

NEW JERSEY
Court of Errors and Appeals.

BETWEEN

JOSEPHINE PIERCE ET ALS.,
Defendants and Appellants,
and

THOMAS W. ORAM, ROBERT F.
ORAM, AND JAMES H. NEIGH-
BOUR, EXECUTORS OF ROBERT
F. ORAM, DECEASED,
Complainants and Respondents.

} Appeal, &c.
March Term.
1907.

**Brief of J. H. Neighbour, Solicitor and of
Counsel with Respondents.**

The complainants, respondents in this case, filed their bill in the Court of Chancery to procure an interpretation of a certain clause in the last will and testament of Robert F. Oram, deceased.

The will was made January 11, 1898. The testator died March 22, 1899. The will was proven in the Surrogate's Office of Morris county, April 5, 1899.

The testator, at the time of his death, was engaged in the mercantile business at Wharton, in Morris county,

New Jersey, consisting of a general store, a drug store, stove and tin store, coal and lumber and plumbing, &c.

These lines of business had been carried on for several years by the testator. His son, Robert F. Oram, one of the executors, had been a partner and the general manager during the latter part of the life of deceased, and was carried on under the style of R. F. Oram & Co.

The deceased left four children, two sons, Thomas W. Oram and Robert F. Oram, and two married daughters, Josephine Pierce and Lottie L. Phillips. They are the sole beneficiaries under the will.

The construction sought for in the bill by the executors relates more especially to the Second Item, which is in these words:

"Second. I do hereby give and bequeath to my son, Robert F. Oram Jr. the equal one half part of all my right, estate and interest in the partnership business of R. F. Oram & Co. composed of myself and my son, Robert, at Port Oram in said County, being all the partnership personal property, pertaining to said business with all book accounts, capital, money, bonds, notes, stock in trade, store goods and merchandise, horses, wagons, harness, coal business, tin and stove business, drug business, lumber business and all equipments and appliances belonging to each branch, as used and employed by said firm, and that the said business be continued with the other equal one half part thereof owned by my estate, under the sole management and control of my son Robert, for the mutual benefit of my son Robert and of my estate, as equal partners in business, and subject to losses and profits, for and during the term of twenty years from and after my decease, and the net profits of said business shall be equally divided between said Robert and my estate; the share or part so belonging to my estate to be taken by my executors, hereinafter named as part of its general assets; the said part of said stock, personal property and business so bequeathed to my son, Robert, to be his absolutely for himself, his heirs and assigns forever."

The testator was possessed of other personal property and also real estate.

The property, real and personal, was left in the hands of the executors in trust, except that part of the merchandise stock which was given to his son Robert, as set forth in the Second Item of the will.

This business has continued under the management of Robert since his father's death down to the present time, under the firm name of R. F. Oram & Co.

The executors have power to sell the interest of the estate in the mercantile business to Robert F. Oram at any time an equitable agreement can be made.

One feature of the will is that no division should be made of either real or personal property for the period of twenty years from the testator's death, the income of which was to be divided equally between the four legatees.

The share of the income for the two daughters was to continue and to be paid to them for life only. No part of the corpus of the estate was to go to them at any time, or under any event.

In the course of administration, the executors made quarterly payments of dividends to each of the four legatees from other sources than from the mercantile business ever since the will was proven. This plan was adopted voluntarily by the executors as a matter of convenience and without prejudice to the corpus of the estate.

The will does not specify any time or period for such quarterly payments, but the same has been acquiesced in by the legatees, quarterly payments being made in April, July, October and January.

Two accountings have been made by the executors in the Orphans' Court of Morris County. The first being to December 31, 1901. The second accounting was brought up to July 31, 1903, and filed January 5, 1904.

Under the management of Robert F. Oram, it ap-

pears that certain net profits have accrued, the one-half of which belongs to the estate generally.

In these two accountings the Orphans' Court, at the suggestion and request of the defendant, Mrs. Pierce, allowed the share of the estate in the net profits of the mercantile business to be charged to the executors, same as other income for distribution.

The question of the proper disposition of any part of the profits of the said partnership business of R. F. Oram & Co., as designated in the said Second Item of the will, then became a matter of dispute between the executors and Mrs. Pierce and Mrs. Phillips, so that the bill of complaint in this cause was filed October 14, 1905, in order to settle such dispute.

The two daughters insist that the share of the net profits or earnings of the mercantile business belonging to the estate should be ascertained and fixed at least once a year and then their fourth part of the estate's share therein should be paid over to them the same as the income from rents and securities, or the same as the income arising from any other class of assets become payable to them.

The executors resist this view of disposing of the said net profits and claim that under the Second Item of the will, the one-half of the net profits of the business should be paid to them as executors and by them retained as other general assets and should not be divided as income.

The Second Item of the will creates a partnership, which is to be conducted on the same principles as any other partnership; each party has an equal amount of capital in the business and is to be carried on for the mutual benefit of the two parties, Robert F. Oram and the estate, and subject to losses and profits, for the term of twenty years. The net profits of the business is to be equally divided between Robert F. Oram and the estate, and shall be taken by the executors as part of the general assets of the estate.

No provision is made in the will for any dividends

of this net profit; it is not treated anywhere in the will as income; it is a general asset of the estate, same as a bond, same as a part of the corpus of the estate, and must so remain for the period of twenty years.

This part of the will can only take effect in a distribution at the end of that period, and consequently does not invalidate the will, or render its construction as to the net profits inconsistent in the way pointed out by the respondents.

I quote now from stipulation in State of Case on page 37, from line 13 to line 25:

"That during each year, either partner drew his share of the prospective profits in cash or merchandise, as he saw fit, and at the end of each year such drawing by each partner was charged against his share of ascertained profits, but the profits thus earned in each year that had not been charged up against the respective parties in each year were added to and allowed to remain in the business. There was no actual settlement or dividend made between the partners; the balance of profits remained and went into the business and was used as capital, thereby increasing the capital of each partner to the extent of the undivided profits."

This relates to the method by which the former business of R. F. Oram & Company had been conducted for many years by the testator, and of which business his son, Robert F. Oram, had been the manager many years prior to his father's decease.

In the Second Item of the will before referred to, he directs the net profits belonging to the estate to be taken by his executors, as part of its general assets. This does not mean by implication, or otherwise, a dividend of such profits among his legatees. The intent is to help along and benefit the business generally under the management of his son, Robert F. Oram.

The testator entertained a very plain and practical view of the business which he left to his son and to his estate. His intention was to have it continued and con-

ducted on the lines of its former management. He never had the profits divided, except for current personal expenses taken out of the business, and after a partnership settlement the earnings were allowed to remain and went into the business and were used as capital.

He had found that plan to be safe and successful and, no doubt, that fact influenced his mind in the disposition of the net profits referred to in the Second Item of the will—that the executors should retain their share as the general assets of the estate were retained or as part of the body of the estate.

On this point, I refer to State of Case, page 11, lines 20 to 30:

“And further, it is my will in reference to said remainder of my personal property and estate mentioned and referred to in the Fourth Item of this my will, that the same be kept together in the hands of my said executors, or the survivors or survivor of them during said period of twenty years in trust, for the use and benefit of my estate and the interest and income to be divided in the same manner as is above provided in the matter of the rents, issues and profits of my real estate and under like contingencies in all respects, as to my said daughters shares.”

Then, again, when and how can the net profits be safely and correctly ascertained? Certainly not each year, as it is well known that in a general mercantile partnership, especially diversified as this business was, profits only appear on the ledger by way of charges or bills due from customers, &c. They can only be ascertained when there is no possibility of a loss in the business, or at the final windup of the business. The stock in trade may all be represented as a book profit, uncollected and consequently indivisible.

Another governing feature of this business is, that losses are just as apt to occur as net profits, and a series of losses might exceed the net profits, and when that condition arises, the executors are without any

fund to meet such losses. They have no authority to and could not have recourse to the corpus of the estate to make up such losses, as that would be reducing the other sources of income directed under the will to be divided. For example, how can the executors be kept in a position to meet with a loss in the twentieth year if all the previous earnings have been paid out and divided?

The mere fact that no losses have heretofore been sufficiently heavy to eat up the apparent book profits in any one year, does not justify the executors in taking it for granted that the future conduct of the business of the concern will escape losses.

The losses, whenever they arise, must be paid out of the earnings retained in the hands of the executors as the result of more prosperous years. These net earnings are to be kept inviolate and not mingled with the other funds or income of the estate, they are to stand as surety in the hands of the executors as an investment in the mercantile business and as against losses.

They are to become a separate partnership fund in one sense, from which to draw in any emergency for the benefit of the partnership, first, and are not to be diverted to any other channel during the twenty years. So that, in construing the will in this respect, we must observe the clear intent of the testator to the effect that he was providing for the safe continuing of the mercantile business.

Another reason for having all the net profits of the mercantile business paid to the executors and which influenced the testator to so direct, is the fact that the two daughters, Mrs. Pierce and Mrs. Phillips, are to receive the one-fourth part of the income of the estate for life only, as before stated, and by the will the child or children of these legatees will receive the principal, or the fund from which the parent received the income while living.

In paragraph 17 of the bill of complaint, it appears that Mrs. Phillips has but one child, Thomas, a minor.

In paragraph 23 of the bill of complaint, the com-

plainants allege that by retaining the net profits of the mercantile business in the body of the estate, the Phillips child, in case he shall survive his mother, will be entitled to his share or one-fourth of the accumulated net profits of said business.

In this line, I will refer to paragraph second of the stipulation, on page 35 of State of Case, that Mrs. Pierce, then of the age of fifty-five years, has never had any child or children.

The will excludes the husbands of these two legatees from taking any part in the distribution or payment of the income, or in any division at the end of the twenty years, whether they survived their wives or not. Under these statements of facts, existing now as at the time of the execution of the will, it appears also that the testator had a clear intent to, and in fact, was creating a fund from the mercantile business, that would in the end enure to the benefit of the two sons as legatees and to the child or children of the two married daughters if any survived the parent.

The answer sets up an estoppel on the ground that the Orphans' Court has put a construction on the will in reference to these net earnings of the mercantile business in which the respondents have acquiesced. All that the Orphans' Court did in this respect was to charge the executors with what appeared to have been paid to them as assets, and has not the effect of a construction.

It may be binding on the executors, so far as that accounting goes, but if an error or mistake, as it is claimed to have been, it does not bind them to divide the profits of the partnership business hereafter, if any such profits happen to accrue.

It is the duty of executors, in any case, to act according to the directions of the will, not as they may have allowed themselves to act under the influence of an incidental side issue, but to act as they discover their trust in its true intent and meaning.

The decree should be allowed to stand.

J. H. NEIGHBOUR,
*Solicitor for and of Counsel with
Complainants and Respondents.*

New Jersey Court of Errors and Appeals. 10

Between

THOMAS W. ORAM, Robert F.
Oram and James H. Neigh-
bour, Executors of Robert F.
Oram, deceased,
Complainants and Respondents,

and

JOSEPHINE O. PEIRCE, Impleaded,
Defendant and Appellant.

On appeal from final decree of Court of Chancery,
dated November 15th, 1906; filed November 17th,
1906.

Brief on Behalf of Josephine O. Peirce, Defendant and Appellant. 30

STATEMENT.

This is an appeal from a decree of the Court of Chancery construing the Will of Robert F. Oram, deceased, in an action brought by the complainants for that purpose.

The testator, a resident of Dover, N. J., died March 27, 1899. His Will, sought to be construed

in this action, is dated January 11th, 1898 (Case, pp. 9, 10, 11, 12).

Will admitted to probate in Morris County, April, 1899 (p. 2, fol. 1).

10 Testator left four children: Thomas W. Oram and Robert F. Oram (who are Executors), Josephine Peirce (wife of Charles Peirce), and Lottie L. Phillips (wife of Frank L. Phillips); (Case, p. 2, fol. 20). The defendant, Thomas Peirce, is a son of said Lottie L. Phillip's. *Said Josephine Peirce has no children* (Case, p. 35, fol. 30).

Testator was engaged as a partner in the mercantile business in two places—one at Port Oram in said County (see Paragraph "Second" of Will); one at Hibernia (see Paragraph "Sixth" of Will).

20 To his son, Robert F., he bequeathed one-half of the mercantile business at Port Oram (Case, p. 9, fol. 20). To his son, Thomas W., he bequeathed all his interest at Hibernia (p. 11, fol. 30). *These are the only absolute bequests of either personal or real estate.*

30 He directs the continuance of the mercantile business at Port Oram for the term of twenty years after his death under the management of his son, Robert, for the mutual benefit of his said son and of his estate as equal partners in the business, both subject to losses and profits, directing that the net profits of the business shall be equally divided between said Robert and his estate (p. 9, fol. 20).

The only provision in the Will which is sought to be construed in this action, is the clause appearing in the "Second" paragraph thereof, which, after directing a division of the store profits equally between Robert and his estate, is in these words:

“The share or part so belonging to my estate to be taken by my Executors, hereinafter named as part of its general assets.”

From the above quoted language, *complainants insist that the one-half profits payable to the estate from year to year shall be taken by the Executors or Trustees and by them re-invested, and the income of such re-investment only be divided among the four children.* 10

The answering defendant, Josephine O. Peirce, insists that the profits of the mercantile business during the lives of the four children shall be paid to and divided among them as part of the income of the Trust Estate. This difference of opinion or construction of said Will, in reference to the store profits, constitutes the only issue between the parties to this cause. 20

The Vice-Chancellor has decided that one-half of the profits, of the mercantile business, shall be held by the Executors until the end of twenty years and neither such profits or the income thereof shall during that time be paid to the legatees (see Decree, pp. 38, 39 and 40).

POINT I.

It is respectfully insisted that the construction of the Will on the point in issue, as claimed by the defendant, Mrs. Peirce, is the correct one. 30

It is a fundamental, legal rule in the construction of wills that the predominant idea of the testator's mind is heeded as against all doubtful and con- 40

flicting provisions which might of themselves defeat it.

