

New Jersey Court of Errors and Appeals

BETWEEN

HENRY PRICE, et. als.,
AND
MATTHIAS PRICE, Executor, &c., of
DANIEL PRICE, Dec'd, et. als.,

Appellants.

*On Appeal
from Decree
in Chancery.*

Respondents.

Brief of David A. Ryerson, of Counsel with Respondent.

MATTHIAS PRICE, Executor, &c.

Matthias Price, executor of the last will of Daniel Price, deceased, filed his bill of complaint praying for a construction of said will and codicils thereto, and asking for instruction, etc.

A decree was made in the cause June 3, 1893, disposing of all the questions raised, except as to the real estate of testator not specifically devised.

On October 12, 1893, a decree was entered whereby it was adjudged that it was the intention of the testator to have his whole estate, not specifically devised, converted into money and the same distributed among the persons and corporations designated in the will and codicils as therein provided, and that he intended to authorize the executors to sell all his estate, not specifically devised, and apply the proceeds as aforesaid, etc.

From the latter decree Henry Price and Thompson Price, and his wife, have made this appeal.

(1.) Seventeen years before his death, Daniel Price made his last will. It is in his own handwriting. He was a man of much intelligence, and possessed a strong and vigorous mind. His estate was of the value of about \$125,000.00, of which about one-half was personal property. All his children had died long before, but his wife was living. Mr. Price had five brothers then living, and one sister, and some twenty-five or thirty nephews and nieces.

He was the rich man of the family. He had given freely of his wealth to the needy ones of his family, and continued to do so during his life.

Being deeply interested in many educational and charitable institutions, particularly some of those mentioned in his will, he had from time to time contributed generously toward their support.

By his will, after directing the payment of all just demands against his estate, he gave to his wife his entire estate for her life, with an unlimited power of disposal.

The words of the devise are as follows: "I give, devise and bequeath to my wife Charity *all of my real and personal estate*, to have and to hold during her natural life, with full power and authority to sell, assign and dispose of at any time she may deem advisable, by will or otherwise."

Then he says, "But should she die intestate, then I direct distribution of my property to be made according to the following bequests."

He does not direct distribution of a particular part, kind or class of his property, but masses it all, real and personal, under the general designation of "*my property*"—"then I direct distribution of my property to be made according to the following bequests."

What are these bequests?

The first one is an interest in a tool manufacturing business. Next: A devise of certain real estate in the State of Michigan, and a gift of the proceeds of the sale of the same.

Then follow legacies amounting to \$105,000 to educational, charitable and religious societies.

Then the testator gives legacies of \$1,000 to each of the children of his five brothers, amounting in all to over \$20,000, and continues:

“Should *my property* fall short in the settlement of *my estate* of the within named *bequests*, I wish the *legacies* to individuals, the Professorship to the College at Princeton, the Old Ladies’ Home of Newark and German Theological School to be paid in full, and deductions made from the various *bequests* made to benevolent societies in proportion to the amount given to each, and should the amount of *my estate* exceed the *bequests*, then I wish the Theological Seminary at Princeton and German Theological School in the care of the Newark Presbytery to be made *my residuary legacies* in equal shares.” Lastly he appoints his wife executrix.

Six years later, and eleven years before his death, the testator added a codicil to his will. It is also in his own handwriting.

By this codicil he revokes his gift to Princeton College, and says in reference to the revocation:

“This change is made necessary through the shrinkage and losses in *my property*.” And after giving \$2,500 to each of three of his brothers the testator says:

“I hereby expressly confirm my former will, dated the sixth day of May, eighteen hundred and seventy-five, excepting so far as the disposition of *my property* is changed by this codicil.” And appoints an additional executor.

Eight years after the making of the first codicil, and seven years after the death of his wife, Mr. Price makes a second codicil.

By the same he appoints one of his brothers an executor, gives to a nephew \$2,000 and some books, gives to each of his sister’s children \$1,000 and a share in the proceeds of a sale of his Michigan lands, revokes the former legacy to three of his brothers, and gives to each of his surviving

brothers, \$1,000 and to his housekeeper \$500, and closes as follows:

“And, lastly, as I have no debts or demands against *my estate*, I hope the *legacies* may be paid by my executors without such waste as will call for large sacrifice of *real estate* or undue pressure in the collection of mortgages.”

(2.) At the time of his death the testator owned, in addition to the Michigan lands, real estate in New Jersey of the value of about..... \$50,000 00
His personal estate was inventoried at..... 67,533 63

Total \$117,533 63
Under the will the bequests to nephews and
nieces amounted to..... 23,000 00
To charitable and other corporations..... 105,000 00

\$128,000 00

Under the will and codicils the bequests to
nephews, nieces, brothers and housekeeper
were..... 32,500 00
To charitable and other corporations..... 75,000 00

\$107,500 00

The tool manufacturing business and the Michigan lands were specifically devised, and are not included in the above statement.

(3). To return to the second item of the will—

The testator gave to his wife for her life all his estate, real and personal, with power to dispose of the same by will or otherwise, and then adds: “But should she die intestate then I direct distribution of my property according to the following bequests:” If he had inserted in this clause the words, “real and personal” after the word property, so that it read—then I direct distribution of my property, real and personal—no question would have arisen as to what part of his property was to be applied to the payment of the bequests mentioned. Unquestionably it

51

would have been his entire estate, real and personal, remaining undisposed of by his wife. The question then, as the case stands, is what did the testator mean, what did he intend to include in the term "my property."

(a). The words "estate" and "property" in a will include real as well as personal estate, unless controlled by the context.

2 Jarman on Wills, page 321 (R. & T. Ed), cases cited in notes. In general the words "estate and property" include real estate.

Schouler on Wills. 510 (2nd Ed.)

"The word "estate," is a general term and in modern construction, may be said to embrace *prima facie* the whole estate of the testator, both real and personal, and his property of every description. And the same may be said of "property," a word which comprehends all things of every nature, to which one may be entitled to the exclusion of others. But in many of the *older* cases the disposition shown was to confine "estate" in meaning as descriptive of personal property only, wherever this was possible, by which means the heir at law was, of course, favored. Associated words which pertain exclusively to personal property, and the context generally, may, of course, indicate that the term "estate" or "property" was applied in the narrower sense in some particular will."

In the case of *Jackson vs. Housel*, 17 Johns, 281; where the words of the will were "*My property* after my debts are paid I *leave and bequeath* to my beloved wife Amelia and wish her to educate my two daughters, Joanna M. and Gertrude with care, and and to treat them with kindness and affection"—without any devise or bequest, except a ring to a third person, or other words to explain them, they were held to pass the whole real and personal estate of the testator to his wife in fee.

Chief Justice Spencer, in delivering the opinion of the Court, says: "Judge Reeve, in his treatise on Domestic Relations, 487, very justly says that the governing rule is

that the intention of the testator is to prevail; and such construction is to be given to the words of a will as to effectuate such estate as comports with the intention of the testator; provided such construction is consistent with the rules of law; and that, in all the cases upon this subject, where the proper technical terms have not been used, the question is, what is the intention of the testator? and if that is discovered to be a legal intention, it is to be complied with.

“It is upon this principle that a devise of lands to one forever, conveys a fee simple. So, a devise of all one’s estate in lands conveys a fee, if the devisor had a fee; as it denotes, not only the subject matter of the devise, but the devisor’s intent in the subject, unless attended with *restrictive* words which *clearly* shows the intention of the testator that a fee should not pass. Upon this point the cases are numerous, and the law perfectly settled.”

The Chief Justice, after commenting upon several cases, continues—“The words and terms of the devise in this case are very clear, and leave not a particle of doubt as to the intention of the devisor. He meant to put all his estate under the dominion and control of his wife, contenting himself with the injunction upon her to educate his daughters with care, and to treat them with kindness and affection. The question turned upon the term, “my property;” whatever that was, he devised it to his wife. The devisor gave her all his property. There is nothing to limit the devise to any species of property, or to any proportion of it; all the testator’s property must pass, or none of it. Although the testator expresses a tender regard for his children, he gives them nothing; but, for the purpose of educating and rearing them he invests everything in his wife.”

In *Wall vs. Langlands* (14 East., 370) the words of the will were, “I give and bequeath all and every the residue of *my property*, goods and chattels, to be divided equally, &c.; it was held, that the word “property” comprehended all the testator was worth, and would pass his *real* as well as his personal estate; and that the words “goods and chattels,” with which it was joined, were not explanatory

or restrictive, but cumulative merely.

Den vs. Snitcher, 2 Gr., 53.

“The word *estate*, means real or personal, according to the sense in which it is used, and that sense must often be ascertained by the connection in which the word is placed; or the subject matter to which it has reference.”

Den. vs. Drew, 2 Gr., 68.

Norris vs. Clarke, 2 Stockt., 51.

Welch vs. Crater, 5 Stew., 177.

Cook vs. Lanning, 13 Stew., 369.

“The term ‘estate’ is the most comprehensive one that he could have used. Standing without qualification, it includes all his property.”

(b.) The modern rule requires evidence to limit the meaning of the term “estate” and “property.”

2 *Red. on Wills*, page 126, Sec. 21.

“The terms ‘estate’ and ‘property’ will embrace both realty and personalty, and it requires clear evidence of such intention to induce the Court to give a more restricted import to these terms.”

2 *Jarman on Wills*, page 329, (R. & T. Ed.)

“They” (cases referred to) “demonstrate the inclination of the courts at the present day, to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only.” And, again, The old rule is, in fact, reversed, for it is now settled that words such as “property” and “estate,” capable of including real with personal estate, will not be deprived of their full force without evidence that they were intended to be used in a more confined sense, whereas formerly the burden of proof was on the other side.”

(c). The word *property* in the second item of the will of Daniel Price is not restricted or limited by the context, and must, therefore, according to the modern rule of construction be held as including real as well as personal estate.

The testator gives all his estate, real and personal, to his wife for her life; but if she should die intestate, then he directs distribution of his property according to the following bequests: There is no limitation or restriction in the devise to any particular class of property. Then, after stating the several bequests, he says: "Should my property fall short in the settlement of my estate of the within named bequests I wish the legacies to individuals," &c., "to be paid in full," &c.; "and should the amount of my estate exceed the bequests, then I wish the Theological Seminary at Princeton," &c., "to be made my residuary legatees in equal shares." No limitation certainly in the will itself. Again, in the first codicil: "This change is made necessary through the shrinkage and losses in my property." And "I hereby expressly confirm my former will dated," &c., "excepting so far as the disposition of my property is changed by this codicil." No limitation or restriction of any kind whatsoever.

(d). On the contrary the context clearly shows that the testator intended by the term, "my property," to include all his estate, real and personal.

Opinion of V. C. Pitney.

It will also be noted that the testator uses the word *property* synonymously with the word *estate*.

For instance. "Then I direct distribution of *my property* to be made," etc. And in the latter part of the will, "Should *my property* fall short in the settlement of *my estate* of the within named bequests," etc., "and should the amount of *my estate* exceed the bequests, etc." Again, in the first item of will, "I direct my executrix hereinafter named, to pay all just demands against my estate," etc. And at the end of second codicil, "And lastly, as I have no

debts or demands against my estate," etc.

(4.) The argument based on the use of the words, "give and bequeath," in making the several bequests, fails entirely "when we consider that what he gave was money, it was perfectly proper to use those words, even though the money was the result of the sale of land." Opinion *V. C. Pitney*.

(5.) The designation of the gifts as "bequests" or "legacies," and the recipients as "legatees," "residuary legatees," etc., is of slight consequence in view of the manifest intent of the testator as shown by the context.

Schouler, on Wills, page 3, (2 Ed).

"Devise," properly speaking, is a gift of real property by one's last will and testament, and cannot with legal precision be applied to things personal. "Bequest," on the other hand, is a gift by will of personal property, and the word is inappropriate where the disposition relates to real estate. Out of favor to the manifest intent of a testator, as shown by the context of the will, courts will often, in these modern days, construe "bequest" into devise, and *vice versa*, notwithstanding verbal inaccuracies of this kind."

And in Sect. 513 the same author says: "In furtherance of a testator's intent, the words 'bequeath' and 'devise' may in any will be treated as synonymous, if the context requires it; and the words 'devise,' 'legacy,' and 'bequest' may be applied indifferently to real or personal property. But where the testator uses words in their technical sense, that sense must of course prevail," citing

Dow vs. Dow, 36 *Me.*, 211.

Brown vs. Taylor, 1 *Burr*, 268.

Thompson vs. Gant, 14 *Lea*, 310.

Ladel vs. Harvey, 21 *N. H.*, 514.

Also cites as follows:

"Legatee" may be read "devisee" or "distributee," as circumstances require."

15 *Sim.*, 600 ;

23 *Geo.*, 571.

The appointment of a person "residuary legatee of all my property" will give him realty.

Warren vs. Newton, Drury, 464.

Day vs. Daverson, 12 *Sim.*, 200—588.

Davenport vs. Coltman, 9 *M. & W.*, 481.

So also if the testator expresses an intention of disposing of all his real and personal estate, and then appoints a residuary legatee.

Pitman vs. Stev., 15 *East.* 505.

So if the testator prefaces his will with the expression of an intention to dispose of his estate.

Hughes vs. Pritchard, 6 *Ch. D.*, 24.

When realty and personalty are made a mixed fund for the payment of legacies the residuary legatee will take everything that remains.

Evans vs. Crosby, 15 *Sim.*, 602.

Wildes vs. Davies, 1 *Sim. & Gr.*, 475.

So where there is an absolute direction to sell the testator's real estate and he disposes of the proceeds of his property, the appointment of a residuary legatee gives him the residue of the proceeds of sale of the realty.

(6). It is manifest from the provisions of the will that the testator intended not only to devote all his "property" or "estate" to pay the bequests mentioned in the will, but also to charge all his "property" or "estate" with the payment thereof.

