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In Chancery of New Jersey.

Between

EDWARD KEARNY, executor of General Philip Kearney's estate to the survivir deceased, complainant,

Item.--But if both

and

AGNES KEARNY, JOHN WATTS KEARNY, and als., defendants.

Bill for direction and relief.

BILL OF COMPLAINT.

[Filed March 20, 1863.]

To the Honorable Henry W. Green, Chancellor of the State of New Jersey.

Humbly complaiuing, showeth unto your Honor your orator, Edward Kearny, executor of the last will and testament of Philip Kearny, deceased, late a Major General of Volunteers in the army of the United States, and who resided, at the time of his death at Harrison, in the county of Hudson, and state of New Jersey; that previous to his death, and at the dates therein mentioned, respectively, said Philip Kearny made his last will, and codicil attached thereto, said will being made and published at the city of Paris, in France, where he was then temporarily residing, and said codicil at the city of Washington, in the District of Columbia, near which the brigade of troops then under the command of said General Kearny was stationed, which last will, and codicil thereto attached, run in the words following, that is to say:—

I, Philip Kearny, formerly in the U. S. Army, a Chevalier of the Legion of Honor of the Empire of France, of New York, but at present temporarily sojourning in the city of Paris, No. 15 Matignon, Champs Elysees, in the city of Paris, do make, publish, and declare this as my last will and testa-

ment, herein and hereby revoking all other wills and codicils by me heretofore made.

1st. I give, demise, bequeath to my wife, Agnes Maxwell Kearny, the sum of three thousand dollars per annum, payable quarterly, and always in advance—the same to be, and be taken by her, in lieu of dower, or all claims for dower, on my estate or settlements heretofore made as to said dower.

Item.—Whereas, I purchased some f[illegible] my present estate of Belgrove, near [illegible], and had the deed drawn so as to create a trust for the benefit of my son John Watts, subject, however, to my right to dispose of the same during my life, now, therefore, I direct my executors, in case I die possessed of said estate, and the above mentioned trust thereby enures to my said son, then, and in such case, I direct and enjoin my executors, first of all, to apportion and set off, absolutely and in fee simple, to my son, Archibald Kennedy, a part or portion of my estate equal in value to the above described property; and all my directions, herein subsequently contained, concerning my estate, are made subject to the provisions of this item, although no further reference be made thereto.

Item.—I give and bequeath to Susan Kearny, my child by the aforesaid Agnes Maxwell, the sum of ten thousand dollars, to be paid to her on her reaching the age of sixteen years; if, however, she dies before that age, this legacy to become part of my residuary estate.

Item.—Whereas, by the provisions of a certain writing, or deed of settlement, I have provided for and settled on my first wife, Diana Bullit, the income of $80,000, and further, the principal sum of $10,000 to each of my children by said Diana, and a half of said sum settled on my said wife Diana, to go to my said son John Watts on her death, now, therefore, I give and bequeath, upon the decease of said Diana, a similar amount to my son Archibald Kennedy, his heirs and assigns—my wish being to equalize the shares of my two sons.

Item.—All the rest and residue of my present, or any hereafter acquired estate, I give, devise, and bequeath—subject, however, to the foregoing provisions—to my two sons, John Watts Kearny and Archibald Kennedy Kearny, to be equally divided between them, share and share alike; and I direct my executors, as soon as conveniently may be after

my decease, to have the same allotted and set off in separate portions, and to hold the same severally in trust until the coming of age of each of my said sons, and as each son comes of age, to execute and deliver to him a sufficient fee simple deed therefor; but in the event that either of said sons die without lawful issue before the period above mentioned, then I give, devise, and bequeath all my said residuary estate to the surviving son.

Item.--But if both of my sons die without lawful issue, and before the period above mentioned, then I give, devise, and bequeath all and singular my said residuary estate, in fee simple to my eldest male grandson then living, but on condition that he takes the name of Kearny in lieu of his patronymic.

Item.—I direct my executors to allow and pay to the guardians of each of my said sons six hundred dollars a year, payable semi-annually, until each of them comes of age, for maintenance and education—said sum of six hundred dollars to be deducted from the income of the part of my estate allotted to such son, the balance of said income to be invested according to law by my executors; these investments to form part of said son's estate, which is to be handed over to him on his coming of age, as above directed.

Item.—I give my executors all such powers to sell, mortgage, or lease any part of my said estate, and generally to do all such acts and things as may be necessary for the good management of my estate and the fulfilment of my intentions in the premises.

Item.—I give and bequeath to my two sons, John Watts and Archibald Kennedy, to be amicably divided among them, all my silver plate, books, paintings, and statues in marble, on condition that the same be not parted with until their reaching the age of twenty-five years, and with my wish that they be handed down to their own children, or sisters' children.

Item.—And I do hereby nominate and appoint my cousin, Edward Kearny, esq., of New York, the executor and trustee of this, my last will and testament.

In witness whereof I have hereunto set my hand and seal, this day of January, 1861, at the city of Paris aforesaid.

P. Kearny.

Signed, sealed, published, and declared, by the above named Major P. Kearny, as and for his last will and testament, in our presence, who, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses, the word December being first effaced, and the word January substituted in the above date; and the testator declared all the foregoing will to be in his own handwriting.

PARIS, January 8th, 1861.

CHARLES J. FAULKNER,
THOMAS BALCH,
JAMES G. CLARKE.

Codicil to the foregoing will:

I, Philip Kearny, above named, do hereby make, publish, and declare this codicil to my above contained last will:—

My son, Archibald Kennedy, having departed this life, and another daughter being born to me, I do hereby make the following alterations and additions to my will:

First. It is my will that my wife, Agnes Maxwell, shall have the right to occupy and possess my estate called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood. Should she at any time surrender its possession to my son, John Watts, to whom, by reason of the death of my son, Archibald Kennedy, the same will go, she shall receive for her life the sum of five hundred dollars yearly, as an equivalent.