The predominant purpose of the testator in this case is to create a Trust of his entire estate, real and personal, for a definite period of twenty years, before there should be any division of the corpus of the estate, except as to the half interest in the mercantile business at Port Oram given to his son, Robert, outright, and the mercantile business at Hibernia given absolutely to his son, Thomas, this twenty year Trust applied:

First. To the half interest in the Port Oram mercantile business retained by the estate.

(Paragraph "Second" of Will.)

Second. As to his real estate.
(Paragraph "Fourth" of Will, p. 10, fol. 10.)

Third. As to the balance of his personal estate.

(Paragraph "Fifth" of Will, p. 11, fol. 20.)

He intended to have substantially all his estate held *in trust*, with the income to go to his children share and share alike, and all the net issues and profits of his real estate, and of his personal estate (except the half interest in the store), are directly so given. *At the end of the twenty years, there shall be a division of the real estate among his four children equally, his sons to take their share absolutely, but the daughters' should still be held in trust for the benefit of their children, or other heirs.*

The same division is directed with reference to the personal estate at the end of such twenty years. There is no direction to the Executors to accumulate rents, issues or profits and add the same to the corpus of the estate which is the effect of the decree made in the Court below and is contrary not only to the construction of the Will insisted on by the

Executors in their bill of complaint but also to that of Mrs. Peirce, the appealing defendant. She contends that testator's children, of whom she is one, should during the twenty years, or while they live, paid the entire net income of his entire estate except the outright bequests to Robert and Thomas. Any other construction would be an unjust discrimination against her. She has no children and her one-fourth of the income of the mercantile business would be continued in the business and accumulate for twenty years for the benefit of her brothers and sister who have children.

It appears on page 26, folio 10 of the case on appeal that between April 1st, 1899, and December 31st, 1900,—a period of one year and eight months—the profits of the business were \$17,644.62 of which \$8,822.31 belonged to the estate. Under the Chancellor's decision, Mrs. Peirce gets no part of these profits or any that may hereafter be made in this business which was always a successful one (see p. 37, fol. 10).

There would be little cause for complaint of this construction perhaps on the part of the other children, because each of them have children, who would ultimately inherit all the accumulated profits of the mercantile business for the twenty years of the trust. Taking the Will as a whole, the testator intended that his children should participate equally in his estate. Any other construction than one which gives Mrs. Peirce during her life one-fourth of the income from the store business discriminates against her, and there is no evidence in the Will to justify such construction.

It is manifest from the general scope of the Will and its purposes, that the testator did not intend the income from the mercantile business at Port Oram, owned by the Executors, should be retained in the business and added to the corpus of the estate, or itself reinvested and the income

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from such reinvestment paid to the four children. He expressly authorizes and directs that the partnership between his son, Robert, and his estate should be continued, under the management of Robert, as one of the sources of income for the benefit of his children. That partnership business was an active and profitable part of his estate and represented an investment by the testator just as clearly as did his bonds and mortgages, railroad stocks, or real estate, and was likely to produce a larger income under his son's management than would the capital represented by it have produced if converted into money and reinvested on bond and mortgage or other security. If the store business produced a net profit of Five thousand dollars in a year, each child would have received Twelve hundred and fifty dollars as his or her share of the income thereof. If, however, the Five thousand dollar net profit, instead of being paid to the children as so much income from the estate, had been invested upon bond and mortgage or otherwise at 5%, it would have produced Two hundred and fifty dollars and given each child annually Sixty-two dollars and fifty cents instead of Twelve hundred and fifty.

If the testator had intended that the income of the store business should not be a part of the income, but the subject of reinvestment and added to the corpus of the estate, he would doubtless have said so in plain language, but there is nothing in the whole Will suggesting that there should be accumulation of that income and its addition to the corpus, instead of paying it over directly to the children.

The clause referred to is too vague and general to justify such construction. It is not a direction to accumulate; it does not direct the investment of the profits received from the business; nor does it provide what should be done with the income of

such investment if intended. No good reason can be given for such construction. It is out of harmony with the rest of the provisions of the Will, and no rational excuse can be urged for such an unusual disposition of the profits of the store business. The conclusions of the Court below are based on the theory that losses might arise in the business and therefore the profits of one year might be required to make good the losses of another. The principal of the personal estate of the testator held in trust by the Executors, amounted to \$101,808.64 (p. 33, fol. 10). Testator's real estate, at the time of his death, was valued at about \$100,000 (p. 37, fol. 10). If the Executors under the Will were directed to continue the partnership with its business risks in a business which had always been profitable, the total capital of which was about \$36,984.64 (see p. 24, fol. 30), it would seem that the estate would be abundantly able to respond for any possible losses in that successful business from its net value of over \$200,000 without holding up during the life of the trust the large annual profits in proportion to capital against possible losses which never before have been made since the business was established. Such reason for withholding from the children the income of this profitable business and allowing them only the income from the rest of the estate, which was much less, is wholly insufficient to justify a construction of the Will in accordance with the decree appealed from. The very fact that he continues the store business by the estate for twenty years of the trust without giving any power to sell it to any one but his son, Robert, is evidence that the business produced more income than would the ordinary investment of the money represented by it, and, therefore, it was to the advantage of the beneficiaries under the Will that such business should continue. *If the half interest of the store*

But R.F. Oran Jr. may
draw his share of

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business should be sold by the Executors to Robert, who, alone, was entitled to purchase it, the proceeds of such sale must be invested in some other form of income producer in substitution for the original form which existed at his death. It will certainly not be argued, if a sale of the estate's half of the store business was made, that the income arising from the proceeds of such sale should be reinvested and the income from that divided among the four children. The disposition made of one-half of the store business is in effect a distinct trust separate from the other trusts under the Will, and, if so, the income arising from such trust must be paid to the children under the general scheme of the Will.

The proceeds of the sale of one-half of the partnership business (and its sale is authorized by the Will to his son, Robert, only), are to be reinvested and the income from such reinvestment paid to the children during the twenty years or so long as they live (Case, p. 10, fol. 10). Converted into some new form of investment, its income goes to the children under the Will; its income in its present form should, therefore, be payable to the beneficiaries under the Will.

If real estate is sold, its proceeds are to be invested and income paid to the children (p. 10, fol. 30). Mrs. Peirce, having no children at the death of the testator, and having none now, would be deprived of the great bulk of the income of the store of the partnership business by not dividing the profits as income. At the same time, if what she insists is payable to her as income should be added to the corpus of the estate, such addition would go to and benefit only the children of her brothers and sister by *increasing the corpus of the estate in which they alone would share.*

It is respectfully submitted that the dubious language in Paragraph "Second" of the Will, which de-

declares that the estate's share of the profits from the partnership business shall be taken by the Executors as part of its "general assets," is not a sufficient or definite phrase, conclusive of the intention of the testator to add to the corpus of the estate to Mrs. Peirce's injury, and to defeat the broad, general purposes of the Will that each child should, during those twenty years, have one-fourth of the entire net income of the whole estate. 10

Schouler on Wills, §476, speaking of the predominant idea of the Will, declares the law to be as follows:

"In construing a will, the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it. The general intent and particular intent being inconsistent, the latter must be sacrificed to the former. *All such subordinate provisions bend in construction to the testator's main purpose and should, if possible, help carry it out, not obstruct it; and undue stress should not be laid upon particular expressions or detached clauses.*" 20

- Urich's Appeal, 86 Penn., 386;
 Allen vs. White, 97 Mass., 504; 30
 3 Dem., 307;
 Stimson vs. Vroman, 99 N. Y., 74;
 Hitchcock vs. Hitchcock, 35 Penn. St., 393;
 Thrasher vs. Ingram, 32 Ala., 654;
 Rose vs. McHese, 26 Mo., 590;
 Pickering vs. Langdon, 22 Me., 413;
 Chaplin on Wills, p. 441;
 Page on Wills, §616;
 Rood on Wills, §§419, 420. 40

POINT II.

10 **If the general intention of the testator can be collected from the whole Will, particular terms used which are inconsistent with that intention must be rejected as introduced by mistake or ignorance on the part of the testator in order that the paramount intent of the testator shall prevail.**

Page on Wills, Secs. 462 & 463;
 Am. Enc. of Law, Vol. 30, p. 687, citing 7
 New Jersey Law, p. 363; 15th New Jersey
 Law, p. 276, and 37th New Jersey
 Equity, p. 78.

20 The cardinal rule of testamentary construction, as already intimated, is that the plain intent of the testator as evidenced by the language of his Will must prevail if that intent may be carried into effect without violating some deeper principle of public policy.

30 And, whatever respect the construction put upon corresponding words in other Wills may deserve from the Court by way of precedent, this plain and lawful intent of the particular Will should not be defeated. It is the intention of the testator as expressed in his own Will which governs.

Yet, every Will should be interpreted as far as possible from the standpoint apparently occupied by the testator, and attendant circumstances, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration.

40 Schouler on Wills, §466;
 Rood on Wills, §420.

A testator's intention is, however, to be collected from the whole Will taken together, and not from detached portions alone.

Chaplin on Wills, page 441;
Schouler on Wills, §468.

Nor is a clear gift or devise in one part of the Will to be cut down or out by indefinite, doubtful or ambiguous expressions in another part, or upon conjecture, but the intention to cut down or out, or the inconsistent provision must be indicated with, at least, reasonable certainty or by the use of language sufficiently imperative. 10

Schouler on Wills, §478.

It will be observed that the testator makes no provision in his Will for any final disposition of the net profits of the store business or of the capital invested in the business. In the latter part of the Second clause of the Will (see Case, p. 9, fol. 30), he directs a division of the profits and "the share or part belonging to my estate to be taken by my Executors hereinafter named as part of its general assets." It is manifest from this language that an actual division should be made of the profits each year as had been done in his lifetime when he and his son were partners in the business (see Case, p. 37, fol. 10, &c.), and not at the expiration of the twenty year Trust. The profits were not to be left in the business to increase its capital but were "to be taken by the Executors." 20

The latter part of the Fifth clause of the Will disposes of the remainder of personal property mentioned in the fourth item, which was all the other personal property except the one-half interest in the store business and the profits thereon. If the construction of item second adopted by the Court below is a correct one, then it would appear that the testator made no final disposition 30 40

of the store interest and the accumulated profits. This omission is not to be allowed if it can be avoided because no one is supposed to make his Will without meaning to dispose of all of his estate. If, however, the construction insisted upon by the appealing defendant in this cause is adopted, the profits will be distributed as income among the four children and the source of such profits, namely, the store interest, will, at the expiration of the twenty years, belong to the four children pursuant to the terms of the Will so construed. This will do equal justice among the children; prevent any intestacy as to any part of the testator's property, and conform to the predominant purpose of the Will as a whole.

It will be noted that there is no general residuary clause or gift.

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POINT III.

Complainants are estopped from insisting upon their asserted construction of the Will of the said testator, by the adjudication and decree of the Orphans' Court of the County of Morris, dated December 31, 1901 (Case, p. 27, fol. 10), on an accounting proceeding by Josephine O. Peirce against the complainants, as Executors, when they settled their final account as such, and also by the decree of said Orphans' Court, dated February 23d, 1904 (p. 33, fols. 10, 40), on a certain other accounting proceeding, on which accountings complainants charge themselves with one-half of the net profits of said mercantile business, and paid to this defendant and to the other children of said testator their respective shares of such profits.

See Case, page 30, folio 10;

See Answer, Paragraphs 18, 19, 20; 30

Case, page 17, folio 30, &c.;

See Stipulation, page 36, folios 10, 20, 30.

The two accountings above referred to appear in the printed case from pages 22 to 34, both inclusive. On page 24, folio 10, the complainants charge themselves with Eight thousand eight hundred and twenty-two dollars and thirty-one cents as one-half of the net profits received from Robert F. Oram & Co. From this they deduct repairs and expenses, \$6,990.60, leaving \$1,831.71 in their hands for distribution among the legatees. On

page 30 of the case the complainants herein charge themselves with one-half the net profits from December 31st, 1900, to December 31st, 1902, amounting to \$7,964.07. On page 22 of the case will be seen the decree of the Orphans' Court, which expressly charges them with One thousand eight hundred and thirty-one dollars and seventy-one cents
 10 "as and for the net income due the estate of said Robert F. Oram, deceased, from the firm of Robert F. Oram & Co. from April 1st, 1899, to December 31st, 1900, according to the provisions of the Will of said deceased."

Said Orphans' Court had jurisdiction to construe the Will of said testator in so far as the question of the profits of the mercantile business being distributed as income among the children.

20 Dunnam vs. Marsh, 7th Dick., page 256;
 Baker's Case, 16th Dick., page 592;
 Orphans' Court Act, Laws of 1898, page
 761, §127.

As these two decisions, which were never appealed from, and involved the construction of the Will upon the very point that is involved in this action, the complainants are estopped from urging any other theory of construction.

30 Diament vs. Lore, 2d. Vroom, pages 220 &
 223.

A sentence, judgment or decree of a Court acting within its jurisdiction is *res judicata* preventing the cause of action, fact, or matter adjudicated from being relitigated in any other Court between the parties and privies where the Court rendering it had general or inferior, concurrent, or successive
 40 jurisdiction.

Am. & Eng. Ency. of Law, title *Res Judicata*, 2d Ed., Vol. 24, page 721.

The law of *res judicata* is stated as follows :

Doctrine or *res judicata* applies alike to the decrees of Courts exercising equity jurisdiction, and to the judgments of Courts of law, and a final determination in either Court may be invoked as a bar or estoppel of the other.

The law of *res judicata* also has application to decisions of Appellate Courts, to sentences or decrees of Courts of special or limited jurisdiction, and to judgments of Courts created for the trial of small causes. 10

Am. & Eng. Ency. of Law, title *Res Judicata*, 2d Ed., Vol. 24, p. 721.

POINT IV.

The words "general assets" of the estate do not refer to the corpus simply, but in legal significance are defined to be "every kind of property owned by decedent, tangible or intangible, legal or equitable." 20

Am. Ency. of Law, 2d Ed., Vol. 11, page 829, citing 14th Peters (U. S.), 282;

Williams vs. Morehouse, 9th Conn., page 470; 30

26th Ind., page 477;

37 Mo., page 20.

Whatever an Executor or Administrator takes as such or in respect to his office, is to be considered assets.