1. The legacies are given generally, payable out of his "property" or "estate" which is wholly devoted thereto.

2. The real and personal estate are blended throughout the will and codicils into one mass or fund.

3. The fact, which is admitted, that the personal estate

is largely insufficient to pay all the bequests and that the testator must have known it, creates a strong impression in favor of an intention to charge them.

Johnson vs. Poulson, 5 Stew., 390.

Turner vs. Gibb, 3 Dick., 526.

4. The further fact, which is apparent that the testator made no other disposition of his land in this State, and that if the legacies are not a charge on the land, he died intestate as to a part of his property, also creates a strong impression that he designed to charge the legacies on the land.

Leigh vs. Savidge, 1 McCarter, 124.

The intention of the testator that his real estate should be devoted in common with his personal estate to the satisfaction of all his bequests, is clearly manifest from the following clause at the end of the second codicil.

“And lastly, as I have no debts or demands against my estate, I hope the legacies may be paid by my executors without such waste as will call for a large sacrifice of *real estate*, or undue pressure in the collection of mortgages.”

The intention of the testator in this respect appears also from the following clause in the will: “And should the amount of my estate exceed the bequests, then I wish the Theological Seminary at Princeton and the German Theological School in the care of the Newark Presbytery, *to be made my residuary legatees.*”

Hawkins on Wills, 294.

Corwin vs. Corwin, 9 C. E. Gr., 579.

Cook vs. Lanning, 13 Stew., 360.

See *Turner vs. Gibbs*, 3 Dick., 526.

The legacies are not only a charge on the real estate, but the executor is authorized and required to sell the same to pay the legacies.

See *Cook vs. Lanning*, 13 Stew., 369, 372.

It is manifest from the provisions of the will and codicils

that the testator contemplated and intended a conversion of all his real estate except that specifically devised.

It is not essential that the direction should be expressed in order to be imperative; it may be necessarily implied. Where the power to convert is given without words of command, so that there is an appearance of discretion, *if the trusts or limitations are of a description exclusively applicable to one species of property*, this circumstance is sufficient to outweigh the appearance of an option and to render the whole imperative. In fact, the whole result depends upon the intention. If by express language, *or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.*

3 *Pom. Eq., Jur.* Sec. 1160.

Wurts vs. Page, 4 C. E. Gr., 365.

Dodge vs. Pond, 23 N. Y., 69.

Power vs. Cassidy, 79 N. Y., 602.

Crane vs. Bolles, 4 Dick., 375.

DAVID A. RYERSON,

Of Counsel with Matthias Price, Esq.,

one of the respondents.

N. J. Court of Errors & Appeals.

<i>Between</i>		10
HENRY PRICE, <i>et al.</i> ,	} <i>On Appeal</i>	
<i>Appellants,</i>		<i>from Decree</i>
<i>and</i>	<i>in Chan-</i>	
MATTHIAS PRICE, EXECUTOR,	<i>cery.</i>	
&C., OF DANIEL PRICE, DEC'D,		
<i>et al.</i> ,	<i>Respondents.</i>	

Brief of F. G. Burnham, of Counsel with the Respondent, "The German Theological School of Newark, New Jersey," and other Charitable Corporations, legatees. 20

The sole question in this case is, did the testator express in his will and codicils his intention that certain real estate, not specifically devised, should be used for the purpose of paying legacies.

A few of the facts proven in this case are briefly as follows: 30

Daniel Price died in the city of Newark, in 1892, where he had lived during his long life, respected by the entire community. He was, at the time of his death, over 92 years old, and retained, up to that time, "a strong and vigorous mind." For many years he had possessed considerable property; his personal property having somewhat shrunken, while his real estate was supposed to have increased in value during the last ten years of his life. "He was a religious man, for years an 40

elder in the Third Presbyterian Church in Newark," and made his generous gifts a matter of religious duty. "He was a man of great intelligence, strength of mind and independence, and boasted of his not needing a lawyer to dispose of his property." He was a business man, and acquired his property in business. He prepared and wrote with his own hand his will and two codicils. His will was dated in 1875, (17 years before his death,) the
 10 first codicil in 1881, (11 years before his death,) and the second codicil in 1889, (3 years before his death). The will and codicils were duly admitted to probate by the Surrogate of the county of Essex on the fifth day of May, 1892, and letters testamentary were duly issued to Mr. Matthias Price, a brother ; and from this probate there exists no appeal. The testator's wife, Charity, died in 1882, (7 years before the making of the second codicil, and 10 years before his own death). They never had any children,
 20 and at his death his only heirs-at-law were his three surviving brothers, all over 80 years of age, and some nephews and nieces, the children of two deceased brothers and a deceased sister, the sister's children having gone west many years ago.

The legacies to the brothers and nephews and nieces amount to \$32,000 in cash, (besides a special devise of Michigan land,) and to the charitable corporations, \$75,000, (besides a residuary bequest
 30 in favor of the German Theological School and the Theological Seminary at Princeton.) The personal estate amounts to some \$67,000 before the payment of the inheritance tax, the large expense of settling the estate, and the very considerable expenses of this litigation, leaving for distribution from the personal estate, about \$40,000.

In his will the testator directs that "should my property fall short in the payment" of all the legacies named (to his brothers and nephews and nieces and
 40

the charitable institutions), then the legacies to his brothers, nephews and nieces, amounting to \$32,000, and the Old Ladies' Home of Newark and the German Theological School of Newark, amounting to \$20,000, be paid in full.

FIRST.

The intent of the testator, in construing the words of his will, must prevail, unless it comes into conflict with some fundamental principle of law. 10

Den v. Snitcher, 2 Green Law R., 53.

SECOND.

In the case at bar the intent is shown from the following :

A. He devises to his wife Charity, in the first part of the will, "*all of my real and personal estate* during her natural life; but should she die intestate, then I direct distribution of my *property*," referring to the preceding words, "real and personal estate." 20

See *Jacob's Estate*, (Paxon, C. J.,) 27 W. N. C., 365. *Affirmed - 140 R R 268*

B. In the second codicil occurs the following: "I hope the legacies may be paid by my executors without such waste as will call for large sacrifice of *real estate*," thus tying the words "real and personal estate," "property" and "real estate," together in three places in the will. 30

Lord Mansfield, in *Roe v. Harvey*, 5 Burr. 2638.

Lord Ellenborough, in *Doe v. Lainchbury*, 11 East. 290.

"The word '*estate*' carries everything, unless tied down by particular expressions." "The cord is too slender to tie down the word '*estate*' as here used to mean only personal estate." 40

See Ashman, *J.*, in *Arrott's Est.*, 28 W. N. C., 198, (1891,) and cases cited.

See *Rossetter v. Simmons*, 6 Serg. & Rawle, 452.

C. The testator directs the distribution of the *residue* of his estate. In speaking of the residue he uses the word "estate"—the same word used in the beginning of the will—"my real and personal estate."

- 10 *Den v. Drew*, 2 Green L. R., 68; see p. 72, and cases cited by Hornblower, *C. J.*
Cook v. Lanning, 13 Stew. 369; see p. 372.
Smith v. Coffin, 2 Hen. Bl. R. 444.
Welsh v. Crater, 5 Stewart, 177.
Roman Cath. Ch. v. Wachter, 42 Barb. 43.

D. The word "property" is defined by Webster, Sec. 7: "An estate, whether in lands, goods or money." Sec. 8: "An estate; a farm; a plantation." The testator prepared and wrote the will himself, and the ordinary use of language is to be taken.

E. The testator uses the words "give, devise, and bequeath." If it be presumed that he used the word "devise," in its technical legal sense, then it applies to real estate.

Blackstone, 2, Vol. 2.

Bowyer Dictionary, title, "Devise."

30 The word "devise" is of itself so controlling in its effect that where it appears in a gift, although the trusts declared are only applicable to personalty, the estate will pass.

Doe d. Burkitt v. Chapman, 1 H. Bl. 223.

Dannage v. White, 1 J. & W. 583.

Stokes v. Salomons, 9 Hare, 75.

Lloyd v. Lloyd, 7 Eq. 458.

Longley v. Longley, 13 Id. 133.

So in *Coard v. Halderness*, 20 Beavan, 147, Sir
 40 J. ROMILLY, M. R., relied on the absence of any

word peculiarly applicable to real estate, as "heir," "devise," "rent," or the like, to show that in that case the words "estate, effects and property," though taken alone, were sufficient to include real property, were yet narrowed and cut down to personal.

But if the above presumption does not hold good, and if the testator is held to use the words in their common and ordinary meaning, then the word "devise" is found to refer to real estate. 10

Webster's Dictionary, "Devise," Sec. 2, "to give, * * by will, as land or other real estate."

F. In July, 1889, three years before his death, the testator made his second codicil, in which he confirms his will and specifically refers to the charitable legacies; his personal estate changed but little after that date in value, (see testimony of Ex'r,) and yet, the personal estate is not much more than sufficient to pay the legacies to his brothers, neph- 20
ews and nieces, as this testator must have known. Unless the Essex and Union county real estate is covered by "property," the charitable legacies, which take up four-fifths of his will according to space, (and evidently a larger part of his thought,) would go absolutely unpaid. Such a purpose cannot be attributed to him.

See *Jacob's Estate*, (PAXON, C. J. 1891,) 27 W. N. C. 365, affirming Orphans' Court of Chester County, Pa.; 26 W. N. C. 574. 30

Smith's Ex'rs v. First Presbyterian Church, 11 C. E. Green, 137; see p. 138.

See *Walker v. Whiting*, 23 Pick. 313, where a gift of real estate was implied to a trustee from direction to him to pay debts and legacies, and the insufficiency of the personal property.

As to the doctrine of "necessary implication," see Lord ELDON's opinion in 1 Ves. & B. 456, where he defines it to be "not *natural necessity*, but so 40

strong a probability of intention, that an intention contrary to it, which is imputed to testator, cannot be supposed."

G. His intention is also clearly shown from the following considerations: After giving his brother, Matthias, his interest in the tool business, he devises the Michigan tract to his brother's children. And then after the charitable bequests come the additional bequests to his brother's children. He thus provides for nearly all his living relatives, and evidently exhausts his intentions in their behalf. There is not a suggestion of any further desire or intention on his part to give them anything more; on the contrary, he has appointed residuary legatees. In the first codicil, six years afterwards, changes are made and new bequests of \$2,500 are given to each of his three brothers. In the second codicil, some eight years after the first execution of the will, he again turns to the question of bequests to his relatives, and adds an entirely new one to his nephew, Matthias, for his loving care and attention, places his sister Phebe's children on the level of the brother's children, and then deliberately cuts down the bequests to his brothers from \$2,500, given in codicil No. 1, to \$1,000 each.

The testator, leaving neither wife nor child, is thus seen, during these fifteen years, to again and again weigh the claims of his relatives as against the claims of the charitable organizations, so dear to him and carefully and thoughtfully settle these adverse claims. He unquestionably thought that those bequests were sufficient for relatives who had no special claim on his generosity; and that all the rest of his property, real and personal, should go to the charities named. These intentions are all frustrated, if it be held that he died intestate as to the Essex and Union county real estate; and the noble charities he provided for entirely fail.

The words of Chief Justice HORNBLOWER, in *Den v. Snitcher*, in 2 Green L. R. 59, apply with peculiar force: "It appears to me hardly possible that any intelligent mind, unembarrassed by technical rules and legal refinement, can entertain a doubt upon the plain reading of this will, that the testator intended to devise," &c.

THIRD.

10

The word "property," in general, includes real estate.

2 Vol. *Jarman on Wills*, (R. & T.'s Ed., 1880,) p. 320; Sec. 2, p. 321, note 2, and cases cited.

In *Morrison v. Semple*, 6 Binney, 94, C. J. TILGHMAN defined the word "property," and said it signified the right or interest which one has in lands or chattels, and that it was used in that sense by the learned and unlearned—by men of all ranks and conditions. 20

In some cases the words "estate and property" are restrained by association with some limited expressions, and then the maxim "*noscitur a sociis*," applies; 2 *Jarman on Wills*, (R. & T.'s Ed. 1880,) page 315 and post; see Note A and cases cited. "All my property, personal and perishable," (*Clark v. Hyman*, 1 Dev. L., 382.) "The residue of my furniture and estate." 30

Bullard v. Goffe, 20 Pick. 252: "My worldly goods of all sorts and kinds." *Bradford v. Bradford*, 6 Wharton, 236, are examples of such limitation or restraint. So in *Croke Charles*, 447, 449. The devise was of "the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate and other goods," &c., and the Court was of opinion that these words, being coupled with per- 40

sonal things, were more properly applicable to personal than to real estate.

2 *Jarman*, 316.

But it is not to be inferred from such cases that the words “*estate*” and “*property*,” when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *ejusdem generis*.

2 *Jarman on Wills*, Sec. 2, p. 320.

- 10 “On the contrary, the presumption is generally against such a construction.”

Ibid.

“All my property and effects” held to pass real estate.

Doe d Morgan v. Morgan, 6 B & Cr. 512.

“The residue of my property, goods and chattels,” held by Lord Ellenborough, to pass real estate.

- 20 *Doe d Wall v. Langlands*, 14 East. 370.

Note a similar construction in *Doe d Evans v. Evans*, 9 Adolphus & El. 720; and see *D’Almaine v. Mosely*, 1 Drewry, 633.

So in *Tanner v. Wise*, 3 Pr Wm. 295.

Lords King and Talbot held real estate passed under the words “all the rest and residue of my estate, goods, chattels,” &c.

- 30 This whole subject may fairly be summed up as follows :

“That the courts of the present day hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only.”

2 *Jarman*, 328 and 329; and note z, bottom of page 328, and cases there cited.

But the word “*property*,” in general, includes real property.

Central R. R. v. State Board, &c., 19 Vroom,
13, 309, 327.

Note 2, p. 321 of 2 *Jarman*.

Wheeler v. Dunlap, 13 Ben Munroe, 291.

