N. J. Court of Errors & Appeals.

Between

JAMES WALLACE, Appellant,

and

FRANCIS G. WETMORE, and others, Respondents.

On appeal from Decree in Chancery.

Bill of Complaint filed June 16, 1869.

To the Honorable ABRAHAM O. ZABRISKIE, *Chancellor of the State of New Jersey:*

In Chancery complaining, show unto your honor your orators, Francis G. Wetmore, Job H. Lippincott and Nannie B. Lippincott, his wife, Charles E. Newham, Levi W. Post, Simeon S. Post and Catherine P. Post, his wife, Andrew J. Post, John Headden, Albert Buschman, Elisha W. Baxter, Charles L. Northrup, Thomas Hopper, John N. Fiacre, Andrew McLane, John Syms and Emma, his wife, Thomas Aldridge, Andrew P. Tompkins, Marcella Riley, William R. Drayton, George S. Hallock, John Headden, Junior, Eleanor Graecen, Jonathan W. Wakeman, John Hallowell, Robert C. Bacot and Susan Jane Wortendyke, Executors of the last will of Jabob R. Wortendyke, deceased, and William V. McKenzie and John McBride, Executors of the last will of Patrick Coyle, deceased.

I. That your orators, aforesaid, are respectively seized of or entitled to some estate or interest in the lots or parcels of

land below named, as laid down and designated on a certain map entitled, "Map of property formerly of the Tonnele homestead, Hudson City, New Jersey, belonging to R. C. Bacot, 1864," as follows: Your orator, Francis G. Wetmore, is seized in fee of lots numbers thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, ninety-four, ninety-five, ninety-six, ninety-seven, ninety-eight, ninety-nine, one hundred, one hundred and one, one hundred and two, and one hundred and three on said map. Your oratrix, Nannie B. Lippincott, the wife of your orator, Job H. Lippincott, is seized in fee of lot number eighty-six on said map. Your orator, Charles E. Newham, is seized in fee of lots numbers twenty-nine, thirty, thirty-one, thirty-two, and the half part of lot twenty-eight on said map. Your orator, Levi W. Post, is seized in fee of lots numbers sixty-one and sixty-two on said map. Your oratrix, Catharine P. Post, is seized in fee of lots numbers sixty-seven, sixty-eight and sixty-nine on said map. Your orator, Andrew J. Post, is seized in fee of lots numbers sixty-three and sixty-four on said map. Your orator, John Headden, Jun., is seized in fee of lots numbers eight and nine on said map. Your orator, Albert Buschmann, is seized in fee of lots numbers twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, and a half part of lot number twenty-eight on said map. Your orator, Elisha W. Baxter, is seized in fee of lots numbers fifty-four, fifty-five and fifty-six on said map. Your orator, Charles L. Northrop, is seized in fee of lots numbers fifty-seven, fifty-eight, fifty-nine and sixty on said map. Your orator, Thomas Hopper, is seized in fee of lots numbers seventy-five, seventy-six, seventy-seven and seventy-eight on said map. Your orator, John N. Fiacre, is seized in fee of lots numbers eighty-seven eighty-eight, eighty-nine and ninety on said map. Your orator, Andrew McLean, is seized in fee of lots numbers eighty-one, eighty-two and part of eighty-three on said map. Your oratrix, Emma Syms, is seized of lots numbers eighty-four and part of eighty-three on said map. Your orator, Thomas Aldridge, is seized in fee of lots numbers seventy, seventy-one and seventy-two on said map.

Your orator, Andrew P. Tompkins, is seized in fee of lots numbers seventy-nine and eighty on said map. Your orator, Marcella Riley, is seized in fee of lot number nineteen on said map. Your orator, William R. Drayton, is seized in fee of lot number ninety-two on said map. Your orators, George S. Hallock and John Headden, are sized in fee of lots number ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen on said map. Your oratrix, Eleanor Graecen, is seized in fee of lot number eighty-five on said map. Your orator, Jonathan W. Wakeman, is seized in fee of lot number eighteen on said map. Your orator, John Hallowell, is seized in fee of lots numbers sixty-five and sixty-six on said map. And your orators, Robert C. Bacot and Susan Jane Wortendyke, executors of the last will and testament of Jacob R. Wortendyke, deceased, are entitled under the said will to a power of sale of lots numbers one hundred and four, one hundred and five, and one hundred six on said map. And that your orators, William V. McKenzie and John McBride, executors of the last will and testament of Patrick Coyle, deceased, are entitled under the provisions of said last will to a power of sale of and concerning lots numbers one, two, three, four, five, six and seven on said map.

II. That your orators are seized of and entitled to the lands occupied by the streets laid out upon said map in front of and adjoining their aforesaid respective lots subject to the easement of said streets, and are entitled to the use of said streets for access to their said lots of land and for the full and complete enjoyment thereof; and that your orators are seized of and entitled to, as aforesaid, the whole of the lands laid down and included on said map with the exception of lots numbers forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, seventy-three and seventy-four, and the lands in front of the same occupied by the streets to the middle thereof which belong to Francis W. Mitchell; and also lot number ninety-one on said map, and the land in front of the same occupied by the street to the centre line thereof which belongs to Isaac Day, which said Francis W. Mitchell and Isaac Day have refused to join with your orators as complainants to this bill.

III. That the said lots of land and the said lands occupied by said streets, as laid down on the aforesaid map, compose the tract or piece of land situated in the city of Hudson (formerly the township of North Bergen), in the county of Hudson, in this state, which was formerly the homestead of John Tonnele, now deceased, and on which he resided at the time of his death and is described as follows: Beginning at the most southerly corner of said lot on the west side of the main road leading through the old town of Bergen in the line of land formerly of Cornelius Van Winkle, thence running along said line (1) north seventy-six degrees west nine chain and seventy-one links to the line of lands of the New Jersey Railroad and Transportation Company; thence (2) along the same north fifty-seven degrees thirty minutes west, eighty-four links; thence (3) north forty-eight degrees west, fifty-one links; thence (4) south ten degrees fifteen minutes west, twenty-eight links; thence (5) north sixty-one degrees west, one chain and sixteen links; thence (6) north forty-one degrees thirty minutes west, one chain and sixteen links; thence (7) north nineteen degrees and fifty minutes east, five chains and forty-eight links to lands formerly of Cornelius Van Riper; thence (8) south seventy-eight degrees thirty minutes east, one chain and nineteen links; thence (9) south seventy-six degrees and thirty minutes east, ninety-two links; thence south seventy-seven degrees and forty-five minutes east, three chains; thence south seventy-six degrees and thirty minutes east, nine chains and thirty links to the main road aforesaid; thence (10) along the same south twenty-three degrees forty-five minutes west, one chain and forty-four links; thence (11) along said road south thirty degrees west, two chains and sixty links; thence (12) along said road south thirty-five degrees west, three chains and four links to the place of beginning, containing nine acres and fifteen-hundredths of an acre.