110 U. S., page 710.

Assets is property belonging to an estate either of a bankrupt or decedent, subject to administration by the Assignee, Trustee or Executor for the benefit of creditors, heirs or distributees. The word 40

"assets" also includes such articles representing real estate of the decedent as are usually denominated the chattels real, as leases, &c.

Shears vs. Rodgers, 3 Barn & Adolph, pages 262, 371.

10 While there is no judicial decision defining "general assets" accurately, the testator in this Will had in mind, by use of the words "general assets," all of his estate of every name and nature, personal or real, legal or equitable, or whether principal or income. *The income from railroad bonds would be received and taken by the Executors as part of the general assets of the estate as those words are used in this paragraph, so would income from any other source.* The mercantile business was a separate trust, the proceeds of which came into the hands of the Executors as income from a particular form of investment, and construing the whole Will together it is manifest that for twenty years the children should have the entire income of the estate. The profits of the store business would come to the Executors as part of the general assets of the estate, but they are not directed to add the same to the corpus of the estate as accumulations to the principal. If the interest in the store business were 20 sold to Robert F. Oram, one of the sons and Executors, the income of the proceeds of such sale would be payable to the children the same as income from 30 any other source.

fol 10 p 10

POINT V.

The whole scheme of the Will is to be taken into consideration, and detached phrases should not be held to defeat it.

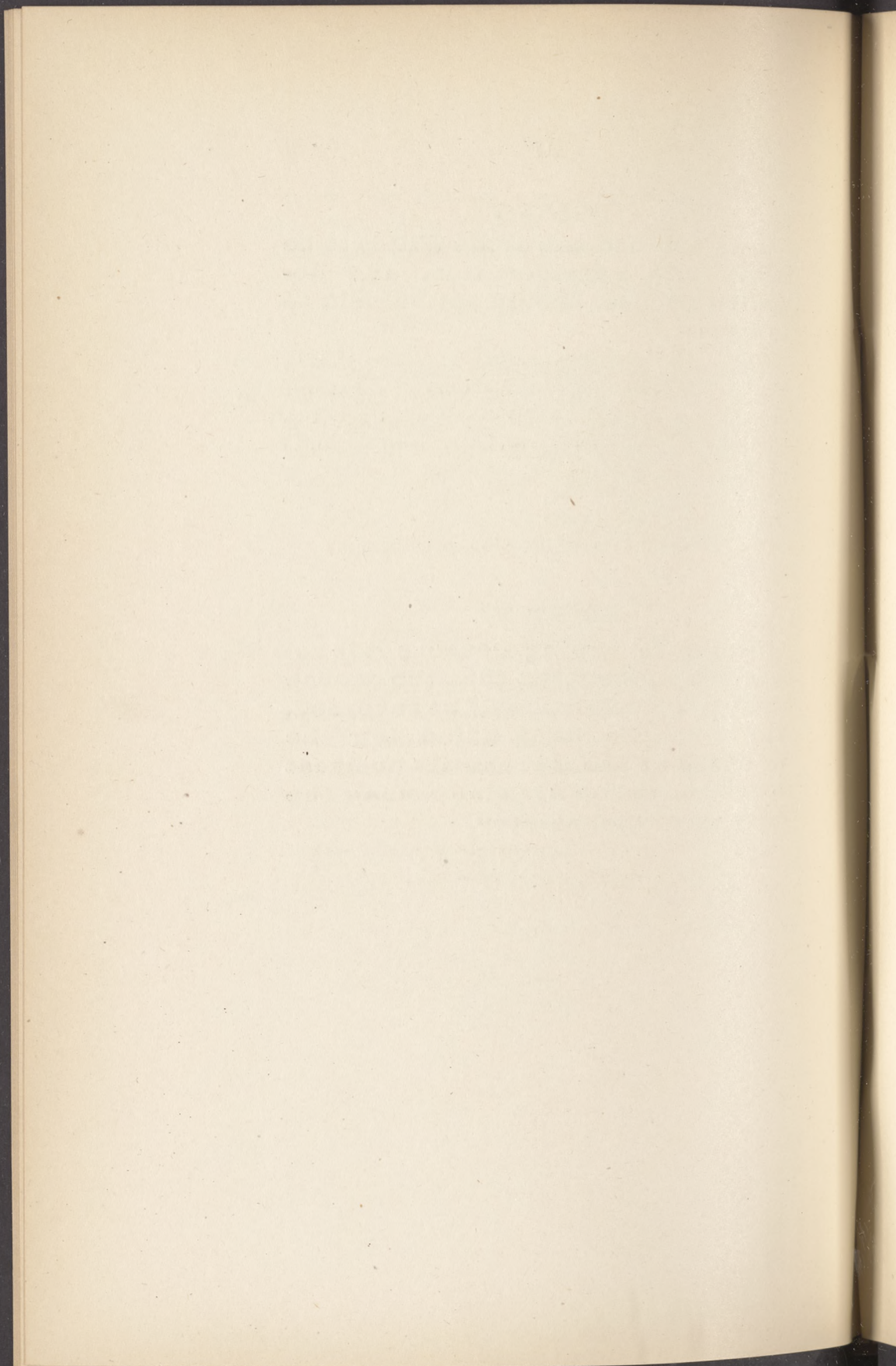
It is not by an exaggerated expression here and there that the Will is expounded, but by what on the whole was one scheme of rational disposition. For the intent as gathered from the whole Will overrides all those technical rules which relate to the construction of Wills. 10

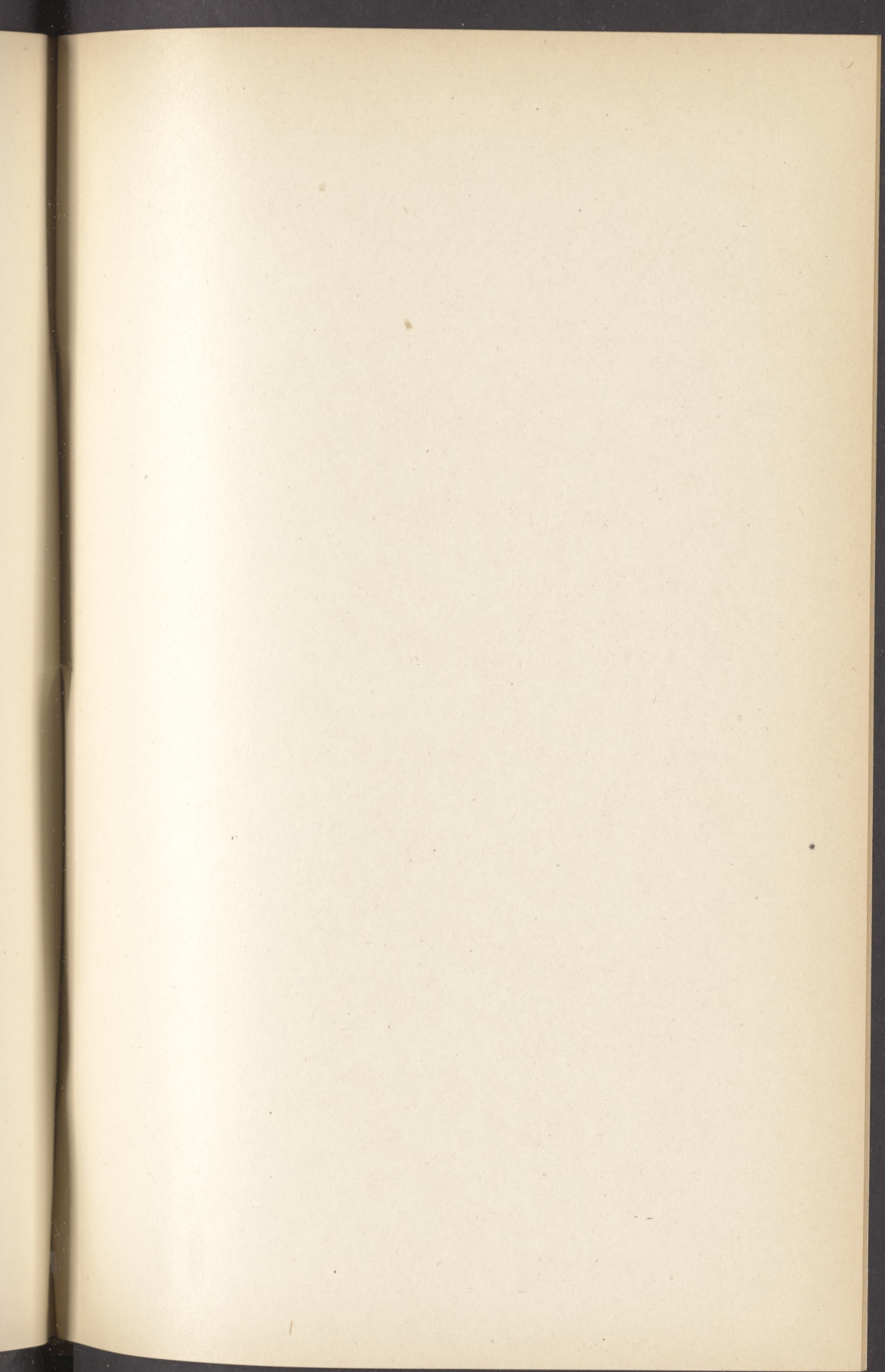
Schouler on Wills, §469, page 522.

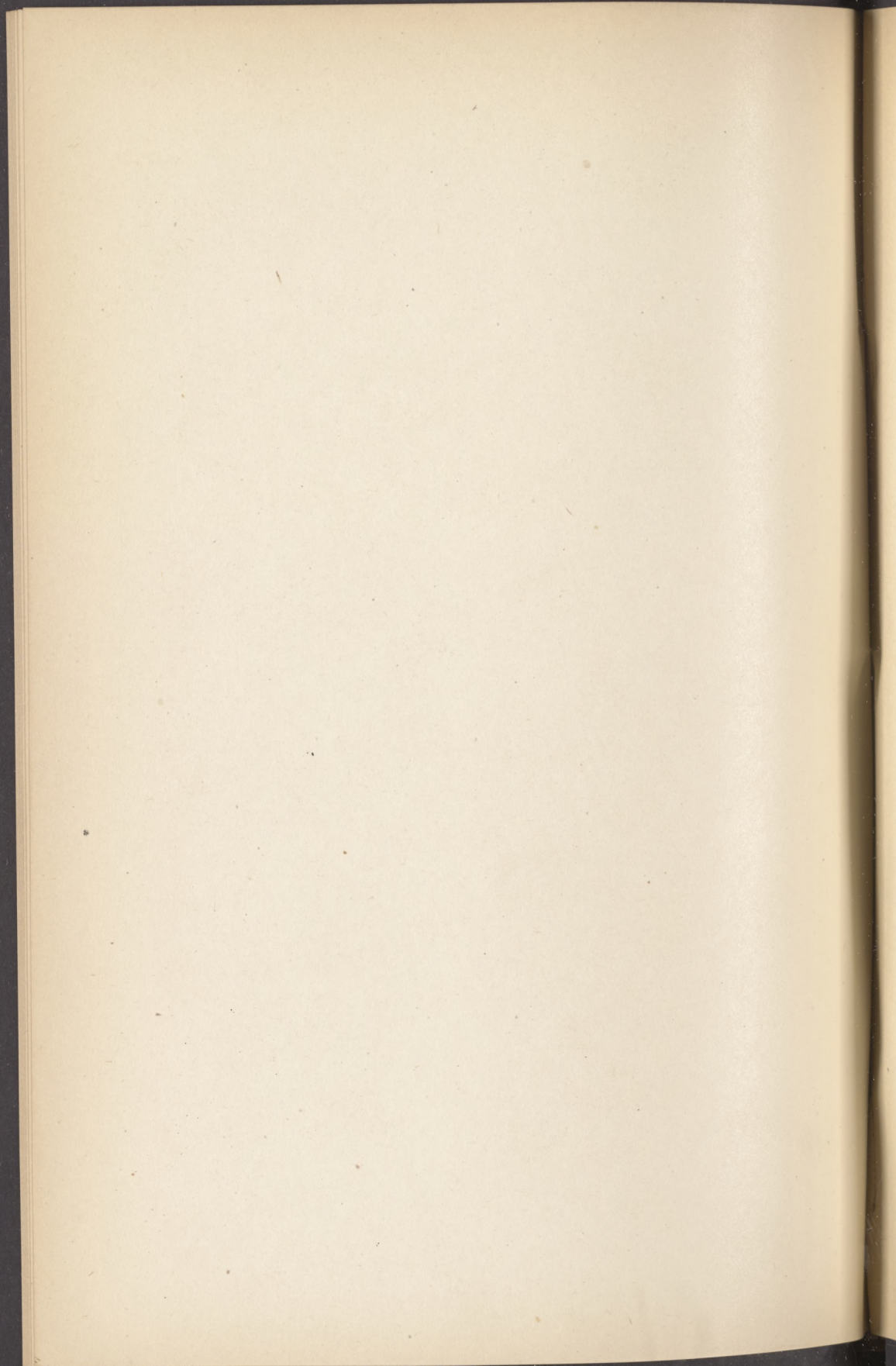
POINT VI.