In *Laing v. Barbour*, 119 Mass., 523 there arose the question as to the intention of testatrix in use of words "I will, ordain and bequeath any other property that may come," &c. She had bequeathed a great variety of personal property by terms. 10 Held, the word *property* includes real estate; nor would the use of the word "bequeath" instead of devise and bequeath, show an intention to confine the operation of the will to personal property only; citing—

Doe v. Lainchbury, 11 East. 290.

Doe v. Morgan, 6 B. & C. 512.

Edwards v. Barnes, 2 Bing. N. C. 252.

Hunt v. Hunt, 4 Gray, 190, 193,

And see further,

20

Morris v. Henderson, 37 Miss. 492.

Jackson v. Housel, 17 Johns. 281.

SPENCER, C. J., says in this case :

"The words of the will were 'my *property* after my debts are paid, *I leave and bequeath* to my beloved wife A, and wish her to educate, &c.'"

"The maxim '*Qui hæret in litem, hæret in cortice*,' might well be applied to any Judge who should refuse to carry into effect the intention of a 30 testator, when that intention is plain," &c.

In *Rossetter v. Simmons*, 6 Serg. & Rawle, 452, "It remains to be considered whether a devise of *property* carries real estate. Property signifies every species of property; it is *nomen generalissimum*, and comprehends all his earthly possessions; it is equivalent to a disposition of 'all I am worth in the world.' 'Property,' *ex vi termini*, includes real estate, unless it appears from the *whole* will 40

that the testator used the term in a restrained sense and intended to confine it to personal estate."

Munroe v. Jones, 8 R. I. 526.

Den v. Payne, 5 Hayward Tenn. R. 104.

2 *Redfield on Wills*, 126.

And see

Smith v. Smith, 17 Grattan, 268, 274.

As to definition of the word "property" see
10 *Doe d Andrew v. Lainchbury*, 11 East. 290.

In this case, Lord Ellenborough discusses this very question, and says that in a "previous part of the will the testator gave a standard of his meaning of the word property and showed that he meant by it real estate."

20 In *Tofield v. Tofield*, 11 East. 246, Lord Ellenborough held that freehold lands passed under the words "all my *personal estates*," because it was clear from the face of the will that the testator intended by these words real property.

Howland v. Howland, 100 Mass. 222, CHAPMAN, C. J., applies the word "property" to real estate.

Penden v. Paxton, 79 N. C. 446.

Lord Brougham, in *Mayor, &c., of Hamilton v. Hodsdon*, 11 Jur. 193, (6 Moore, P. C. 76).

30 "The word '*estate*' is *genus generalissimum*," where in a will the testatrix uses the words "estate" and "effects" as identical in meaning, and orders her executors to convert her "effects" into money, the language is comprehensive enough to include real estate, and gives the executor power to sell the same.

Schropp's Exr. v. Shaeffer, Leg. Int. Vol. L. (Mch. 17, 1893,) p. 106.

FOURTH.

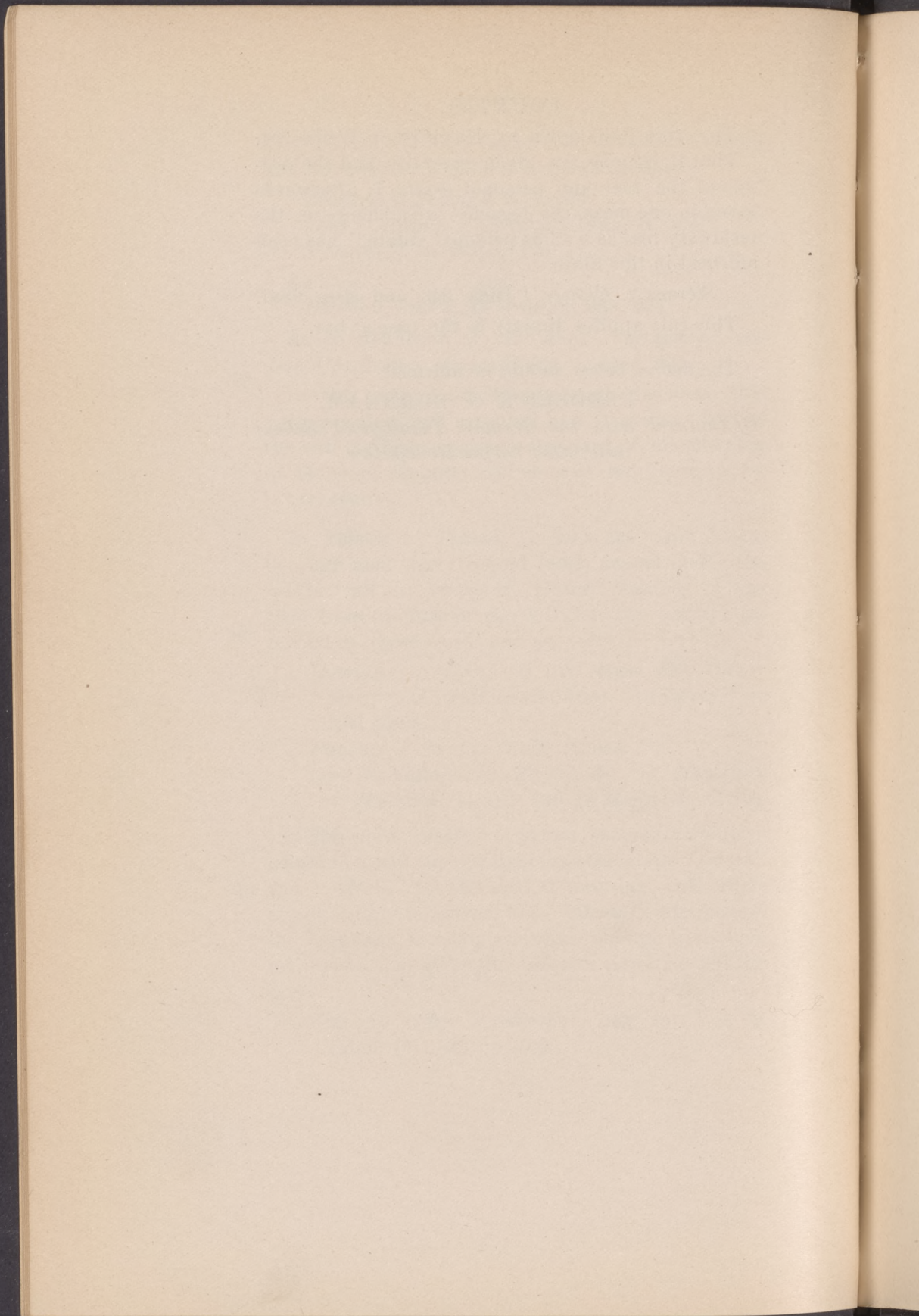
The rule laid down by Hawkins on Wills, 294, "That if legacies are given generally and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate," has been affirmed in this State.

Stevens v. Flower, 1 Dick. 343, and cases cited.

This rule applies directly to the case at bar.

The decree below should be affirmed.

FREDERICK G. BURNHAM,
*Of Counsel with the German Theological School
and other corporate legatees.*



New Jersey Court of Errors and Appeals

BETWEEN

HENRY PRICE, et. al.,

Appellants,

AND

MATTHIAS PRICE, Executor, &c., of

DANIEL PRICE, et. al.,

Respondents.

On Appeal from

Decree in Chancery

Brief of Robert H. McCarter for Appellants.

The question involved in this case is whether the testator in the will and codicils here to be construed (and found on pages 2-7 of the case) impliedly charged the lands of which he died siezed, situate in this State, with the payment of the legacies therein named. Neither the will nor the codicils make an express charge, and the intention so to charge them, if it exists at all, must be inferred from the language of the instruments taken in connection with the circumstances surrounding the testator at the time of the execution of the will and at his death.

The decree below finds in the instruments an implied charge, and directs the executor to sell the lands to pay the legacies. The appeal from this order is by two surviving brothers and heirs at law of the testator, who are very poor and each of whom is over eighty years of age.

The following facts (case pp. 26-27) are of importance:—

The testator died April 23, 1892, leaving last will dated May 6, 1875, and codicils dated respectively February 22,

1881, and July 16, 1889. The will and codicils were duly proved before the Surrogate of the County of Essex, by him admitted to probate, and no appeal is pending therefrom.

The will and codicils were written by the testator himself, who was born 1799, and who was therefore over 92 years of age when he died. The testator left no descendants, and his wife died in 1882, between the execution of the first and second codicils. Three brothers, however, survived him, all of whom were over 80 years of age, and one of whom is the sole acting executor, who was likewise his partner in a business enterprise. The most cordial relations existed between the testator and his surviving brothers, all of whom lived in Newark, where the testator lived and died. Two of these surviving brothers are very poor, and were frequent recipients of bounty from the testator during his life. The only other relations of the testator are some twenty-five nieces and nephews, children of the surviving brothers, and of a deceased sister and two deceased brothers, who live scattered throughout the country.

The testator possessed a strong and vigorous mind up to the time of his death. He was a religious man, for years an elder in the Third Presbyterian Church in Newark. He had also in his lifetime given generously to some of the institutions made beneficiaries by his will, particularly The German Theological School, of Newark, N. J. He was a man of great intelligence, strength of mind and independence, and boasted of his not needing a lawyer to dispose of his property.

The personal estate was inventoried at \$67,533.63, upon which there has been a small shrinkage (about made good however by income) and besides some real estate in Michigan, to which special reference is made in the will and codicils, he died seized of his homestead property, where he had lived a great many years, and two other houses on Mulberry Street in the City of Newark, and a farm of about 37 acres on the outskirts of the city, which had in 1890 become more valuable by reason of the construction and operation through it of the Lehigh Valley Railroad Company's main line to New York, making it accessible.

The charitable bequests in the will and codicils amount to \$75,000.00, against \$32,000.00 required to pay the pecuniary legacies to brothers, nieces and nephews.

It further appeared in the case that between 1875 and 1881, the testator lost, or expected to lose, a considerable

amount of his personal property, while no shrinkage had occurred in the value of his New Jersey real estate during the same time.

Before entering upon any detailed examination of the will and codicils in question, it may not be amiss to remind ourselves how firmly the authorities in this State have settled one or two general principles, which must be constantly before the mind of one seeking to decide whether, in the absence of an express charge upon the lands of a testator, such lands otherwise undevise, will be impliedly and as against the heir, charged with the payment of legacies.

It must be remembered that the testator died without widow or children, but leaving three brothers, and the children of two deceased brothers and one sister, his heirs at law. The bulk of his estate is left to charitable and religious institutions.

By the terms of the will, his own brothers, now in the shadow of life, over eighty years of age, and who stood in the most friendly relationship to the testator, received no greater bounty than his numerous and unnamed nieces and nephews, living all over the country, not excepting the children of these very brothers.

Leaving out of the question the bequest of thirty thousand dollars to Princeton College, which was revoked, the charitable bequests in the will and codicils amount to seventy five thousand dollars, (\$75,000) against thirty one thousand dollars (\$31,000), being the aggregate amount required to pay the pecuniary legacies of a thousand dollars (\$1,000) each to the surviving brothers, and the nieces and nephews of the testator.

The first general principle above referred to, is that expressed by CHANCELLOR GREEN, in the leading case of *Leigh vs. Sawidge*, 1 McC. 126, as follows: "Heirs have always been looked upon with favor by Courts of Justice, and the rule is well settled that plain words are required to disinherit them; and as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir; for a charge is *pro tanto* a disinheriton of the heir."

The rule thus laid down by that eminent Judge is a familiar one, and has received the sanction of all tribunals; it cannot be too strongly born in mind in this case.

The second principle to which I beg to refer is, that in the absence of an express charge in the will, the presumption, (on account of the favor with which the law looks upon an heir), is against an implied charge, unless distinctly imposed, and that in order to charge real estate with the payment of legacies, the will must either expressly, or by clear implication make such charge.

Massaker vs. Massaker, 2 Beas. 264.

Lee vs. Savidge, Sup.,

Johnson vs. Poulson, 5 Stew. 390.

Taylor vs. Tolen, 11 Stew. 91.

Starin vs. Flower, 1 Dick. 340.

The third principle to be noted in this connection is, that which is equally settled in this State, to the effect that as against an heir, the mere fact that the testator's personal estate is insufficient to pay the legacies, does not make them a charge upon the land.

See Massaker vs. Massaker, 2 Beas. 264.

Lee vs. Savidge, Sup.,

Johnson vs. Poulson, 5 Stew. 390.

Taylor vs. Tolen, Sup.,

Turner vs. Gibb, 3 Dick. 526.

In *Massaker vs. Massaker, Sup.*, the testator, when he made his will, had no personal estate to pay the legacies, but had real estate not devised or mentioned in the will. It was held that the legacies were not charged on the land; and upon this point Judge Dodd, in expressing the opinion of the Court of Errors of this State in *Johnson vs. Poulson, Sup.*, says, "such however is the presumption against a charge unless distinctly imposed, that though the insufficiency of the personal estate to pay legacies when so made to appear, creates a strong impression in favor of an intention to charge them; yet standing alone, it is not enough as against heirs to effect such a change."

In *Taylor vs. Tolen, Sup.*, the testator left personal es-

state amounting to a little over \$50,000, and legacies amounting to \$71,500. His real estate was valued at \$25,000, so that the real estate and personalty combined, just about equalled the amount of the bequests after the necessary expenses of administration were provided for, yet the court held that the real estate was not charged. The opinion says, "the most that is to be said on this point is that the testator may have been, and probably was, when he made his will, aware of the fact that his personal estate would not be sufficient to pay the legacies." This case, as we shall see hereafter, has many similarities to the one now under consideration.

Bearing in mind these general principles, let us turn now to the will and codicils of this decedent.

The will is dated 1875, the first codicil 1881, and the second codicil 1889. Each codicil expressly refers to the will, and in fact republishes it.