Second. I likewise bequeath, give, and order my executors to pay to my said wife, Agnes Maxwell, one thousand dollars, yearly, during her life, in addition to what is herein and by said will devised to her, to be paid as directed in my said will, in item first thereof, and on the same conditions therein expressed, my object being to enable her to reside in the place where our cherished son, Archibald Kennedy, died, and meet its expenses; but whether she reside there or not, it is my intention that she shall receive said additional yearly sum of one thousand dollars.

Third. I do hereby devise to my daughter Virginia, lately born to me, five hundred dollars per annum during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year.

In witness whereof, I have hereto set my hand and seal, this seventeenth day of March, one thousand eight hundred and sixty-two. (City of Washington.)

P. KEARNY.
Brig. Gen'l of N. J. Vols.

Signed and sealed in the presence of,
(Witness our signatures)
DANIEL BUTTERFIELD,
Lt. Col. 12th Inf'try, Brig. Gen. Vols., U. S. A.
WM. FORSYTH,
Surveyor of Washington City.

And your orator further shows to your Honor, that said General Kearny fell in battle on the first day of September, one thousand eight hundred and sixty-two, at Chantilly, in the state of Virginia; that immediately after his death, your orator took proceedings for the proof of said will and codicil, and that, after delays occasioned by the difficulty of procuring the evidence of the witnesses thereto, said will and codicil were, on day of one thousand eight hundred and sixty-two, duly admitted to probate by the surrogate for the time being of Hudson county aforesaid, and letters testamentary thereupon duly granted by him to your orator, as sole executor thereof—and your orator immediately entered upon execution of the same.

And your orator shows that the heirs and next of kin of said Philip Kearny are as follows: his widow, Agnes Kearny, his two children by said Agnes, to wit, Susan W. Kearny and Virginia Kearny, both infants under the age of fourteen years, and Diana Kearny, John Watts Kearny, Ann Kearny, and Elizabeth Watts Kearny, his children by his first wife, all infants under the age of twenty-one, and above the age of fourteen years, now residing temporarily in Europe, at Berlin or elsewhere.

And your orator shows, that the estate of said decedent is large, consisting of personal estate to the amount of about one hundred and forty-seven thousand dollars, including much expensive furniture and statuary, and many costly paintings; and real estate, including said Bellegrove, mentioned in said will, to the amount of nearly one hundred thousand dollars; and that an inventory of said personal estate has been duly filed by your orator in the office of the surrogate of Hudson county.

And your orator shows to your Honor, that the said deceased made, in his lifetime, certain settlements of real or personal property, by which entirely adequate and liberal provision is made for the maintenance and education of each of his children by his first marriage, and for the division among them, when arrived of age, of a large portion of his property; but that no provision is made by said will or codicil, in terms, for the maintenance and education of his daughters, Susan and Virginia, until they become sixteen years of age, respectively; and it is insisted on behalf of said children, by their said mother, that, legally and equitably, such provision ought to be made. It is likewise insisted by counsel learned in the law, on behalf of said Agnes Kearny, that the legal effect of said will and codicil is to vest in her the furniture, statuary, and other personal articles mentioned in article first of said codicil absolutely as her property, and not simply that she might enjoy the same for life and widowhood, and that the legal effect of said will and codicil is to vest in her the estate called Bellegrove for life, whether or not she marry again, and that during whatever period she legally is entitled under said will and codicil, to possess said estate called Bellegrove, or said personal articles, (if they are not absolutely hers) the estate of said decedent is bound to pay taxes, insurance, repairs, and all expenses necessary to retain said premises and chattels in preservation.

The said Agnes Kearny, widow of said decedent, further insists, that she is not compellable, under said will and codicil, actually herself to occupy said estate, nor to keep or use said personal chattels there, but that she may lawfully and without forfeiture rent all or any part of the same.

And your orator, having applied to counsel touching said questions, is informed that it is not safe for him to settle them, and act upon his convictions, but that his proper course is to pray the direction of this court in the matter—wherefore your orator, by advice of his counsel in the law, applies hereby to your Honor in order to obtain from this honorable court authoritative construction of said will and codicil as to the following questions:

First. Whether, in executing said will and codicil, it is the duty of your orator, as executor thereof, to pay anything for or towards the support and maintenance of the said two infant children, Susan and Virginia, until they shall severally arrive at the age of sixteen years, and if so how much per annum?

Second. Upon whom devolves the payment of the taxes, insurance, repairs, and expenses generally attending the keeping up in proper order of the house, grounds, and estate of said decedent, situate in Harrison aforesaid, called Bellegrove, and for how long; and whether, if the said expenses are chargeable on and to be paid out of the estate, they are to continue during the life of said Agnes Kearny, the widow of said deceased, or only during her widowhood; and in case the termination of her widowhood end her estate, whether said expenses are chargeable on the estate of said deceased until John Watts Kearny aforesaid becomes of age, or are to be paid by him.

Third. What right, under said will and codicil, the said Agnes Kearny has to the furniture and personal chattels mentioned in said will and codicil—for how long such right endures—to what extent—who is to bear the expenses of removing said chattels from Paris to said Bellegrove, the same having been ordered from Paris thither by said decedent before his death, and having arrived about the time of his death and shortly after; whether they should be insured against fire, and if yea, whether or not by the estate of said deceased, and for how long?

Fourth. Can the said Agnes Kearny lawfully lease the said estate, called Bellegrove, or the said furniture and personal chattels, or remove said furniture and personal chattels elsewhere, if so disposed, and without forfeiture?

Your orator likewise prays the direction of the court on the following state of facts:—Eliza Kearny, an aunt of said deceased, has, for twenty-five years past, regularly received from him an annuity of one hundred and fifty dollars, and your orator possesses a letter from him, within five years since, in which your orator received directions, as his agent, among other things, as follows:—After keeping enough in hand, you will please pay these annuities in the following order: Mrs. Trainger $150 per annum, Aunt Eliza $150, Uncle Archy $300." Said Mrs. Trainger and Archibald K. Kearny, referred to as "Uncle Archy," each have or had bonds of said deceased securing said annuities. The said Eliza never had. No consideration, save love and affection, ever existed for either of said annuities, but all have been regularly paid for twenty-five years. Your orator prays direction whether to pay said annuity and annuities to said Archibald K. Kearny and Eliza Kearny, who still survive, the other annuitant being now dead.

