and all instruments, desks, office appurtenances and other property of like nature and now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of Sites & Harrison."

and the Court said

> "the words 'consisting of' &c. which follow are naturally confined to the words 'personal estate' and were intended simply *to specify what the personal estate consisted of.*"

Much useful information can be obtained from reading the case of *Grescom* vs. *Evans,* in the Supreme Court, 40 New Jersey Law, page 402, where the court considered the true construction to be given the devise

> "all that my farm and plantation near Cropwell, conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about 85 acres, more or less."

The testator owned two parcels of land near Cropwell, the one a farm containing about seventy-two and sixty-two hundredths acres, which had been conveyed to him by the heirs of his deceased

wife, and the other containing fourteen and seventy-three hundredths acres, which had been conveyed to him by one Abel Lippincott; these two parcels adjoined each other, and had been rented and cultivated together for many years. Thomas resided on the first named parcel, but cultivated and used both, and the Court held that only those premises which had been conveyed to the testator by the heirs of his deceased wife, passed under the devise.

This decision was then reviewed in the Court of Errors and Appeals, and is reported in *Grescom* v. *Evans,* 42 Law, page 579, where the judgment below was affirmed, the Court said, on page 581:

> "the argument in favor of the 14 acres being included in the devise is, that the entire Cropwell farm is embraced in the general description of 'all that my farm and plantation near Cropwell where my son Thomas now resides' and that, therefore, the further description of it as being the lands conveyed to him by the heirs of his deceased wife, is to be rejected as a false demonstration: But the difficulty is to see upon what principle these latter words are to be rejected: If left in, they are not incongruous with anything in the sentence. It is only by an arbitrary assumption that the testator has expressed a purpose of giving the entire Cropwell farm to this devisee, that the words in question are thrown out of joint with the context. If we accept the entire clause, and all its terms, then there is no jar or discord between its parts. If, when the language is 'I give all that my farm and plantation conveyed to me by the heirs of my deceased wife' we say that the testator meant to convey not only the tract so described, but also an alien tract of fourteen acres, of course it becomes manifest that a part of the terms used are to be thrust out of the sentence. But why this expulsion?
>
> A case is, therefore, present of a first description of the subject of the gift, which is at least so general as to be amenable, without in-

congruity, to a limitation by a subsequent restrictive description, and, under such conditions, I have not found a single instance, among the numerous decisions on this subject, in which such restrictive description has been eliminated. The rule results from the principle of construction that every word in a will is to be retained, and a force given to it whenever such course is practicable. In the present case, the restrictive words 'conveyed to me by the heirs of my deceased wife' are not incongruous, except in the sense of being restrictive with the previous description contained in the words, 'all that my farm and plantation near Cropwell,'. I see no more reason for mutilating this sentence and rejecting the part called in question, than there is in almost every case in which a description of the subject of the gift is followed by a more specific definition."

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

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

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

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

Clark vs. *Hyman,* 12 N. C. 382.

In *Creamer* vs. *Harris,* 90 Ohio St. 610; 106 N. E. 967 (1814):

"It is a rule of presumption that when there is such an enumeration the testator intended

> only those things to pass. "All the words of the will are to be taken into view and not a part of them only; as every word is employed to develop the intention of the testator and all of them taken in connection, exhibit a transcept of his mind."

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

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

> "I do order that all my property CONSISTING OF bonds, mortgages, ground rents, stocks, and personal effects in the State of Pennsylvania be sold."

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

The Court:

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

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

He used the word "firm" in the sense he further described it as "consisting" of. The descriptive limitation of his intention was clearly expressed, and the beneficiary should receive this and nothing more.

III.

Is the appellee estopped from the relief prayed for in the bill and granted by the decree?

Law.

As the estoppel is alleged to have arisen under an appraisement made to ascertain the tax due the state of New York, it is necessary to consider the statutory authority for such an appraisement.

The New York appraisers' report does not adjudicate the validity of the scope of the devises or bequest in testamentary dispositions.

The provisions of the statutes of New York under which the appraiser acts clearly show that his function is merely for the determination of the property to be assessed and the value thereof.

1. Laws of New York, 1909, Ch. 18, Sec. 122, C. S. N. Y., Vol. 1, page 1010.

   "Whenever by reason of the provisions of any law of this state it shall become necessary to appraise IN WHOLE OR IN PART the estate of any deceased person * * *."

2. Laws of New York, 1905, Chapter 368, Sec. 230.

   "He shall at such time and place appraise the same at its fair market value as herein prescribed AND for THAT PURPOSE the said appraiser is authorized to issue subpœnas and compel attendance of witnesses before him to take the evidence of such witnesses under oath concerning such property and the value thereof and report the same to the Surrogate. * * *"

3. Laws of New York, 1905, Chapter 368, Sec. 232.

   "The State Comptroller or *any other* person dissatisfied with the appraisement or assess-

ment and determination of the tax may appeal therefrom to the Surrogate within 60 days * * *."

4. Laws of New York, 1911, Chapter 244.

"Provides the validity and effect of the testator's disposition of any other property (than real estate) situate within the State shall be *regulated by the laws of the State or country of which the deceased was resident at the time of his death.*"

5. The duty and jurisdiction of the appraiser is to determine the law and facts as to whether the property is part of the estate and the value thereof *and not the extent of the bequests.*

In re Barnes Estate, 144 N. Y. S. 794.

The appraisement as a practical matter in regard to residents is generally done by some competent person appointed or nominated by the appraiser thus showing that the appraiser's duty is one primarily of valuation and not for the determination of the will.

In re Barnes Estate, 144 N. Y. S. 794 (Dictum).

The law of the domicile of the testator determines the distribution of the property owned by such testator.

A. The general rule is that the validity of a will so far as it affects movable property depends on the law of the domicile of the testator but this rule will not render invalid a gift of property in another jurisdiction through a non-compliance with the regulations as to the holding of property by the citizen of the state or country where the will was made and which has no extra-territorial effect. A gift of personalty to be administered in another state has been held not invalidated

when not unlawful or against public policy by a restriction imposed by that state on the supervision of the power of alienation.