The testator's wife died between the making of the first and second codicils, so that when the will was finally published in 1889, about three years before his death, Mr. Price knew that the first clause of his will, in which he had devised and bequeathed everything to his wife for life, had been rendered inoperative by her previous death. The will and codicils were all drawn by the testator. He was a remarkably shrewd and intelligent man, and by means of his great natural endowment, he had accumulated a large fortune, which enabled him to end his days in peace, comfort and leisure. He boasted of the possession of sufficient legal knowledge to draw his will; and, notwithstanding the great age to which he lived, and the eccentricity of his will, no one ventured to suggest that he lacked mental capacity sufficient to make it. Indeed, it is plain from the evidence in this case, that he was a gentleman of unusual shrewdness and mental vigor, and that he was a man of affairs. The will makes no express charge of the legacies upon his land, neither is there what is commonly known as a general residuary clause. If this clear-headed man intended to charge the payment of these legacies upon his land, he did not say so, and such a conclusion must be gathered by inference from certain phrases in the will.

The burden is upon the party asserting that the will does so charge the land. The presumption is all against such an assertion. Let us look at it now for the purpose of ascertaining.

The second clause of the will directs his executrix to pay all just demands against his estate, but the testator carefully refrains from giving her any power to sell real estate in that clause.

In the next clause he "*gives, devises and bequeathes, to his wife Charity (who is also named his executrix) all of his real and personal estate, to have and to hold during her natural life, with full power and authority to sell, assign and dispose of at any time she may deem advisable by deed, will or otherwise.*"

It is plain that the testator here intended to give his wife all of his property, real and personal, and realizing the necessity of giving her a power of sale, he expressly did so. This clause of course has no practical operation now, because of the death of Charity before the testator, but still it is of importance to ascertain the testator's intention. Being a man of intelligence, and acquainted with legal phraseology, when referring to real estate, he uses the technical phrase "devise." He also uses the words "to have and to hold," and as before stated, gives a power of sale. Passing for a moment to the fifth clause, we find there a specific devise of lands in the State of Michigan, where again his correct phraseology comes in by the use of the word "devise," and where again, appreciating the fact that that property, in order to carry out his intentions in connection with it, would have to be sold, he endows his brother Matthias, who is subsequently made an executor, with "full power and authority to sell by all proper deed or deeds duly executed, said lands and premises," (referring of course to the Michigan lands only).

It is to be noted too, that in this clause, where he is referring to the land, he directs the executor to sell and pay from the proceeds to the said "heirs," indicating his association between that word and the lands he was specifically devising.

Now, I think it may well be said, that these two clauses

indicate that the testator knew exactly what he was about and understood the propriety, if not the necessity, when he was attempting to dispose of lands, of using apt words therefor.

It is most significant that in the balance of the will, or in the two codicils which follow, notwithstanding the fact that some dozen or fifteen different bequests have been made, he never once uses other words than "give and bequeath"—words of course appropriate to personal property only.

Why, may I ask, did he in the two clauses where land was before his mind, use the word "devise," and other appropriate nomenclature, and expressly bestow the necessary power of sale, and yet, in the numberless other times where he is giving away his property, does he carefully abstain from either giving a power of sale, or from the use of the words appropriate to the devise of land, but also carefully, time after time repeat the two words "give and bequeath", which are technically applicable, to personal property only? The natural, the almost inevitable answer to this inquiry is, that in the one case he had in mind his land and was disposing of it, in the other, he was not.

CHANCELLOR RUNYON, in the case of *Taylor vs. Tolen*, *Sup.*, remarks as a significant fact, indicating the testator's intention not to charge his land with the legacies in that case, although they greatly exceeded, as we have seen, the amount of his personal estate, that "he (the testator) does not thereby confer any power on his executors over his real estate," and in that case there was a further clause that the executors were "to carry out the provisions of the will as executors," and yet that was not deemed sufficient to impliedly endow them with a power of sale, or to charge the land with the legacies.

Now in this case, we have seen the very first of the will directs the executrix to pay all just demands, as soon as convenient, but she is not given a power of sale as executrix. That the use of words "devise" and "bequeath," "heirs," etc., is of importance in this particular, plainly appears from the recent opinion of VICE CHANCELLOR PITNEY, in *Bragaw vs. Boles* 25 *Atl. Rep.* 947, and, indeed, there seems to be a strange similarity between the situations of the testator's in

that case and in this. In each case, the will was holographic; in each case the testator is an "elderly gentleman, long resident of Newark, and far from illiterate," in each case the testator had no descendants and several collaterals.

Now concerning the testator in that case, the following language is used, which is equally applicable here:—

"He was an elderly gentleman, a long resident of Newark, and far from illiterate; and so far as appears in his will, he was by no means lacking in intelligence, and the possession of general information. He must be presumed to have understood the meaning of the language he employed, and to have had a general understanding of the laws of his State, and of the duties and powers of executors. He must be presumed to have known that executors, after probate of a will would have power to take possession of and turn into money, all personal property, without any express power given them for that purpose by the will, and that for that reason a simple gift of money would be satisfied by his executor in the regular course of their administration of his estate, out of the proceeds of his personal property. But he must further be presumed to have known that they (the executors) would have no power to deal with real estate, except to pay debts, unless power for that purpose was expressly, or by necessary implication given them by the will and that, therefore, a gift of money was not a gift of the proceeds of the sale of land, unless power was given to his executors to sell it for that purpose. He must, presumably have known that the ordinary way of giving land, or an interest or share therein, was to give it directly, by mention of the land, to direct his executors to sell it, and dispose of the proceeds as he wished."

In *Hall vs. Hall*, (1892) Ch. Div. 1, page 361. on appeal from the decree of LORD JUSTICE FRY, the Court of Appeal had occasion to consider whether, under the peculiar phraseology of a will, certain real estate not mentioned in the document, passed by it. Both LORD JUSTICE LINDSLEY, and LORD JUSTICE KAY, refer particularly in their judgements, to the use by the testator of the word "devise," in connection with the word "bequeath," as indicating an intention to include real estate.

The latter says (page 367) "then the next indication I look at is that you have the word "devise" used twice. A man, although he is not a lawyer, very probably has a notion that by using the word "devise," he would sufficient-

ly indicate his intention to pass real estate."

In *Cook vs. Jaggard*, *L. R. 1. Ex. Rep.*, 12, hereafter referred to, the use of the word "bequeath" by the testator was looked upon as an important item as indicating his probable intention not to pass real estate.

These cases, and many others, that might be quoted, show how strong is the legal presumption that the use by testator of this different phraseology, and his care in giving a power of sale, when he had land in view, and refraining to do so in other cases, indicates that he did not have in mind any other real estate that he might own, in making the pecuniary bequests, but was thinking solely of his personal property.

It is of importance also to bear in mind that his will is republished three years before his death, and five years at least after the death of his wife, when he knew that the first clause of his will, was rendered nugatory. If he had intended his real estate other than the Michigan lands, which he specially "devised," and for which he provided a power of sale, to be charged with the payment of these other legacies, why in those five years, and why when he republished the will, did he not endow his executors thereafter appointed, one his brother, a partner, and the other a trusted friend, with the power to sell his real estate?

We have seen that the first devise was a gift to his wife for life, of everything, real and personal, both of which are specifically mentioned, and it will doubtless be claimed that the bequests following, are substitutionary for that devise in the event of the death of his wife, without disposing of the property; but such is not the law. In the recent case of *In re Methuen*, *16 Ch. Div. 696*, the following will was before JESSEL. M. R., for construction, namely: "I commit to paper my wishes respecting the disposal of my property, and give this my last will and testament. Everything I am possessed of, I leave to my dearest sister Sophia Plumtre for her life. After her decease, I give and devise as here annexed." Then follow a number of pecuniary legacies, and the will proceeds as follows: "My two nephews, H. H. Methuen and F. P. Methuen, I leave my executors and the latter residuary legatee, *after the decease*

of my sister,” and then follow more pecuniary legacies as to one of which the word “devise” was used.

It then appears that everything of which the testator was possessed or seized, was left to his sister for life, and after her death, there was a bequest over; and in reference to this the learned MASTER OF THE ROLLS says: “but although everything is left to a person for life, it does not follow that everything is to be left after her decease. I may take it another way. Although words have been used which either having regard to their natural meaning, or having regard to the operation of the will’s act (because the will’s act comes in as regards real property), would pass everything she had to her sister for life, there is no indication of an intention to my mind to show that the remainder man must necessarily take all that is given to the tenant for life. It would to my mind have made a very great difference if specific freehold property had been given by the will itself, and then the residue given over.”

The will there under consideration was very like this one in this particular, and the case I think is a strong authority to the effect that a number of bequests in the original will following the provisions for the life tenancy to his wife, do not necessarily indicate that the latter are a substitute for the former, or that the remainder man took all that the life tenant was given.

It is important in this connection, to remember that the testator knew when he last published his will, as well as when he died, that the devise to his wife had adeemed.

My contention is that all the way through this will and its codicils, there is strongly marked in the testator’s mind, a distinction between his real estate and his personal property; that wherever he refers to the former, he uses appropriate language, and gives effective power to carry out his intention with reference to it. That on the other hand, he has in mind his large personal estate, somewhat fluctuating in value, consisting of mortgages, bank and insurance stocks and other securities, which he “bequeaths.” That the beneficiaries of the latter are universally called by him “legatees,” while he refers to those enjoying the former as “heirs,” or words of like effect; that when his wife was

alive he intended to give her the use and enjoyment of all his real and personal property, and he stated so specifically, and that afterwards when she died, and he republished his will, the only land he had in mind was the Michigan property, and that therefore the subsequent use by him of the words "property" or "estate" were in connection with that portion of his estate, which he had in his mind at the time.

I am well aware that these are broad words, and that in several cases they have been held by courts of high authority to include both real and personal property, but I believe the rule to be unquestioned, that where they are used in a will, they must be considered in connection with the context; thus it appears from the cases quoted, in *2 Jarman on Wills*, pages 322 and 323 (R. & T. ed) that the word "estate" is considered to mean land, whenever it is coupled with other words, which of themselves comprehend real property, but if it is not so associated and from the context it appears that the testator when using the word was referring to his personal property, then the word "estate" is confined to such personal property.

This rule is based upon the maxim *noscitur a sociis*; that general words are restrained in their meaning by their association to subjects of the same species with which they are connected.

The authorities in this State are particularly strong upon that subject. In *Den vs. Snitcher*, *2 J. S. Green 53*, it is said by CHIEF JUSTICE HORNBLLOWER, "the word *estate* means real or personal, according to the sense in which it is used; and that sense must often be ascertained by the connection in which the word is placed, or the subject matter to which it has reference." So the same learned Judge in the case of *Birdsall ads. Applegate, Spencer 244* says, concerning the words "residue of my estate," "that they are proper and apt words to pass real estate must be admitted; but if manifestly used in a different sense, they must be restrained so as to effect the intention of the testator. That intention must be collected from the whole will, or from the connection in which they are implied, or from both. *

* * * By a reference to *2d Pres't on Est. 89 etc.*, it will be seen that the words "all the residue of my estate" have been frequently applied to a specific fund,

or to personal property in exclusion of the real estate; that the testator in this case used the words "residue of my estate" in this restricted sense, I have no doubt."

It must be remembered that in this case there is no general blending of the real and personal property into one fund, and the gift of it. On the contrary, the testator as far as we can tell, whenever he referred to land, spoke of it as "land" or "real property" and when he was having his other property in mind, which he proposed to distribute directly, and for which he gave no power of sale, he spoke of his "estate" or "property" indifferently.

In *Welch vs. Crater*, 5 Stew. 177, we find: "It is manifest from the connection in which the words 'balance of my estate are used' (after the provisions for absolute conversion of his real estate) that by them the testator meant his entire estate, including the proceeds of the whole of his real property remaining after deducting the legacy of \$8,000." There the provision for the sale of the entire property led the Court to believe that the testator had in mind the distribution of the assets as personalty, and attributed to the word "estate" the meaning that would naturally follow.

In *Cook vs. Lanning*, 13 Stew. 369, the word "estate" is again construed and is said to be all inclusive, when it stands without qualification, and reference is made by the Court to the implied power given to the executors to sell the land and pay the legacies with the proceeds, from the fact that all the testator's property, real and personal, is blended in one mass, thus giving a basis for the broad construction of the word "estate."

It is true, most of the foregoing cases have been concerning the word "estate" but there are a great many which hold and apply the same principles to the use of the word "property"; both are generic terms, and the rule here contended for applies to both. In the case of *Hall vs. Hall*, (1992 Ch. Div. p. 361,) decided in England, the Court of Appeal held that the use of the word "property" alone as indicating both "real" and "personal" estate, when previously only personal property had been mentioned, was a "small, very small" indication of real estate being intended.

So in the case of *Camfield vs. Gilbert*, 3 East 517, as to the word "effects."

The following cases have been selected from a great number as illustrating clearly the principle here contended for :

In *Timewell vs. Perkins*, 2 Atk. 102, the will read :

All those my freehold lands, and hop grounds, with the messuages or tenements, barns etc., now in the tenure and occupation of the widow Leach and all other, the rest and residue and remainder of my estate, consisting of ready money, plate, jewels, leases, judgments, mortgages, etc., or in any other thing whatsoever or whensoever, I give unto my dearly beloved, Arabella Hitchins, and her assigns forever." The question for decision was whether other real estate passed to Arabella than that in the occupation of the widow Leach. It was held that it did not, the Court saying that notwithstanding the strong language of the clause above quoted, and the fact that under certain circumstances, the word "estate" may include as well "real" as "personal" property, yet, looking at the whole will, the other real estate should not be considered as included in the clause, for, as it is significantly put by the Court, "if he (the testator) intended to give his wife all his real estate, why did he mention only the Essex estate." And the opinion continues, "but supposing it might admit of a doubt, yet certainly the heir at law ought to be preferred, unless the intention of the testator to exclude him appears exceedingly plain."