For the foregoing reasons it is respectfully submitted that the decree of the Court below should be reversed, and a decree made adjudging the proceeds of the mercantile business to be income, for division among the children of the testator. 20

ALBRIDGE C. SMITH,
Attorney for Josephine O. Peirce, Appellant. 30

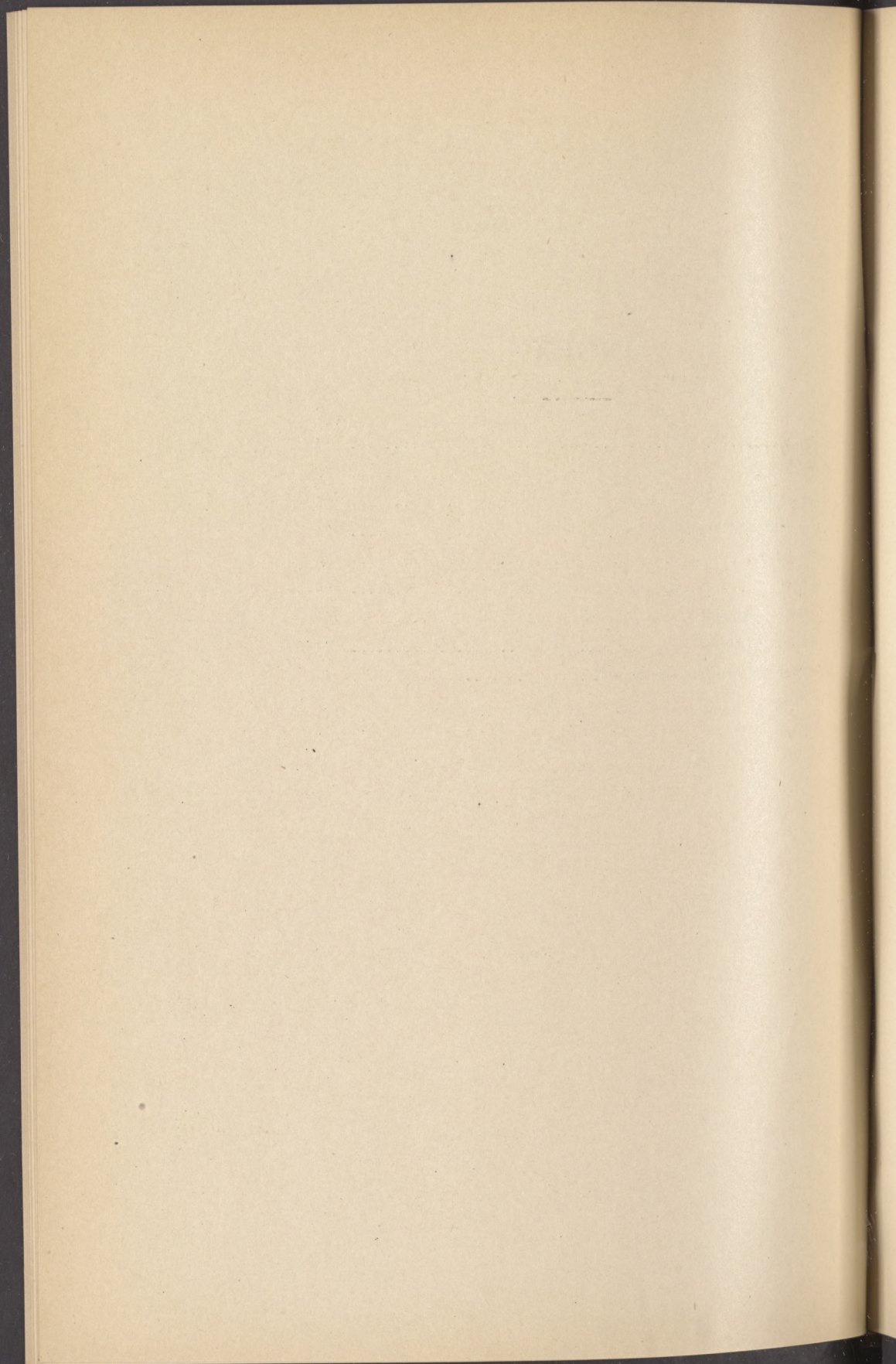






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NEW JERSEY
Court of Errors and Appeals

BETWEEN

JOSEPHINE PEIRCE ET AL.,
Defendants, Appellants,
and

THOMAS W. ORAM, ROBERT F. ORAM
AND JAMES H. NEIGHBOUR, EXECU-
TORS OF ROBERT F. ORAM, DE-
CEASED,
Complainants, Respondents.

BILL.

IN CHANCERY OF NEW JERSEY. 10

To His Honor, William J. Magie, Chancellor of the
State of New Jersey:

Humbly complaining, showeth unto your Honor,
your orators, Thomas W. Oram, Robert F. Oram and
James H. Neighbour, executors of the last will and
testament of Robert F. Oram, deceased.

First. That on the twenty-seventh day of March, A.
D. one thousand eight hundred and ninety-nine, Robert
F. Oram, of the town of Dover, departed this life, hav-
ing first made and published his last will and testament

bearing date the eleventh day of January, 1898, and in and by said last will and testament did name and appoint your orators as the executors thereof, and that on the fifth day of April, A. D. eighteen hundred and ninety-nine, the said will was admitted to probate by and before the surrogate of the county of Morris on the application of your orators, executors as aforesaid, and that the said Thomas W. Oram, Robert F. Oram and James H. Neighbour duly qualified as executors
10 thereof and took upon themselves the burden of the administration of the estate of the said Robert F. Oram, pursuant thereto.

Second. That a true copy of said last will and testament of the said Robert F. Oram is annexed to and forms a part of this, your orators' bill.

Third. That at the time of the decease of the said Robert F. Oram he left him surviving the four children named in said will, namely, your two orators, Thomas W. Oram and Robert F. Oram, and Mrs. Josephine
20 Pierce and Lottie L. Phillips, all of whom are now living, as his sole heirs-at-law.

Fourth. That at the time of the decease of the said testator he was engaged in the mercantile business at Port Oram, in said county of Morris, New Jersey, as particularly set forth and referred to in the second item of said will, and that by the terms of said second item of said will one-half interest in said mercantile stock in trade and business became vested in your orators, as executors under said will, and the other one-half interest
30 therein became vested in your orator, the said Robert F. Oram, as the owner thereof, and that the business of said merchandising was to be continued under the sole management of your orator, the said Robert F. Oram, for the mutual benefit of your orator, the said Robert F. Oram, and of the estate of the said testator as equal partners in business.

Fifth. That your orator, the said Robert F. Oram, was the manager of said mercantile business in all its

parts for some years prior to and at the time of the decease of said testator.

Sixth. That your orators, as such executors, in due course of administration upon the estate of said testator, caused an inventory and appraisement to be made of said merchandise, stock in trade, assets and goods and chattels belonging to the same amounting to the sum of nineteen thousand seven hundred and ninety-five dollars and thirty-two cents.

Seventh. That in pursuance of the terms of said second item of said will your orator, the said Robert F. Oram, took the sole management of said mercantile business for said estate and for himself, and has, since the decease of the said testator, continued to manage and carry on said mercantile business for the equal benefit of the estate of said testator and for your orator, the said Robert F. Oram, as equal partners and subject to losses and profits, and to be continued for the term of twenty years from and after the decease of said testator, as in said will directed. 10

Eighth. That by the further terms of said second item in said will the net profits of said business is to be equally divided between your orator, Robert F. Oram, and said estate of said deceased, and that the share or part belonging to the said estate should be taken by your orators as executors as aforesaid, as part of the general assets of said estate. 20

Ninth. That by the terms of the fourth item of said will all the real estate of said testator and all the remainder of the personal property and estate not otherwise disposed of was given and devised to your orators as executors under said will in trust to keep the same for the purposes specified in said will. 30

Tenth. That your orators, as such executors, were directed in and by said fourth item of said will to keep all the real estate of said deceased together, and not to sell or divide the same for the period of twenty years from and after the decease of said testator, and to di-

vide the net rents, issues and profits thereof, after keeping the same in repair, paying insurance, taxes and other incidental expenses, equally between the said four children of the testator above named in paragraph third.

Eleventh. That in the third item of said will it is provided that said executors could at any time sell and dispose of the share and interest of said estate in the said remaining part or half of said partnership business, stock in trade and goods and chattels belonging to the same to your orator, the said Robert F. Oram, on such equitable terms as might be agreed on, and to
10 retain the proceeds of such sale in the said estate for the use and benefit of said estate.

Twelfth. That in the said fourth item of said will, it is provided that said executors could sell or dispose of any part or parcel of said real estate of the deceased, when in the judgment of said executors, or the survivor of them, at any time during said period of twenty years, the same could be sold or disposed of to the advantage of the estate, and for its benefit, and in such case the
20 proceeds of such sale or sales should be invested by said executors in some safe and responsible manner, and the income thereof divided in the same manner as the rents, issues and profits of the said land was held and divided as set forth in paragraph nine.

Thirteenth. That, in and by the fifth item of said will, at the expiration of said twenty years your orators, as such executors, or the survivors or survivor of them, were ordered and directed to make partition by sale or otherwise, as to them might seem best, of all the real estate then remaining, among the said four
30 children of the testator, share and share alike, but it was provided in said fifth item, that the shares or parts of said daughters, Josephine and Lottie, were to remain in the hands of said executors, and for said two daughters to receive the interest or income only of their respective shares for and during the term of their natural life respectively, and that at the death of either

leaving child or children or grandchildren, the share of such deceased daughter should go to such last-named heirs, and that in the event of the death of either of said daughters without leaving any such named heir or heirs, then such share should go to the surviving children of the testator or their heirs, either surviving daughter, however, receiving only the income of such part for life as above set forth, and then to her heirs as above named.

Fourteenth. That in and by the fifth item of said will, it was further directed in reference to the said remainder of the personal property and estate mentioned and referred to in the fourth item of said will, that the same should be kept together in the hands of said executors, or of the survivor of them during the period of twenty years, in trust for the use and benefit of said estate, and that the interest and income thereof should be divided in the same manner as had been provided in said will in the matter of the rents, issues and profits of the real estate of said testator, and under like contingencies in all respects as to the shares of the said daughters. 10

Fifteenth. That in and by the eighth item of said will, it is directed that all and every, the shares or parts of the income of the said estate of said deceased, which might come to either of the said daughters of said testator, should come to and be received and held by them free from the custody and control of the husband of either of them, and all receipts, releases or discharges given by them or either of them to your orators, as such executors, signed by them, or either of them alone and without joining with the husband of either should be a full and complete release and discharge to your orators executors as aforesaid. 20 30

Sixteenth. That the said Josephine Pierce is a married woman and has for her husband one, Charles Pierce, and that the said Lottie L. Phillips is a mar-

ried woman and has for her husband, one Frank L. Phillips.

Seventeenth. That the said Lottie L. Phillips has one child whose name is Thomas Phillips, a minor, now of the age of years.

Eighteenth. That under the management and control of said mercantile business by your orator, the said Robert W. Oram, by and with the share of your orators and the share of the said Robert F. Oram, as set forth
10 in the second item of said will, and as alleged in the sixth paragraph of this your orator's bill, certain net profits have accrued therefrom to be divided equally between your orators as such executors and the said Robert F. Oram, for the mutual benefit of the said estate and of the said Robert F. Oram, as equal partners in business.

Nineteenth. That one-half of said net profits belong to your orators as executors as aforesaid for the benefit of said estate to be taken by your orators as part of
20 the general assets of said estate.

Twentieth. That your orators allege and insist that by the true and proper construction of said will, said half part of the net profits of said business, so taken or to be taken by your orators, is to be kept and retained by them as a part of the general assets or body of the estate of said testator to be added thereto and is to be by your orators invested from time to time as an income earning portion thereof and that the interest and profits of such portion is to be divided as the income
30 and profits of the real estate and the other personal estate of said testator is directed by said will to be divided.

Twenty-first. That your orators are informed and believe that the said Josephine Pierce and said Lottie L. Phillips dispute and deny that the said half part of the net profits of said mercantile business should be kept and retained by your orators as part of the assets or body of the estate, to be added thereto and by your

orators invested from time to time as an income earning portion thereof, and only the interest and profits of such portion divided in like manner as the income and profits of the real and personal estate of said deceased is directed by said will to be divided.

Twenty-second. That said Josephine Pierce and said Lottie L. Phillips insist that by the true and proper construction of said will the said half part of the net profits of said mercantile business should not be invested by your orators, but should be divided equally by your orators between the said four children of said testator, and that one part should be paid to said Josephine Pierce for her life and one part paid to said Lottie L. Phillips for her life, in the same manner as the other income of said estate is directed to be divided. 10

Twenty-third. That your orators allege that if the construction of said will as insisted on by your orators is the true and proper construction thereof, the said Thomas Phillips, the infant child of the said Lottie L. Phillips, will, in case he survives his said mother, become entitled to his share of the said accumulated net proceeds of said mercantile business taken and retained by your orators, as executors as aforesaid, and for that reason becomes a party interested in the construction of said will. 20

Twenty-fourth. That your orators, by reason of the dispute arising between your orators and the other devisees under said will, have filed this their bill by amicable understanding for the construction of the provisions thereof, yet your orators charge that they have, in paragraph nineteen of this bill, placed the true and only proper construction as to the disposition of said half part of the net profits of said mercantile business. 30

To the end, therefore, that the said Josephine Pierce, Lottie L. Phillips and Thomas Phillips may full, true, direct and perfect answer make to all and singular the matters aforesaid (your orators hereby waiving the answer or answers of said defendants being put in under

oath) as fully as if the same were here again repeated, and they thereunto interrogated, and that it may be ascertained and determined by the finding and decree of this Honorable Court whether or not the said half part of the net profits of said mercantile business so taken by your orators, as such executors, should be retained by them as part of the general assets or body of the estate of the said testator to be added thereto and invested from time to time as income-earning portions
10 thereof, and whether or not the interest and income of such investment only should be divided and paid to said legatees in equal parts, share and share alike, as the other items of income are directed to be divided in and by said will, or whether or not the said half part of the net profits of said mercantile business so taken by your orators, as such executors, should be divided and paid to said legatees in equal parts, share and share alike, as the other items of income are directed to be divided in and by said will; and in what manner said
20 net profits should be disposed of or divided, and that your orators may have such other and further relief as the nature and circumstances of the case may require and as your Honor shall seem meet and proper, together with the costs and charges of your orators in this behalf sustained.

May it please your Honor, the premises considered, to grant unto your orators the State's writ of subpoena issuing out and under the seal of this Honorable Court to be directed to the said Josephine Pierce, Charles Pierce, Lottie L. Phillips, Frank L. Phillips and Thomas Phillips, commanding them and each of them, on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor, in this Honorable Court, then and there to answer the premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet,

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

J. H. NEIGHBOUR,
Sol. for and of Counsel with Compts.

COPY OF WILL.