Corpus Juris, Vol. 12, Sec. 72, page 476.

B. Wills are to be governed by the Law of the domicile as to the capacity of the parties and as to their validity and effect in relation to personal property.

Bouvier Law Dictionary, Vol. 1, page 922.

Nelson v. *Potter,* 50 N. J. L. 324.

Harrison v. *Nixon,* 9 Pet. 483, 502.

Story, *J.:*

"In regard to personalty in an especial manner the law of the place of the testator's domicile governs in the distribution thereof; and will govern the interpretation of will thereof; unless it is manifest that the testator had the laws of some other country in his view."

C. The law of the domicile will govern even though the carrying out of the bequest is not in exact conformance with the laws of the State where the same is to be executed.

Cross et al. vs. *U. S. Trust Co.,* 131 N. Y. 330.

D. The Laws of New York expressly provide that the Law of the domicile shall govern.

Laws New York, 1911, Ch. 244.

The executrix is not estopped from denying the claim of Albert W. Baker by reason of his payment of the amount of tax assessed against him in New York.

Pomeroy Equity Jurisprudence, Vol. 2, Sec. 805 (4th Ed.), defines estoppel as consisting of the following elements:

1. Representation or concealment of material facts.

2. Such facts must be known to the party estopped.
3. The truth concerning these facts must be unknown to party claiming the estoppel.
4. The conduct must be done with the intention of expectation that it will be acted upon.
5. Such representations must be relied upon and acted upon.
6. By so acting he has been led to change his position to his detriment.

Lawrence vs. *Dana,* Fed. case 8136, 15 Fed. 49.

The purpose of estoppel is to prevent inconsistency and fraud resulting in prejudice.

Corpus Juris, Vol. 21, p. 1060;
Corpus Juris, Vol. 21, p. 1113;
Church vs. *Florence Iron Co.,* 45 N. J. L. 129.

Estoppel *in pais,* in New Jersey, contains fraud as one of its essential elements.

Richman et al. vs. *Baldwin,* 21 N. J. L. 395.

There was no misrepresentations on the part of the executrix.

The appraiser does not stipulate how the valuation of the undivided interest in the partnership was determined or of what the same consisted.

Exhibit D-2, page 65.

The first appraisement was for $8,776.88, which was later reduced to $3,527.17 (p. 68).

Whether this included the bank account is not shown nor did the executrix have any knowledge of the basis of this determination.

The appellant had notice of this assessment and the tax thereon and also of his right to appeal the same according to the laws of New York.

Exhibit C-4, page 37.

The appellant knew immediately after the will was probated, that there was a dispute between himself and the executrix concerning the money on deposit.

Testimony of Albert W. Baker, p. 22:

> Q. When did you see him? (Mr. Rathbun) A. This was a couple of days before Nov. 17th, 1921.
>
> Q. Then at that time you knew that there was a dispute concerning Mrs. Baker's right in the firm and yours? Didn't you? A. Yes.

Testimony of Mr. King, p. 28. Shows that Albert W. Baker was informed of Mrs. Baker's claim two or three weeks after the opening of the box of the testator and obtaining the will.

Letters written to Mr. Rathbun by Mr. King on January 26th, 1922, stating what Mrs. Baker claimed under the will.

We also respectfully submit that the payment of the tax by Albert W. Baker on April 18th, 1922 (C-4, p. 37), was with knowledge of the dispute, and with as much knowledge of the basis of the assessment and what it included, as the executrix.

There was no fraud on the part of the executrix. In the appraiser's report there is no statement of the property upon which the assessment was made.

A mistake without fraud or intention to deceive in which both parties participated is no ground for estoppel.

Pierce vs. *Chace,* 108 Mas. 254.

The moneys paid, are, by the terms of the decree, ordered to be returned the appellant.

Argument.

Immediately after the death of Mr. Baker, a dispute arose between Mrs. Baker, the executrix, and the nephew, Albert W. Baker as to the construction to be given the codicil under which testamentary disposition was made for the benefit of the nephew. The nephew contending that under the true construction of the codicil, he was entitled to receive a one-half interest of the deceased in the bank account and the other personal property. This contention was denied by the Executrix. The nephew employed an attorney in November, as the deceased died in September, and conferences were held between the attorneys of Executrix and the attorney of Mr. Baker, concerning this disputed point.

It was finally agreed that a bill should be filed in the Court of Chancery to determine the true construction of the codicil, and this was done by the executrix who filed her bill for that purpose.

The State of New York, with practically all other states, has a Law commonly known as a Collateral Inheritance Tax Act, and to collect this tax, requires a release from the Comptroller of its State before any papers can be removed by the personal representative from a safe deposit box in New York, or before a New York Corporation can transfer any of its stocks.

The proceedings are instituted by the Tax Appraiser in New York. The Tax Appraiser for the Surrogate does not sit as a court, but sits solely for the purpose of assessing the tax to be paid the State of New York under its law. The proceedings are informal.

In this case, such proceedings were instituted and the property in New York and the stock of New York corporations were appraised to determine the amount of tax to be paid.

Mr. Baker had notice of the proceedings, as did all other parties in interest.

The Tax Appraiser, to determine the value of the business in the City of New York, required a statement of the earnings of the partnership for the last three years. The only statement available was that prepared by an accountant employed by the surviving partner, and this was enclosed to the appraiser.

After the appraisement was made, an assessment was made against the nephew and the widow. Notice of the amount was given to both the nephew and the widow. The nephew paid the tax assessed against him and the widow did likewise. Upon this payment, the securities were released in New York and were brought to New Jersey. It is now contended if the nephew paid a tax to the State of New York upon the undivided half of the personal estate belonging to deceased in the firm of Soltau & Baker, this gives to the nephew the right to the same, and the executrix is estopped from denying this claim.

Under the Law, the appraiser is required to fix a sum as the present value of a going business, and in the assessment the appraiser in New York appraised the value of the business as a going concern. How much this value was, does not appear, nor does it appear how the value of the appraisement was arrived at.

The adjudication of the true construction of the will of the deceased must be made by the Courts in New Jersey where the deceased was domiciled at the time of his death and in which State his will was admitted to probate.