So in *Sanderson vs. Dobson*, 1, Ecch. 141, where a testator, after devising certain real estates by his will, proceeded, "I give all the rest of my household furniture, books, linen and china, except as hereinafter mentioned, goods, chattels, estate and effects, of whatever nature or kind soever, and wheresoever the same shall be at the time of my death" unto certain executors in trust, to dispose of the same as specified by the will. It was held that the word "estate" in the clause quoted, did not apply to other real estate not specifically mentioned in the will. In the course of his opinion, CHIEF BARON POLLOCK, calls attention to the fact that the word "heirs" is not used in the clause to the

trustees, but the words "executors, administrators and assigns," and says that while no doubt a gift of "real estate" to trustees and their executors, would be sufficient to carry the fee, yet the omission of the word "heirs," is certainly indicative of an intention to confine the operation of the clause to personal property, more especially as in the prior parts of the will, where he is devising his real estate at Middletown, the testator uses the appropriate language and devises to the same trustees "their heirs and assigns."

In *Woolam vs. Kenworthy*, 9 Ves. 137, a testator first directed the payment of his debts and funeral expenses, and then made certain specific devises and pecuniary bequests, closing his will with a residuary clause, in which he gave all his other "estate and effects;" and the question that LORD ELDON had to decide was, whether land of the testator not so specifically devised, passed by virtue of the residuary clause. The Lord Chancellor called for a more elaborate preparation and argument on the question than had been given, suggesting that his first impression was, in as much as the testator had anxiously provided for the application of the real estate, expressly devised upon trust, that unless it was necessary, the will cannot be taken to mean that other real estate, concerning which he was so significantly silent, should pass by and be included in the word "estate." Upon further argument, the opinion shows that that eminent Judge still adhered to the same view. After calling attention to the specific devise of a particular piece of real estate, the opinion continues, "and it is by no means probable that a testator who intended the other part of his real estate should be clothed with the same trusts, and be applicable to the same purposes, should not have said one word to that effect; giving all these particular directions as to the other estate; taking it out of the heir, and yet not saying a word as to that part of the estate which in his hands is contended to be subject to the trust." The conclusion was, that in as much as the testator had with such care specifically provided for certain portions of his real estate, that the general phrase at the end of his will, would not be held to cover other real estate which he owned, but did not so refer to.

The case of *Coard vs. Holderness*, 20 *Beav.* 147, 1 *Jur. N. S.* 316, is instructive. There the testator, after giving four legacies of certain sums, proceeded as follows: "and subject to the said four legacies, I give, bequeath and dispose of all estate, effects and property whatsoever and wheresoever, which I am now, or shall at the time of my decease, be possessed of or entitled to at law or in equity, or over which I have any right or power of disposition." The question arose as to whether certain real estate of which the testator died seized, passed under that clause.

SIR J. ROMILLY, after adverting to the fact that the language above quoted was in itself ample and broad enough to include real estate, yet, decided, upon looking at the general scope of the will, he was unable to conclude that it had been the intention of the testator to include real estate in his will. He calls attention to the fact that the words "heirs" or "devise" are nowhere used; that the gifts are always spoken of as "shares or legacies;" and from the fact that it nowhere appears from the will that all of the testator's real estate was before his mind, as well as from the context of the whole instrument, he was of the opinion that the land did not pass.

In *Havens vs. Havens*, 1 *Sanfords Ch. Repts.* 324, the testator made several legacies and specific devises of real estate, and then closed his will with the following residuary clause: "And all the rest, residue and remainder of my estate, in case it shall more than suffice to pay the legacies herein above and hereinafter given, I bequeath unto the above named pecuniary and specific legatees, severally and respectively, to be apportioned among them according to the amounts of their respective legacies, and to be added as an increase thereof." Then followed several pecuniary legacies. Among the questions which the Assistant Vice-Chancellor decided was, what property was included in the residuary clause above quoted. He says: "This language is too plain to admit of any doubt upon its true construction. The testator has used throughout his will, not merely apt words, but technical words of devise and bequest in reference to the real and personal estate respectively. Here he gives the residue to his *pecuniary* and specific *legatees*, in-

cluding devises, and as an increase of their *legacies* not in addition to their *devises*; neither the general scope of the will, nor the previous gifts, nor the situation of the family, furnish us any ground for supposing that he used this language erroneously, and as we have seen the residuary fund itself was personalty and thus properly given to legatees."

In *Cook vs. Jaggard*, *L. R. 1 Ex. Rep. 125*, the question arose as to whether under a will, in which a remainder in fee of copy-hold premises, specifically devised in tail, passed by the residuary clause, and which directed first the payment of debts out of the testator's personal estate and effects, and then continued, "and all the rest of my worldly estate, both real and personal, I give, devise and bequeath as follows." (Then followed a devise of certain copy-holds to Susanna Westbrook, and the heirs of her body) and it then continued, "And all the rest, residue, and remainder of my personal estate and effects, wheresoever and whatsoever, and of what nature, kind or quality soever, the same may be, moneys, securities for money, or whatever I may be possessed or entitled to at the time of my decease, I give and bequeath the same to my said daughter, Susanna Westbrook, to, in and for her own use absolutely." Susanna entered upon the property so devised to her, was married and died, and subsequently her children died, thus exhausting the specific devise in tail, and the question arose whether there was an intestacy on the expiration of the estate tail above devised, or whether the remainder in fee passed under the residuary clause of the will above quoted. It was held that there was no devise of the remainder in tail, and that the testator died intestate as to it. POLLOCK, C. B. says:

"Looking at the whole of the will, it is clear that whether or not the testator manifests an intention to part with his whole property, he has not used language capable of effecting that object. The beginning of the will no doubt expresses an intention to dispose of the whole property. Then the testator proceeds specifically to devise two copy-hold estates to his daughter, Susanna Cook Westbrook, and the heirs of her body, and then follows the residuary clause. The whole of this clause appears to be confined to personalty of which the testator enumerates the various kinds, e.g. money, and securities for money. Then come

the words, 'or whatever I may be possessed of or entitled to' following the description of the property bequeathed, 'as money etc.,' and coupled with that description by the word 'or,' that I think shows that the words referred to property *ejusdem generis* with 'moneys etc.,' and it may be observed that the testator used the word 'bequeath.' *

* * * * * This residuary clause therefore in my opinion only applied to personal property."

BARONS MARTIN AND CHANNEL concurred, the latter writing an additional opinion and referring with approval, as did also C. B. POLLOCK, to the case of *Monk vs. Mawdsley*, 1 Sim. 286.

The case of *Nixon vs. Cameron*, L. R. 26 Chancery Division, page 19, came before the Court of APPEAL on appeal from the Vice Chancellor, upon the construction of a will, containing the following clauses: "I direct that all my just debts, and funeral and testamentary expenses shall be paid in the first instance, as soon as possible after my decease. I do hereby give and bequeath unto Hannah Cameron, my wife, the house in which she resides in Cornbrook Park, and all the furniture therein, together with the sum of three pounds, ten shillings per week for her natural life. Moses Cameron, my son, I give the sum of £500 to be paid out of my estate, and the sum of shop wages per week, until he is twenty five years of age, to be paid out of the business. Elizabeth Cameron, my daughter, the sum of two pounds per week," (then were several other bequests of sums of money to different members of his family), the will then continued, "My executors may realize such part of my estate as they think right and in their judgment to pay the forenamed legacies." After directing his business to be carried on as in accordance with his minute plans, the testator continued: "At the decease of my wife, Hannah Cameron, the property in which she now resides is to be equally divided among my children." The question arose as to whether the pecuniary legacies were charged on the real estate of the testator other than that in Cornbrook Park above referred to. In the course of argument on the appeal from the decision of the Vice Chancellor, who held that there was no such charge, it was insisted: "Then we say that the legacies are charged on the real estate. The old cases went very strongly against disinheriting the heir, but the current of decisions has now altered, and the rule

is that the words of a will must have their natural effect given to them without any bias in favor of the heir."

LORD CHANCELLOR SELBORNE affirmed the finding of the Vice Chancellor in this particular, saying: "The first declaration in that order is that the testator died intestate, as to his real estate, except a certain house in Cornbrook Park. It was contended that this was wrong, and that the whole real estate, (with that exception) was either devised by implication to the executors, or at all events charged with the testator's legacies, (of debts, there is no question they have all been paid). That the real estate, except the house in Cornbrook Park, is not expressly devised or expressly charged, is certain. The implication was sought to be raised, (1) from a direction that the first pecuniary legacy given by the will, (a sum of £500.) 'be paid out of my estate,' and (2) from the direction which follows after all the legacies and annuities have been given, 'my executors may realize such part of my estate as they think right and in their judgement to pay the aforementioned legacies.' It was insisted that the words, 'my estate' thus used, comprehended real estate; as they no doubt might, if the testator gave 'all his estate' to his executors, or to any other devisees, but, when an implication adverse to the heir at law is sought to be raised from a mere direction for payment of legacies, it is necessary to consider whether the words are not sensible without any such implication. The whole personal estate vests by law in the executors, the real estate does not. The personal estate not specifically bequeathed is generally the proper fund for the payment of pecuniary legacies. When a testator directs his executors to realize for the payment of such legacies 'such part of his estate as they think right, and in their judgement' it is reasonable to understand him to refer to the estate which vests in them as executors, and not to that which does not; and the direction in the earlier sentence of the same will, that a particular legacy is to be paid 'out of his estate' naturally means that it is to be paid in the course of administration."

The conclusion was thus reached that the legacies were not charged upon real estate, and it will be observed that in many of these cases the will contained a specific clause of certain real estate, just as occurs in reference to the Michigan lands in the Price will.

In *Walker vs. Walker*, 3 B. and P. 375, A. devised to his wife his home and goods with all his lands, goods and

chattels whatsoever and wheresoever for her life, and after her death, to two younger sons, till they should attain the age of fifteen, for their education. He then devised his aforesaid house, goods and chattels equally to be divided between all his sons and daughters share and share alike. It was held that under the last clause of the devise, the lands did not pass, the Court observing that they never knew an instance in which the subject of devise was supplied on account of a supposed omission; that indeed no mistake in the will could ever be rectified by the Court unless it could first be demonstrated that such mistake did exist, and that in the present case however strongly they might conjecture what the deviser intended to have done from the previous devise to his wife and his children, yet it was not of necessity to intend that he meant to have added the word "lands" in the last clause of his will.

My contention therefore is, that there is not sufficient in the words "estate" or "property" as used by the testator to charge his real estate with the payment of these legacies. The testator speaks in his first codicil of a shrinkage and losses in his property. It is in evidence in this case that no such shrinkage had occurred in the lands in question between 1875 when his original will was written, and 1881 when he wrote the codicil, and on the other hand, it is shown that he had expected to suffer considerable loss on his personal property; that would indicate that the use of the word "property" by him was in reference to his personal estate.

He had made in this first codicil, no change in his real estate or in the specific devise previously made of it, yet he speaks there of a "change in the disposition of his *property*."

The provisions in the last codicil, as follows:

"I hope the legacies may be paid by my executors without such waste as will call for large sacrifices of real estate or undue pressure in the collection of mortgages" is difficult to understand. Attributing to him an intention to say "haste" instead of "waste," my view is, that inasmuch as he had provided for the sale in the discretion of his executor, Matthias, of the Michigan property, and the payment there-

from of a number of legacies, that he was there directing Matthias to exercise his discretion with caution, and not with undue haste. The value of this property was somewhat speculative, and probably unknown to the testator, and it is reasonable to suppose that inasmuch as this is the only reference to real estate that is made in the will and codicils, except those hereinabove mentioned, it applied to the real estate before mentioned, and for which an express power of sale had been given, and from the proceeds of which legacies were to be paid. The other legacies would naturally be paid at a certain time fixed by law. Those to be paid from Michigan lands, were dependent upon the exercise of the discretion of Matthias in the sale of those lands, and it cannot be said, inasmuch as this is a rational and probable explanation of these words, that they alone are sufficient to overcome the presumption that obtains against the lands being charged for the payment of the legacies.

It remains to consider whether the language of this will, "should my property fall short in the settlement of my estate of the within named bequests, I wish the legacies to individuals, the Professorship to the College at Princeton, The Old Ladies Home of Newark, and German Theological School to be paid in full, and deductions made from the various bequests made to benevolent societies in proportion to the amount given to each, and should the amount of my estate exceed the bequests, then I wish the Theological Seminary at Princeton, and German Theological School in care of the Newark Presbytery, to be made by residuary legatees in equal shares" is sufficient to include the testator's real estate in the "residuary estate" which he thereby left. In other words assuming that my contention that the testator has made no charge of the pecuniary legacies either to individuals or to the institutions upon his lands, yet, nevertheless, can it be claimed that said lands would go to the Theological Seminary at Princeton, and the German Theological School?

The language of this clause is peculiar. He does not leave "*all the rest and residue of his estate;*" and if I am correct in supposing that he had before his mind nothing

but his personal estate, the word "property" and "estate" used by him in this clause, must be construed to indicate that he intended not to include the lands in his residuary clause, but rather had still before him the fluctuating value of his personal property, and was providing for a shrinkage or a surplus.

It is quite well settled that the use of the words "residuary legatee" will not of themselves include lands not otherwise referred to, and in this particular, the case of *Bragaw vs. Boles, Sup.* is quite in point, and it seems to me that the conclusion reached by the court in that case, in reference to the clause "whether deficiency or surplusage, let it apply in either case *pro rata* to all, according to the sum bequeathed," must also prevail here.

As in that case, the words here used may be satisfied "by applying them to the proceeds of the personalty, which would come into the hands of the executors, in the performance of the ordinary duty of administering the estate, which duty fell upon them precisely as it would fall upon administrators if there had been no will"; as in that case, so here, there is no "rest or residue;" as there, we have no gift "of all my property," or the "residue of my property" or any equivalent words. As there, "there is nowhere any expression indicating any massing of all his property." Indeed, that case is somewhat stronger than this because there was there a prefatory clause in the will, stating "it is always best to have our affairs in proper condition." None such is found here.

Indeed, a careful reading of the opinion in that case, seems to be convincing, not only of the correctness of the decision there reached, but of its applicability to the one now in hand.