To the end, therefore, that your orator may be directed in the premises, and instructed how to proceed in the execution of said estate, and may have such relief therein as to your Honor shall seem meet and agreeable to equity and good conscience—

May it please your Honor, the premises considered, to grant unto your orator the state's gracious writ of subpœna, to be directed to the said Archibald K. Kearny, Eliza Kearny, Agnes Kearny, Susan Kearny, Virginia Kearny, John Watts Kearny, Diana Kearny, Anne Kearny, and Elizabeth W. Kearny, therein and thereby commanding them and each of them, on a certain day and under a certain penalty, therein to be expressed, personally to appear before your Honor in this honorable court, then and there to answer the premises, and to stand to, abide, and perform such decree as to your Honor shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

PARKER & KEASBEY,

Solicitors for and of counsel with complainant.

ANSWER OF AGNES KEARNY, SUSAN KEARNY, VIRGINIA KEARNY, AND OTHERS.

[Filed May 20, 1863.]

IN CHANCERY OF NEW JERSEY.

The joint and several answer of Agnes Kearny and of Susan Kearny and Virginia Kearny, infants, by Agnes Kearny, their guardian, three of the defendants to the bill of complaint of Edward Kearny, executor of the last will and testament of Philip Kearny, deceased.

These defendants, saving and reserving to themselves all manner of advantage and benefit of all errors and insufficiencies contained in the bill of complaint of the complainant, for answer thereunto, or unto so much and such parts thereof as they are advised is material for them to make answer unto, answering say—

That they admit—

That said Philip Kearny, Major General of Volunteers in the army of the United States, died at the time and in the manner in said bill stated; that he resided, at the time of his death, at Harrison, in Hudson county, New Jersey, at stated, and that he made and published his last will and codicil in the manner and of the tenor therein stated.

And that said will and codicil were proved before the surrogate of the county of Hudson, and letters testamentary thereon were granted by him to the complainant, as executor thereof.

That the heirs, next of kin, and children of said Philip Kearny are as stated in said bill of complaint, and that their ages and residence are correctly stated in said bill.

That the amount of the personal estate, and also of the real estate of said Philip Kearny, is large, but that these defendants have no knowledge, and cannot answer as to the amount or value of either his real or personal estate, and have not seen or heard, except by the complainant's bill, of any inventory of the personal estate, and do not know or admit that any has been filed in the office of the surrogate of the county of Hudson.

That his personal estate includes much costly furniture,

statuary, and paintings, and that Bellegrove is part of said real estate.

That said Philip Kearny, in his lifetime, made ample provision for his children by his first wife, as in said bill stated, and ample and adequate provision for their support and education until of age; and that he made no express provision whatever for the maintenance or education of this defendant, Susan Kearny, until she shall attain the age of sixteen years, or for this defendant, Virginia Kearny, until she shall attain her fifteenth year; and that it is insisted by this defendant, Agnes Kearny, in behalf of said Susan and Virginia, her infant children, that the said infants are entitled, by the principles of equity and by the proper construction of said will, to have the interest on the sum bequeathed to said Susan Kearny paid to her, to be applied to her support from the death of the testator, and that said Virginia Kearny is entitled to have the annuity bequeathed to her by said codicil, or some other adequate and suitable sum paid out of said estate for her maintenance and education, from the death of said Philip Kearny until she shall attain to her fifteenth year.

That this defendant, Agnes Kearny, and her counsel insists, that the furniture, statuary, and other personal property mentioned in article first of said codicil vest in her absolutely, and that the limitation for life and widowhood do not apply to said personal estate; and that the true construction of said limitation, and the only effect it can have upon her enjoyment of Bellegrove, is to limit it to the period of her natural life, for which she would be entitled to it notwithstanding she might again marry; and that the effect of the devise to her of the right to use and occupy Bellegrove estate vests the same in her for her natural life, and does not restrict her right therein to such time as she shall occupy it in person, and that she has the right to permit others to occupy the same, or parts thereof, as her tenants or otherwise; and if said will should be so construed as to give her only the right to occupy the same in person, that in such case the estate of said deceased or his executor is bound to pay the taxes and cost and expense of keeping and maintaining the same in good repair; and that the complainant

is bound to pay all cost and expenses incurred in transporting the furniture of said Philip Kearny from Europe out of the personal estate of said deceased.

And these defendants further answering say, that they, or either of them, have no estate or property whatever, except their interest in and right to be supported out of the estate of said Philip Kearny, deceased, and that the defendants, Susan and Virginia Kearny, are utterly and entirely without any means of present support.

And this defendant, Agnes Kearny, is advised and insists that such construction ought to be given to said will, so far as regards her own rights, estate, and interest, as herein is stated and set forth, and that said infant, Susan Kearny, is entitled to have the interest of said sum of ten thousand dollars, bequeathed to her in said will, from the death of said testator, paid to her for her support until she shall be sixteen years of age; and that said infant, Virginia Kearny, is entitled to have said annuity of five hundred dollars paid to her out of the estate of said deceased from the day of his death.

All which things these defendants are ready to maintain and prove, and pray that this court may give such construction to said will and codicil as is herein contended for, and may direct said complainant to conform thereto, and that they may be hence dismissed with all their costs and charges in this behalf sustained.

AGNES KEARNY.

State of New York, city and county of New York, *ss.*— Before me, Lewis Hurst, a commissioner for the state of New Jersey, residing in the state of New York, came before me Agnes Kearny, the defendant within named, who, being by me duly sworn according to law, on her oath saith, that the facts and allegations in the within answer set forth and contained, so far as they relate to the acts and deeds of this deponent, are true, and so far as they relate to the acts and deeds of other persons, she believes them to be true; and further saith not. AGNES KEARNY.

Sworn and subscribed, this 18th day of May, A. D. 1863, before me.