The bank accounts, notes, &c., were personal property and being the *res* are subjected to and controlled by the law of the domicile of the testator.

No other rule could be safely applied, because it is at once apparent the incongruity which would

arise by having the meaning of this will determined in every State in which the deceased had personal property.

The deceased died a resident of the State of Jersey, and had the right to assume that his will would be construed and administered under the law of this State.

No representations were made to the appraiser in New York concerning the interest of the nephew, nor had he any jurisdiction to construe the will; if the appraiser appraised the personal property in New York as belonging to the nephew, the payment by the nephew of the tax assessed in New York, would not give him any right to this property. His rights arise under the will and are controlled by the adjudication of this Court and no other.

This claim of estoppel by the appellant is somewhat artful.

He knew immediately after the death of the deceased of the dispute concerning the true construction of the codicil.

The respective counsel agreed upon a suit to have this determination made.

Pending this determination the taxes are assessed in New York.

Notice of the time and place of assessment was given the appellant.

Notice of the amount claimed to be due from the appellant was given him.

Nothing in the report by the appraiser showed how the amount was determined.

Payment by the appellant could be made directly to the State of New York, or through the executrix.

Payment was made through the executrix, and when such payment was made, the appellant concealed from her the fact that he intended to use the fact of such payment as an estoppel against the

construction by the Court of the will as agreed upon between the respective counsel.

As was said in *Mutual Life Insurance Company* vs. *Morris,* 4 Stew. 583:

> "Where the act appears to be rather the result of his own will or judgment, than the product of the defendant's representation or act, there can be no estoppel."
>
> *Perkins* vs. *Moorestown & Camden Turnpike Co.,* 3 Dick. 505.

As was said in Stamford, 10 Stew. 94:

> "A party who by the obscurity or ambiguity of his inquiry, leads another to make an erroneous statement respecting his rights, or by his artful silence entraps another into an admission he would not have made, if a fair opportunity had been given him the truth, is in no position to claim the benefit of an equitable estoppel.

The appellant has not changed his position or condition to his harm.

The appellant has had his full and complete day in this Court to try the matter in dispute. If he has made a greater payment to the Comptroller of New York than he was lawfully required to make, he made it with the purpose and design of bettering his own position and to plead his own act as an estoppel against the complainant. This was his secret design.

In *Phillipsburg Bank* vs. *Fulmer,* 2 Vroom, 52, at 55, the Court said:

> "to constitute an estoppel *in pais* there must be an admission intended to influence, or of such a nature as will naturally influence another and so change his condition as materially to injury him, if the party making it is allowed to retract it. And the estoppel must not be carried beyond the limits of the injury, so as instead of preventing a fraud, the enforcement of it will produce a greater injury than it was intended to prevent."

An estoppel *in pais* never arises except where there is actual or legal fraud.

Richman vs. *Baldwin,* 1 Zab. 395;
Martin vs. *Righter,* 10 Eq. 526-531;
Bush vs. *Cushman,* 27 Eq. 134;
Mutual Life Ins. vs. *Norris,* 4 Stew. 585;
Woodruff vs. *Moorestown Institution for Savings,* 7 Stew. 180;
Ruckelschans vs. *Ochme,* 3 Dick. 448, and many others.

The complainant withheld nothing from the appellant. He had the same information she had, but he withheld from her the use he intended to make of the payment and now sets up this payment, made by designed intent, to estop her.

The Vice-Chancellor by the decree has ordered the appellee *to refund the appellant the whole amount he paid her, and with this re-imbursement the appellant cannot be prejudiced or at any loss.*

We respectfully submit that the decree should be affirmed.

KING & VOGT,
Solrs. of Complainant and Appellee.

ELMER KING,
of Counsel.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between ANNA B. BAKER, Executrix, *Respondent and Complainant,* *and* CHARLES SOLTAU, *et als.,* *Appellants and Defendants.*	*On Bill for Accounting.*

BRIEF ON PART OF APPELLANTS AND DEFENDANTS.

I.

The first question involved in this case is what interpretation shall be given to the so-called codicil to the will of Richard S. Baker, which reads as follows:

> "I give devise and bequeath to Albert W. Baker my one half undivided interest in the firm of Soltau & Baker 184 Washington St N. Y. consisting store fixtures produce and supplies on hand, horse & wagon, my one undivided interest in our cress beds real estate and personal property at Bonnybrook and Spotsdam in Cumberland Co. Pa. also personal property at Mechanicsburg, Pa. also my one-half undivided interest in our real estate & personal property in Jefferson and Knox Counties Tenn. December 12th 1916.
>
> RICHARD S. BAKER.
>
> Signed, sealed and declared by the said testator to be his last will and testament in our presence we at his request in his presence and in presence of each other set our names as attesting witnesses.
>
> WARNER G. TAYLOR, Stanhope, N. J.
> FRANK HULSE, Stanhope, N. J."

It is admitted that this so-called codicil was in the handwriting of the testator and apparently it was drawn without any assistance. The first clause reading: "I give devise and bequeath to Albert W. Baker my one-half undivided interest in the firm of Soltau & Baker 184 Washington St., N. Y." is perfectly plain, but it is contended that the word "consisting" immediately following this clause limits the devise and bequest to the specifically enumerated articles and property.

The writing lacks proper punctuation and words and, unless it is to be construed as the will instead of a codicil to the will, wrong language is employed to express the intention of the testator in other respects than in the use of the word "consisting." I would point out some of the shortcomings of this document.

In one place it mentions "my one undivided interest" while in two places the words "my one-half undivided interest" are employed to convey the same meaning, the interest of the testator being the same in each case.

The writing was not "sealed" although the attestation clause so states.

It is not described as a codicil to his will, although written on the blank half-page of the will and probably intended as a codicil, notwithstanding the attestation clause distinctly declares it to be "his last will and testament," thereby revoking the will if full force is given to the words used. Words are lacking to complete the grammatical construction of the attestation clause.