IV. That the said John Tonnele died seized in fee simple of the said tract of land on or about the twenty-sixth day of November, in the year eighteen hundred and fifty-two; and by his last will and testament made and executed in due form of law to pass title to real estate in the state of New Jersey the said John Tonnele, did amongst other things give

and devise to his wife Cecile Tonnele, as long as she lived and remained a widow, his Mansion House at Bergen, where he then lived, and all the grounds attached and contiguous thereto (which are the same lands lastly above described); and upon the death or re-marriage of his said wife he did thereby devise to his son, Laurent John Tonnele, for his life, said Mansion House and that part of the grounds belonging to the same, which lies west of the line of the two picket fences as they then stood east of the two gardens on each side of said house, together with the use of the avenue as then fenced off leading from said Mansion House to the public road; and at the death of his said son he gave and devised the same to his lawful issue; but if the said son should leave no lawful issue living at his death he then devised the same to his daughters equally, the issue of any that might have died to take its parents share. And all the residue of his said homestead lot, including all of the same east of the said line of said picket fences subject to the right of his said son and his issue to the use of said avenue, he gave and devised after the death or re-marriage of his said wife, to his daughters equally share and share alike to each during her natural life, and after her death to her issue, the issue of any that should have died to take the share that such daughter would have taken if living, and if any of his daughters should die without issue living at her death, her share should go to his other daughters and the issue of such as might be dead, such issue taking the share of such deceased daughter. And the said John Tonnele did thereby appoint his said wife, Cecile Tonnele, and his friends, Robert Gilchrist and Abraham O. Zabriskie the Executors of his said will; and did thereby authorize his said executors to sell and convey all or any part of his real estate. Which said last will was on or about the eleventh day of December in the year last aforesaid, duly proved by the said Cecile Tonnele, Robert Gilchrist, and Abraham O. Zabriskie, the Executors therein named, before the surrogate of the county of Hudson in this state; and they, the said Executors, were duly qualified to take and did take upon themselves the execution thereof. A true copy of which said will and the

certificate of probate thereof is hereunto annexed marked Schedule A, which your orators pray may be taken as a part of this bill.

V. And your orators are advised and insist that by virtue of the provisions of said last will, the said executors therein named had full and complete power to sell and convey the said lands above described free, clear and discharged of the estate or interest devised, as aforesaid, to the said Laurent John Tonnele, and of all liens or incumbrances made or suffered by him; and that the said power of sale so devised to said executors enabled them to sell and convey the same estate in said lands of which the said John Tonnele died seized, except so far as the same might have been subject to the life estate devised, as aforesaid, to the said Cecile Tonnele.

VI. That on or about the twenty-sixth day of April, in the year eighteen hundred and sixty-four, the said Cecile Tonnele, Robert Gilchrist, and Abraham O. Zabriskie, Executors as aforesaid, under and by virtue of the power so given and devised to them by said last will, and to carry out and execute the same as to the lands therein described, did by a deed of conveyance bearing date on the day and year last aforesaid, and duly executed and acknowledged, in consideration of the sum of fifty thousand dollars, bargain, sell, and convey unto your orator, Robert C. Bacot and his heirs, the said lands and premises herein lastly above described, being the same lands named in said last will as the Mansion House of said John Tonnele, deceased; and being also the same lands laid down on and included in the map above named, and of all of which your orators are now seized or entitled to, as aforesaid, except said lots owned by said Mitchell and Day, as in and by the said deed in your orators possession, ready to be produced and proven, will more fully appear.

VII. And your orators further show that the execution of said last named deed was duly proved by the subscribing witness thereto before one of the Masters of this Court on the twenty-ninth day of April, in the year eighteen hundred and sixty-four, and that the same was recorded in the office of the clerk of the county of Hudson on the same day last aforesaid. That a copy of said deed is hereunto annexed marked Sche-

dule B, which your orators pray may be taken as a part of this bill.

VIII. That on the twenty-sixth day of April, in the year last aforesaid, the said Cecile Tonnele, the widow of the said John Tonnele, deceased, being and having remained unmarried, did by a deed of conveyance, dated on that day, convey her interest and estate in the said lands to the said Robert C. Bacot. And your orators aver that by virtue of said two deeds of conveyance, last aforesaid, the said Robert C. Bacot became and was seized of and entitled to the same estate and interest in the said land and premises which the said John Tonnele had and was seized of at the time of his death free, clear, and discharged of any estate or interest of said Laurent John Tonnele, or any other of the said children of said John Tonnele therein, and free from all liens or incumbrances made or suffered by said Laurent John Tonnele or any other of said children thereon.

IX. And your orators further show that they have all derived their title to the said lots or portions of said lands of which they are seized or entitled to, as aforesaid, directly or indirectly from and through the said Robert C. Bacot.

X. And your orators further show that on or about the twenty-second day of November, in the year eighteen hundred and sixty-one, James Wallace recovered a judgment in the Supreme Court of this state against said Laurent John Tonnele and one Timothy Deegan, for the sum of seven hundred and fifty-nine dollars and thirty-three cents for his damages and costs; and that subsequently at the term of February last of the said Supreme Court, such proceedings were had before said court in said suit that the said court ordered that the said James Wallace, the plaintiff in said suit have leave to issue an alias writ of *fieri facias* upon said judgment against the said defendants for the amount of the said damages and costs remaining unpaid; and that thereupon on the first day of March last an alias writ of *fieri facias de bonis et terris* was issued out of said Supreme Court by one John J. Burke an attorney at law of this state, at the suit of James Wallace against the said Laurent John Tonnele and Timothy Deegan, directed to the sheriff of the county of Hudson, for the said sum due upon said judgment

and returnable before said court on the first Tuesday of June last; and that on or about the fifteenth day of April last John H. Midmer, the Sheriff of the county of Hudson, under and by virte of the said writ of *fieri facias*, levied upon the said tract of land herein above described and known as the Homestead lot of said John Tonnele, deceased, and has advertised the same to be sold at public auction at Taylor's Hotel in the city of Jersey City on Thursday the first day of July next at two o'clock in the afternoon. A copy of the advertisement of which sale is hereunto annexed marked Schedule C.

XI. And your orators further show that the whole of said lands so advertised to be sold by said sheriff of the county of Hudson, except said nine lots owned by said Mitchell and Day are owned as aforesaid by your orators; and that since the conveyance thereof, as above mentioned, to the said Robert C. Bacot extensive and valuable improvements have been made on said lands, and that the said property so owned by your orators is worth in the aggregate at the lowest calculation the sum of two hundred and fifty thousand dollars.

XII. And your orators charge, that the said judgment is and was no lien upon said lands or any part thereof, or if it ever was a lien upon the estate therein devised by said will to said Laurent John Tonnele it was subject to the power of sale therein devised as aforesaid to said executors, and that upon the giving of said deed as and for an execution of the said power by said executors to said Robert C. Bacot, the said lands were for ever discharged and free of all lien of the said judgment; and that the said sheriff has no right or authority to levy upon said lands or expose the same for sale or to sell the same by virtue of said executions issued upon said judgment. And your orators believe that the said John H. Midmer, sheriff, as aforesaid, means to sell and will sell the said lands at the time named in said advertisement of sale unless prevented by this court.

XIII. And your orators further show, that although they are advised and believe that the sale of said lands of your orators by the said sheriff, under the said writ of *fieri facias*, will not in fact pass any title to the purchaser or purchasers thereof, and will not divest the title of your orators thereto

devised
~~devised~~, as aforesaid, yet your orators believe and charge that the effect of such sale will be injurious to the interests of your orators and will for ever cast a cloud upon their title to said lands, and will cause delays and inconveniences in the sale and disposition thereof; from which your orators submit that they as purchasers and owners of said lands, by good and indefeasible title, should be protected by the injunction of this court.