LEWIS HURST, *Com'r.*

ANSWER OF AGNES KEARNY, SUSAN KEARNY, VIRGINIA KEARNY, JOHN WATTS KEARNY, DIANA KEARNY, ANNE KEARNY, AND ELIZABETH W. KEARNY.

[Filed January 29, 1864.]

The joint and several answer of Diana Kearny, John Watts Kearny, Anne Kearny, and Elizabeth Watts Kearny, infants under the age of twenty-one years, by Barker Gummere, their guardian, defendants, to the bill of complaint, of Edward Kearny, executor of the last will and testament of General Philip Kearny, deceased, complainant.

These defendants, saving and reserving to themselves all and all manner of advantage of exception to the many errors, untruths, uncertainties, and other imperfections in the said bill of complaint contained, for answer thereunto, or unto so much thereof as these defendants are advised is material for them to make answer unto, they, answering by their guardian, say that they are strangers to all and singular the matters and things in the said bill of complaint contained, otherwise than that these defendants have heard that General Philip Kearny, their father, in the complainant's bill named, was seized of, or entitled to, certain lands and tenements in the state of New Jersey, and possessed considerable personal estate, and made some disposition thereof by last will and testament, in which these defendants have some interest; and these defendants, being infants of tender years, submit themselves to the judgment of this honorable court, and hereby humbly hope that whatever right or interest they have in the real or personal estate of their father, the said General Philip Kearny, deceased, shall be protected and saved to them, without this, that any other matter or thing in the complainant's said bill of complaint contained, and and not herein and hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true; and they pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

BARKER GUMMERE,
Guardian of the said infant defendants.

New Jersey, *ss.*—Barker Gummere, the guardian of the infant defendants within mentioned, being duly sworn according to law, on his oath saith, that the facts and allegations in the within answer set forth and contained, so far as they relate to the acts and deeds of this deponent, are true, and so far as they relate to the acts and deeds of other persons, he believes them to be true; and further saith not.

Sworn and subscribed this day of , A. D. 1864, at , N. J., before me,

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DECREE.

[Filed May 18, 1864]

This matter being opened to the court, and the said will and codicil and the pleadings in the case read and considered, and the court having likewise heard the arguments of counsel learned in the law for the respective parties, viz. the attorney general, for John Watts Kearny, one of the defendants, A. O. Zabriskie, esq., for Agnes Kearny, another of said defendants, and Cortlandt Parker, on bahalf of said executor, the complainant, it is now, on this eighteenth day of May, one thousand eight hundred and sixty-four, adjudged, declared, and ordered by the Chancellor, in answer to the various questions stated in the bill of complaint in this cause, as follows:

First. That it is the duty of said Edward Kearny, the said executor, to pay to the widow of said Philip Kearny, the said defendant, Agnes Kearny, mother and guardian of the testator's infant child, Susan W. Kearny, the sum of six hundred dollars per annum, being the interest of the legacy of ten thousand dollars bequeathed her by the said will, notwithstanding that said legacy is not made payable till she arrives at the age of sixteen years, as and for her maintenance and support; and the said executor is hereby directed to pay the same, beginning at the date of the said testator's death, and continuing till the said legacy becomes payable as aforesaid; payment to be made thereof by quarterly instalments.

And it is further adjudged, declared, and decreed that it is not the duty of said executor to pay anything out of the said estate for maintenance of the testator's infant child, Virginia, to whom, by said will, he devised an annuity of five hundred dollars, payable when she arrives at the age of fifteen years, nor is he justifiable by law in doing so, until, by the terms of said will, said annuity becomes payable.

Second. It is adjudged, declared, and decreed that the said defendant, Agnes Kearny, widow of said testator, is entitled, under said will and codicil, to an estate for life in the estate called Bellegrove, mentioned in said will, and in the personal property likewise therein mentioned and devised to her, subject to be defeated by marrying again, and thereby ceasing to be the widow of said Philip Kearny, deceased; that as such tenant for life she is accountable for waste in, upon, or of the said premises, as regulated ordinarily by common law in case of tenant for life, and must make such repairs as are necessary to prevent waste, and need make no more; that John Watts Kearny, the son of testator by his first marriage, is owner in fee of the remainder in said premises after the determination of said life estate of said Agnes Kearny; that the executor of said testator has no right to pay out of said estate, for insurance of the buildings on said estate or said personal property, and that if either the said tenant for life or remainderman desires to insure the interest to them respectively belonging in said real or personal property, it is for them to do so, or to refrain from doing so as they shall choose. Any repairs upon said premises, beyond those necessary to avoid being guilty of waste, if not made by said tenant for life, are to be made not out of the testator's estate, but by or for said John Watts Kearny.

Third. The expenses of removing the household furniture and other personal chattels from Paris, said removal being ordered in the lifetime of said testator, are a lawful charge against said estate.

Fourth. The said Agnes Kearny, the tenant for life, can lawfully lease the real or personal property to her devisee as aforesaid, viz. Bellegrove and the furniture thereof, and other personalty bequeathed to her, and can remove said furniture and personal chattels whenever and wherever she

desires. She is not compelled to reside at Bellegrove, nor, if she lease it, does she forfeit any interest therein.

Seventh. As to the annuities spoken of in said bill of complaint, the executor is not justified in paying any annuity which the testator was accustomed to pay, unless he was legally bound thereto.

And it is further directed and decreed, that the costs of this suit be paid by said executor out of the estate of the testator, and that he do likewise pay reasonable counsel fees to the three counsel aforesaid, which are hereby fixed at one hundred dollars for each of said counsel.—On motion of Parker & Keasbey, solicitors for complainant.

HENRY W. GREEN, *C.*

APPEAL OF VIRGINIA KEARNY.

[Filed August 23, 1864.]

The defendant, Virginia Kearny, by her guardian, Agnes Kearny, hereby appeals from so much of the final decree, made in this court in the above stated cause, as declares that it is not the duty of said executor to pay anything out of the said estate for the maintenance of the testator's infant child, Virginia, to whom, by said will, he devised an annuity of five hundred dollars, payable when she arrives at the age of fifteen years, nor is he justifiable by law in doing so, until, by the terms of said will, said annuity becomes payable.—To the Court of Errors and Appeals.