I, Robert F. Oram, of Dover, in the County of Morris and State of New Jersey, being of sound mind, memory and understanding, do make, publish and declare this my last will and testament in manner following.

First:—I do order all my debts and funeral expenses 10
fully paid and satisfied as soon as conveniently can be
after my decease.

Second:—I do hereby give and bequeath to my son, Robert F. Oram Jr. the equal one half part of all my right, estate and interest in the partnership business of R. F. Oram & Co. composed of myself and my son, Robert, at Port Oram in said County, being all the partnership personal property pertaining to said business, with all book accounts, capital, money, bonds, 20
notes, stock in trade, store goods and merchandise,
horses, wagons harness, coal business, tin and stove
business, drug business, lumber business and all equip-
ments and appliances belonging to each branch, as used
and employed by said firm, and that the said business
be continued with the other equal one half part thereof
owned by my estate, under the sole management and
control of my son Robert, for the mutual benefit of my
son, Robert and of my estate, as equal partners in busi-
ness, and subject to losses and profits, for and during 30
the term of twenty years from and after my decease, and
the net profits of said business shall be equally divided
between said Robert and my estate; the share or part,
so belonging to my estate to be taken by my executors,
hereinafter named as part of its general assets; the said
part of said stock, personal property and business so

bequeathed to my son, Robert, to be his absolutely, for himself, his heirs and assigns forever.

Third:—It is my will and I do hereby authorize and empower my executors, at any time, to sell and dispose of the share and interest of my estate in said remaining part or half of said partnership business, stock in trade and goods and chattels belonging to the same, to my son Robert, on such equitable terms as may be agreed on, and the proceeds of such sale to be retained in my
10 estate for its use and benefit, as is above provided for said remainder of my said personal property and estate.

Fourth:—I give and devise all my real estate, wheresoever situate and in whosoever hands found, and all the remainder of my personal property and estate not herein by this my will otherwise disposed of; to my executors hereinafter named and to the survivors or survivor of them, in trust for the purposes specified in my will, that is to say; it is my will that all my real estate of which I shall die seized, shall be kept together
20 by my said executors, in trust, and neither sold, nor divided for the period of twenty years after my decease, but the same shall be held in trust by my said executors for the use and benefit of my estate, and the net rents, issues and profits thereof, after keeping the same in repair, paying insurance, taxes and other incidental expenses shall be divided equally between my four children, namely Thomas, Robert, Mrs. Josephine Pierce and Mrs. Lottie L. Phillips; Provided However, that any part or
30 parcel of my real estate may be sold or disposed of by my said executors, or the survivor of them, at any time during said period of twenty years, when in the judgment of said executors, or the survivors or survivor of them, the same can be sold or disposed of to the advantage of my estate and for its benefit, but in such case, the proceeds of all such sale or sales shall be reinvested by my said executors in some safe and responsible manner, and the income thereof divided in the same manner

as the rents, issues and profits of the land were held and divided.

Fifth:—It is my will and I do hereby order and direct my said executors, or the survivor or survivors of them, at the expiration of twenty years as aforesaid, to make partition by sale or otherwise as to them may seem best, of all my real estate then remaining, among my said four children, share and share alike, but the shares or parts for my said daughters, Josephine and Lottie are to remain in the hands of said executors, and for them to receive the interest or income only of their respective shares, for and during the term of their natural life, respectively, and at the death of either, leaving child or children, or grandchildren, then the share of such deceased daughter to go to such last named heirs, and in the event of the death of either of my said daughters without leaving any such named heir or heirs, then such share shall go to my surviving children, or their heirs; either surviving daughter, however, receiving only the income of such part for life as above set forth, and then to her heirs as above named. And further, it is my will in reference to said remainder of my personal property and estate mentioned and referred to in the fourth item of this my will, that the same be kept together in the hands of my said executors, or the survivors or survivor of them during said period of twenty years in trust, for the use and benefit of my estate, and the interest and income to be divided in the same manner as is above provided in the matter of the rents, issues and profits of my real estate and under like contingencies in all respects, as to my said daughters shares.

Sixth. I give and bequeath to my son Thomas W. Oram all my stock, share and interest in the store at Hibernia, known as "The Oram Co." with all accounts, assets and credits and subject to all claims and demands against the same. To have and to hold the same unto the said Thomas W. Oram, his heirs and assigns forever.

Seventh:—My said executors or the survivors of them

are hereby empowered to make, execute and deliver good and sufficient deeds of conveyances, assignments, releases or assurances in the law for any and all parts or parcels of my estate, real or personal, whenever necessary or advisable so to do, in pursuance of this my will.

Eighth.—It is my will, and I do direct that all and every, the shares or parts of the income of my estate, which may come to either of my said daughters, shall come to and be received and held by them, free from
10 the custody and control of the husband of either, and all receipts, releases, or discharges, given by them or either of them to my said executors, signed by my said daughters, or either of them, alone and without joining with any husband shall be a full and complete receipt, release and discharge to said executors.

Ninth.—I hereby revoke any and all other wills by me heretofore made.

Lastly.—I hereby constitute and appoint my two sons, Thomas W. Oram and Robert F. Oram Jr. and my
20 friend James H. Neighbour, executors of this my last will and testament.

In Witness Whereof I have hereunto set my hand and seal this Eleventh day of January in the year of our LORD One thousand eight hundred and ninety eight.

ROBERT F. ORAM (s)

Signed, sealed, published and declared by the said Robert F. Oram to be his last will and testament in our presence, who were present at the same time, and we did then hereunto subscribe our names as witnesses in his
30 presence and in the presence of each other and at his request.

ROBERT KILLGORE, Dover, N. J.

EDWARD D. NEIGHBOUR, Dover, N. J.

Filed October 14, 1905.

VIVIAN M. LEWIS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THOMAS W. ORAM, ROBERT F. ORAM
AND JAMES H. NEIGHBOUR, EXEC-
UTORS OF THE LAST WILL AND TES-
TAMENT OF ROBERT F. ORAM, DE-
CEASED,

Complainants,

and

JOSEPHINE PEIRCE, CHARLES PEIRCE,
LOTTIE L. PHILLIPS, FRANK L.
PHILLIPS AND THOMAS PHILLIPS,
(A MINOR),

Defendants.

10

ANSWER.

The answer of Josephine Peirce, one of the defend-
ants to the bill of complaint of Thomas W. Oram,
Robert F. Oram and James H. Neighbour, the execu- 20
tors of the last will and testament of Robert F. Oram,
deceased :

I. This defendant admits that the complainants qual-
ified as executors of the last will and testament of Rob-
ert F. Oram, deceased, as alleged in their said bill of
complaint, and that a copy of the will of this testator is
annexed thereto.

II. Defendant further admits that testator left him
surviving four children, to wit, Thomas W. Oram, Rob-
ert F. Oram, this defendant, and Lottie L. Oram (now 30
Lottie L. Phillips), all of whom are now living.

III. This defendant admits that at the time of his
decease the said Robert F. Oram, the testator, had been
for several years engaged in the mercantile business at
Port Oram, in the county of Morris, and that a one-
half interest in the stock in trade and other assets in
the said partnership was bequeathed to the said Robert
F. Oram, one of the complainants, and the other one-

half thereof was retained by the complainants, as executors as aforesaid, and from the death of said testator and in pursuance of the second paragraph of his said will, the complainants and said Robert F. Oram continued said mercantile business as equal partners under the sole management of the said Robert F. Oram, one of the complainants, he and the executors of said testator being equal partners in said business.

IV. Defendant further admits that said Robert F. Oram, one of the complainants, was the business manager of said mercantile business for years prior to and at the time of the death of said testator.

V. Defendant admits that an inventory and appraisal of the stock in trade, but not other assets of said mercantile business, was made by complainants after the decease of said testator, and the same amounted to nineteen thousand seven hundred and ninety-five dollars and thirty-two cents.

VI. Defendant admits, as alleged in paragraph seventh of complainants' bill, that said Robert F. Oram, one of the complainants, has been the business manager of said mercantile business since the death of said testator.

VII. Defendant admits that item second of said will provided, among other things, that the share or part of the profits of said business belonging to the estate of said testator (being the equal one-half thereof) should be taken, in the language of said will, by the complainants as part of its general assets.

VIII. Defendant admits that by the fourth paragraph of said will testator's real estate and the balance of his personal property not otherwise bequeathed was given to the complainants IN TRUST for the purposes expressed in said will.

IX. Defendant admits that testator's real estate was devised to the complainants IN TRUST for twenty years from testator's death, and they are directed not to sell or divide the same until after the expiration of that

period, and the net income thereof should be divided among the children of said testator, and that on a sale of one-half interest in said mercantile business the proceeds thereof should be held IN TRUST by the complainants as other personal estate.

X. Defendant admits the allegations contained in the twelfth paragraph of complainants' bill that should said executors sell or dispose of any part of said real estate of said deceased the proceeds of such sale should be invested and the income divided in the same manner as rents, issues and profits of the said land was held and divided. 10

XI. Defendant admits that in and by the fifth item of said will, at the expiration of said twenty years, said executors were ordered and directed to make partition or sale, as to whom might seem best, of all real estate then remaining among said children of the testator, share and share alike, and that it was provided in the fifth item of said will that the shares or parts of his daughters Josephine and Lottie were to remain in the hands of the executors, and for said two daughters to receive the income of their respective shares during their life, and at the death of either daughter leaving child or children or grand-children the share of such deceased daughter should go to such last-named heirs, and in the event of the death of either of said daughters, without leaving such named heir or heirs, then her share should go to the surviving children of said testator, or their heirs, either surviving daughter, however, to receive the income of her part or share during her life, and then to her heirs, as in said will provided. 20 30

XII. Defendant admits that in and by the fifth item of said will, it was directed in reference to the remainder of the personal property and estate mentioned and referred to in the fourth item of said will that the same should be kept together in the hands of the complainants, as executors, or the survivor or survivors of them, during said period of twenty years IN TRUST for the

use and benefit of the estate, and the interest and income should be divided in the same manner as was provided in said will in reference to the rents, issues and profits of testator's real estate, and under like contingencies in all respects as to the shares of said two daughters.

XIII. Defendant admits that in and by the eighth item of said will, it is directed that all and every the shares or parts of the income of the said estate of said
10 deceased which might come to either of the said testator's daughters should come to and be received by them free from the custody and control of the husband of either of them, and all receipts, releases or discharges given by them, or either of them, to the complainants as such executors signed by them, or either of them alone and without joining with the husband of either should be a full and complete release and discharge of the complainants as executors.

XIV. This defendant admits that she is married and
20 that Charles Peirce is her husband, that one Frank L. Phillips is now the husband of Lottie L. Phillips and that the defendant, Thomas Phillips, is a son of the said Lottie L. Phillips and is a minor under the age of twenty-one years.

XIVa. Defendant admits that said mercantile business, conducted for the equal profit of said Robert F. Oram and the estate of said testator, has realized and earned net profits to be divided equally between the complainants as executors and the said Robert F. Oram
30 as equal partners in such business.

XV. Defendant admits that one-half of the profits of said mercantile business belongs to the complainants as executors aforesaid for the benefit of the estate, but denies that such profits shall be taken by the complainants as part of the general assets of said estate for the purposes of re-investment and alleges the truth to be that the profits of said business is a part of the income of the estate of the said testator and should be at regu-

lar intervals distributed among the four children and legatees named in the will of said testator the same as income from any other real or personal estate in the hands of said complainants.

XVI. This defendant further answering denies that by the true and proper construction of said will and one-half part of the net profits of said business so taken or to be taken by complainants, is to be kept and retained by them as a part of the general assets or body of the estate of said testator to be added thereto, and 10 denies that the complainants are authorized or required to invest such profits as an income earning portion of the estate of said testator, and that the interest and profits of such portion is to be divided as an income and profits of real and other personal estate is directed by said will to be divided.

XVII. This defendant admits, as alleged in paragraph twenty-first of complainants' bill, that this defendant and said Lottie L. Phillips dispute and deny that the one-half part of the net profits of said mercantile 20 business should be kept and retained by the complainants as part of the assets, or body of the estate, and this defendant insists, as alleged in paragraph twenty-second of the complainants' bill, that by the true and proper construction of said will one-half part of the net profits of said mercantile business, received by the complainants as executors as aforesaid, should not be invested by complainants, but should be divided equally between this defendant and the said other three children of said testator during their respective lives; one-fourth part 30 of said one-half to be paid to this defendant during her life in the same manner as other income of said estate is directed to be divided and paid.

XVIII. This defendant further answering alleges the truth to be that said complainants, on August 22d, 1901, filed in the Orphans' Court in the county of Morris, their account as executors and trustees under the will of said

testator, and failed in said account to charge themselves with the inventory value of the assets and with the profits arising from said mercantile business, and thereupon this defendant filed exceptions to said account and alleged that said complainants should amend said account by charging themselves with the profits in said business, in its various branches, to the thirty-first day of December, nineteen hundred and two; and should also charge themselves and account for the financial condition of said business as of the time when said account was filed and should also exhibit the assets and liabilities of said business and the general condition thereof.

XIX. That thereupon said complainants as executors, on or about the third day of December, 1901, filed an amended account charging themselves with the value of said mercantile business and the accrued profits thereof, and thereupon their said account, so amended, was by decree of said court, dated December 31st, 1901, settled and adjusted accordingly; that this defendant was paid her part or share of the income from said mercantile business as ascertained and adjusted by said accounting of said executors.

XX. This defendant further alleges the truth to be that said complainants as executors as aforesaid filed a second account as executors and trustees under the will of said Robert F. Oram, deceased, for the estate and income which had come into their hands to be administered, and the payments and disbursements out of the same to the thirty-first day of July, 1903, which said account was filed on or about January 5th, 1904, in the Surrogate's office in the county of Morris, which said account included the value of the said mercantile business as inventoried and one-half of the net profits of said business to the thirty-first day of December, 1902; that said account was in all things allowed as audited and stated by the Surrogate of the county of Morris by decree of the Orphans' Court of said county, dated February twenty-third, nineteen hundred and four, and

thereafter on or about March 24th, 1904, this defendant was paid the sum of one thousand seven hundred and forty-three dollars and forty-three cents, her share or part of the profits of said mercantile business which had come to the hands of the complainants as executors as aforesaid to the thirty-first day of December, 1902, as so much of the income belonging and payable to this defendant as one of the four children of the said Robert F. Oram, deceased.