XIV. And your orators have frequently applied to the said John H. Midmer, sheriff of the county of Hudson, and to the said James Wallace, the defendants to this bill, to act towards your orators in such a way as was equitable and just; and your orators had well hoped that such their reasonable requests would have been complied with; but now so it is, may it please your honor, that the said defendants combining and confederating with divers persons unknown to your orators, but whose names when discovered your orators pray may be inserted herein with proper words to charge them as parties defendants hereto, absolutely refuse to comply with such requests. And the said defendants sometimes pretend that the said judgment is a good and valid lien upon said lands, and that the estate therein devised to said Laurent John Tonnele was not subject to or included in the said power of sale devised, as aforesaid, to said executors; but your orators charge the contrary thereof, and that the said power of sale so given to said executors was general and absolute, and included as well the said estate in said lands devised to said Laurent John Tonnele as all the other lands of said testator except perhaps the said life estate devised as aforesaid to said Cecile Tonnele. All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In consideration whereof and forasmuch and as your orators are remediless at and by the strict rules of the common-law, and can only have adequate relief in a court of equity where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths according

to the best and utmost of their several and respective knowledge, information and belief full, true and perfect answer make to all and singular the premises as fully and particularly as if here repeated. And that the said defendants may be enjoined and restrained by the injunction of this court from further proceeding to sell, or selling under the execution issued out of the Supreme Court of the state of New Jersey at the suit of James Wallace against Laurent John Tonnele and Timothy Deegan, any part of the tract of land containing nine acres and fifteen hundredths of an acre, known as the homestead lot late of John Tonnele, deceased, and situate in the City of Hudson, in the county of Hudson, in this state, except lots numbers forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, seventy-three or seventy-four and ninety-one on the map of said property made for Robert C. Bacot in 1864, which lots are said to be owned by Francis W. Mitchel and Isaac Day, and for such other and further relief as to this court shall seem meet.

May it please your honor, the premises considered, to grant unto your orators, not only a writ of injunction to be issued out of and under the seal of this court to be directed to the said John H. Midmer, Sheriff of the county of Hudson, and James Wallace, to restrain them from further proceeding to sell or selling under the execution issued out of the Supreme Court of the State of New Jersey, at the suit of James Wallace against Laurent John Tonnele and Timothy Deegan, any part of the tract of land containing nine acres and fifteen hundredths of an acre, known as the homestead lot late of John Tonnele, deceased, and situated in the City of Hudson, in the county of Hudson, in this state, except lots numbers forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, seventy-three, seventy-four and ninety-one, as laid down on the map of said property made for Robert C. Bacot in 1864, which lots are said to be owned by Francis W. Mitchell and Isaac Day; but also a writ or writs of subpœna to be directed to the said John H. Midmer, Sheriff of the county of Hudson, and James Wallace, commanding them on a certain day, and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to an-

swer the premises and to stand to, abide by and perform such order a d decree therein as to your honor shall seem meet. And your orators, as in duty bound, will ever pray, &c.

L. & A. ZABRISKIE,
Solicitors and of Counsel with Complainants.

SCHEDULE A.—THE LAST WILL OF JNO. TONNELE, DECD.

I, John Tonnele, of the township of North Bergen, in the county of Hudson, and state of New Jersey, do make, publish and declare the following as and for my last will and testament.

First. I direct my executors to pay all my just debts, as soon as can conveniently be done after my decease.

Second. I give and devise unto my beloved wife Cecile, all the real and personal estate of which I may die seized or possessed, that was conveyed, assigned or paid to me in her right, in the distribution of the estate of her father, the late Laurent Salles, and also my four lots and the six houses thereon, situate at the corner of Fourteenth street and the Sixth avenue in the city of New York, said lots being bought and houses built with money received from said estate, to have and to hold said real and personal estate to my wife during her natural life as long as she remains a widow. But if she shall marry again, then I direct that her estate in, and right to the same shall cease, and I do order my executors to pay her out of the income of my estate, an annuity of five thousand dollars during her natural life, to be paid in two equal half yearly payments of twenty-five hundred dollars each.

Third, I also give and bequeath to my said wife during her natural life, my horses, carriages, plate, and all my

household furniture, and all my other movable chattels, and, I declare the provisions for my wife herein contained, to be in lieu of her right of dower in my estate.

Fourth. I give and devise to my said wife, so long as she lives and remains a widow, my mansion house at Bergen where I now live, and all the grounds attached and contiguous to the same as owned by me, and upon the death or re-marriage of my said wife, I do give and devise to my son, Laurent John Tonnele for his life, said mansion house and that part of the grounds belonging to the same, which lies west of the line of the two picket fences as they now stand east of the two gardens on each side of my house, together with the use of the avenue as now fenced off leading from said mansion house to the public road, and at the death of my said son, I give and devise the same to his lawful issue. But if my said son shall leave no lawful issue living at his death, then I devise the same to my daughters equally, share and share alike, the issue of any one that may have died to take what would have been the share of such daughter if she had then been living, and all the residue of my said homestead lot, including all of the same east of the said line of said picket fences, subject to the right of my said son and his issue to the use of said avenue, I do give and devise after the death or re-marriage of my said wife, to my daughters equally, share and share alike, to each during her natural life, and after her death to her issue, the issue of any one that shall have died to take the share that such daughter would have taken if living, and if any of my daughters shall die without issue living at her death, her share shall go to my other daughters and the issue of such as may be dead, such issue taking the share of such deceased daughter.

Fifth. All the rest and residue of my property both real and personal, including after the death or re-marriage of my said wife whatever I have herein given or devised to her for life or widowhood respectively, I give, devise and bequeath to my eight children, that is to say, to my son Laurent John Tonnele, and my daughters Julie Emile Tonnele, Cecile Josephine Tonnele, Laurencine Salles Tonnele, Adelaide Jane Tonnele, Margaret Tonnele, Eloise Tonnele and

Isabella Zedina Tonnele, to be equally divided between them, share and share alike, in such manner that each child shall receive only the net rents, income and profits of his or her share during her life, and at the death of each child, his or her share shall go to and vest in his or her lawful issue, and in default of such issue living at his or her death, then to my other children and their issue in the same manner as the share of each child is herein given and limited : the children of any deceased child to take their parents share.

Sixth. I do hereby order and direct that in case my son Laurent John Tonnele shall at my death be married to Hannah Wood, then every bequest, devise and gift to him or to his issue herein before contained shall be void, and he shall receive, have or occupy nothing by virtue thereof, or in case he shall after my death marry said Hannah Wood, then and from thenceforth, every such bequest, devise and gift herein before contained shall cease and be void and all his estate therein shall determine, and nothing pass to his issue by virtue of the same, and in such case either of his being married to said Hannah Wood at my death, or of his marrying her afterwards, he shall receive out of the income of that part of my estate herein given or devised to him, an annuity of five hundred dollars per annum, or so much thereof as the net income of the part he would have otherwise been entitled to would give, so that at no time he shall be entitled to receive a greater income out of my estate that he would have received if he had not married said Hannah Wood ; and my said son shall receive nothing else whatever by virtue of any provision in any part of this will contained, and in such case my executors shall retain in their hands so much of the property in this will given to my said son and his issue, as they may judge sufficient and ample to produce by its income such annuity, and the residue of said share shall be divided among and go to my other children and their issue in the same manner as is hereinbefore provided in case of his death.