The document does not say "consisting of" nor "consisting in part of." Lack of punctuation does not enable one to say definitely whether he meant "store fixtures" or "store and fixtures," although the former is the more probable. The use of the words "produce and supplies" is confusing because the concern dealt in water cress only and the word "produce" adequately cared for that which the concern dealt in. Again difficulty arises over the expression "real estate & personal property in Jefferson and Knox Counties, Tenn." because property had been

sold there and a purchase money mortgage had been given back securing notes issued for a part of the purchase money, and which notes belonged to the firm as well as the mortgage, and the mortgage was in the hands of the attorneys in Tennessee.

The foregoing criticisms indicate at least some of the infirmities of the document in question. The respondent would be very unwilling to have the Court construe the words "his last will and testament" in the attestation clause, strictly, because she would suffer very greatly financially, but she would have the Court construe the word "consisting" strictly for the reason that she would thereby benefit while the appellant Albert W. Baker would suffer loss. It is clear that the document cannot be interpreted fairly by adherence to a strict definition of words.

In this situation, although it is a fundamental rule in the construction of wills that words are to be given their usual significance, usually, and that the testator's intention is to control, yet it is also true that in determining what the testator's intention was the Court will consider the circumstances the testator had in view (*Hewitt* v. *Green,* 77 Equity 345; 77 Atl. 25), and will endeavor to place itself in the position of the testator (*Howell* v. *Steelman,* 76 Equity 423, affirmed 77 Equity 586), and words will be supplied or omitted to effect the intention.

And what were the conditions surrounding the testator and what did he have in view at the time?

The testator and Mr. Soltau had been engaged in the water cress business for many years. The business was usually at a standstill during the winter. At the close of the busy season they divided between themselves a part of the money in bank and kept the balance as working capital to carry the business through the winter, make necessary repairs to cress beds, etc. Just before the testator died this very thing had been done and a check for $2,500 had been drawn by testator for himself and one for his partner, Soltau. The check for the share of the

testator had not been deposited and accounts for the difference between the cash in bank mentioned in the statement of the auditor, $4,189.06, and the cash mentioned by counsel in the brief, $6,689.06. The beneficiary, Albert W. Baker, was a nephew of testator, thirty-nine years of age, and he had been working for this firm since boyhood (Case, p. 17). The testator had no child. What more natural thing could have happened than for the testator, under such circumstances, to have intended to turn over his business interests to this favored nephew? For ten or twelve years the nephew seems to have represented the uncle (Case, p. 17).

And then again, how improbable it is that the testator would have thought of stripping the business of the cash on hand at the time of his death when he so well knew how important it was to have this working capital on hand. It may be that when drawing the codicil the money in bank entirely escaped his special thought. He seems to have overlooked the items of bills receivable, good-will of the business and the lease for the store, unless the word "store" is to be treated as a separate item instead of being treated in conjunction with the word "fixtures" to show that "store fixtures" were what he was referring to, and this would require the insertion of a comma.

And what is the interest of a partner?

It has been defined several ways:

> "The interest of defendant in a partnership, which is held by a temporary injunction in a suit by a creditor, is the balance which would become due him after the payment of all firm debts and the adjustment of the accounts of the partners."
>
> *Gay* v. *Ray,* 80 N. E. 693, 694, 195 Mass. 8.

> "The interest of each partner in the partnership property is his share of the surplus after payments of all the partnership debts and settlement of all accounts between himself and his partners."
>
> *Jones* v. *Way,* 97 Pac. 437, 438, 78 Kan. 535, 18 L. R. A. (N. S.) 1180.

> "The interest of a partner in the partnership property of his firm is his share of what may be left of such property after the payment of the debts of the firm, and after the deduction therefrom of his indebtedness, if any, to his firm; for his copartners have a specific lien on his share of the assets of the partnership to secure his indebtedness to the firm, and in the ascertainment of his interest in the property of the firm his indebtedness thereto must be taken into the account and settled out of his share. When therefore, as in this case, a partner makes a sale of his 'interest in the concern,' it must be presumed, we think, that he sells only his legal interest in the firm, and nothing more. It cannot be assumed, in such case, in the absence of any stipulation to that effect, that such partner sold, or intended to sell, if he could, his own indebtedness to the firm, or any part thereof."
>
> *Riddell* v. *Ramsay,* 78 Pac. 597, 602; 31 Mont. 386 (Quoting *Over* v. *Hetherington,* 66 Ind. 365).

If the contention made by respondent that the word "consisting" limits the devise and bequest to the items mentioned, then from what account would the liabilities of the firm be taken? Again, with such a contention, what becomes of the good-will of the business, of the notes and bills receivable or the leasehold of the store? Would the executrix in such a case become a partner as to the undivided one-half interest in the good-will, of the notes, bills receivable and the lease of the premises, while Arthur W. Baker would be a partner as to the rest of the business?

If the contention of the respondent is to be sustained, then the bequest to Albert W. Baker as to property in New York dwindles to the insignificant sum of $376.80 (Case, p. 55) from which is to be deducted a proportionate share of the liabilities of $802.79 (Case, p. 45). Surely the testator did not intend to destroy the partnership, but his evident purpose was to substitute his nephew, who for several years had been his partner's associate, for himself. But the contention of the respondent would effectually destroy the relationship because the widow would thereby

become the owner of her husband's interest in the good-will, the leasehold interest of the store, the bills receivable and cash. The testator made liberal provision for his wife. The application for the appraisement of the transfer tax in New York shows that the widow will receive about $50,000 to $60,000 (Case, p. 50, ll. 25-30), and she had property of her own which was in testator's possession (Case, p. 59).

We insist that a fair construction of this will does not support the claim of the respondent.

The case of *Sites* v. *Eldredge,* 45 Equity 632, is somewhat in point. In that case the will provided: "I give and bequeath to my wife, Jennie B. Eldredge all my real and personal property," following this with the words: "consisting of" and then setting out items of personalty only. If the words "consisting of" had been words of limitation, the real estate would have been excluded because the only items which followed the words "consisting of" were items of personal property. But the Court did not treat the words "consisting of" as a limitation upon the prior clause, although separated by a comma from the word "consisting," but held that the real estate went with the personal property.