Dated August 22d, 1864.

A. O. ZABRISKIE & SON,
Solicitors of defendant.

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

A. O. ZABRISKIE & SON,
Of counsel with defendant.

APPEAL OF JOHN WATTS KEARNY.

[Filed August 24, 1864.]

The defendant, John Watts Kearny, by Barker Gummere, guardian, &c., hereby appeals from so much of the final decree, made in this court in the above stated suit, as declares that it is the duty of the said Edward Kearny, the said executor, to pay Agnes Kearny, mother and guardian of the testator's infant child, Susan W. Kearny, the sum of six hundred dollars per annum, being the interest of the legacy of ten thousand dollars bequeathed to her by the said will, &c.; and as declares that the executor of said testator has no right to pay out of said estate for insurance of the buildings on said estate or said personal property; and as declares that the said Agnes Kearny, the tenant for life, can lawfully lease the real or personal property, to her devised as aforesaid, viz. Bellegrove, and the furniture thereof, and other personalty bequeathed her, and can remove said furniture and personal chattels whenever and wherever she desires, and that if she lease Bellegrove, does not forfeit any interest therein.—To the Court of Errors and Appeals.

Dated August 24th, 1864.

FRED'K T. FRELINGHUYSEN,
Solicitor of said defendant.

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

FRED'K T. FRELINGHUYSEN,
Of counsel with said defendants.

APPEAL OF AGNES KEARNY.

[Filed October 19, 1864.]

The defendant, Agnes Kearny, hereby appeals to the Court of Errors and Appeals from so much of the final decree made in this court in this cause, on the eighteenth day of May, eighteen hundred and sixty-four, as adjudges and

decrees that she must make such repairs upon the premises known as the Bellegrove estate as are necessary to prevent waste, and that no repairs of said property are to be made out of the estate of the testator, Philip Kearny; and also appeals from said decree in this, that it does not order and direct the taxes upon the real and personal property given by said testator to this petitioner for her life to be paid by the complainant out of the estate of the testator.

Dated October 19th, 1864.

A. O. ZABRISKIE & SON,
Solicitors of Agnes Kearny.
A. O. ZABRISKIE,
Of counsel.

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

A. O. ZABRISKIE.

PETITION OF APPEAL.

[Filed August 29, 1864.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN WATTS KEARNY, appellant,
and
EDWARD KEARNY, executor, &c., of PHILIP KEARNY, deceased, appellee.

On bill, &c.

To the Honorable the Court of Appeals in the last resort in all causes of law.

The humble petition of John Watts Kearny, by Barker Gummere, guardian, &c., the appellant in the above stated cause, respectfully shows, that your petitioner feels himself aggrieved by a final decree, made in the Court of Chancery by his Honor Henry W. Green, Chancellor of the state of New Jersey, bearing date the day of in the year of our Lord one thousand eight hundred and sixty-four, wherein the said Edward Kearny, executor, &c., of

Philip Kearny, deceased, was complainant, and the said John Watts Kearny and others were defendants, in this respect, to wit, that the said decree adjudges that it is the duty of the said Edward Kearny, the said executor, to pay Agnes Kearny, mother and guardian of the testator's infant child, Susan W. Kearny, the sum of six hundred dollars per annum, being the interest of the legacy of ten thousand dollars bequeathed her by the said will, &c.; and declares that the executor of said testator has no right to pay out of said estate for insurance of the buildings on said estate or said personal property; and declares that the said Agnes Kearny, the tenant for life, can lawfully lease the real or personal property to her devised as aforesaid, viz. Bellegrove and the furniture thereof, and other personalty bequeathed her; and can remove her said furniture and personal chattels whenever and wherever she desires; nor if she leased Bellegrove does she forfeit any interest therein.

And your petitioner humbly appeals from that part of said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden.

And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

FRED'K T. FRELINGHUYSEN,
Solicitor and of counsel with appellant.

Dated August 29th, 1864.

PETITION OF APPEAL OF VIRGINIA KEARNY.

[Filed September 2, 1864.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

VIRGINIA KEARNY, (impleaded with AGNES KEARNY, SUSAN KEARNY, JOHN WATTS KEARNY, DIANA KEARNY, ANNE KEARNY, and ELIZABETH W. KEARNY) appellant, &c.,

and

EDWARD KEARNY, executor of the will and codicil of General PHILIP KEARNY, deceased, appellee.

} *On bill, &c.*

To the Honorable the Court of Errors and Appeals of the state of New Jersey.

The petition of appeal of Virginia Kearny, by Agnes Kearny, her guardian, respectfully shows, that your petitioner finds herself aggrieved by a final decree, made in the Court of Chancery of the state of New Jersey, bearing date on the eighteenth day of May, in the year eighteen hundred and sixty-four, in a suit wherein the said Edward Kearny, executor of the will and codicil of General Philip Kearny, deceased, was complainant, and your petitioner and said John Watts Kearney and others were defendants, in this respect, to wit:

That the said decree adjudges that it is not the duty of the said executor to pay anything out of the said estate for the maintenance of the testator's infant child, Virginia, to whom, by the will, he devised an annuity of five hundred dollars, payable when she arrives at the age of fifteen years, and that he is not justifiable by law in doing so until by the terms of said will said annuity becomes payable.

And your petitioner humbly appeals from that part of the said decree which adjudges as aforesaid, upon the ground that it is erroneous in the matters above set forth.

Your petitioner therefore prays that so much of the said decree of the Chancellor, so made, which adjudges as afore-

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

A. O. ZABRISKIE & SON,
Solicitor and of counsel with petitioner.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AGNES KEARNY, appellant,

and

EDWARD KEARNY, executor of the will and codicil of General PHILIP KEARNY, deceased, appellee.

On bill, &c.

To the Honorable the Court of Errors and Appeals.