Seventh. And in order more fully to carry out the objects of this, my will, I do hereby appoint and declare my executors hereinafter named, to be trustees of all property, estate or interests herein given or devised to any of my

children, or that any of my children may be entitled to by virtue of any provision in this my last will, during the life of such child, (excepting the life estate in the mansion house devised to my son), with full power to retain all such property in their hands unsold and undivided until after the year eighteen hundred and sixty-seven. And I do authorize my said executors to sell and convey all or any part of my real estate, and all real estate that may be purchased by them, and to invest my personal estate and the proceeds of the sale of such real estate at interest on bond and mortgage of real estate, or in government or state stocks, or to lay out the same in the improvement of my real estate or in the purchase of other real estate and the improvement thereof, as may seem to them most for the interest and advantage of my children and for the improvement of my estate, and to change such investments as they shall judge best from time to time.

Eighth. I order and direct my executors to pay over to each of my children during his or her natural life, the net income of that part or proportion of my estate herein given or devised to such child, after deducting therefrom all taxes, assessments, commissions and other annual expenses and charges, the income of each of my daughters, to be paid to her upon her own receipt, for her separate use, free from the control of any husband; and that of my son, as well as the annuity herein granted to him on certain events, to be paid to him on his own receipt, for his own use, and not to any assignee or mortgagee of the same.

Ninth. I do hereby order that each of my executors shall be liable for his or her own default and neglect only, and not for that of either of his or her co-executors, and not for any money received by his or her co-executor, or by him or her in good faith, and for the purposes of their trust paid over to his or her co executor.

Lastly. I do hereby appoint my beloved wife Cecile, and my friends Robert Gilchrist and Abraham O. Zabriskie, executors of this my last will, and I do hereby revoke all former wills by me made.

In witness whereof, I have hereunto set my hand and

seal, this sixth day of November, in the year of our Lord eighteen hundred and fifty-two.

JOHN TONNELE. [L. S.]

The above writing, written on one side of six leaves of paper, was signed, sealed, published, pronounced and declared to be his last will and testament, by John Tonnele, in the presence of us at the same time, and we in his presence and at his request, and in the presence of each other have subscribed our names thereto, as witnesses to the execution and publication thereof—the words "or her" interlined in tenth line of last page.

JACOB M. MERSELES, Residence of Bergen, New Jersey.
MICHEL MESNARD, Bergen, N. J.

I, *Edmund W. Kingsland*, surrogate of the County of of Hudson, do certify the annexed to be a true copy of the last *will* and *testament* of *John Tonnele*, late of the county of Hudson deceased, and that *Cecile Tonnele*, *Robert Gilchrist* and *Abraham O. Zabriskie*, the executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the testator agreeably to the said will.

Witness my hand and seal of office the *eleventh* day [L. S.] of *December*, in the year of our Lord *one thousand eight hundred and fifty-two.*

E. W. KINGSLAND,
Surrogate.

SCHEDULE B—THE DEED OF TONNELE'S EXECUTORS.

"This Indenture, made this twenty-sixth day of April, in the year one thousand eight hundred and sixty-four, between Cecile Tonnele, Robert Gilchrist and Abraham O. Zabriskie, executors of the last will and testament of John Tonnele, late of the township of North Bergen, in the county of Hudson and state of New Jersey, deceased, of the first part, and Robert C. Bacot of Jersey City, in said county of the second part, witnesseth: That whereas the said testator in and by his last will and testament dated the sixth day of November, A. D. 1852, did appoint said parties of the first part the executors thereof, and did order and direct as follows: "I do hereby authorize my said executors to sell and convey all or any part of my real estate," and said executors did cause said will to be proved and recorded in the office of the surrogate of the county of Hudson, and took upon themselves the execution thereof. And whereas said executors did by virtue of said authority sell the lands hereinafter described and conveyed, being lands of which said testator was seized at his death, and the making of said last will, to said party of the second part in two parcels, the easterly parcel as hereinafter designated and distinguished for the sum of twenty-six thousand dollars, and the westerly parcel as hereinafter designated and distinguished for the sum of twenty-four thousand dollars.

Now therefore, the said parties of the first part, by virtue of the power and authority to them given, in and by the said last will and testament, and for and in consideration of the sum of fifty thousand dollars, lawful money of the United States of America, to them in hand paid at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators forever, released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, release convey and confirm unto the said party of the second part, his

heirs and assigns forever, all that tract or parcel of land and premises in the city of Hudson, formerly part of the township of North Bergen in the county of Hudson and state of New Jersey, being the homestead lot of said John Tonnele, whereon he resided at the time of his death, including his mansion house and all the lands attached and contiguous to the same that were owned by him—butted and bounded as follows: beginning at the most southerly corner of said lot on the west side of the main road leading through the old town of Bergen, in the line of land formerly of Cornelius Van Winkle; thence running along said line (1) north, seventy-six degrees, west, nine chains and seventy-one links to the line of lands of the New Jersey Railroad and Transportation Company; thence (2) along the same, north, fifty-seven degrees thirty minutes, west, eighty-four links; thence (3) north, forty-eight degrees, west, fifty-one links; thence (4) south, ten degrees fifteen minutes, west, twenty-eight links; thence (5) north, sixty-one degrees, west, one chain and sixteen links; thence (6) north, forty-one degrees thirty minutes, west, one chain sixteen links; thence (7) north, nineteen degrees fifty minutes, east, five chains forty-eight links to lands formerly of Cornelius Van Riper; thence (8) south, seventy-eight degrees thirty minutes, east, one chain and nineteen links; thence (9) south, seventy-six degrees thirty minutes, east, ninety-two links; then south, seventy-seven degrees forty-five minutes, east, three chains; south, seventy-six degrees thirty minutes, east, nine chains and thirty links to the main road aforesaid; thence (10) along the same, south, twenty-three degrees forty-five minutes, west, one chain and forty-four links; thence (11) along said road, south, thirty degrees, west, two chains and sixty links; thence (12) along said road, south, thirty-five degrees, west, three chains and four links to the place of beginning, containing nine acres and fifteen hundredths of an acre. Being the lands conveyed to said John Tonnele in his life time by two deeds to him, one from William Hornblower and wife, by deed dated April 30th A. D. 1836, and recorded in Bergen County Clerk's office, in book A 4 of deeds, pages 580 to 581. The other from the New Jersey Railroad and Transportation Company, dated September 10th A. D. 1841, and re-

corded in Hudson County Clerk's office, in Liber 2 of deeds pages 307 to 309.

The price paid by the party of the second part for that portion of said premises east of the line of the two picket fences standing on the east of the two gardens on each side of said mansion house subject to a right of way over the avenue as fenced, being twenty six thousand dollars, and the price paid for the part west of the line of said picket fence with said right of way attached, being twenty-four thousand dollars.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime and at the time of his decease, and which the said parties of the first part, or either of them, have or hath by virtue of the said last will and testament or otherwise of, in and to the same and every part and parcel thereof with the appurtenances. To have and to hold the said premises above mentioned and described and hereby granted and conveyed, or intended to be, with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof forever. And the said parties of the first part severally and respectively, do severally and not jointly, but each and every of them for her and himself only, and for her and his heirs, executors and administrators, and his and her several and seperate acts and deeds only, covenant, grant, promise and agree to, and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may, from time to time and at all times for ever hereafter, peaceably and quietly have, hold, possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, to and for his and their own use and benefit, without any lawful let, suit, hindrance, or denial whatsoever, of, from or by them the said parties of the first part, their heirs and assigns; or

any other person or persons whomsoever lawfully claiming by, from or under them or either of them. And that free and discharged, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments and all other charges and incumbrances whatsoever made or done by them the said parties of the first part.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

CECILE TONNELE, [L. S.]
R. GILCHRIST, [L. S.]
A. O. ZABRISKE, [L. S.]
ROBT. C. BACOT, [L. S.]