Singleton v. Tomlinson L. R., 3 App. Cas. 404 is instructive.

There the testator's will, after directing the payment of debts and funeral expenses, recited the fact that "whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell my landed property, namely:" (and then four separate pieces of landed property were named) "for its full value." Sev-

eral legacies were then given, and then a fifth landed property was specially devised to I. W. with the ultimate remainder to T. T. and then came a gift of other legacies, and finally the will declared, "I constitute the said T. T. my residuary legatee." The question arose as to whether by the last clause quoted, T. T., became entitled to the real estate of the testator, not specifically devised; and the conclusion was that inasmuch as there was an absolute and unqualified direction in the will to sell the whole of the landed property, with the exception of one piece specifically devised, and the distribution to be made was of the proceeds thereof, that the final clause of the will making the said T. T., residuary legatee, indicated that the testator was looking upon all his property as converted into cash, and to be distributed as such.

Among other things, LORD CHANCELLOR CAIRNS, in his judgment says: "There is no doubt that if you found the term 'residuary legatee' standing alone; above all if you found it in a will, which appeared to make a distinction between the real property and personal property the *prima facie* meaning of 'residuary legatee,' would be the person taking what the law calls the residue of the personal property: but this is a term which must be fashioned and moulded by the context, and if you have a context in which the testator is found looking at his landed property not as land, but as something which is all to be sold and turned into money, then the term "residuary legatee" becomes a term as applicable to the proceeds of landed property, as it would have been in the first instance to personal property."

LORD HATHERLEY in his concurring opinion, calls particular attention on page 421 to the fact that the express directions of the will called for the sale of every piece of land which the testator owned, except one, which was specifically devised, and says, "He, the testator, orders that landed property to be sold for its full value." In this way he has got into his executors hands a fund which he calls "the proceeds of this property," from which they may pay his funeral expenses, and his debts, and any legacies given by the will; accordingly he has provided a fund which is in my opinion for the execution of all these purposes; then he proceeds to specify the legacies."

It may be of interest in this connection, to quote the language of LORD MANNERS in the case of *Kellett vs. Kellett*,

3 *Dow. 248.* After stating that the intention to disinherit must be plainly shown, and not merely assumed, as a matter of implication, he says of the will in question, that it is "a will which in my view of the matter neither expresses nor implies an intention "of that kind," and he goes on, "if there be any doubt, the title of the heir at law ought to prevail; that is the established rule of this Court, and upon that principle I think the heir at law entitled to a decree."

This case was considered in the House of Lords on Appeal from the Irish Chancery. The testator seized of real and personal property, bequeathed various legacies, "to be raised and levied from my properties by my executors," and then after a specific devise of his interest in certain lands says: "The remainder of my properties I devise to my executors to make good the above sums, and I also ordain. &c., and devise the said (naming the executors) executors of this my last will, &c., also my residuary legatees share and share alike."

It was held by the court below and affirmed above, that there was a resulting trust as to the real estate for the heir at law, LORD ELDRON and LORD REDESDALE both stating that it was a case of gravest doubt, but that as above shown, where there was a doubt, the heir ought not to be excluded, the rule of the law being that the heir cannot be disinherited except by express words or necessary implication.

In *Lea vs. Grundy*, 1 Jur. N. S., 951, a testator made some specific devises, and some pecuniary legacies, and declared his daughter Mary Ann (to whom a legacy of £100 had been given) to be sole residuary legatee of his will. The testator was at the time of his decease, seized of certain copyhold estates, of which no specific mention was made in the will.

The Counsel quoted *Kellett vs. Kellett*, *Day vs. Daverson*, *Davenport vs. Coltman*, and *Evans vs. Crosbie*, sup., and it was urged that the quantity of the estate showed that the testator expected there would be no residuary personalty, but SIR J. STUART, V. C., said that in the cases which had been cited, there were words which showed that the testator meant the residuary legatee should take his property of every kind. He considered that there must be

words to show the testator meant that real as well as personal estate should pass; else he could not give real estate to a person intended to take as legatee. There might have been a residue of the personal estate, but he saw no grounds why the testator should expect a residue of real estate. Every gift of real estate was a specific gift. If there were any words showing that he meant all his real and personal estate, they would have carried the real estate. In *Day vs. Daverson*, and *Kellett vs. Kellett*, there were words in the context of the will which showed that the testator meant to include all his property and the Court would not restrain this operation. But where the testator simply said he appointed a person residuary legatee under his will, and did not show an intention that everything should pass, the word "legatee" clearly pointed to personalty, and there might have been residue of personalty. He therefore must hold that the copyhold estate did not pass.

Windus vs. Windus, 6 *De Gex. M. and G.* 547, is quite a recent case, which reviews a number of the previous authorities.

There a testator gave several pecuniary legacies and devised his free hold, copy hold and lease hold estates to his sons T. and A., as tenants in common, and he appointed them his residuary legatees and executors. T. dies and by a codicil, the testator appointed E., another son, executor in the place of T. and revoked the legacies given to A. and E. by the will, and he appointed them residuary legatees, and declared that certain freehold, and lease hold properties, comprised in his marriage settlement, and which he had power to appoint, should go to the "residuary legatees," his sons. It was held that the appointment of A. and E., to be residuary legatees, did not pass to them, the testator's real estate.

This is a recent case, decided after consideration by a high Court, and should be carefully considered, and certainly is a strong authority for our contention.

The suggestion made by LORD CRANWORTH in *Windus vs. Windus* that the cases which held that the words "residuary legatee" will pass both real and personal estate of the testator, are based on the apparent intention of the

testator to dispose of all his property, manifested by words in some part of his will, receives great sanction in the opinion of JESSEL, M. R., in delivering the opinion of the Court of Appeal in the recent case of *Hughes vs. Pritchard*, 6 Ch. Div. 24.

There the testator began "as to my estate which God has been pleased in his providence to bestow upon me, I do make and ordain this my last will and testament as follows: that is to say"; concerning which the opinion says: "now what is the meaning of the first words? It appears to me to be reasonably plain that the testator has declared I do by this my will, dispose of my estate, real and personal; I intend to do it, and I give it as follows; that is what I understand to be the meaning of these words. They are otherwise useless and the construction which has been put on the will in the Court below, reduces them to nothing, which is not to be done without reason. Then he appoints residuary legatees. I agree that an appointment of residuary legatees standing alone in a will, would be a gift of the personal estate only, that is settled by authority. To what extent that ought to be modified by other devises and bequests, it is not necessary now to consider, because, looking at the preliminary words, the testator it seems to me, has told us in express terms, that he has disposed by his will, of all his property; that being so, and finding in the will the disposition of parts of his property, with the appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to such consideration as the expressions in the latter part, and that he intended these three people to take the residue of his property. That is my opinion, and I think that the appeal must be allowed."

I ask the Court to carefully look at all of this will and its codicils, to bear in mind the principles of law which are so well settled, to remember that some reason must have existed for the testator placing his brothers on the same plane with his nephews and neices, and only giving them \$1,000., particularly in view of the fact that he at one time increased their legacies to \$2,500 apiece, and subsequently reduced them to the original sum.

I suggest that this man knew what he was about, and ap-

parently had in mind the enjoyment by his family of the homestead where he lived and where they had been accustomed to enjoy his hospitality.

The legatees who will suffer by the construction for which I contend, are not children or dependents otherwise unprovided for; they are charitable and religious corporations, many of them very wealthy. This cannot but have weight with the Court, as it did with CHANCELLOR RUNYON, in the case of *Taylor vs. Tolen*, 11 Stew. 91.

The learned VICE CHANCELLOR who decided the case below, in reaching his conclusion, was not only compelled to infer, what is nowhere expressed, that the testator intended his New Jersey Real Estate, a most prominent feature of his property, to be charged with the payment of these legacies, but himself was in doubt as to whether the will and codicils contained any power of sale, or gave any one the right to carry out the assumed intention of the testator by selling the property to raise funds with which to pay the pecuniary legacies, and so directed that a cross bill be filed asking that the Executor be authorized to make a deed, and be declared competent to make a title. In other words the position is, that while this shrewd lawyer-like old gentleman when providing for a disposition of his Michigan Lands, gave an express power of sale, yet in the same instrument he expected his New Jersey Lands—ten times more valuable—to be sold in order to raise the money to pay these legacies, and yet nowhere made provision for their sale. The necessity of judicially creating a means of carrying out a judicial inference seems to me with deference, to be fatal to the decree. If the court realized, as it did, that probably no one would take title to the land, under a sale made in pursuance of the will to raise funds with which to pay the legacies, then it is practically doubtful whether the will charges the land with the legacies. But as we have seen, in case of this kind to doubt is to deny; the presumption is against an implied charge; the burden of proof is on the respondents, *they* must satisfy you that there is no doubt about it.

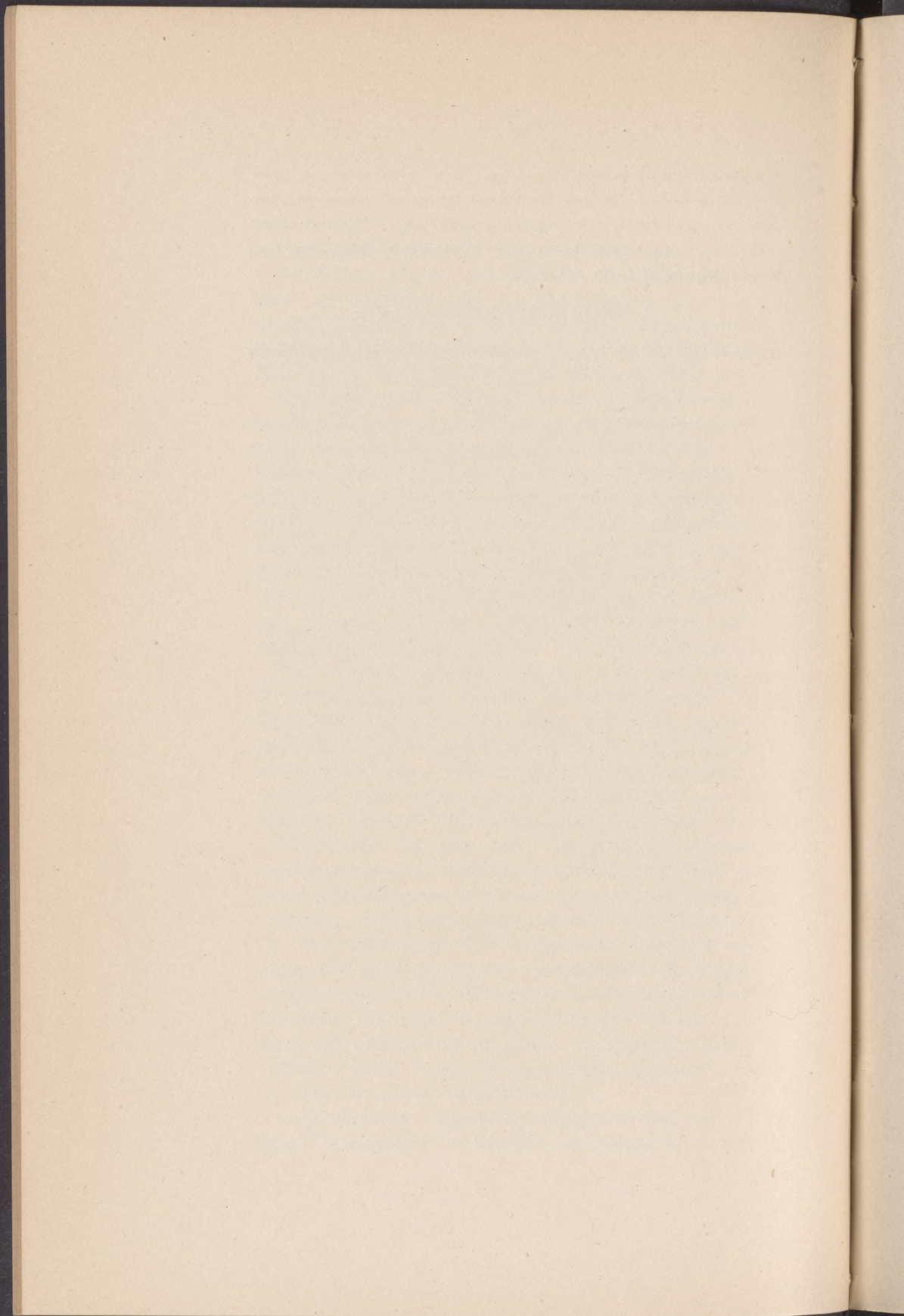
It is therefore respectfully submitted that the decree should be reversed, and this land be allowed to descend in

the natural and lawful way, to those who need it, and instead of being dissipated among countless charities, the property will thus make light the declining years of these poor respectable gentlemen, who honestly believe that was the intention of their brother.

ROBERT H. McCARTER,

Feb. 7. 1894.

of Counsel with Appellants.



N. J. Court of Errors and Appeals.

BETWEEN	}	<i>On Cross Bill.</i>
HENRY PRICE, et. als.,		<i>State of Case</i>
Appellants,		<i>on</i>
AND		<i>Appeal from Decree</i>
MATTHIAS PRICE, Executor, &c., of	}	<i>Thereon.</i>
DANIEL PRICE, dec'd, et. als.,		
Respondents.		

It is stipulated and agreed that the following shall be the State of the Case on the appeal in the above stated cause.

The Executor of the last Will and Testament and Codicils of Daniel Price, deceased, filed his original bill of complaint in this cause (a copy of the material portions of which is annexed), praying for a construction of the documents and asking for instruction upon several questions, some of which are not involved in this appeal.

In Chancery of New Jersey.

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey.

Humbly complaining shows unto your Honor, your orator, Matthias Price, of the City of Newark, in the County of Essex, and State of New Jersey, in his capacity of Executor of the last will and testament of Daniel Price, deceased.