Vice-Chancellor Pitney, in this case, says:

> "At a venture, I would suspect that the enumeration was made as information to his executor, that he claimed to own such property in severalty, as distinguished from other property which belonged to the firm, of which he appears to have been a member."

In other words, the items following the words "consisting of" were not intended to be comprehensive and all inclusive, but rather suggestive and illustrative or explanatory.

In the same case Vice-Chancellor Pitney at the bottom of page 638, says: "precedents are of little value in interpreting wills."

In view of the fact that in Sites *v.* Eldredge Vice-Chancellor Pitney did not see fit to restrict the first clause to personalty, it would seem to me that a like liberal view should be adopted in this case. Sites *v.* Eldredge is the only case in our reports which is at all similar to the case at bar.

It might be of value to give certain definitions of the words "including" and "consisting."

Worcester defines "including" as enclosing; comprising; taking in; while "consist" is defined as:

"4. To be comprised; to lie;

5. To be composed; to be made up."

The Standard defines "including":

"1. To comprise; comprehend; embrace as a component part, item or member.

2. To enclose within; containing; confine."

"Consist" is defined as:

"1. To be composed or constituted; made up."

While I concede that the words "including" and "consisting" are not the same, yet it will be observed that the definitions given to these two words are very similar and it may well be that in drawing a will a layman would think of the word "consisting" in the same sense that he would the word "including."

The Vice-Chancellor considered that the word "consisting" was descriptive of the extent of the one-half undivided interest in the firm that was given to the nephew and seems to rely upon *Evens* v. *Grixcom,* 42 Law 579, decided by this Court in 1880, by the vote of 7 to 5. The closeness of that vote leads me to believe that it would not be extended to cases beyond the scope of the one then before the Court, which is very dissimilar to the one at bar. In that case the testator had devised certain land in the following language: "all that my farm and plantation near Cropwell, conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides,

containing about eighty-five acres, more or less.'' Standing by itself this devise does not seem to be at all dubious and its meaning seems to be entirely plain. However, because of the fact that the testator owned an additional tract of fourteen acres adjoining the lands specifically devised and which additional land was in possession of Thomas Evens, the contention was made that the additional land passed to Thomas Evens and that the words commencing with the word ''conveyed'' were not intended to be restrictive. The Court held otherwise and it seems to me very properly so. The identification of the devise had to be made and this identification was definite. At pages 583 and 584 is contained the following statement from the majority opinion which seems to have the approval of the Court, to wit:

> ''The distinction is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description of the thing given. It thus appears that, in the opinion of this eminent jurist, it was the designation of the tract of land devised, by its name, that alone prevented the first description from being cut down and diminished by the second description. That a devise of a tract of land described by a name which is applicable to the whole of it, will not, under ordinary circumstances, be affected by a subsequent description, which appears to be intended for a second description of the same tract, but which, in fact, covers only a part of it, is the well-settled rule which has been enforced in a multitude of decisions. Many of the authorities cited in the brief of the counsel of the plaintiff-in-error belong to this class. Such are Chamberlaine *v.* Turner, Cro. Car. 129; Down *v.* Down, 7 Taunt, 343; Doe *v.* Earl of Jersey, 1 B. & Ald. 550; Doe *v.* Galloway, 5 B. & Ad. 43; Ela *v.* Card, 2 N. H. 175; Crosby *v.* Bradburg, 20 Me. 61; Drew. *v.* Drew, 8 Foster 489. These are all cases in which there was a particular description, by name, of property devised, and the rule on which they were decided

> is a very ancient one, for we find the doctrine thus laid down in Sheppard's Touchstone, as extracted from the Year Books: 'If one,' says the author, 'grants all his lands in Dale, which he had of the gift of J. T., by this grant nothing will pass but that which he had of J. T. But if one grant all his lands in Dale, called Hodge's, which he had of the gift of J. T., by this grant all which is called Hodge's shall pass, Albeit the grantor had it not of the gift of J. T.' "

In the case at bar there was a definite bequest and devise which was complete in itself, but that which follows the word "consisting" was "a subsequent misdescription." I cannot believe that the testator meant to say in effect, "I give, devise and bequeath all that portion of my undivided one-half interest in the firm of Soltau and Baker described as follows," and then adding the various objects mentioned.

In my opinion a fair view of the language used and the surrounding circumstances will give to the word "consisting" a meaning corresponding to that of "including," both of which are somewhat synonymous, and this will result in the reversal of the decree.

II.

But we go a step further and insist that the parties in this cause have, by their conduct at least, placed a construction upon this term which now estops them from claiming that the devise and bequest is limited to the specific items mentioned after the word "consisting." For the purpose of having the transfer inheritance tax assessed in New York, the respondent obtained from the appellant a financial statement prepared by a certified public accountant of New York City (Case, p. 39). The balance sheet of the exhibit in question sets forth the assets, and among them the cash in bank $4,789.06, cash in safe $469.03, accounts receivable $1,338.97, notes receivable $1,100, and other items, and showing a net worth

of the firm of $7,054.35. The interest of the testator was one-half, to wit, $3,527.17. (See also the summary, Case, p. 42, ll. 1-10). The respondent submitted this as a part of her application for the appraisement, and the appraisement against the respondent and Albert W. Baker shows that the item of $7,054.35 (which, of course, included all and only all of the items set forth in the balance sheet), was the item accepted by the Court. Accordingly, the decree of the Surrogate fixing the amounts upon which the respondent and appellant, Albert W. Baker, were respectively assessed, makes an assessment against Albert W. Baker on the item of $3,527.17 (just one-half of the partnership assets), and against the respondent, Mrs. Baker, on the item of $10,663.06, which item was made of the items of $8,680, $1,073.75, $2,250, a total of $12,003.75 less debts, funeral expenses, commissions, etc., $1,340.69, leaving the net amount as stated $10,663.06 (Case, p. 69). After this appraisement had been made the solicitors of the respondent wrote to Albert W. Baker that the tax had been assessed and giving the amount to be paid by Mr. Baker and requesting check "so that the title of this property may be vested in you" (Case, p. 71). Upon receipt of this letter Baker sent a check for the tax assessed upon the item of $3,527.17, and this was turned over by the solicitors to the respondent (Exhibit D. 4, Case, p. 72), and subsequently deposited and paid (Exhibits D. 5, Case, p. 73), and the endorsements indicate that the amount of the check went to the personal account of Mrs. Baker (Case, p. 73, ll. 20-25). In other words, although the respondent now denies that Albert W. Baker is entitled to any of the cash in bank, cash in safe, accounts receivable, notes receivable and other items mentioned in the balance sheet, in fact, nothing except the inventoried items aggregating one-half of $753.60, yet she consented to the appraisement being made as stated and without objection, and then calls upon Albert W. Baker to pay the tax on the whole item of $3,527.17 and accepted his money and employed it in the payment of