The word "March" crossed out and word "November" interlined on 11th line 1st page, and the words "south seventy-six degrees thirty minutes east ninety-two links, then south seventy-seven degrees forty-five minutes east eight chains" on the 5th page, and the word "links" on 2d page inserted before signing.

Sealed and delivered in presence of

AUGUSTUS ZABRISKIE.

NEW JERSEY, } ss.
Hudson County, }

I, Lansing Zabriskie, one of the Masters in Chancery of said State, do hereby certify that on this twenty-ninth day of April, in the year eighteen hundred and sixty-four, before me personally appeared Augustus Zabriskie, who, being by me duly sworn, upon his oath did depose and say, that he knows Cecile Tunnele, Robert Gilchrist, Abraham O. Zabriskie, and Robert C. Bacot to be the parties named in the within deed, and that he saw them sign, seal snd deliver the same as their voluntary act and deed, and that he, said deponent, subscribed his name thereto at the same time as witness of the execution thereof.

L. ZABRISKIE, *M. C. C.*

IN CHANCERY OF NEW JERSEY.

Between
FRANCIS G. WETMORE and others,
Complainants.
and
JOHN H. MIDMER and JAMES WALLACE, Defendants.
} *Demurrer.*

The demurrer of James Wallace, one of the defendants to the bill of complaint of Francis G. Wetmore, Job H. Lippincott and Nannie B. Lippincott, his wife, Charles E. Newham, Levi W. Post, Simeon S. Post and Catharine P. Post, his wife, Andrew J. Post, John Headden, Albert Buschman, Elisha W. Baxter, Charles L. Northrop, Thomas Hopper, John N. Fiacre, Andrew McLean, John Syms and Emma, his wife, Thomas Aldridge, Andrew P. Tompkins, Marcella Riley, William R. Drayton, George S. Hallock, John Headden, Junior, Eleanor Graecen, Jonathan W. Wakeman, John Hallowell, Robert C. Bacot and Susan Jane Wortendyke, Executors of the last will of Jacob R. Wortendyke, deceased, and William V. McKenzie and John McBride, Executors of the last will of Patrick Coyle, deceased, complainants. This defendant by protestation, not confessing or acknowledging all or any of the matters or things in and by the said bill set forth and complained of to be true in manner and form as the same are therein and thereby set forth and alleged, says, that he is advised by his counsel that there is no matter or thing in the said bill contained good and sufficient in law to call this defendant in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore this defendant doth demur thereunto, and for cause of demurrer

this defendant says, that the said bill of complaint (in case the allegations therein contained were true, which this defendant does in no sort admit) contains not any matter of equity wherein this court can ground any decree or give the complainants any relief or assistance as against this defendant.

And this defendant, for further cause of demurrer, shows that the complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed for from or against this defendant, and this defendant for further cause of demurrer shows, that the said complainants have not in and by their said bill shown any right and title whatsoever to compel this defendant to answer the said bill. Wherefore and for divers other errors and imperfections in the said bill appearing this defendant doth demur in law thereunto and humbly demands the judgment of this honorable court whether he shall be compelled to put in any further or other answer to the said bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

C. E. SCHOFIELD,
Solicitor of Defendants.

JOHN S. DE HART,
Of Counsel.

IN CHANCERY OF NEW JERSEY.

Between
FRANCIS G. WETMORE and others, Complainants.
and
JAMES WALLACE and others, defendants.

On Bill, &c. Decree overruling Demurrer.

The arguments of the counsel of the respective parties having been heard upon the demurrer filed in this cause, and it appearing from the allegations of the complainant's bill that John Tonnele died seized of the lands described in said bill, and by his last will devised an estate for life therein to his son Laurent John Tonnele, subject to a life estate devised by said testator to his widow; and that the said testator did also thereby authorize his executors to sell and convey all or any part of his real estate, and that said executors subsequently by virtue of said power, sold and conveyed to the complainant's grantor said lands, out of which said life estate had been devised to said Laurent John Tonnele; and it also appearing that previous to the execution of said power and conveyance of said lands by said executors, the said defendant, James Wallace, recovered a judgment in the Supreme Court of this State, against said Laurent John Tonnele, which judgment the said defendant, James Wallace, now claims to be a valid lien in law, upon the said estate of said Laurent John Tonnele in said lands, notwithstanding the devise of said power to said executors, and the execution thereof by them in making said conveyance thereunder, and which said power of sale the said defendant claims did not embrace the said life estate in said

lands so devised to said Laurent John Tonnele, and that therefore the complainants are not entitled to the relief prayed by their said bill. And the matter having been duly considered by the Court, and it appearing by the true construction of said will, that the said power of sale did relate to and embrace the said life estate of said Laurent John Tonnele, and that upon the execution of said power of sale by the executors the said judgment was no lien upon said estate, and that the complainants are therefore entitled to the relief prayed by their bill.

It is thereupon on this eighth day of November, eighteen hundred and seventy, ordered and adjudged by the Chancellor that the life estate, in said bill alleged to have been devised by the last will of John Tonnele, deceased, to his son Laurent John Tonnele, was subject to the power of sale therein given and devised by said testator to his executors, and that the judgment of said defendant, James Wallace, was no lien upon said estate after the execution of said power by said executors, and that the said defendants demurrer to the complainants bill, be and the same hereby is overruled.

A. O. ZABRISKIE,
Chancellor.

I advise the chancellor to sign the above decree.

JOS. F. RANDOLPH,
Master.

OPINION.

J. F. Randolph, *Master*.—John Tonnele, late of Hudson County, died seized in fee of a considerable amount of real estate situate in said county, amongst which were the premises in question. Prior to his death he made and duly executed his last will and testament which was duly proved by his executors, and by it he devised certain of his real estate to his wife for life in lieu of dower, giving also to his son, Laurent John Tonnele, a life estate in his mansion house and part of the grounds belonging thereto, subject to the life estate of his widow; the rest of his estate was divided amongst his children equally, so that each should receive only the income of his or her share during life, and at death his or her share should go to their lawful issue. The seventh section of the will provides, "that in order more fully to carry out the objects of this my will, I do hereby appoint and declare my executors hereinafter named to be trustees of all property, estate and interest herein given or devised to any of my children, or that any of my children may be entitled to by virtue of any provision in this my last will during the life of such child (excepting the life estate in the mansion house devised to my son) with full power to retain all such property in their hands unsold and undivided until after the year eighteen hundred and sixty-seven, and I do authorize my said executors to sell and convey all or any part of my real estate, and all real estate that may be purchased by them," &c., &c.