1. That on the twenty-third day of April, eighteen hundred and ninety-two, said Daniel Price, then of the City of Newark aforesaid, departed this life, having first made, published and declared his last will and testament in writing, bearing date the sixth day of May, eighteen hundred and seventy-five, in due form of law to pass the title to real and personal estate, and two codicils thereto, each executed in like manner, the first thereof dated the twenty-second day of February, eighteen hundred and eighty-one, and the second dated the sixteenth day of July, eighteen hundred and eighty-nine, which said last will and codicils were, after the death of the said testator, and on the fifth day of May, eighteen hundred and ninety-two, duly admitted to probate by the Surrogate of the said County of Essex, and the letters testamentary thereon were duly issued to your orator, who has taken upon himself the burthen of the execution of the said will and codicils, and the administration of the estate of the said deceased and that he is now engaged thereon; the testator's wife Charity, the executrix in said will named having departed this life, and Charles S. Haines, an executor named in said first codicil, having neither renounced his executorship nor accepted the duties of said office.

2. And your orator further shows that the following is a copy of the last will and testatment of the said Daniel Price and of the two codicils thereto annexed, to wit:

"I, Daniel Price, of the City of Newark, County of Essex, and State of New Jersey, being in sound mind, memory and understanding, do make and declare this my last will and testament in the manner following.

"I hereby direct my executrix, hereinafter named, to pay all just demands against my estate as soon as convenient after my decease.

"I give, devise and bequeath to my wife Charity all of my real and personal estate, to have and to hold during her natural life, with full power and authority to sell, assign and dispose of at any time she may deem advisable, by will or otherwise, but should she die intestate, then I direct distribution of my property to be made according to the following bequests.

“To my brother, Matthias Price, I give all my right, title and interest to and in his tool manufacturing business, being the one, undivided third part of the same assigned to me for five thousand dollars, by himself.

“I give and devise all that tract and parcel of pine timber land, situated and being in the County of Marquet, State of Michigan, containing eight hundred and eighty acres when sold, the proceeds to be given share and share alike to each of my brothers' children, viz: the children of William, David, Thompson, Henry and Matthias, and in case of the death of any it shall be divided equally among the survivors.

“I hereby appoint my brother Matthias as trustee of said lands, with full power and authority to sell by all proper deed, or deeds duly executed, whenever he may think advisable, all said lands and premises, and pay over the proceeds to the said heirs after all expenses are paid for such sale.

“I give and bequeath to the Trustees of the College of Princeton, N. J., thirty thousand dollars for the establishment and endowment of a professorship in said college, the incumbent to be styled Professor of Christian Evidence and Doctrine; this bequest is made with the understanding and on the condition that it shall be the duty of said Professor to give year by year to one or more of the classes in said College an outline of the evidences from Miracles and Prophecy, combined with the collateral proofs, and also an exposition of the doctrines of Christianity and of those which relate more especially to Christ and the Holy Spirit in the redemption of man and of faith, repentance, justification, sanctification and eternal life, the exposition to be in entire accord with the teachings of the Westminster Shorter Catechism; should the above bequest not be accepted on the terms named, then the thirty thousand dollars shall be paid to the Trustees of the College of Liberia for the endowment of a professorship in said Institution.

“I give and bequeath ten thousand dollars to the Board of Directors, or Trustees, of the German Theological School under the care of the Presbytery of Newark, N. J.,

toward the endowment of said Institution.

“I give and bequeath to the American Bible Society formed in the City of New York in the year eighteen hundred and sixteen, ten thousand dollars.

“I give and bequeath ten thousand dollars to the Trustees of the Board of Home Missions of the General Assembly of the Presbyterian Church.

“I give and bequeath five thousand dollars to the Board of Foreign Missions of the Presbyterian Church, in the United States of America.

“I give and bequeath five thousand dollars to the American Seamen's Friend Society.

“I give and bequeath five thousand dollars for Church extension, to aid poor Presbyterian Churches in the erection of houses of worship in destitute sections of our Western country.

“I give and bequeath five thousand dollars to the American Tract Society, as a permanent fund for the support of Colporteurs under the direction of said society.

“I give and bequeath five thousand dollars to the Presbyterian Board of Publication, in the City of Philadelphia.

“I give and bequeath five thousand dollars to the Old Female Charitable Society, in the City of Newark, New Jersey.

“I give and bequeath five thousand dollars to the Trustees of Donations, Joseph Tracy, former Secretary, to aid in endowment of Liberia College.

“I give and bequeath ten thousand dollars to the Society called the Home for the Relief of Respectable Aged Women, in the City of Newark, for which a charter was given by the Legislature of the State, March 14th, 1867, to aid in the endowment of said Institution.

“I give and bequeath to each of my nieces and nephews, children of my brothers, William, David, Thompson, Henry and Matthias, one thousand dollars apiece, and in case of the death of any, such shares shall be equally divided among the survivors. Should my property fall short in the settlement of my estate of the within named bequests, I wish the legacies to individuals, the Professorship to the College at Princeton, the Old Ladies' Home of

Newark and German Theological School to be paid in full, and deductions made from the various bequests made to benevolent societies in proportion to the amount given to each, and should the amount of my estate exceed the bequests, then I wish the Theological Seminary at Princeton and German Theological School in the care of the Newark Presbytery to be made my residuary legatees in equal shares.

“I do hereby constitute and appoint my wife Charity my executrix of this, my last Will and Testament, this being my last Will and Testament, I have hereunto set my hand and seal this sixth day of May, eighteen hundred and seventy-five. All previous wills made by me are now revoked.

“Signed, sealed, published and declared by the said Daniel Price, to be his last Will and Testament, in the presence of each other, do witness the same as his last Will and Testament.

DANIEL PRICE. [L. s.]

Witness,

JOSEPH WARD,

ISAAC ALLING,

A. S. GRAHAM.

No. 1. A Codicil to my last Will and Testament.

“Whereas, I, Daniel Price, of the City of Newark, County of Essex, and State of New Jersey, having made my last Will and Testament in writing, bearing date the sixth day of May, eighteen hundred and seventy-five, and have thereby given to the Trustees of the College of Princeton, New Jersey, thirty thousand dollars, for establishment and endowment of a Professorship in said College, the incumbent to be styled Professorship of Christian Evidences and Doctrine. Now, I do by this, my writing, which I hereby declare to be a Codicil to my said Will, to be taken as a part thereof, I will direct that the said bequest be withdrawn and made void. This change is made necessary through the shrinkage and losses in my property. I am glad to know that it will not be missed, since the

Lord has influenced the very rich men to pour unto the Treasury of the College by the millions.

"I give and bequeath to my three brothers, David, Thompson and Henry, twenty-five hundred dollars each.

"I hereby expressly confirm my former Will, dated sixth day of May, eighteen hundred and seventy-five, excepting so far as the disposition of my property is changed by this Codicil.

"I do hereby constitute and appoint Charles S. Haines my executor in connection with my wife Charity, named as my executrix in my last Will and Testament, dated May sixth, eighteen hundred and seventy-five.

"And lastly, it is my desire that this, my present Codicil, be annexed to and made a part of my last Will and Testament to all intents and purposes.

"In witness whereof, I have hereunto set my hand and seal this twenty-second day of February, eighteen hundred and eighty-one.

DANIEL PRICE. [L. s.]

"The above instrument of one sheet was at the date thereof declared to us by the Testator, Daniel Price, to be a Codicil to be annexed, and he acknowledged to each of us that he had subscribed the same, and we at his request sign our names thereto as attesting witnesses.

DANIEL P. FITZGERALD,
282 Mulbery St.,
Newark, N. J.

EDWARD D. LYON,
2 Elm St.,
Newark, N. J.

No. 2. This second Codicil to my last will and testament.

"Whereas I, Daniel Price, of the City of Newark, County of Essex, and State of New Jersey, have made my last will and testament in writing, bearing date the sixth day of May, eighteen hundred and seventy-five, with Codicil No. 1, bearing date twenty-second day of February, eighteen hundred and eighty-one.

"I do by this Codicil No. 2, constitute and appoint my brother Matthias Price, one of my executors in conjunction with Charles S. Haines, named in Codicil No. 1.

I give and bequeath to my nephew, Matthias T. Price, for his generous attentions to me at all times, two thousand dollars; also the five volumes of Scott's Bible and Conden's Concordance, complete.

"I give and bequeath to my sister Phebe's children, nieces and nephews, the same as the brothers' children are to receive, one thousand dollars each; also an equal interest in my Michigan Marquette Land when sold—in case of the death of any, such shares shall be divided equally among the survivors.

"In Codicil No. 1, I give and bequeath to my three brothers, David, Thompson and Henry, twenty-five hundred dollars each; now, by this writing, I withdraw and make null and void this bequest, and instead give one thousand dollars each to my surviving brothers, and in case of death of any of them such share to be equally divided among the living.

"To my careful worthy house-keeper, Charlotte M. Holder, I give five hundred dollars.

"And lastly, as I have no debts or demands against my estate, I hope the legacies may be paid by my executors without such waste as will call for large sacrifice of real estate or undue pressure in the collection of mortgages; it is my desire that this my present Codicil be annexed to and made a part of my last will and testament to all intents and purposes.

"In witness whereof, I have hereunto set my hand and seal this sixteenth day of July, eighteen hundred and eighty-nine.

DANIEL PRICE, [L. s.]

"The above instrument of one sheet was at the date thereof declared to us by the Testator, Daniel Price, to be a Codicil to be annexed to his last will and testament, and he acknowledged to each of us that he had subscribed the same,

and we at his request signed our names thereto as attesting witnesses.

Witness,

ISAAC A. ALLING,
JOS. M. SAYRE.

To which will, now on file in the office of the Secretary of State, or a certified copy of the record thereof now remaining in the said Surrogate's office, book _____ of Wills for said Essex County, on pages _____, your orator prays leave to refer for greater certainty.

3. And your orator further shows that he has prepared and filed an inventory of all the personal estate of the said Daniel Price, so far as the same have come to his knowledge, and that the same amounts to the sum of sixty-seven thousand, five hundred and thirty-three dollars and sixty-three cents (\$67,533.63).

4. And your orator further shows that in addition to those certain lands situate in the County of Marquette, in the State of Michigan, in said will mentioned, and therein and thereby specifically devised, the said Daniel Price, died seized and possessed of certain lands and premises, situated, lying and being in the said County of Essex, in this State, of the value of fifty thousand dollars and upwards.

5. And your orator further shows that the said Daniel Price died, leaving no issue or descendants of issue, and no wife; that his wife Charity in said will named departed this life prior to the death of said testator, to wit: on the _____ day of January, A. D., 1882, having first made, published and declared her last will and testament in writing in due form of law, which said will remaining unproved, is now in the possession of your orator, ready to be produced if necessary so to do.

6. And your orator further shows that he is advised by his counsel, and he is himself of opinion that there are grave doubts as to his duty in several important respects in regard to the validity of some of the provisions of said testator under said will, and also as to the rights of certain legatees named in said will under the same; and he is ad-

vised by his counsel that it is not only his privilege and right, but it is his duty to seek the advice, aid and direction of this Honorable Court, as to all the said matters.

7. And your orator further shows that the said testator in and by his said will gave and devised all his estate, real and personal, to his wife Charity in the manner and words following, to wit: "to have and to hold during her natural life, with full power and authority to sell, assign, and dispose of at any time she may deem advisable, by will or otherwise; but should she die intestate, then I direct distribution of my property to be made according to the following bequests." Although said devisee is expressly stated to be for life, and the said devisee, the testator's wife, Charity, died prior to the death of said testator, your orator is in doubt as to the validity of the limitation over—the bequests thereafter in said will mentioned—in view of the full, complete and absolute power of disposal given by said devisee, and in view of the fact that the contingency contemplated by said testator, viz: the survival of his said wife and her death, intestate, and upon the occurrence of happening of which the limitation is based, had not risen, and your orator prays the advice and direction of this Honorable Court in that matter?

8. And your orator further shows that the said testator did not, in and by said last will and the codicils thereto specifically devise the real estate whereof he died seized, situate as aforesaid in the said County of Essex, and which is of large value, nor did he thereby give power to his executor to sell the same and apply the proceeds to the purposes set forth in said will and codicils; that the intent of said testator in reference to the said lands can only be ascertained if it can in fact be determined, from the following general terms and expressions in said will and codicils contained, to wit: in case of the death of his wife, Charity, intestate, said testator directed distribution of his "property" to be made according to certain bequests thereafter in said will particularly mentioned, and afterwards in said will said testator expressed his wish in the case his "property" should fall short in the settlement of his "estate" of said bequests; and also his wish and in the first

codicil to said will, said testator states that the revocation of a certain named legacy was made necessary through the shrinkage and losses in his property, and in and by the said codicil confirmed said will, excepting so far as the disposition of his "property" was changed by that codicil, and in the second codicil to said will said testator added as follows, "and lastly, as I have no debts or demands against my estate, I hope the legacies may be paid by my executors without such waste as will call for large sacrifice of real estate, or undue pressure in the collection of mortgages." That some of the said heirs at law of the said testator claim that the lands and premises whereof the said Daniel Price, died seized, situate in the said County of Essex, descended to the above named heirs at law of said testator, subject to such inchoate rights and interests as the husbands and wives respectively of said heirs at law may have by reason of their marriage relations, and that the legatees in said will named, or some of them claim and will claim, that in and by said will, it was the intention of the said testator to convert his whole estate, excepting such as is therein specifically devised, and including his real estate situate in the said County of Essex, into cash, and to distribute the same among the persons and corporations designated in said will and codicils as devisees in the amounts and proportions therein set forth and provided, and your orator shows that he is in doubt in regard to his rights and duties in relation to the matter; that it is uncertain by the terms of the said will and codicils, whether the said Daniel Price intended that his real estate situated in the said County of Essex should be devoted to the payment of the legacies mentioned in said will and codicils, and that if it should be determined that he did so intend, it is uncertain whether your orator has a power of sale of the said lands under the terms of the said will; and that your orator cannot make sale of the said lands without the aid, advice and direction of this Court in relation thereto, in as much as no one could be found who would be willing to take the title thereto and pay to your orator anything near the value thereof. And your orator prays the advice and direction of this Honorable Court in that matter."