The humble petition of Agnes Kearny, the appellant in the above stated cause, respectfully shows, that your petitioner finds herself aggrieved by a final decree, made in the Court of Chancery, by the Honorable Henry W. Green, Chancellor of New Jersey, bearing date the eighteenth day of May, in the year one thousand eight hundred and sixty-four, wherein the said Agnes Kearny was one of the defendants, and the said Edward Kearny was complainant, in this respect, to wit: That the said decree adjudges and decrees that the said Agnes Kearny make such repairs upon the premises known as the Bellegrove estate as are necessary to prevent waste, and that no repairs of said property are to be made out of the estate of the testator, Philip Kearny; and that it does not order and direct the taxes upon the real and personal property, given by said testator to this petitioner for her life, to be paid by the complainant, out of the estate of the testator. And your petitioner humbly appeals from that part of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is

erroneous; for that the same should have ordered and decreed that your petitioner was not bound to keep said premises in repair, but that the same should be kept in repair, in all things, by the complainant, out of the estate of the testator, and that the taxes on said real and personal property, given to your petitioner for her life, should be paid by the complainant, out of the estate of the testator. Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

Dated October 19th, 1864.

A. O. ZABRISKIE & SON,

Solicitors of appellant, of counsel with appellant.

CHANCELLOR'S OPINION.

The will of the testator, General Philip Kearny, among other provisions, contains the following gifts and directions, viz.

To his wife Agnes, the sum of $3000 per annum in lieu of dower.

To his son Archibald, a devise of real, and a gift of personal estate, equal in value and amount to the real and personal estate previously settled upon his son John Watts, in order to equalize the shares of his two sons.

To his daughter Susan, the sum of $10,000, to be paid to her on her reaching the age of sixteen years.

All the rest, residue, and remainder of his present or after acquired estate he gave, devised, and bequeathed to his two sons, John Watts and Archibald Kennedy, to be equally divided between them, to be allotted and set off in separate portions by his executors, as soon as conveniently might be after his death, and to be held by them severally in trust until the coming of age of his sons, and as each son come of age, to execute and deliver to him a sufficient fee simple deed therefor. In the event of the death of either of his

sons under age and without issue, he gave all the residuary estate to the surviving son; and if both should die under age and without issue, he gave all the residuary estate *in fee simple* to his eldest male grandchild then living, on condition that he take the name of *Kearny*, in lieu of his patronymic.

He directed his executor to allow and pay to the guardians of each of his sons $600 a year, payable semi-annually, until each of them comes of age, to be deducted from the income of his part of the estate.

He gave his executors all such powers to sell, mortgage, or lease any part of his estate, and generally to do all such acts and things as may be necessary for the good management of his estate and the fulfilment of the testator's intentions in the premises.

He appointed his cousin, Edward Kearny, of the city of New York, executor and trustee of the will.

The testator subsequently made and published a codicil to his will, as follows:

"My son, Archibald Kennedy, having departed this life, and another daughter being born to me, I do hereby make the following alterations and additions to my will:

First. It is my will that my wife, Agnes Maxwell, shall have the right to occupy and possess my estate, called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts there or elsewhere, to hold to her during her natural life and widowhood. Should she at any time surrender its possession to my son John Watts, to whom, by reason of the death of my son Archibald Kennedy, the same will go, she shall receive for her life the sum of five hundred dollars yearly as an equivalent.

Second. I likewise bequeath, give, and order my executors to pay to my said wife, Agnes Maxwell, one thousand dollars yearly during her life, in addition to what is herein and by said will devised to her, to be paid as directed in my said will, in item first thereof, and on the same conditions therein expressed, my object being to enable her to reside in the place where our cherished son, Archibald Kennedy, died, and meet its expenses.

But whether she reside there or not, it is my intention

that she shall receive said additional yearly sum of one thousand dollars.

Third. I do hereby devise to my daughter Virginia, lately born to me, five hundred dollars per annum during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year."

The will is dated at Paris, France, on the day of January, 1861, and is in the handwriting of the testator. The codicil is dated at the city of Washington, on the seventeenth of March, 1862.

The testator fell in battle on the first of September, 1862, and the will and codicil were thereafter duly admitted to probate by the surrogate of the county of Hudson.

The executor and trustee asks a judicial construction of the will, and the direction of the court in the execution of his trust.

The testator left at his decease two daughters, Susan and Virginia, each under the age of fourteen years. By his will he gave as follows: "I give and bequeath to Susan Kearny, my child by the aforesaid Agnes Maxwell, the sum of $10,000, to be paid to her on her reaching the age of sixteen years. If, however, she die before that age, this legacy to become part of my residuary estate."

The codicil contains the following clause: "I do hereby devise to my daughter Virginia, lately born to me, $500 per annum during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year."

The will contains no provision for the support or education of either of these daughters until their legacies are payable. Their mother, as guardian, claims an allowance for their present support.

The legatee takes a vested interest in the legacy of $10,000, liable to be defeated by her death before reaching the age of sixteen years. If she die before that time, the legacy sinks into the residue. As a general rule, legacies, like debts, draw interest from the time they are payable. But when the legatee is an infant child of the testator, and no provision is made for its support before the time fixed for the payment of the legacy, interest on the legacy will be al-

lowed from the testator's death by way of maintenance. 1 *Eq. Cas. Ab.* 301; *Ingleton* v. *Northcote*, 3 *Atk.* 438; *Harvey* v. *Harvey*, 2 *P. Wms.* 21; *Lupton* v. *Lupton*, 2 *Johns. Ch.* 614; *Jordan* v. *Clark*, May T., 1863.

The exception extends only to the infant child of the testator, or to one toward whom the testator has assumed a paternal relation. It extends to no other relation, nor even to an adult child. It is founded upon the natural obligation of the father to provide a present support for his infant children, and upon his presumed intention not to deprive them of such support. *Crickett* v. *Dolby*, 3 *Vesey* 10; *Dawes* v. *Swan*, 4 *Mass.* 215; *Sullivan* v. *Winthrop*, 1 *Sumner* 1; *Roberts* v. *Malin*, 5 *Indiana* 18; *Brinkerhoff* v. *Merselis' Ex'rs*, 4 *Zab.* 80; 2 *Roper on Legacies, chap.* 20, 1246.