that tax. The respondent does not set up that this was a mistake of fact nor does she attempt to explain it, because she cannot. Both she and her counsel must have known that if Albert W. Baker took nothing except the items following the word "consisting," then that there would have been no tax for him to have paid in New York, because one-half of the item $753.60 would have reduced the amount he received under the will of property situated in New York to less than $500. I say it could not have been a mistake of fact and therefore the respondent is estopped from denying the right of Albert W. Baker to this whole fund, the undivided one-half of the partnership assets, and the bill of complaint should have been dismissed.

Moreover in her application for the appraisement she gave the interest of herself and Albert W. Baker as follows:

"Anna B. Baker" "Residuary."
"Albert W. Baker" "½ business Soltau & Baker in New York."

Exhibit D. 2, Case, p. 50.

and when the appraiser made the appraisement the respondent was represented by King & Vogt, her present counsel (Exhibit D. 2, Case, p. 68, ll. 10-20), but no one appeared for Albert W. Baker.

The appraiser determined the New York Taxable Assets as follows:

Real Estate in New York State	none
Taxable Personalty within the State of New York:	
112 shs. Am. LaFrance Fire Eng. Co., pfd. at 77½	$8,680.00
10 shs Am. Tel & Tel. Co., 107⅜	1,073.75
25 shs. American Locomotive Co. com. 90	2,250.00
10 shs. Buffalo Potash pfd.	.....
15 shs. Buffalo Potash com.	.....

One-half interest in partnership of Soltau & Baker, appraised at 3,527.17

Gross New York Taxable Assets..... $15,530.92

Exhibit D. 2, Case, p. 68, ll. 30-40.

and in determining the beneficiaries he found as follows:

Beneficiaries		Exempt Amt. Of Interest.	Taxable Amt. of Interest.
Albert W. Baker, nephew:			
Specific bequest of interest in partnership of Soltau and Baker	$3,527.17	0.	$3,527.17
Anna B. Baker, widow:			
Residuary estate ..	$10,663.06	$5,000.	$5,663.06

Exhibit D. 2, Case, p. 69, ll. 20-30.

Moreover, if it were a mistake of law, she of course cannot obtain relief, and this is too well settled to require the citation of authorities.

We go one step further and insist that the exhibits show that the solicitors of the respondent appeared in her behalf in the Surrogate's Court at the time the tax was assessed against the respective parties. As before stated, the appraisement made, according to the exhibits, was in the presence of the respondent or her solicitors, and designated $10,663.06 as the amount on which the respondent's tax was determined, and the amount of $3,527.17, being one-half of the net worth of the partnership property in New York City, as the amount upon which the tax of Albert W. Baker was fixed. The judgment or decree of the Surrogate's Court of New York made April 7, 1922 (Case, p. 70), does not show any objection was made by the respondent, nor is it contended that an appeal had been taken from that adjudication. It determined the tax to be paid as follows:

Beneficiary	Amount Received	Amount of Exemption	Taxable Amount	Tax Asse'd
Albert W. Baker, nephew.....	$3,527.17	0	$3,527.17	$176.36
Anna B. Baker, widow.....	10,663.06	$5,000.00	5,663.06	56.63

This judgment or decree having been rendered or made in a proceeding wherein both the respondent and the defendant, Albert W. Baker, were parties in which the respondent actually appeared either in person or by counsel, it is my contention that the judgment or decree is conclusive as between the respondent and Albert W. Baker, and therefore the respondent cannot maintain this suit. Moreover, the will shows that only the respondent and Albert W. Baker have any interest in the property affected by the appraisement. It is not a case of where the judgment or decree affects any other party either as a matter of law or as a matter of fact, and therefore if the judgment of a court should ever be held to have determined the rights of parties to the proceedings, this is certainly a case where such judgment should be given full effect. I believe it to be according to the fundamental principles of law and also to the soundest principles of equity and even morality.

The testator died September 26, 1921, a resident of the State of New Jersey. On January 25, 1922, a letter (Case, p. 38) was sent to the attorney of respondent setting forth the claim of the appellant, Albert W. Baker, and suggesting court proceedings to determine the rights of the respective parties. On April 12, 1922, notice from the Surrogate of New York County was sent to Albert W. Baker in care of the attorney of the respondent, advising him that the tax of $176.36 had been assessed upon the valuation of $3,527.17 (the one-half of the partnership assets of Soltau & Baker in New York) (Case, p. 32, Exhibit C). This was received by the attorneys of the respondent. Instead of this being sent to Albert W.

Baker the letter (Exhibit D. 3, Case, p. 71) was sent which is as follows:

"The amount of tax assessed on the property coming to you under the will of Richard S. Baker is as follows: Amount assessed against you $3,527.17, tax $176.36. Will you kindly enclose me a check for this amount made payable to Anna B. Baker, executrix, so that the title of this property may be vested in you." On April 18, 1922, the check was sent (Case, p. 37, ll. 35-40) and acknowledged April 21, 1922 (Exhibit D. 4, Case, p. 72). In the letter of acknowledgment it is stated: "This check is in payment of the collateral inheritance tax assessed by the State of New York against your interest in the business of Soltau & Baker."

This assessment, as before stated, is upon the exact amount fixed by the accountant as the share of the testator in the firm of Soltau & Baker (Case, p. 42, ll. 1-10).