The bill of complaint sets forth the provisions of the will and its probate by the executors on the eleventh day of December, eighteen hundred and fifty-two; and that afterwards the executors sold to Robert C. Bacot, by virtue of the power given in said will, for the sum of fifty thousand dollars, the said lands described in said will as the mansion house of said John Tonnele, deceased, and included in the map mentioned in said bill, which property was subsequently cut up into numerous lots and streets, and the lots, or a large portion of them, sold to the several persons named in said bill, the owners of which had built houses and made improvements

thereon, all claiming through the first purchase of Robert C. Bacot. The bill also sets forth that on or about the twenty-second of November, eighteen hundred and sixty-one, James Wallace recovered a judgment in the Supreme Court of this state against said Laurent John Tonnele and one Timothy Deegan for the sum of seven hundred and fifty-nine dollars and thirty-three cents for his damages and costs, and afterwards at the term of February, eighteen hundred and sixty-nine, procured an *alias* to be issued out of said court to the sheriff of the County of Hudson, by whom it was received and the property levied on and advertised to be sold at sheriff sale, that the property so advertised was all held under and by virtue of the said deed made by said executors to Robert C. Bacot, and that it had become of great value equal to two hundred and fifty thousand dollars. The bill insists that the claim by and through said deed to Mr. Bacot is good and valid, and that there was no valid lien on said premises by the reason of said judgment and execution. The bill also alleges that the sheriff intends and will sell the premises if not restrained by this court, and that such sale will make no title to the same but be a mere cloud over the property injurious to the sale thereof at any future time, to avoid which an injunction is prayed for and such other relief as might be equitable and just. The injunction was granted according to the prayer of the bill, and commands and enjoins the defendants, John H. Midmer, Sheriff of the County of Hudson, and James Wallace, the defendants, that they do absolutely desist and refrain from further proceedings to sell, or from selling, under the execution issued out of the Supreme Court of the State of New Jersey, at the suit of James Wallace against Laurent John Tonnele and Timothy Deegan, any part of the tract of land containing nine acres and fifteen hundredths of an acre known as the homestead lot, late of John Tonnele, deceased, and situate in the City of Hudson, in the County of Hudson in this state, except lots numbered forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, seventy-three, seventy-four and seventy-one, as laid down on the map of said property, made for Robert C. Bacot, eighteen hundred and sixty-four, which lots are said to be owned by Francis W. Mitchell and Isaac T. Day. To

this bill defendants have put in a demurrer and several causes of demurrer are assigned and set forth. The point particularly insisted on is as to the power given by the will to sell that part of the house and grounds devised for life to the son, Laurent John Tonnele, and the effect that the Wallace judgment against Tonnele and Deegan, which is prior to the deed to Bacot, and the execution thereon, which is subsequent to the deed, may have upon the title to Bacot and his assigns. The first point was decided in *Bacot* v. *Wetmore*, (2 *C. E. Greene*, 250), by *Chancellor* GREEN, whose view I adopt without hesitation as the only correct view that can be taken of the question. The subsequent power in the will to the executors to sell all or any of the lands devised, is in broad decided language without exception, and must therefore prevail over the prior devises which must be taken as subject to this power and its execution. This being the case it follows that the Wallace judgment and execution must be subordinate, to the absolute power of sale vested in the executors. The sale by the sheriff can only be made, if at all, subject to that power, and as that power has been exhausted prior to the issue or levy of the execution the execution itself can have no effect on the property

The demurrer, therefore, must be overruled with costs.

N. J. COURT OF ERRORS AND APPEALS.

Between
JAMES WALLACE, Appellant,
and
FRANCIS G. WETMORE, and others,
Respondents.
} *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals of the State of New Jersey:

The petition of James Wallace, the above named appellant, respectfully shows that he finds himself aggrieved by a decree of the Chancellor, made in a certain cause wherein the said Francis G. Wetmore and others were complainants and your petitioner was defendant, in this respect, to wit: that the said decree adjudges that the life estate devised in the last will of John Tonnele, deceased, to his son Laurent John Tonnele, was subject to the power of sale therein devised to his executors, and that the judgment of the appellant was no lien upon said estate after the execution of such power by said executors.

Your petitioner therefore humbly appeals from the said decree on the ground that the same is erroneous in the respects aforesaid, and prays that the same may be reversed, and that your petitioner may have such relief in the premises as to this Court shall seem meet.

CHAS. E. SCOFIELD,
Solicitor and of Counsel with Appellant.

N. J. COURT OF ERRORS AND APPEALS.

Between
JAMES WALLACE, Appellant,

and

FRANCIS G. WETMORE and others, Respondents.

Answer to Petition of Appeal.

The Answer of the above Respondents to the Petition of Appeal of the above Appellant.

These respondents, not acknowledging all or any of the matters which, in the said petition of appeal, are contained, to be true, for answer thereunto, nevertheless, say and admit that a decree was made and entered by the Court of Chancery in the cause for that purpose mentioned in said petition, as therein stated. But, as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs, to be adjudged to these respondents.

L. & A. ZABRISKIE,
Solicitors and of Counsel with Respondents.

Court of Errors and Appeals.

Between

JAMES WALLACE, Appellant,

and

FRANCIS G. WETMORE *et al.*, Respondents.

Brief for Respondents.

The questions raised before the Court by the petition of appeal in this case are these two, viz :

FIRST. Did the power of sale devised by John Tonnele to his executors relate to and embrace the life estate in remainder devised by him to his son Laurent John Tonnele ?

SECOND. If the executors had such power of sale over this life estate was the lien of the appellants judgment, against Laurent John Tonnele, upon his life estate, destroyed by the execution of such power ?

The first question undoubtedly is the only one which will admit of any serious discussion.

It is a question of construction of the will in order to get at the testator's intention.

The fourth section of the will of John Tonnele, devised to his son Laurent John upon the death or re-marriage of testator's widow, the mansion house and a certain part of the grounds belonging thereto for his life, at his death to go to his lawful issue, and in default of such issue, to go over to testator's daughters. The rest of the grounds of the homestead lot was devised (on the death or re-marriage of his

widow), to his daughters equally to each for life, and at her death to her issue, and in default of issue to go over to the other daughters and the issue of such as were dead.

By section *seventh*, testator makes his executors trustees of all property devised by the will to any of his children during the life of such child, excepting the life estate in the mansion house devised to his son. Afterwards the same section of the will contains this provision, "And I do authorize my said executors to sell and convey all or any part of my real estate."

By the *eighth* section, testator directs his executors to pay over to his children, the net income of that portion of his estate therein given to each child during his or her life; to his daughters on their separate receipt, free from the control of any husband; and to his son on his own receipt, for his own use and not to any assignee or mortgagee.

It is evident that the testator desired his widow, and on her death, his son, to occupy the mansion house, and therefore he devised it so that they could do so. But it is equally evident that he meant to give to his executors the power to sell it when circumstances rendered it necessary or advisable to do so. In this view, effect can be given to both the devise for life to the son, and the devise of the power of sale to the executors.

If it is contended that the power of sale cannot relate to such life estate because the life estate in the specific property could not then be enjoyed upon execution of the power of sale; then the like reason would apply with equal force to the devise of the rest of the homestead lot to the daughters for life, and indeed to all the testator's lands, for they are all devised to his children for life; and thus the power of sale would virtually have no effect whatever.

The words of the power are as broad and comprehensive as it is possible to make them; and they cannot be abridged or restricted for any reason, or for any indication of the intent of the testator as gathered from other parts of the will, that would not be equally potent to expunge them altogether.

The fact that the testator excepts his son's life estate from the *trust* cannot be held to imply an intention to except it from the operation of the express words of the *power;* for

in that event it would be allowing an *implied* intent to prevail over an *expressed* intent.

Besides such an implication is not necessary. It does not follow that because testator excepted his sons life estate from the *trust* he therefore meant to except it from the *power*.