XXI. This defendant, further answering, says that on 10
or about July 23d, 1904, and many times since, this defendant, through her attorney, demanded of said complainants, as executors as aforesaid, that they pay over to her her share of the profits of said mercantile business for the year 1903, and the first six months of the year 1904. That said executors neglected to comply with the request of this defendant, and on the third day of March, 1905, this defendant presented her petition to the Orphans' Court of the county of Morris for a decree requiring said executors, who are the complainants in 20
this action, to pay over to her her share of the one-half net profits of said mercantile business aforesaid for the year 1903 and the year 1904, although in this defendant's petition she erroneously claims her said share and said profits to January 31st, 1905; that by a decree of said Orphans' Court, dated May 12th, 1905, said executors were ordered to file and render an intermediate account of the estate of said deceased on or before the second day of July, 1905. That on the hearing of said petition before said Orphans' Court the complainants 30
for the first time alleged that they were doubtful as to the construction of the will of said testator, and under their construction of the terms thereof alleged that this defendant was not entitled to have paid to her her part or share of the net profits of said business as income payable to her under the will of said testator, and thereupon said proceedings in said Orphans' Court were sus-

pended until this action for the construction of said will by this Honorable Court might be held and determined.

XXII. Defendant, further answering, says that she is advised that the true construction of said will entitles this defendant to her part or share in the one-half of the net profits of the said business as so much income from the estate of said testator; and that after the filing of said accounts by said executors and the allowance thereof by said Orphans' Court, from time to time, as
10 hereinbefore set forth, the complainants are estopped from claiming or asserting that the true construction of said will as to the net profits of said mercantile business is otherwise than as is claimed by this defendant in this, her ANSWER, and that said decrees of said Orphans' Court are binding and conclusive in respect to said profits being part of the annual income from the estate of said deceased and payable to this defendant as one of the four children of the said testator, the same as other income from personal property.

20 XXIII. This defendant, further answering, admits that this action is an amicable one brought for the purposes of having this Honorable Court construe the will of said testator in respect to the right of this defendant and the other children of said testator to the annual profits of said mercantile business as part of the income payable to the children of said testator pursuant to the provisions and directions of his said will, and this defendant insists that a proper construction thereof and the decree of said Orphans' Court entitle this de-
30 fendant to a one-fourth part or share in equal divided one-half of the yearly profits of said mercantile business as so much income payable to her under said will, and this defendant prays that this Honorable Court will decree accordingly.

All which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays that her

reasonable costs and charges in this behalf may be paid by said complainants from the estate of said testator.

ALBRIDGE C. SMITH,
Sol. for and of Counsel with
Josephine O. Peirce, Defendant.

Filed January 30th, 1906.

VIVIAN M. LEWIS,
Clerk.

REPLICATION.

10

IN CHANCERY OF NEW JERSEY.

The complainants join issue on the answer of the defendant Josephine Pierce.

J. H. NEIGHBOUR,
Solr. and of Counsel with Complts.

Filed February 10th, 1906.

VIVIAN M. LEWIS,
Clerk. 20

ACCOUNTS AND DECREES.

STATE OF NEW JERSEY.
MORRIS ORPHANS' COURT.

October Term, 1901.

At an Orphans' Court held at the Court House at 30 Morristown, in and for the county of Morris, on Tuesday, the third day of December, A. D. nineteen hundred and one.

Present—Hon. JOHN B. VREELAND, *Judge.*

| | | |
|--|---|---|
| <i>In the Matter of the Account of Robert F. Oram and James H. Neighbour, two of the Executors of Robert F. Oram, Dec'd.</i> | } | Order for amendment of account and allowing commissions and com- pensation to executors. |
|--|---|---|

The above-stated matter having been continued to this time, and now coming on to be heard, James H. Neighbour, one of the executors above named, appearing in behalf of the said executors, and the Court having
 10 heard the argument of counsel, and duly considered the same. And it further appearing that said executors have received from the firm of Robert F. Oram & Company the sum of \$1,831.71. It is further ordered that the said executors be charged with the said sum of eighteen hundred and thirty-one dollars and seventy-one cents as and for the net income due the estate of said Robert F. Oram, deceased, from the firm of Robert F. Oram & Co. from April 1, 1899, to December 31, 1900,
 20 according to the provisions of the will of said deceased, and as shown by a statement of said firm filed with the surrogate;

It is therefore ordered that the executors of the said Robert F. Oram, deceased, be and they are hereby allowed the sum of six thousand five hundred and forty-two dollars and ninety-seven cents as and for their commissions on the principal and income of the estate of said deceased which has come to their hands;

It is further ordered that the surrogate's fees and the taxed costs in this matter, amounting to the sum of two
 30 hundred and three dollars and twenty-five cents (\$203.25), be paid by the said executors from and out of the estate of said deceased;

It is further ordered that the surrogate state an amended account in accordance with this decree, and that the consideration of said account and said amended account be further postponed to the thirty-first day of December, instant.

JOHN B. VREELAND,
Judge, &c.

COURT OF ERRORS AND APPEALS. 23

Amended account of Robert F. Oram and James H. Neighbour, two of the executors of Robert F. Oram, late of the county of Morris and State of New Jersey, deceased.

These Accountants are Charged on Principal.

| | | | |
|--|--------------|--------------|----|
| With the amount of the total footings as charged in their account, filed August 22d, 1901, to wit, | \$164,277 14 | | |
| | | | 10 |
| Less the amount of income included therein, | 25,718 21 | | |
| | \$138,558 93 | \$138,558 93 | |

These Accountants are Allowed on Principal.

| | | | |
|---|-------------|--------------|----|
| The total amount of their credits as stated on pages 3 and 4 of said account, | \$54,897 11 | | |
| Less the amount chargeable to income, | \$8,201 49 | | |
| And payments to heirs, | 15,979 50 | | 20 |
| | 24,180 99 | | |
| | | 30,716 12 | |
| Dover index, notice of settlement, | | 3 30 | |
| Accountant's commissions and compensation on principal of estate to wit: | | | |
| On \$132,190.63 at 4%, | \$5,287 62 | | |
| Expenses of accountants on account, | 153 35 | | |
| | 5,440 97 | | |
| David Young, Surrogate: | | | 30 |
| Fees on inventory, | \$4 54 | | |
| Statute fee on account, | 157 90 | | |
| Taxed costs, | 30 81 | | |
| Fees amended account, | 10 00 | | |
| | 203 25 | | |
| Total disbursements, .. | | \$36,363 64 | |
| Balance principal in hands of accountants, | | 102,195 29 | |
| | | \$138,558 93 | |

24 COURT OF ERRORS AND APPEALS.

These Accountants are Charged on Income.

| | | |
|---|------------|-----------------|
| The total amount of income as charged on their said account, pages 2 and 6, to wit, | | \$25,718 21 |
| With the one-half net profit received from Robert F. Oram & Co., as per statement submitted to the executors of testator—Schedule annexed, | \$8,822 31 | |
| Less repairs and expenses as directed by will of testator,.. | 6,990 60 | |
| 10 | | <u>1,831 71</u> |
| Total income, | | \$27,549 92 |

These Accountants are Allowed on Income.

| | | |
|--|----------|-----------------|
| For the payments charged against said income for expenses, repairs, &c., page 6, to wit, | | \$8,201 49 |
| For the commissions on income received to wit—on \$27,549.92 at 4%, | | 1,102 00 |
| For payments to heirs according to the terms of will of said testator, to wit— | | |
| 20 Josephine Oram Pierce, | 4,000 00 | |
| Robert F. Oram, Jr., | 4,000 00 | |
| Thomas W. Oram, | 3,979 50 | |
| Lottie Oram Phillips, | 4,000 00 | |
| Total disbursements from income,.... | | \$25,282 99 |
| Balance income undistributed, | | <u>2,266 93</u> |
| | | \$27,549 92 |

R. F. ORAM AND COMPANY, Port Oram, N. J.

Balance Sheet.

April 1st, 1899, to December 31st, 1900.

| | | |
|--|-------------|--------------------|
| 30 Creditors: | | |
| Dealers ledger, | \$14,369 04 | |
| General ledger, | 513 11 | |
| | | <u>\$14,882 15</u> |
| R. F. Oram, Jr.; Note a/c, | | <u>1,500</u> |
| R. F. Oram, Jr., Capital Mch. 31/99—½ of | | |
| R. F. Oram, Sr., Capital a/c, | \$18,492 32 | |
| Less; Drawings, | 2,512 67 | |
| | | <u>\$15,979 65</u> |

COURT OF ERRORS AND APPEALS. 25

| | | |
|--|--------------------|----|
| Add; ½ profits brought from Profit and Loss account, | \$8,822 31 | |
| | <u>\$24,801 96</u> | |
| Less Drawings per balance private account a/c December 31/00, | 3,530 38 | |
| | <u>\$21,271 58</u> | |
| Estate R. F. Oram, Capital a/c Mch. 31/99, ½ of R. F. Oram, Sr., capital account, .. | \$18,492 31 | |
| Add ½ of profits brought from Profit and Loss, | 8,822 31 | |
| | <u>\$27,314 62</u> | 10 |
| Less materials supplied, | 6,990 60 | |
| | <u>20,324 02</u> | |
| | <u>\$57,977 75</u> | |

Balance Sheet.

| | | |
|--|--------------------|--------|
| <i>Debtors:</i> | | |
| Sales Ledger, | \$14,861 89 | |
| General Ledger, | 3,556 06 | |
| | <u>\$18,417 95</u> | |
| <i>Bills receivable</i> Wm. Hance, | | 299 59 |
| Stock on hand, | | |
| Merchandise, | \$16,058 89 | |
| Lumber, | 11,817 08 | 20 |
| Tin Store, | 1,591 99 | |
| Drugs, | 1,295 22 | |
| Coal, | 395 30 | |
| | <u>31,158 48</u> | |
| <i>Furniture, Fixtures and Tools:</i> | | |
| Store, | \$345 | |
| Office, | 138 50 | |
| Lumber yard, | 131 50 | |
| Coal yard, | 21 | |
| Tin store, | 200 | |
| | <u>836</u> | |
| Horses, | 725 | |
| Wagons and harness, | 435 | 30 |
| Gas Plant, | 293 99 | |
| Carpenter Shop building, | 355 41 | |
| Lumber sheds, | 300 | |
| Addition Tin store building, | 37 50 | |
| Saw Mill, | 310 65 | |
| New Wall, | 193 82 | |
| Cash on hand, | \$4,479 05 | |
| Cash in Bank, | 135 31 | |
| | <u>4,614 36</u> | |
| | <u>\$57,977 75</u> | |

R. F. ORAM AND COMPANY, Port Oram, N. J.
Profit and Loss Account.

April 1st, 1899, to December 31st, 1900.

| | | |
|---|-------------|-------------|
| To expenses, | \$10,435 01 | |
| Insurance, | 516 70 | |
| Rent, | 962 50 | |
| Donations, | 289 41 | |
| Amount written off for bad debts, | 1,806 94 | |
| Error in balance December 31st, 1898, .. | 01 | |
| Balance profits carried to capital accounts, .. | 17,644 62 | |
| as | | |
| ½ to R. F. Oram, cap. a/c, ... | \$8,822 31 | |
| IO ½ estate R. F. Oram a/c, ... | 8,822 31 | |
| | | \$31,655 19 |
| By profits on merchandise, | \$19,329 32 | |
| Lumber, | 7,734 10 | |
| Coal, | 2,338 97 | |
| Tin store, | 1,410 14 | |
| Drugs, | 563 99 | |
| Discount, | 198 11 | |
| Interest, | 80 56 | |
| | | 31,655 19 |

SUMMARY.

| | | |
|---|--------------|--------------|
| Total amount of principal estate, | \$102,195 29 | |
| 20 Total amount income undistributed, | 2,266 93 | |
| | | \$104,462 22 |
| Total estate, | | |

I, David Young, Surrogate of said county of Morris, do hereby certify that I have stated the above amended account in pursuance of a decree made by the Orphans' Court of said county on the third day of December, A. D. 1901.

DAVID YOUNG,
Surrogate.

30

STATE OF NEW JERSEY,
 MORRIS ORPHANS' COURT.

October Term, 1901.

At an Orphans' Court held at the Court House at Morristown in and for the county of Morris, on Tuesday, the thirty-first day of December, A. D. nineteen hundred and one.

Present—Hon. JOHN B. VREELAND, *Judge.*

| | | |
|--|---|---|
| <p><i>In the matter of the account of Robert F. Oram and James H. Neighbour, two of the Executors of Robert F. Oram, De- ceased, and the account amendatory thereof.</i></p> | } | <p>Final Settlement. Balance, \$105,389.02.</p> |
|--|---|---|

The surrogate having audited and stated the final account of Robert F. Oram and James H. Neighbour, two of the executors of Robert F. Oram, deceased, and placed the same on the files of his office twenty days previous to this time, and the settlement of said account appearing to have been noticed according to law, due proof of which has been made and filed with the said surrogate; and said surrogate having audited and stated the amended account of the said executors in pursuance of an order of this court made on the third day of December instant and placed the same on the files of his office twenty days previous to this time, and the matter now coming on to be heard in the presence of Albridge C. Smith, proctor of Josephine Peirce, a party interested, and Robert F. Oram, one of the executors in person; and objections being made to certain portions of the said final account, and the Court having heard the parties, and it appearing that the items for interest of F. L. Phillips' bonds and mortgage, included in the inventory but not collected, amounting to nine hundred and five dollars and ninety-seven cents, and the interest on the Scranton Fire Brick note of one thousand dollars, inventoried but not collected, amounting to twenty dollars and eighty-three cents, making a total sum of nine hundred and twenty-six dollars and eighty cents, for which the accountants have prayed allowanec, should not be allowed;

It is on this thirty-first day of December, A. D. nineteen hundred and one, ordered, adjudged and decreed that the said sum of nine hundred and twenty-six dollars and eighty cents be disallowed at this time, and that

the surrogate state a supplemental account, charging said executors with that sum and showing the true balance of the estate in their hands; and it is further ordered, adjudged and decreed by the Court that the said accounts, when the said supplemental account shall have been so stated, be in all things allowed, and that there be paid to the said Albert C. Smith out of the principal of the estate the sum of one hundred dollars as counsel fee.