The bill of complaint in this cause was not filed until June 29, 1922—five months after the letter (Case, p. 36) was sent to the attorneys of the respondent, and more than two months after the tax was paid. If this had not been assessed against Albert W. Baker the assessment against Mrs. Baker, the respondent, would have been at least $3,000 greater than it was and her tax would have been increased accordingly. By reason of the tax being assessed as it was, Mrs. Baker was *relieved* of paying a tax which she would have otherwise been obliged to pay, and Albert W. Baker paid $176.36 which otherwise he would not have been called upon to pay. In other words Mrs. Baker, the respondent, has accepted the benefit to her of these proceedings, after a knowledge of the facts, and she assented to and participated without objection, in the judicial proceedings in New York which determined the tax to be paid by each. Surely she is estopped from asserting any claim to the property so assessed against Albert W. Baker with her assent.

> "Where a party with knowledge of the facts assents to or participates in judicial proceedings

without objection, he is ordinarily bound by such proceedings as against one who has been mislead to his injury by his conduct, especially where the party against whom the estoppel is claimed has accepted benefits or enjoyed rights under the judgment or decree or order therein."

21 Corpus Juris 1220, par. 224;

In re Grattan, 78 N. J. Equity 225.

"A recital in a judicial record imports absolute verity, and all parties thereto are estopped from denying its truth."

21 Corpus Juris 1064, note 51.

"As to a judgment, the record has the further effect of precluding a re-examination into the truth of the matters decided."

21 C. J. 1064, par. 22.

"Estoppels of record to the extent that they bind parties will also bind their privies."

21 C. J. 1067, par. 24.

In Pomeroy's Equity Jurisprudence (Sec. 804) equitable estoppel is defined as follows:

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

The Vice-Chancellor does not think the facts in the case bring the conduct of either party within the definition given.

The evidence in the case clearly shows that the only information Albert W. Baker received was from the letters sent him already referred to. He had the right to assume the information given by the respondent's attorney was correct, and that his claim as to the ownership of the property had been sustained by the tax appraiser

and Surrogate's Court, both of whom had jurisdiction over the subject matter. Upon the strength of the conduct and representations of the respondent, through her attorneys, he, in good faith, acted—complying with the demand for a check for the amount of the tax. He thus changed his position for the worse to the extent of $176.17, and he has no legal ground of action to recover back the money so paid. By reason of the foregoing he acquired the "corresponding right, either of property, of contract or of remedy."

It is true that the questions as to the title to personal property of testator would ordinarily be determined by the courts of this state, but it is also true that the parties had the right to submit themselves and the questions involved to the jurisdiction of the Courts of New York. The partnership was a New York one, and the *res* was located there. Both the Tax Appraiser and the Surrogate's Court had jurisdiction over the parties and the subject matter. No appeal was taken from the adjudication nor was any objection made thereto. In fact, as already shown, the respondent, in her application for the appraisement of the property in New York of the testator had stated that Albert W. Baker's interest was the "one-half business of Soltau & Baker in New York" (Case, p. 50). This was her solemn declaration under oath; and both the Tax Appraiser and Surrogate's Court in determining the beneficiaries, the property assessable, the extent of the interest of the parties, the value thereof and the tax to be paid by each, concurred therein (Case, p. 68, ll. 30-40 and p. 69, ll. 20-30).

In re Grattan's Estate, 78 N. J. Eq. 225, at 234.

The rights of the respective parties as to property in New York were thereby judicially established and both parties are estopped from asserting any other right—the respondent, both by her conduct and by the said adjudication, and the appellant Baker by the record.

It is hardly necessary to cite additional authorities in support of the above, but I will.

> "A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding."
>
> 23 Cyc. 1055.

> "The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely *ex parte,* provided the matter involves a judicial determination and carries the sanction of the court's authority."
>
> 23 Cyc. 1059, par. 7.

> "The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court are called upon to act judicially in matters of administration, such as boards of county commissioners, boards of land commissioners, or railroad commissioners, or a state board of equalization."
>
> 23 Cyc. 1062, par. d.

I respectfully reiterate, that whether or not the construction of the will made by the tax appraiser in New York and of the Surrogate's Court of New York is the same as might have been made by the Courts of New Jersey, yet the respondent is estopped both by her own acts in setting forth in her application for the appraisement of the tax that Albert W. Baker had a one-half interest in the firm of Soltau & Baker, the subsequent demanding and accepting the entire tax from the defendant Albert W. Baker, assessed to him against said one-half interest, but also estopped by the court proceedings and adjudications in New York, from seeking an accounting or any other relief as to said firm assets in New York. In other words, there is not only an estoppel *in*

pais, but also an estoppel by the record which bars her action.

I respectfully submit the decree entered in this cause should be reversed to the end that the bill of complaint my be dismissed.

CHARLES A. RATHBUN,
Solicitor for and of Counsel with Appellants.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

ANNA B. BAKER, Executrix,
Complainant and Respondent,

and

CHARLES SOLTAU, *et al.,*
Defendants and Appellants.

On Bill, &c.

REPLY BRIEF FOR APPELLANTS.

Several statements made in the brief of the respondent and citations of New York statutes are without any evidence to support them.

It is stated at the bottom of page 2 of the brief that "All the real estate at Bonny Brook, Spotsdam, and in Jefferson and Knox Counties was held in the names of Richard S. Baker and Charles Soltau as *individuals.*" No evidence supports this statement.

The argument is then made by the respondent at page 3: "We, therefore, insist that the words 'my one-half interest in the *firm* of Soltau & Baker' would not act as a devise of the one-half interest in the real estate owned by deceased and specifically devised by the codicil' "; notwithstanding the fact that when the witness Baker was asked "what estate belonged to the firm?" counsel for the respondent in open court stated:

> "Can't we admit that the property designated by Mr. Soltau, that is, the real estate, did belong to the firm? We don't dispute that" (Case, p. 18, ll. 20-30).

Besides this, the citation from 30 Cyc., page 424, contains this clause:

> "The intention of the parties, if clearly disclosed, will determine whether property connected with a

> partnership business is owned by the firm, or by its individual members."