Compton vs. *Compton*, 9 *East. R.* [268].

He might have meant that his executors should have no charge on account of the mansion house while his son lived there, and that at the same time they should have power to sell it when it became necessary.

This construction of the will makes both of the above named provisions consistent and gives to both an effect. It moreover works no injustice to the devisee of the life estate in the mansion house—and it is easy to see how it might be a benefit, for by the eighth section of the will the nett income of his interest therein is to be paid over to him by the executors.

The construction of this will, on the very points now under consideration, has already been before the Court of Chancery in another suit.

Bacot vs. *Wetmore*, 2 *C. E. Green*, 250.

Here a bill was filed for the specific performance of a contract made by the defendant Wetmore (who is one of the respondents in this case) for the purchase of this very same mansion house. The defendant objected to the complainants title on the ground that he claimed through the deed of the executors of John Tonnele, deceased, and that the power of sale given to them in his will did not embrace the life estate devised to testator's son in the premises.

The court, however, held that the power did relate to such life estate, and made a decree against the defendant compelling him to take the title.

In this case Ch'r. Green said:

"The terms of the power are as broad and comprehensive as language can make them. * * * The power extends to any and every part of the testator's estate. It is clear and unequivocal in its terms. There is no ambiguity in its meaning. It leaves no room for construction."

The intent of the testator must be gathered from the words he has used, and such words must be taken in their

ordinary sense. The force of the words must prevail even though it may be surmised that the testator meant to use them in a sense different from their ordinary sense or with a different effect.

Hay vs. *Coventry*, 3 *Term R.* p. 85.

In this case Ld. Kenyon said:

"The general rule which is laid down in the books, and on which Courts can with any safety proceed in the decision of questions of this kind, [devises], is to collect the intention of the testator from the words which he has used in his will and not from conjecture * * * we must collect the meaning of testator from those words which he has used, and cannot add words which he has not used."

Brownsword vs. *Edwards*, 2 *Vesey*, *Ld. Hardwick*, p. [248].

Collett vs. *Laurence*, 1 *Vesey, jr.*, 269.

Lett vs. *Randall*, 10 *Sim.*, 112.

2 *Roper on Legacies*, [1461].

Milnes vs. *Slater*, 8 *Vesey, jr.*, *Ld. Eldon*, [306].

Crooke vs. *De Vandes*, 9 *Vesey, jr.*, *Ld. Eldon*, p. 205.

Chambers vs. *Brailsford*, 18 *Vesey, jr.*, [368].

Mowatt vs. *Carrow*, 7 *Paige Chr. Walworth*, p. 339.

Chrystie vs. *Phyfe*, 19 *N. Y.*, (5 *Smith*), *Strong J.*, p. 348.

Arcularius vs. *Geisenhainer*, 3 *Bradfd.*, 64.

Lovelass on Wills, [276].

If then, the words of the power must be taken in their ordinary sense, and the intention of testator must be gathered from the force of the words *he has used* without abridgement or addition, it follows of necessity that those words: "And I do authorize my said executors to sell and convey all or any part of my real estate," must have included the life estate in remainder devised by testator to his son Laurent John.

If moreover, it is impossible to reconcile the devise of the power with the devise of the life estate, by giving to the latter such construction as to make it subject to the power, then there is an absolute repugnancy between them, and both clauses cannot stand.

In this predicament, according to what appears to be an established rule of construction in the case of wills, the

power of sale being the *last* devise in order of time it must prevail over the *previous* devise of the life estate.

The rule is this: where there is an irreconcilable repugnancy in different clauses of a will, and both cannot operate, the last shall prevail over the first.

2 *Black's Comm.*, 380.

1 *Jarman on Wills*, Chap. xiv. p. 412.

Sims vs. *Doughty*, 5 *Vesey, jr.* 247.

Constantine vs. *Constantine*, 6 *Vesey, jr.* 100.

Bragg vs. *Ryland*, 7 *Mees & Welsb*, 59.

Parks vs. *Parks*, 9 *Paige*, 107.

Bradstreet vs. *Clark*, 12 *Wend.* 602.

Chrystie vs. *Phyfe*, 19 *N. Y.*, STRONG, J., p. 348.

Dawes vs. *Swan*, 4 *Mass.* 208.

Braman vs. *Stiles*, 2 *Pick.* 460.

Pratt vs. *Rice*, 7 *Cush.* 209.

In the case of *Bragg* vs. *Ryland*, the court held that the power of sale did not include a certain part of the testator's estate, but the reason the court gave for its construction of the power is strongly in favor of the construction contended for by the respondents in this case. In that case the testator devised one half of his estate to his children to be equally divided among them by his executors whom he empowered to "sell or dispose of the whole or any part," according to their opinion, for the benefit of his children. Then in a *later clause* of his will he devised the remaining half of his estate to his wife for life. PARKE, B. said:

> "We have had considerable doubt upon it [the construction of the power]. The words of the will should be construed according to their ordinary import; and we think the natural meaning of the words by which the power is given, *in the place in which they occur in the will*, is to give the executors power to sell only that half of the property which is given directly to the children."

The remaining point to be considered is, whether the conveyance by the executors to Bacot, if the power of sale included the life estate, destroyed the lien of the appellant's judgment.

It is submitted that there can be no doubt on this subject, for it is settled that the grantee or appointee under a power takes under the deed or will creating the power, and has

the same estate that was in the grantor or devisor at the time the power was granted or devised.

Co. Lit., 113 *a*, *Note* 298.

Cruise Dig., *Title* xxxii, *chap.* xvi, § 75.

Sugden on Powers, *vol.* 2, p. [36].

2 *Wash.*, *Real Prop.*, p. 320.

Bergen vs. *Bennett*, 1 *Caine's Cases.*

Braman vs. *Stiles*, 2 *Pick.* 460.

There is one other argument in favor of the affirmance of the decree in this case that must forcibly address itself to the *conscience* of the Court, and that is, that one of the respondents in this cause was compelled by the decree of the Chancellor in *Bacot* vs. *Wetmore*, to take the title to these same premises, against his volition, on the ground that the power did include the life estate.

On the faith of this construction of the will, many different persons have taken title to portions of the land, and made extensive improvements, which would now, on a contrary construction of the will, be entirely swept away and occasion a loss to innocent purchasers of upwards of a quarter of million of dollars. [See bill, § xi.]

It is held that Courts will not *compel* a purchaser to take title that depends upon the construction of a devise, unless it is free from all doubt.

Wilson vs. *Bennett*, 5 *Eng.*, *Law & Eq. R.* 45.

MacDonald vs. *Walker*, 11, *Ibid.* 324.

Sohier vs. *Williams*, 1 *Curtis*, *C. C.*, *R.* 491.

L. ZABRISKIE,
Of Counsel with Respondents.

N. J. Court of Errors and Appeals.

Between

JAMES WALLACE, Appellant,

and

FRANCIS G. WETMORE, *et. al.*

Respondents.

Points made by the appellants for the reversal of the order overruling demurrer.

The intention of the testator is to be gathered from the reading of the whole will.

The fourth item devises an estate for life to his son, Laurent J. Tonnele (after the death or remarriage of his mother), in the mansion house and that part of the grounds west of the picket fences with the use of the avenue, and after his death to his lawful issue.