As regards the legacy to Susan, there is no doubt. She is entitled to interest on the legacy from the death of the testator.

It is urged that the annuity to Virginia falls within the same principle, and that she is entitled to the annuity from the death of the father. It is certain that the necessity for maintenance, and the obligation of the father to provide for it, is the same in regard to both the legatees. But the case of an annuity does not fall within the principle upon which the court gives interest upon a legacy before the time when, by the terms of the will, it is made payable. It is admitted that there is no precedent for such an allowance in the case of an annuitant. There is no fund or principal money given to the annuitant out of which the annuity is to be paid. She has no legacy, vested or contingent, and no interest in the estate beyond the annuity itself. The will fixes with precision the time at which the payment of the annuity shall commence. There is no room for the presumption that the testator intended it should commence at an earlier period. It is suggested that the annuity is given to her during her natural life, and must therefore, as in other cases, commence from the death of the testator; that, by the latter clause of the bequest, the testator simply intended to declare that the annuity should be paid to the annuitant *in person* after she attained her fifteenth year, and that previous to that time it should be expended for her support and education. But the

obvious design of the testator was that the annuity should commence with the annuitant's attaining her fifteenth year, and that the payments should be made quarterly in advance. That is the natural import of the bequest. It is moreover highly improbable that the testator should have desired or intended that the annuity should be paid into the hands of a child only fifteen years of age, rather than to her mother or guardian. But it is insisted that this court may, even against the clearly expressed intention of the testator, make provision for a child out of his estate. As a general principle, I think that proposition cannot be supported.

It is well settled that a court of equity will, where it appears necessary for the support or education of an infant, anticipate his income, whether secured by will or by deed of settlement, and for this purpose they will even break into the principal of the fund. And in this class of cases the allowance will be made in direct contradiction to the terms of the will or deed. It is not a question of construction. It respects not the right of property, but the time of enjoyment. If the court deem it necessary for the support and education of an infant, or most for his advantage, that interest which has been directed to accumulate, or that principal payable at a future day should be applied for that purpose, it will be so ordered, and so a larger allowance will be made for an infant's support than is provided by the testator.

But these cases turn not upon the true construction of the will or the presumed intent of the testator, but upon the power and practice of the court to control the estate of the infant for his benefit.

But the allowance of interest to an infant child of the testator before the time fixed for the payment of the legacy, is mainly, if not exclusively, a question of construction.

The court considers the parent to be under an obligation to provide not only a future, but a present maintenance for his child, and therefore holds that he could have postponed the time of the payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide. *Crickett* v. *Dolby*, 3 *Vesey* 13.

"If," says Chancellor Kent, "there be no other provision, the legacy carries interest immediately on the presumption that the parent must have intended that the child should in the meantime be maintained at his expense." *Lupton* v. *Lupton*, 2 *Johns. Ch. R.* 628.

And Lord Redesdale says: "In the case of a father and a child having no other provision, it is considered a necessary implication that the legacy shall bear interest, because he, being bound to provide maintenance for his child, and having made provision by a legacy payable at a future day, must be presumed to intend that the child should be supported in the meantime; but this implication is ousted if he provide any maintenance for the child, however small the maintenance and however large the legacy. *Ellis* v. *Ellis*, 1 *Scho. & Lef.* 5.

The whole current of authority shows that the settled rule of construction, that the legacy draws interest from the death of the testator, has been adopted from regard to the presumed intention of the testator.

It has been remarked by eminent judges, that courts of justice have gone great lengths, or, in the language of Lord Hardwicke, "have made a great stretch" to provide a maintenance for infants who are entitled to legacies payable at a future time. *Hearle* v. *Greenbank*, 3 *Atk.* 717; *Miles* v. *Ex'rs of Wister*, 5 *Binn.* 477.

Interest has been allowed not only on vested legacies, and legacies defeasible on a future contingency, but also upon legacies in which the legatee has no interest *in præsenti*, but which are purely contingent. In *Mole* v. *Mole*, 1 *Dick.* 310, the legacy was not only contingent upon the legatee attaining the age of twenty-one, but the interest was ordered to accumulate, and the legacy was given over upon the defendant's dying before twenty-one. It has been observed that this is as strong a case as could well arise for the application of the rule, and it is relied on by counsel as authority for the position, that the court will make provision for the infant out of the estate against the expressed intention of the testator. The master of the rolls, in deciding the case, gives no reason for his decision which will justify the inference drawn from it. He makes no allusion whatever to the direction for the accumulation, nor to the fact that the de-

cision is against the intent of the testator, but supports the decision solely by the citation of authorities, to show that interest will be allowed when the legacy is contingent. The decision may, perhaps, be sustained on the ground that the presumption arising from the obligation of the testator to support his infant child is so strong as not to be overcome by the direction for accumulation, and that the order for accumulation was in fact made subject to that intent. If the case was meant to decide that maintenance will be allowed to an infant child out of the estate of a testator, against his clearly expressed intent, it is certainly in conflict with the great weight of authority.

Courts make the allowance of interest to the infant either on the ground of carrying out the intention of the testator, or of dealing with the estate of the infant for its benefit. They do not attempt to violate the will of a testator by disposing of his property contrary to his clearly declared intention, or by appropriating property bequeathed to A. for the support of B., though he be a child of the testator, an infant and destitute. If the testator had seen fit to leave both his infant daughters totally unprovided for, this court would have had no power to alter, however much it might regret such disposition.

Nor can the court presume, when the testator has given to his daughter an annuity for life, commencing on her attaining the age of fifteen years, that he intended that the annuity should commence upon his death. The more natural and reasonable presumption would seem to be, where provision has been made by the testator for the mother of the child, that his intent and expectation was that the child would be maintained by the mother until the time designated for the commencement of the annuity.

The executor is not authorized to anticipate the annuity to Virginia, nor to pay anything out of the estate of the testator for her maintenance.