Under the discussion of the question of estoppel the brief of respondent purports to quote from New York statutes, none of which were offered in evidence, and therefore should not be considered by this Court. Nor was any expert testimony given as to what is the law of New York upon the scope of the duties of the New York appraiser.

It is also stated in the brief of respondent at page 13:

> "The proceedings are instituted by the Tax Appraiser in New York. The Tax Appraiser for the Surrogate does not sit as a Court, but sits solely for the purpose of assessing the tax to be paid the State of New York under its law. The proceedings are informal."

None of the foregoing is supported by any testimony. On the other hand, that portion of Exhibit D. 2 found in the case on pages 65-70 shows that the appraiser made his report to the Surrogate's Court; that what he assessed against Albert W. Baker was the "specific bequest of interest in partnership of Soltau & Baker, $3,521.17," the exact amount found by the accountant to be the one-half interest of testator in the firm of Soltau & Baker, outside of the real estate (Case, p. 42, ll. 1-10). When this came before the Surrogate's Court, that Court determined the amount received by Albert W. Baker was $3,527.17 (Case, p. 70). This was a formal adjudication.

The brief also states at page 14 that:

> "Under the law, the appraiser is required to fix a sum as the present value of a going business, and in the assessment the appraiser in New York appraised the value of the business as a going concern. How much this value was, does not appear, nor does it appear how the value of the appraisement was arrived at."

There is no evidence of what the New York law is in respect to the foregoing, nor is there any evidence whatsoever that the "appraiser in New York appraised the

value of the business as a going concern." It is absurd to say that it does not appear how the value of the appraisement was arrived at. The balance sheet (Case, pp. 42 & 43) shows the following:

Total Assets	$8,278.93
Liabilities	1,224.58
Net worth	$7,054.35
Of this one-half would be	$3,527.17

the exact sum assessed against Albert Baker.

The brief of respondent further states that:

"No representations were made to the appraiser in New York concerning the interest of the nephew." How can this statement be justified in view of the sworn statement of the respondent (Exhibit D. 2, Case, p. 50), wherein she set forth the following as to the interest of the appellant, Albert W. Baker? "Albert W. Baker, Dover, ½ business Soltau & Baker in New York."

It is unfair for the respondent to charge, "And when such payment was made, the appellant concealed from her the fact that he intended to use the fact of such payment as an estoppel against the construction by the Court of the will as agreed upon between the respective counsel," as is done at page 15 of brief.

The so-called agreement between counsel had been made months before, and Albert W. Baker had the right to assume, as in fact I did, that his aunt, Mrs. Baker, had abandoned the idea of making claim to any portion of the assets of the firm of Soltau & Baker. There was no thought at the time of using the payment as an estoppel nor was there any expectation that this suit would be started.

It is true that after the assessment was made, Mr. King of King & Vogt, the solicitors of the respondent, with all the copies of the papers in the case before him, and a copy of the decree of the Surrogate, wrote the appellant Baker to send check for the tax which had been assessed

upon the whole of the undivided one-half interest in the firm's business and in that letter stated it was necessary in order to vest the title in Mr. Baker. Mr. Baker assumed that Mr. King knew what he was talking about and forwarded the check.

All of the information which is now before the Court was in possession of the respondent, but, on the other hand, the appellant Baker did not have full knowledge of the matter because, although having due notice of the proceedings in New York, yet he did not appear, nor was he represented either before the appraiser or the Surrogate, and trusted entirely to the respondent, or her counsel, in supplying him with information. If he was mistaken, then it was by the respondent or her counsel wittingly or unwittingly. The respondent had full knowledge.

On the other hand, how honest was the respondent in demanding payment of so large a tax from Albert W. Baker if she still claimed the greater part of the assets of the firm? She well knew that the assessment against her was not as large as it should have been, if she was entitled to receive her husband's share of the money in the bank, bills receivable, notes, &c. It was at least a legal fraud to demand from Albert W. Baker so large a tax.

It seems to me that the quotation in counsel's brief from the case of *The Mutual Life Insurance Company* v. *Morris,* 4 Stew. 583 (31 Eq. 583), and *Stanford* v. *Lyon,* 10 Stew. 94 (37 Eq. 94), fortifies the position of the appellants. It was the appellant Baker who was entrapped into paying money which should not have been paid, if the contention of the respondent is right, and it was the representations of the respondent, or her counsel, that brought about the payment of the money.

Counsel says that the appellant has had his full and complete day in this court to try the matter in dispute (p. 16 of brief). While that is true, the respondent also has had her full and complete day in the Surrogate's

Court of New York and she should abide by the determination of that Court. Even though it had not been by the Court but had been only by the appraiser in New York, yet as shown in the brief which I have heretofore filed, inasmuch as the appraiser had jurisdiction and the respondent appeared either in person or by counsel and without protest accepted the findings of the appraiser, she is certainly concluded by such findings.

At page 16 of the brief respondent again asserts that, if the appellant Baker "made a greater payment to the Comptroller of New York than he was lawfully required to make, he made it with the purpose and design of bettering his own position and to plead his own act as an estoppel against the complainant. This was his secret design."

Replying to this, my answer is, that there is no evidence to justify such an assertion. In the first place, the payment was not made to the Comptroller by the appellant Baker but to the solicitors of the respondent, and then only after a demand for payment had been made by them and after they had had full knowledge, which was not in possession of the appellant Baker. The appellant Baker did not make the move until demand had been made upon him. What was the design of the respondent or her counsel in demanding money which the most casual examination of the papers in their possession would have convinced them that an error had been made by the appraiser and Surrogate of New York if her present contention is correct? She knew that she was trying to get money from the appellant Baker to which she would not have been entitled if her claim is sound. The charge of secret design on appellant Baker's part is flagrantly unjust and it appears to me that the only reason for making the claim is to try and bring him within the exceptions as to when an estoppel will not operate, cited in the brief of the respondent.

My brief already filed with the Court sufficiently covers the other points made and I will not enlarge upon the same.

Respectfully submitted,

CHARLES A. RATHBUN,
Solicitor for and of Counsel
with the Appellants.