10 And it appearing that there is a balance in the hands of said executors amounting to the sum of one hundred and five thousand three hundred and eighty-nine dollars and two cents, including the sum of two thousand two hundred and sixty-six dollars and ninety-three cents income,

It is further ordered that the said accounts be entered of record, and that said income be distributed and paid by said executors assording to the terms of the last will and testament of said deceased.

20 JOHN B. VREELAND,
Judge, &c.

The Supplemental Account of ROBERT F. ORAM and JAMES H. NEIGHBOUR, two of the executors of ROBERT F. ORAM, deceased, stated by David Young, surrogate of the county of Morris, in pursuance of a decree of the Orphans' Court of said county made on the thirty-first day of December, A. D. 1901.

30 *These Accounts are Changed:*

| | |
|---|--------------|
| With the balance of principal in their hands as shown by their amended account, | \$102,195 29 |
| With interest on F. L. Phillips' bond and mortgage included in inventory, but not collected, | \$905 97 |

With interest on Scranton Fire
 Brick note of \$1,000 included in
 inventory, but not collected, 20 83

926 80

The same having been claimed as an al-
 lowance by the accountants in their final
 account and not being allowed by the
 Court at this time.

Total amount of principal in hands of
 accountants, \$103,122 09 10

With the amount of income undistributed
 as shown by their amended account, . . . 2,266 93

Total estate, \$105,389 02

I, David Young, surrogate of said county, do hereby
 certify that I have stated the above supplemental ac-
 count, in pursuance of an order made by the Orphans'
 Court of the county of Morris on the thirty-first day of
 December, A. D. 1901. 20

Dated, December 31st, 1901.

DAVID YOUNG,
Surrogate.

The Second Account of Thomas W. Oram, Robert F.
 Oram and James H. Neighbour, Executors and
 Trustees under the last will and Testament of
 Robert F. Oram, deceased, for the estate and the
 income thereof which has come to their hands to
 be administered and the payments and disburse- 30
 ments out of the same since their last accounting,
 to the Thirty first day of July, 1903.

These Accountants Charge Themselves.

With the balance in their hands as shown
 by decree of the Orphans' Court made on
 the 31st day of December, 1901:

Principal, \$103,122 09

Income, 2,266 93

————— \$105,389 02

30 COURT OF ERRORS AND APPEALS.

| | | | | |
|---|-------------|----|-----------|--------------|
| With amount realized from sale of Forgings Oct. 13th, 1902, not heretofore appraised, | | | | 525 |
| With Sundry payments on account of Con- tract by J. H. Hicks as per Schedule F.,.. | | | | 236 98 |
| With Income from Dover Real Estate, | | | | |
| | Schedule 1, | | \$6,039 | |
| Port Oram | do do | 2, | 10,260 15 | |
| Rockaway | do do | 3, | 439 | |
| Brooklyn | do do | 4, | 43 84 | |
| | | | <hr/> | 16,781 99 |
| Bonds & Mortgages, | do | 5, | | 3,919 55 |
| Stocks & Bonds, | do | 6, | | 4,850 69 |
| 10 Sand Bank, | do | 7, | | 448 05 |
| Homestead Rent, | do | 8, | | 60 |
| Farm Produce, | do | 8, | | 409 42 |
| Interest on Notes &c., | do | 9, | | 929 01 |
| Robert F. Oram & Co., Store, ½ Net Profit from December 31, 1900, to December 31, 1902, as per their Balance Sheet & P. & L. a/c herewith, | | | | 7,964 07 |
| 20 With erroneous allowance for Materials, Labor, etc., supplied by Robert F. Oram & Co., for repairs to Buildings. An allow- ance for this amount was made twice, first in the build'g account and also by a Credit to Robert F. Oram & Co., hence this charge to accountants for duplicate allow- ance aforementioned, | | | | 519 24 |
| | | | | <hr/> |
| Total Charges, | | | | \$142,033 02 |

These Accountants Pray Allowance.

| | | | | |
|--|-------|-------|----|----------|
| For Cash charged to them erroneously in former accounting (See Page 5 Final Ac- count) according to information derived from and instruction given by the Surro- gate, | | | | \$302 61 |
| 30 For Decrease on 10 Shares State Mutual & Building Loan Association viz: | | | | |
| Appraised see page 5..... | \$330 | 00 | | |
| 18 Monthly Assessments @ \$5 each, | | 90 | 00 | |
| | | <hr/> | | |
| Cost, | \$420 | 00 | | |
| Sold January 31, 1902, | | 402 | 60 | |
| | | <hr/> | | |
| Decrease, | \$17 | 40 | | 17 40 |

COURT OF ERRORS AND APPEALS. 31

| | | |
|--|------------|----|
| For Counsel fees to Albridge C. Smith as allowed by Surrogate December 31, 1901, | 100 00 | |
| For the following Expenditures for repairs, etc.: | | |
| Dover Real Estate, Schedule 10, | \$4,255 49 | |
| Port Oram Real Estate, " 11, | 3,154 95 | |
| Rockaway Real Estate, " 12, | 243 52 | |
| Brooklyn Real Estate, " 13, | 215 12 | |
| Sand Bank Labor, " 14, | 89 75 | |
| Homestead, " 15, | 46 77 | |
| Farm, " 16, | 245 84 | |
| | <hr/> | |
| | 8,251 44 | |
| Expense account, " 17, | 594 80 | 10 |
| Payments to Heirs: | | |
| Josephine Oram Pierce, " 18, | \$5,100 00 | |
| Robert F. Oram, " 18, | 5,431 34 | |
| Thomas W. Oram, " 19, | 5,254 91 | |
| Lottie Oram Phillips, " 19, | 5,192 36 | |
| | <hr/> | |
| | 20,978 61 | |

| | |
|-------------------------|------------|
| Total Allowances, | 30,244 86 |
| Total Estate, | 111,788 16 |

\$142,033 02

| | | |
|-----------------------|--------------|----|
| Principal, | \$103,464 06 | |
| Income—Undistributed: | | 20 |
| July 31, 1901, | \$2,266 93 | |
| " " 1903, | 519 24 | |
| " " 1903, | 5,537 93 | |
| | <hr/> | |
| | 8,324 10 | |
| | <hr/> | |
| | \$111,788 16 | |

SUMMARY.

In accordance with Decree of the Orphans' Court,
Made February 23d, 1904.

These Accountants are Charged on Principal Account.

| | | |
|--|--------------|----|
| As charged in the foregoing account, | \$103,884 07 | 30 |
|--|--------------|----|

Accountants are Allowed Therefrom

| | | |
|---|----------|--|
| For disbursements as claimed,.... | \$420 01 | |
| " Commissions on Corpus allowed by Court—1½% on \$103,464.06, | 1,551 96 | |
| For Pro-rata Surrogate's fees & costs, | 103 46 | |
| | <hr/> | |
| | 2,075 43 | |

| | |
|--------------------------|--------------|
| Balance Principal, | \$101,808 64 |
|--------------------------|--------------|

32 COURT OF ERRORS AND APPEALS.

These Accountants are Charged on Income Account

| | | |
|---|------------|-----------|
| With the balance on hand, July 31st, 1901, as shown by last accounting, | \$2,266 93 | |
| With the Income since received to July 31st, 1903, | 35,882 02 | |
| | | 38,148 95 |

Accountants are Allowed Therefrom

| | | | |
|----|---|------------|--------------|
| 10 | For disbursements as claimed in foregoing account to wit: | | |
| | Repairs &c., | \$8,251 44 | |
| | Expense account, | 594 80 | |
| | | \$8,846 24 | |
| | Payments to heirs, | 20,978 61 | |
| | A. C. Smith, Counsel fee, | 50 00 | |
| | Commissions on Income rec'd. 5% on \$35,882.02, | 1,794 10 | |
| | Proportion Surrogate's fees &c.,... | 64 40 | |
| | | 31,733 35 | |
| | Balance undistributed Income, | | 6,415 60 |
| 20 | Total Estate, | | \$108,224 24 |

Distributive Shares Income on Hand.

| | |
|------------------------------|------------|
| Josephine Oram Peirce, | \$1,743 43 |
| Lottie Oram Phillips, | 1,651 07 |
| Robert F. Oram, | 1,412 08 |
| Thomas W. Oram, | 1,609 02 |
| | \$6,415 60 |

30 STATE OF NEW JERSEY,
MORRIS ORPHANS' COURT.
January Term 1904.

At an Orphans' Court held at the Court House at Morristown in and for the County of Morris, on Tuesday the Twenty third day of February, A. D. Nineteen hundred and four.

Present, Hon. Alfred Elmer Mills, Judge.

In the matter of the account of Thomas W. Oram, Robert F. Oram and James H. Neighbour, Executors and Trustees under the last Will of Robert F. Oram, deceased. }

Intermediate Settlement.

| | |
|------------------------------|--------------|
| Balance Principal, | \$101,808.64 |
| “ Income, | 6,415.60 |
| | \$108,224.24 |

The Surrogate having audited and stated the account 10
of Thomas W. Oram, Robert F. Oram and James H.
Neighbour, Executors and Trustees under the last Will
of Robert F. Oram, deceased, and placed the same on
the files of his office twenty days previous to this time,
and being now reported for settlement, and no excep-
tions thereto; and citation to appear having been issued,
and served on, or the service thereof acknowledged by
all persons interested in said estate, as required by law ;
It is Ordered and Decreed, that the said account be and
is hereby allowed in all things as reported, and it ap- 20
pearing that there is a balance of principal remaining
in the hands of the said Executors and Trustees amount-
ing to the sum of One hundred and three thousand,
four hundred and sixty four Dollars and six Cents,
(\$103,464.06), and a further sum of Eight thousand
three hundred and twenty four Dollars and ten cents,
(\$8,324.10) of undistributed income; and it appearing
that the costs and Surrogate's fees, and the Trustees
commissions in said matter have not been paid, and ap-
plication now being made for an allowance therefor; 30
it is thereupon ordered that the Surrogate's fees and
costs taxed at the sum of \$167.86 be allowed; and that
the Trustees be allowed one and one half per cent. as
partial commissions on \$103,464.06, the corpus of the
estate, being the sum of \$1551.96; and a further sum of

\$1794.10 as their commissions at the rate of five per cent. on \$35,882.02, the income received by them;

It is further ordered that Albridge C. Smith, Esquire, Proctor for Josephine Oram Pierce, a daughter of testator, be and he hereby is allowed \$50.00 as a counsel fee in said matter;

And it is further ordered that the said counsel fee of \$50.00, and the said sum of \$1,794.10, allowed as commissions on the income, and \$64.40 of the Surrogate's
 10 fees and costs, be paid from and out of the undistributed income in the hands of the said Trustees, and that the sum of \$1,551.96, commissions allowed on the corpus of the estate and \$103.46 of the Surrogate's fees and costs be paid from and out of the Principal of the estate in the hands of the said Trustees; and it then appearing that the balance of principal remaining in the said Executors and Trustees is the sum of \$101,808.64
 20 invested as appears by the schedule annexed to said account, and the amount of the undistributed income remaining in their hands is the sum of \$6,415.60, it is further ordered that said balance of income be distributed and paid according to the terms of the last will of the said Robert F. Oram, deceased, and that the said account be entered of record.

ALFRED ELMER MILLS
Judge, &c.

STATE OF NEW JERSEY
 MORRIS COUNTY SURROGATE'S OFFICE

30 MORRIS COUNTY, ss.

I, David Young, Surrogate of the said county and Clerk of the Orphans' Court thereof, the same being a Court of Record, do hereby certify that I have compared the foregoing copies of Summary of Accounts of Executors and Trustees of Robert F. Oram, deceased, and the Decrees of the Orphans' Court thereon, as follows:

Decree of December 3rd, 1901, Order Amending Executors' Accounts, &c.;

Amended Account in pursuance of above decree;
Decree of December 31st, 1901, Directing Supplemental Account;

Supplemental Account—Stated by Surrogate December 31st, 1901;

Second Account (Summary), February 23rd, 1904;

Decree of February 23rd, 1904,

with the original records thereof, now remaining in my office, and have found the same to be true copies therefrom.

10

In testimony whereof, I have hereunto set my hand
[L. s.] and seal of office this Ninth day of
June, A. D. Nineteen hundred and six.

DAVID YOUNG,

Surrogate, Etc.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THOMAS W. ORAM, ROBERT F. ORAM
AND JAMES H. NEIGHBOUR, EXECU-
TORS OF ROBERT F. ORAM, DE-
CEASED, *Complainants,*

and

JOSEPHINE PEIRCE ET ALS.,
Defendants.

20

STIPULATION.

The solicitors for the respective parties in the above 30
entitled action hereby stipulate as follows:

First: That the allegations of fact in the Bill of Com-
plaint and in the Answer of the defendant, Josephine O.
Peirce, are true, notwithstanding the replication filed
herein.

Second: That the said Josephine O. Peirce is of the
age of fifty-five years and has never had any child or
children.

Third: That annexed hereto is a summary and statement of the amended account of Robert F. Oram and James H. Neighbour, two of the Executors of Robert F. Oram, deceased, stated December 3d, 1901, showing a balance in the hands of said Executors of the personal estate of said testator of \$104,462.22, being \$102,195.29 of principal and \$2,266.93 of undistributed income, and showing also that they are charged with one-half of the net profits received from Robert F. Oram & Co. of
10 \$8822.31 less repairs and expenses, leaving a net charge of profits of \$1831.71.

Fourth: That annexed hereto is a copy of the Decree of the Orphans' Court of the County of Morris made on the accounting by the Executors of Robert F. Oram, deceased, dated December 3d, 1901, directing said amended account to be made and allowing commissions &c. to the Executors.