By his will, the testator gives the residue of his estate, real and personal, to his two sons, John Watts and Archibald Kennedy, to be equally divided between them. If either die before coming of age, the residuary estate is given to the survivor. If both die before coming of age, the entire

residue is given to the testator's eldest male grandchild then living, on condition that he takes the name of Kearny. The terms of the devise are clear, and vest an immediate estate in the sons of the testator, liable to be defeated upon a future contingency.

There are expressions in the will which indicate a different purpose, and which it is insisted vest in the executor an estate in fee, to be held by him in trust for the purposes specified in the will. Thus the executor is directed, as soon as convenient after the testator's death, to have the residuary estate allotted and set off in separate portions, and to hold the same severally in trust until the coming of age of each of the sons, and as each son comes of age, to execute and deliver to him a sufficient fee simple deed therefor, which it is clear the executor cannot do, unless he be himself seized in fee. The real design of the testator was, that the residuary estate should vest in his surviving son in possession and enjoyment upon his attaining the age of twenty-one years. He probably believed that, in order to effect that purpose, a deed from the executor was necessary, inasmuch as the estate until that period was to remain in the hands and under the control of the executor, who was invested with all such powers as might be necessary for the good management of the estate and the fulfilment of the testator's intentions. The surviving residuary devisee undoubtedly takes the estate subject to all the provisions of the will. He takes the residue only after the legacies to the wife and daughters of the testator have been provided for. And the power of the executor to control the estate, so far as may be necessary for those purposes, is unquestioned. The legal title nevertheless is, by the terms of the will, in the residuary devisee, not in the executor.

By the codicil, this legal estate of the residuary devisee in a part of the land is made subject to a life interest of the wife. The language of the devise is as follows: "It is my will that my wife Agnes shall have the right to occupy and possess my estate called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood."

The interest of the widow, both in the real and personal estate, continues so long only as she remains unmarried. It is tantamount to a devise for life, provided she remains unmarried; and if she marry, during her widowhood only. The interest of the wife is not a mere easement, consisting of the right of living in the house, and occupying the personal property there; but it is an estate of freehold, with all its rights and incidents. The gift is of the right to possess the property during her life. The possession of the estate necessarily involves its use and enjoyment, the right of receiving rents, with all the privileges incident to a tenancy for life.

A gift of the rents is a devise of the land. *Kerry* v. *Derrick*, *Cro. Jac.* 104; *Stewart* v. *Garnett*, 3 *Simons* 398; *Beekman* v. *Hudson*, 20 *Wend.* 63; *Craig* v. *Craig*, 3 *Bart. Ch. R.* 77; 4 *Kent's Com.* 536.

The testator might undoubtedly have restricted the widow to the mere privilege of occupying or residing in the house, and of using the personal property there, and not elsewhere. Such may have been his intention, but certainly no such restrictive words are used, nor is there anything in the will from which such intention can be legitimately inferred.

There is no restriction whatever, express or implied, upon the use of the furniture. It is a gift of the right to possess the personal property for life or during widowhood, and necessarily involves the right of using it there or elsewhere at her pleasure. *Marshall* v. *Blew*, 2 *Atkyns* 217.

It is worthy of remark, that the right conferred is not the right to *reside* in the *mansion house*, but to occupy and possess the estate called Bellegrove. In the next clause of the codicil, the testator bequeaths to his wife an annuity of $1000 during her life, in addition to what he had previously bequeathed to her, his object being (in the language of the will) "to enable her to reside in the place where our cherished son Archibald Kennedy died, and meet its expenses." But whether she reside there or not, she shall receive the additional yearly sum of $1000. The annuity was given to enable her to *reside* in the *house*, but it was left optional with her to reside there or not. The gift of the land and chattels, as has been said, was much broader than a mere right of

residence. It is a gift of the right to possess the estate and chattels, and to hold to her during her life and widowhood. No restriction is imposed in regard to her residence. None will be implied. It can be imposed only by the use of clear and unequivocal terms. Courts lean strongly against such restriction in favor of the widow's right.

In *Holme* v. *Harrison*, 2 *Wharton* 283, the words of the will were, "My wife to have a *house to live in* and garden." It was held that she took an estate for life.

In *Musthoff* v. *Dracourt*, 3 *Watts* 240, the testator, after reserving two rooms for the use of W. during life, used this language: "I desire that the widow may have the choice of those two rooms which shall the best suit her, because I desire that the said W. may be sure of a shelter during the time she may have to live." It was held that W. took an estate for life, and not a mere easement in the property.

Though not apparent upon the pleadings, it was admitted, upon the argument, that the estate called Bellegrove consists of one hundred acres of land, more or less. That there are upon it several tenements besides the mansion house, and its outhouses and dependencies, which the testator during his life was in the habit of leasing to tenants. Assuming this as an admitted fact, it seems to render the construction of the devise free from all doubt. The devisee clearly cannot occupy several tenements by personally residing in them. She cannot have the benefit of the devise, nor possess the Bellegrove estate in any other way than by taking an estate for life, which she may occupy either by her tenants or in person.

The widow takes the Bellegrove estate with all the incidents of a tenancy for life. She may not commit actual or *permissive* waste. To that extent only she is bound to repair. If the trustee deem that the interest of his *cestui que trust*, the tenant in remainder, require other repairs to the estate before he comes of age, to that extent he will be authorized to repair.

The tenant for life and remainderman each pay insurance for their respective interests. The estate of the infant can in no wise be benefited by insuring the life estate of the widow.

The expenses of removing the goods from Paris to Bellegrove, having been ordered by the testator in his lifetime, is clearly a debt of the estate, and must be paid by the executor.

Annuities secured by the bond of the testator or otherwise, and for which his estate is liable, must be paid by his executor.

But an annuity for which there is no consideration save natural love and affection, and which the testator was under no legal obligation to pay, creates no charge upon the estate. The fact that it was paid by the testator for a long course of years, and that he gave written instructions to his agent for its punctual payment while in life, creates no legal or equitable obligation to continue it after his death. The trustee has no authority to continue the payment of such annuity.

HENRY W. GREEN, *C.*