The fifth item gives and devises all the rest and residue of his estate, after the death or remarriage of his wife, to his eight children equally, *in such manner that each child shall receive only the net rents, incomes, and profits* of his or her share during life, and at death to his or her lawful issue, &c.

The sixth item declares that on certain conditions every devise and gift to his son shall be void and gives an annuity of $500 per annum; and in such case my executors *shall retain in their hands* so much of the property given to my son and his issue as they may judge sufficient and ample to produce by its income such annuity, and the residue to his other children and their issue.

This last clause authorizes the executors on certain con-

ditions to retain in their hands a part or the whole of the property given to his son as may be sufficient to produce the annuity.

In the opinion of the counsel of the appellant, this is the only authority contained in the will under which the executors have any right in any way to meddle with the life estate in the mansion house devised to L. J. Tonnele, and it does not appear that the conditions under which this authority is given have ever transpired.

The seventh item, coming immediately after this clause in the sixth, authorizing the executors to retain a part or all of the property given to L. J. T., excepts from its provisions, "the life estate in the mansion house devised to my son." It does not except the estate given to him by the residuary clause in item fifth, that is included with the estate given to the other children and is a part of that which the executors are appointed and declared trustees with full power to retain in their hands unsold and undivided until after 1867.

This express authority to retain the property given to L. J. Tonnele on certain conditions, and to retain all the property, estate or interest given or devised to any of his children (excepting the life estate in the mansion house devised to his son), makes it evident that the testator intended the specific devise to L. J. Tonnele to be different in its operation from the devises to the other children, and from the residuary estate devised to all his children including L. J. Tonnele.

It is apparent on the face of the will that L. J. T. was the favorite child of his father.

It is also apparent that the mansion house was the favorite property of the testator which, as the homestead, he most disliked to have go out of the family name.

We have a right to believe he was attached to it and desired it to be retained in the family name. What could be more natural? and with what regret must he have considered the circumstances that induced him to insert the sixth item, whereby on certain conditions which have never occurred, the executors were to retain so much thereof as would by its income produce the annuity payable on the happening of such conditions.

Reading the whole will, together with all its surroundings it cannot be doubted that the testator intended to preserve the homestead with its family name, as far as possible consistent with what he considered his unpleasant duty to his son.

The words of exception although contained within brackets and in only one item of the will, were intended by him to apply to every part of the will, as long as the conditions referred to in the sixth item should not occur.

Such is the only consistent construction of the testator's meaning.

With the highest respect for the opinions of His Honor Chancellor Green upon questions of law, and with no intention to question any one of the authorities cited by him in *Bacot* vs. *Wetmore*, 2 *C. E. Green*, 250, the counsel for the appellant respectfully submit, that it does not appear in that opinion that His Honor had brought to his special notice or duly considered the bearings of the testator evidenced by the other items, and especially by the fifth item of the will, authorizing the executors to retain a part of the homestead only under certain circumstances.

The nature of the office of an executor is that of a trustee, then why should the testator specially appoint and declare the executor's trustees with full power to retain all such property (excepting the life estate in the mansion house), unsold and undivided? Evidently for the simple reason that when he was about to give a power of sale to the executors, as the will expresses it, in order to carry out or (to show the manner in which he wished his executors to carry out) the objects of his will, he wisely directed that they might retain in their hands, unsold and undivided, what he wished them to sell if not before, at least after a certain time, viz., 1867.

Although executors are trustees, their trusts are limited by the objects of the trust which can only be ascertained by the will itself.

The testator in this will, has expressly limited the object of the trust, by specifying the property to which it should apply.

He had a right to do so, he had a right to limit the power

of sale by antecedent words, and that is all that he has done in this case.

There is a life estate in the homestead given L. J. Tonnele and to the daughters respectively, subject to the life estate therein given by the testator to his wife in lieu of dower. This appears by reading the fourth item of the will.

But the fifth item does not devise a life estate to the children in the residuary estate therein devised, but it is devised to them respectively "in such manner that each child shall *receive only* the net rents, issues and profits of his or her share during her life."

The effect of the devise of the residuary estate passes the fee therein, directly to the lawful issue of his children, subject to the payment of the net rents, income and profits to be received by each child during life.

Under this devise the executors would have had power to control only the residuary estate. The seventh item extends that power to all the estate devised to the children, except the homestead devised to L. J. Tonnele.

But the express words of the first clause of item seventh, show conclusively that they relate to, (and are entirely without meaning, without being read in connection with, and as part of) the power of sale.

The previous part of the will gave no power of sale or indication of any such intent, but here in the first clause of item seven, (if the seventh item can be divided into clauses separate and at the same time complete), the testator declares the executors trustees, with full power to retain all such property, that is, all the estate devised to the children (except the life estate in the mansion house devised to L. J. T.), *unsold and undivided.*

These words *unsold and undivided* relate directly to the power of sale which immediately follows, and without which they are unintelligible nonsense. The conclusion is that the testator intended the whole of item seven to be read in connection and construed together as one clause, and with such reading alone can the clause giving a power of sale be made harmonious with either the previous or subsequent provisions of the will. Ex-Chancellor Green, in *Bacot* vs. *Wetmore*, found a serious objection to exist to the power of the

executors to make sale of the life estate of the widow in the mansion house and premises.

But it is respectfully submitted if the Chancellor's opinion is correct that, notwithstanding the objection that existed in his mind to such power of sale extending to the life estate of the widow in the mansion house and premises, only it would extend also to all and every part of the testator's real and personal estate. Such a proposition was too startling to be entertained by his honor for a single moment, and he, therefore without argument, rejected it and declared the power of sale subject to the life estate of the widow.

Now we submit that item seven declares together in one item and not in distinct clauses the manifest intention of the testator, and reading it as one item, and the will declares it to be the *seventh* item—it only applies to the property, estate or interest given to the children and not to the wife—it excepts out of it the life estate in the mansion house devised to the son. The other property alone it authorizes the executors to retain in their hands unsold and undivided, and to sell and convey the same; and it is natural to suppose the testator thought under the provisions of his will that the executors might purchase other real estate with the proceeds, and that some part of such proceeds might become personal estate and therefore he extended the power of sale to all real estate purchased by the executors and authorized them to invest such personal estate and the proceeds of such real estate at interest, &c., and to change such investment at will.

This is the only view of his intentions which give consistency and harmony to the will of the testator, and which does not cause one part of it to conflict with another.

Whereas the strained construction sought to be placed on the testator's intentions by the honorable counsel for the respondents, makes the will from beginning to end a batch of conflicting absurdities, impossible to be reconciled on any sound principles of reasoning or law.

The eighth item of the will applies only to that portion of the testator's estate devised to his children which the executors as trustees were empowered to retain in their hands,

and to receive the rents, incomes and profits of and to sell the same.

The executors are by this item directed "to pay over"—language which does not apply to real estate, but rather to money invested, rents, incomes or profits. It is quite evident that when the testator excepted from the power given to the executors to retain in their hands, the life estate in the mansion house devised to his son, that he intended that L. J. T. should take, occupy, receive and hold the possession, rents, issues and profits of the mansion house without any interference or interruption from the executors.

The appellants counsel insist that the power of sale contained in the will, did not relate to or embrace the life estate of Laurent J. Tonnele in the mansion house, and that the assumed execution of any such power was and is entirely void, and that the judgment of the appellant was and is a lien upon the same, and that the demurrer to the respondent's bill ought to be allowed and the bill dismissed.

C. E. SCOFIELD
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