Fifth: Annexed hereto is a Decree of the Morris County Orphans' Court, dated December 31st, 1901
20 making a final statement of said account by said Executors and showing a balance in their hands of \$105,389.02, and directing the Surrogate to state a supplemental account charging them with \$926.80, a copy of which said supplemental account made in pursuance of said Decree is hereto annexed.

Sixth: That hereto annexed is a copy of the second account of said Executors as Trustees of said Robert F. Oram, deceased, to the 31st day of July, 1903 and showing, among other things, undistributed income from
30 July 31, 1901 to July 31, 1903 of \$8,324.10, which said second account shows net profits received by said trustees from the mercantile business of Robert F. Oram & Co. from December 31st, 1900 to December 31, 1902 of \$7,964.07.

Seventh: And there is also hereto annexed a copy of the Decree of the Orphans' Court of the County of Morris on such second accounting and dated February 23d, 1904. That the income charged in said second account was thereafter paid out and distributed by said

Executors to the beneficiaries under the Will, being the four children of said testator.

Eighth: That at the death of the said testator the value of his real estate was about \$100,000.

Ninth: It is also further stipulated and agreed, that in the lifetime of said testator, and while he was a member of the firm of R. F. Oram and Company, referred to in the "Second" paragraph of the Will, annual inventories of the stock in trade, merchandise, &c. were taken and the profits or losses in the said business from year to 10 year ascertained, and that said business was never a losing business, but always showed a profit.

That during each year, either partner drew against his share of the prospective profits in cash or merchandise, as he saw fit and at the end of each year, such drawing by each partner was charged against his share of ascertained profits, but the profits thus earned in each year that had not been charged up against the respective parties in each year were added to and allowed to remain in the business. 20

There was no actual settlement or dividend made between the partners; the balance of profits remained and went into the business and was used as capital, thereby increasing the capital of each partner to the extent of the undivided profits.

Dated, Oct. 5, 1906.

ALBRIDGE C. SMITH,

Solr. for and of Counsel with Defts.

I hereby consent that the Vice Chancellor mark the foregoing Stipulation and documentary Evidence annexed, as offered in evidence on the 6th day of June 1906 and mark them filed as of that date. 30

JAS. H. NEIGHBOUR,

Solr. for Compts. and of Counsel.

Filed Oct. 26, 1906, as of (received in office) Nov. 17, 1906.

VIVIAN M. LEWIS,

Clerk.

DECREE.

IN CHANCERY OF NEW JERSEY.

This cause coming on to be heard before the Chancellor upon bill, answer, replication and proofs, in the presence of James H. Neighbour, of counsel with the complainants, and of Albridge C. Smith, of counsel with the defendant, Josephine Pierce.

10 And it appearing that Robert F. Oram, deceased, in the pleadings in the cause mentioned, on or about the eleventh day of January, in the year one thousand eight hundred and ninety-eight, duly made, executed and published his last will and testament in writing in due form of law to pass real and personal estate, and certain interests therein, and afterwards departed this life leaving the said last will and testament unrevoked and in full force; and therein and thereby did appoint the said Thomas W. Oram, Robert F. Oram and James H.
20 Neighbour, complainants, the executors thereof.

And it appearing, further, that at the time of the decease of the said testator he was engaged in the mercantile business at Port Oram, in said county of Morris, with the said Robert F. Oram, son of said deceased, under the name, style and firm of R. F. Oram & Co.

And it further appearing to the satisfaction of the Court that in and by the said will and testament so made and executed as aforesaid the said testator, among other things, devised and bequeathed as follows, to
30 wit: "*Second.* I do hereby give and bequeath to my son, Robert F. Oram, Jr., the equal one-half part of all my right, estate and interest in the partnership business of R. F. Oram & Co., composed of myself and my son, Robert, at Port Oram, in said county, being all the partnership personal property pertaining to said business, with all book accounts, capital, money, bonds, notes, stock in trade, store goods and merchandise, horses, wagons, harness, coal business, tin and stove

business, drug business, lumber business and all equipments and appliances belonging to each branch as used and employed by said firm, and that the said business be continued, with the other equal one-half part thereof owned by my estate, under the sole management and control of my son Robert, for the mutual benefit of my son Robert and of my estate, as equal partners in business, and subject to losses and profits, for and during the term of twenty years from and after my decease, and the net profits of said business shall be equally 10
divided between said Robert and my estate; the share or part so belonging to my estate to be taken by my executors, hereinafter named, as part of its general assets; the said part of said stock, personal property and business so bequeathed to my son Robert to be his absolutely, for himself, his heirs and assigns forever."

And it further appearing that the said mercantile business has been continued by said Robert F. Oram and said complainants in pursuance of the direction of said last will and testament of said deceased, and cer- 20
tain disputes having arisen between said executors and the devisees under said will as to the disposition by said executors of the net profits of said mercantile business by said defendants claiming and demanding that said share of said net profits so belonging to said executors should be divided from time to time as the same is earned between the four children of the said deceased named in said will as part of the interest and income, and that the same should not be retained by said executors nor become a part of the estate of said de- 30
ceased.

And it appearing that said complainants, in and by the prayer of their said bill of complaint in this cause, ask for the construction of said clause in the said second item of said will, relating to said net profits of said mercantile business, as to the share or part thereof, so belonging to said estate; and no cause being shown

to the contrary, or appearing why the said clause should not be in all things fully construed and established;

It is thereupon on this fifteenth day of November, nineteen hundred and six, by his Honor William J. Magie, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the direction in said will, set forth in the second item thereof in these words: "The net profits of said business shall be equally divided between said Robert and my estate; the share or part
10 so belonging to my estate to be taken by my executors hereinafter named as part of its general assets," be and the same are hereby construed to direct and empower the said executors to keep and retain all the net profits arising from time to time from said mercantile business during the continuance of same in their custody and under their control for and during the term of twenty years from and after the death of the said testator, subject, however, to the payment of all losses incurred
20 in said business during said term, or during the continuation of said business, as a part of the general assets of said estate; and such net profits shall not be paid over to any of the devisees under said will as part of the interest and income during said period of twenty years.

And it is further ordered and decreed that a counsel fee of two hundred dollars be paid by said executors to the counsel of complainants, and a counsel fee of like amount be paid to the counsel of Josephine Pierce, and that the costs of said parties be paid out of the assets
30 of said estate.

W. J. MAGIE, C.

Respectfully advised

FREDERICK W. STEVENS, V. C.

Filed November 17, 1906.

VIVIAN M. LEWIS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THOMAS W. ORAM ET AL., EXRS.,
Complainants,

and

JOSEPHINE PEIRCE ET AL.,
Defendants.

CONCLUSIONS.

(Filed August 2, 1906.)

Mr. JAMES H. NEIGHBOUR, for complainants.

Mr. ALBRIDGE C. SMITH, for defendants.

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STEVENS, V. C.

It seems to me that to anyone who attentively considers the provisions of the will of Robert F. Oram, deceased, the construction of it, in the only particular in which a construction is asked for, is clear.

The will bears internal evidence of being drawn by a professional hand, and a clear distinction is maintained throughout between testator's personal property and estate, and the interest and income of that property given to the four specified children. Testator had (inter alia) a partnership business at Port Oram. He gave one-half of his interest in that business to his son Robert. He gave the other half to his executors, and directed them to continue the business for twenty years after his decease "subject to losses and profits." He directed, further, as follows: "The net profits of said business shall be equally divided between said Robert and my estate; the share or part so belonging to my estate to be taken by my executors hereinafter named, as part of its general assets."

The two daughters claim that the profits are to be ascertained periodically, and are to be paid over to them as part of the interest and income. The executors contend that the profits are not devisable as income but that they go into the principal.

As I have said, a distinction is constantly maintained between the estate and income. The profits are, by the will, to go, in terms, "to the estate" and not to the four children. That it was not the intention to give them to the children as part of the income is made furthermore apparent by the clause "the share or part (that is, the share or part subject to losses and profits) so belonging to my estate to be taken * * * *as part of its general assets.*" This share cannot be precisely
10 ascertained until the expiration of twenty years, for it may be, in part, composed of profits or it may be diminished by losses. During the twenty years, if profits be made, they are at least the primary fund, out of which the losses are to be made good. There is, therefore, a very good reason for the provision as it stands. There is no reason for attempting, by construction, to alter the meaning of plain words.

Whether the personal estate, or its income, is disposed of after the twenty years are up, and who may be then
20 entitled to the net profits, if any, is a question that is not now before the Court, and cannot be determined at this time.

The defendants rely upon what they call an estoppel. They say that the executors, having made payment of profits on two separate occasions pursuant to decree of the Orphans' Court, cannot now take the opposite view. It was proper for them to charge themselves with profits, if, in fact, they were received by the estate. The accounts were passed on this basis and this is all the
30 Orphans' Court has approved of. If it should become necessary to pay losses, no doubt the executors would be entitled to an allowance for them. If the executors have gone further and committed the error of actually dividing profits, instead of holding them, there is nothing in the orders or decrees set up in the answer that would compel them to perpetuate it.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

The defendant Josephine Peirce hereby appeals from so much of the final decree made in this Court in the above stated cause as adjudges and decrees that the direction in the second item of the Last Will and Testament of Robert F. Oram, deceased, which is in these words, "the net profits of said business shall be equally divided between said Robert and my estate; the share or part so belonging to my estate to be taken by my 10 executors hereinafter named as part of its general assets" shall be construed and in and by said decree is construed to direct and empower said executors to keep and retain all the net profits arising from time to time from said mercantile business during the continuance of the same in their custody and under their control for and during the term of twenty years from and after the death of said testator subject, however, to the payment of all losses incurred in said business during said term or during the continuation of said business as a part of the 20 general assets of said estate and that such net profits should not be paid over to any of the devisees under said will as part of the interest and income during said period of twenty years, to the Court of Errors and Appeals in the last resort in all causes.

Dated December 1st, 1906.

ALBRIDGE C. SMITH,
Solr. for Appellant.

I conceive there is good cause for appeal in the above 30 stated cause.

ALBRIDGE C. SMITH,
Counsel.

To James H. Neighbour, Esq.,
Sol. for and of Counsel with Complainants.

Due and sufficient Service of the within Notice of Appeal, by a copy thereof, is hereby acknowledged this 3d day of December, 1906.

JAS. H. NEIGHBOUR,
Sol. for Complainants and Respondents.

Filed December 31, 1906.

VIVIAN M. LEWIS,
Clerk.

10 IN THE COURT OF ERRORS AND APPEALS.

| | | |
|--|---|------------|
| BETWEEN JOSEPHINE PEIRCE, <i>Appellant,</i> <i>and</i> THOMAS W. ORAM, ROBERT F. ORAM, AND JAMES H. NEIGHBOUR, EXECU- TORS OF ROBERT F. ORAM, DE- CEASED, <i>Respondents.</i> | } | Affidavit. |
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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss:

220 Albridge C. Smith, being duly sworn, deposes and says that he is the solicitor for the appellant in the above entitled cause; that on the thirteenth day of December Nineteen Hundred and Six, at Dover, New Jersey, deponent served a copy of the annexed Petition of appeal personally upon James H. Neighbour, Solicitor for the respondents in the above entitled cause by giving the same to him.

ALBRIDGE C. SMITH.

Sworn and subscribed before me this 15th day of
30 December, 1906.

B. W. ELLICOTT,
Master in Chancery of New Jersey.

PETITION OF APPEAL.

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

The humble petition of Josephine Peirce, 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 his Honor William J. Magie, Chancellor of New Jersey, bearing date the 15th day of November, in the year of our Lord, One Thousand Nine hundred and six wherein the said Thomas 10
W. Oram, Robert F. Oram and James H. Neighbour, Executors of Robert F. Oram, deceased, were complainants, and the said Josephine Peirce and others were defendants, in this respect, to wit, that the said decree adjudges that the Order of direction in the second item of the will of said Robert F. Oram, deceased, which is in the words following, that is to say, "the net profits of said business shall be equally divided between said Robert and my estate; the share or part so belonging to my estate to be taken by my executors hereinafter named 20
as part of its general assets" are construed to direct and empower the said executors of Robert F. Oram, deceased, who are the respondents in this appeal, to keep and retain all the net profits arising from time to time from the mercantile business referred to in said will during the continuance of the same, in their custody and under their control for and during the term of twenty years from and after the death of the said testator, subject, however, to the payment of all losses incurred in said business during said term or during the continuation of said business as a part of the general assets 30
of said estate of Robert F. Oram, deceased, and that such net profits should not be paid over to any of the devisees under said will as part of the interest and income during said period of twenty years, And your petitioner humbly appeals from that part of the decree

of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for that one-half of the net profits of said mercantile business belonging to the estate of said Robert F. Oram, deceased, should be paid to and distributed among his four children, legatees and devisees under his will, in the same manner as other income from his said estate should be paid and distributed, and for that also that said executors having paid and distributed the net profits of said mercantile
10 business during certain years among the children and beneficiaries under the will of said Robert F. Oram, deceased, and such distribution and payment having been decreed by the Orphans' Court of the County of Morris to be in accordance with the provisions of the will of said deceased, said executors having taken no appeal from the decrees of said Orphans' Court are estopped from otherwise construing the provisions and directions of said will.

Your petitioner therefore prays that said decree of the
20 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 may seem meet.

ALBRIDGE C. SMITH,

Sol. for and of Counsel with Appellant.

Due and legal service of a copy of the within Petition of Appeal is hereby acknowledged December, 1906.

ALBRIDGE C. SMITH,

Solicitor for Appellant.

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Filed January 2, 1907.

S. D. DICKINSON,

Clerk.

ANSWER TO PETITION OF APPEAL.

The Answer of the above named respondents to the
Petition of Appeal of the above named 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 on the fifteenth day of
November last past made and entered in the Court of 10
Chancery in the cause for that purpose mentioned in the
said petition, as is 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 re-
spondents.

J. H. NEIGHBOUR,
Sol. of and Counsel with Respondents. 20

Filed January 5, 1907.

S. D. DICKINSON,
Clerk.