One of the questions in said bill raised was, whether by said will and codicils, the testator died intestate as to the real estate of which he died seized, located in New Jersey, or intended that his real estate situated in New Jersey should be converted into money, and the same be distributed among the persons and corporations designated in said will and codicils in the manner therein provided; and also whether said executor under the terms of said will and codicils had the power to sell said lands. An answer was filed by the appellants, who are two of the testator's surviving brothers and heirs at law, claiming that the testator died intestate as to the New Jersey real estate; and answers were also made by the charitable corporations named as legatees, and at the hearing the Court ordered that the misnomers of some of the charitable institutions, legatees, be corrected; and further held that it was the intention of the testator to have the New Jersey real estate sold and converted into money, and distribution among the legatees named in the will and codicil, and the Court further directed that a cross bill be filed describing the property in question, which was done in due course by the German Theological School of Newark, New Jersey, one of the residuary legatees named, and from the decree (a copy of which is hereto annexed) taken thereon, this appeal is taken by the heirs at law aforesaid.

The cross bill, answers and decree are herewith presented.

In Chancery of New Jersey.

BETWEEN
MATTHIAS PRICE, Executor, etc., of
DANIEL PRICE, dec'd,
Complainant,
AND
HENRY PRICE, et al.,
Defendant.

*Cross bill of
the defendant
The German
Theological
School of
Newark,
New Jersey.*

The defendant, the German Theological School of Newark, New Jersey, in behalf of itself and of all the legatees named in the will and codicils of Daniel Price, deceased, hereinafter set forth, and who desire to avail themselves hereof and who contribute to the expenses of this proceeding by this, its cross bill, exhibited by leave of the Court, shows that Daniel Price, late of the City of Newark, in the State of New Jersey, departed this life on or about the twenty-third day of April, one thousand eight hundred and ninety-two, having first made, published and declared his last will and testament in writing, bearing date the sixth day of May, eighteen hundred and seventy-five, in due form of law to pass the title to real and personal estate and two codicils thereto, each executed in like manner, the first thereof dated the twenty-second day of February, eighteen hundred and eighty-one, and the second dated the sixteenth day of July, eighteen hundred and eighty-nine, which said last

will and codicils were after the death of the said testator, and on the fifth day of May, eighteen hundred and ninety-two, duly admitted to probate, by the Surrogate of the said County of Essex, and letters testamentary thereon were duly issued to the complainant, who has taken upon himself the burden of the execution of the said will and codicils, and the administration of the estate of the said deceased, and that he is now engaged thereon, the testator's wife Charity, the executrix in said will named, having departed this life long before her said husband, and Charles S. Haines, as executor named in said first codicil, having neither renounced his executorship nor accepted the duties of said office.

2. And our orator further shows that the following is a copy of the last will and testament of the said Daniel Price, and of the two codicils thereto annexed, to wit:

[Here followed a copy of the last will and testament and the codicils thereto, as set out in the original bill, *supra*.]

3. That the said Daniel Price died seized of certain pieces or parcels of real estate, situate in the Counties of Essex and Union, in the State of New Jersey, which are particularly described, as follows: * * * * * [Descriptions omitted.]

This defendant further alleges that in addition to the tracts of land hereinbefore particularly described, it has reason to believe the fact to be that the said Daniel Price died seized of other lands and premises situate in the Counties of Essex and Union, and in other places, but this defendant up to this time has not been able to learn the situation or boundaries of any of such parcels and tracts of land, but begs leave to amend this cross bill if at any time during the continuance of this suit it should obtain such information.

4. This defendant further alleges and contends that in and by his said last will and testament and his codicils thereto, according to the true intent and meaning thereof, the said Daniel Price intended to and did in effect direct that the above particularly described parcels of land and

premises, and each of them should be sold by his executor and converted into money, and the proceeds thereof distributed among certain legatees particularly named in the said will and codicils, of whom the defendant is one.

And this defendant further alleges that the said will and codicils contain ample power and authority, authorizing and empowering the said executor to sell said premises and to give a good and perfect title thereto for the purpose aforesaid.

5. This defendant further shows that this cause came on to be heard before the Court on the third day of May instant upon the bill, answers, replications previously filed herein and testimony then produced, and that upon the hearing thereof the Court expressed a doubt as to the power of this Court, in the then condition of the pleadings, to make such a decree as was requested by this defendant, directing the executor to sell said real estate and to apply the proceeds thereof toward the payment of the legacies and bequests named in the said will and codicils, and suggested the exhibition of this cross bill.

6. That this defendant is the person named as one of the legatees receiving specific legacies, and also as one of the two residuary legatees in said will and codicils, and that upon the settlement of said estate, one-half of all the residue of the proceeds after the sale of the said real estate will belong to this defendant.

7 That the heirs at law of the said Daniel Price are as follows: Henry Price, whose wife's name is Marion Price; Thompson Price, whose wife's name is Frances Price, and Matthias Price, the complainant, whose wife's name is Emily C. Price, all of the City of Newark; that William W. Price, deceased, a brother of said testator, died in the year eighteen hundred and ninety, leaving him surviving four children, all of whom are now living, excepting Mary L. Fowler, hereinafter named, viz: Elizabeth M. Price, who is unmarried, of Allentown, in the County of Monmouth, in this State; Sarah W. Porter, a widow, of Bordentown, in the County of Burlington, in this State, and Annie L. Fowler, the only child of Mary L. Fowler, deceased, of Allentown aforesaid, and J. Wilbur Price, whose wife's

name is Hannah C. Price, of the City of Plainfield, in this State; that David Price, deceased, a brother of said testator, died in the year eighteen hundred eighty-five, leaving him surviving eight children, all of whom are living, viz: Charles C. Price, whose wife's name is Helen T. Price, of the City of Brooklyn, in the State of New York; Mark A. Hopkins, wife of Augustus C. Hopkins, of the City of Newark aforesaid; Emma A. Bond, wife of Theopolis Bond, of the City of Plainfield aforesaid; Jane C. Bruen, wife of William Bruen, of the City of Newark aforesaid; Thomas E. Price, whose wife's name is Jane S. Price, of the City of Newark; Anna A. Gould, a widow, of the said City of Newark; D. Frank Price, whose wife's name is Margarette B. Price, of the City of Boston, in the State of Massachusetts, and Adele S. Langstroth, wife of James Langstroth, of the said City of Newark; that Phebe Burnham (afterwards Phebe Kemp), deceased, a sister of said testator, died many years ago; that said Phebe Burnham has six children, viz: Mary Ann Sowers, Eliza Burnham, Jane Richardson, John Burnham, Daniel Burnham and Phebe Taylor, three of whom are still living, viz; Eliza Burnham, who is unmarried, of Hartwell, in the County of Hamilton, State of Ohio; Daniel P. Burnham, whose wife's name is Jennie H. Burnham, of the City of Cincinnati, in the State of Ohio, and Phebe Taylor, who is a widow, of Hartwell aforesaid; that the said Mary Ann Sowers died some years since, leaving two children, both living, viz: Harriet B. Marot, wife of Benjamin Marot, of the City of Dayton, in the State of Ohio, and Emma B. Moore, wife of William J. Moore, of the said City of Newark; that the said Jane Richardson died several years ago, leaving three children, all of whom are living, viz: Nettie Tuchfarber, wife of Frank Tuchfarber, of Cheviot, in the County of Hamilton, State of Ohio; Scott Richardson, whose wife's name is Jennie W. Richardson, of Elmwood, in the County of Hamilton, State of Ohio, and Hattie Hare, wife of Edward Hare, of the said City of Cincinnati, and the said John Burnham died some years ago, leaving issue, and that the said named living brothers of said testator and the descendants now living of deceased brothers and sisters of said

testator are the heirs at law of the said Daniel Price, deceased.

This defendant further alleges that it has caused the most careful inquiries to be prosecuted in relation to the names and residences of the descendants of Phebe Burnham, afterwards Phebe Kemp, the deceased sister of said Daniel Price, but that owing to the fact that she died many years ago at the west, and that the brothers of said Phebe Burnham had to a large extent lost sight of her and all of her family, many years ago, it has been impossible for this defendant to ascertain with accuracy the names and residences of the heirs, devisees or personal representatives of the said Phebe Burnham, afterwards known as Phebe Kemp, but that all of said heirs, devisees, or personal representatives of the said Phebe Burnham, afterwards Phebe Kemp, are proper parties defendant to this suit.

8. This defendant further shows that there will not be sufficient proceeds of the personal property belonging to the said estate to pay one half of the amount of the specific legacies named in said will, and that unless the above described real estate is sold and its proceeds applied by the executor in payment of said legacies, that the same will remain unpaid to a large extent. And this defendant alleges that fact to be that there will be no funds whatever to go to the residuary legatees referred to in said will and codicils unless the said real estate is sold and the proceeds thereof applied as aforesaid by the said executor.

9. That this defendant has applied to the said Matthias Price, executor as aforesaid, and requested him to proceed to sell said real estate hereinbefore particularly described, and after the settlement of said estate to apply balance of the assets thereof first toward the payment of the said specific legacies, and secondly to pay the balance thereof to this defendant and "The Trustees of the Theological Seminary of the Presbyterian Church" at Princeton, as directed by said will; but that the said executor has refused and still does refuse and neglect to sell the said premises, stating to this defendant as an excuse for his said refusal and neglect that he is not empowered by the said will to sell and convey the said premises or to receive and appropriate the pro-

ceeds thereof as aforesaid, and cannot make a valid title thereto without the special order and decree of this Court.

10. This defendant further shows that the heirs at law of the said Daniel Price above named, to wit ; Henry Price, Thompson Price, Matthias Price, Elizabeth M. Price, Sarah W. Porter, Annie L. Fowler, J. Wilber Price, Charles C. Price, Mary A. Hopkins, Emma A. Bond, Jane C. Bruen, Thomas E. Price, Anna A. Gould, D. Frank Price, Adele E. Langstroth, Eliza Burnham, Daniel P. Burnham and Phebe Taylor, Harriet P. Marot, Emma B. Moore, Nettie Tuchfarber, Scott Richardson, Hattie Hare, and the heirs, devisees, or personal representatives of Phebe Burnham, known as Phebe Kemp, deceased, are proper defendants to this bill, and that upon the death of said Daniel Price they all claim that the premises hereinbefore particularly described were not devised in and by said will, but that the said Daniel Price died intestate as to the same, and that they passed direct by descent to them as such heirs at law, and that they are now the proper owners and entitled to the possession thereof.

This defendant further shows that Marion Price, as the wife of Henry Price ; Frances Price, as the wife of Thompson Price ; Emily C. Price, as the wife of Matthias Price ; Hannah C. Price, as the wife of J. Wilbur Price ; Helen T. Price, as the wife Charles C. Price ; Jane S. Price, as the wife Thomas E. Price ; Margarett B. Price, as the wife of D. Frank Price ; Jennie J. Burnham, as the wife of Daniel P. Burnham, and Jennie W. Richardson, as the wife of Scott Richardson, each claim to have an inchoate right of dower in and to the said premises hereinbefore described, and that Samuel F. Fowler, as the husband of Mary L. Fowler, deceased, claims to have as tenant by the courtesy some estate, title or interest, in and to said premises, and that Augustus C. Hopkins, as the husband of Mary A. Hopkins ; Theophilus Bond, as the husband of Emma A. Bond ; William Bruen, as the husband of Jane C. Bruen ; James Langstroth, as the husband of Adele L. Langstroth ; Benjamin Marot, as the husband of Harriet B. Marot ; William J. Moore, as the husband of Emma B. Moore ; Frank Tuchfarber, as the husband of Nettie Tuchfarber ; Edward Hare, as the

husband of Hattie Hare, each claim to have as tenant by the courtesy some estate, title or interest, in and to the said premises.

11. And this defendant further shows unto your Honor that it is without remedy in the premises at and by the strict rules of the common law, and can only have relief in in this Honorable Court, where matters of this sort are properly cognizable and relievable.

appropriate prayer for desired relief.

F. G. BURNHAM,

Solicitor for and of counsel with said defendant.

In Chancery of New Jersey.

BETWEEN
MATTHIAS PRICE, Executor, &c., of
DANIEL PRICE, dec'd,
and
HENRY PRICE, et. als.,

Complainant,
Defendants.

*On Cross Bill
of the defendant
The German
Theological
School of New-
ark, New Jersey.*

The joint and several answers of Henry Price and Thompson Price, two of the defendants to the cross bill of complainant, of The German Theological School of Newark, New Jersey.

These defendants, to so much and such parts of said cross bill as they are advised is material for them to make answer unto, answering say :

That they admit that the said Daniel Price departed this life at or about the time in said cross bill named, having made, published and declared his last will and testament in writing, and codicils thereto, which afterwards, and on or about the fifth day of May, eighteen hundred and ninety-two, was duly admitted to probate in the Surrogate's office of the County of Essex, and that the complainant before named, has taken upon himself and is now engaged in executing the burthen of his duties as such executor.

2. And these defendants further answering say that they believe that a true copy of said will and codicils is set out in the second clause of said cross bill, but for greater certainty, they ask that certified copies thereof be produced at the hearing.

3. And these defendants further answering likewise admit that the said Daniel Price died seized of several parcels of real estate located in the State of New Jersey, most if not all of which are described in said cross bill; but these defendants deny that the said testator by his said last will and testament and codicils, intend to or did, in effect, direct that the said real estate should be sold by his executor and converted into money and the proceeds thereof distributed among certain legatees particularly named in the said will and codicils; and they likewise deny that said will and codicils contain ample power and authority for the said executor to sell said premises and to give a good and perfect title thereto for the purposes aforesaid; but on the contrary, these defendants say and insist that the testator died intestate as to all of said real estate; that the same is not referred to expressly or impliedly in said will; that no power of sale of the whole, or in any part thereof, is by said will or codicils vested in said executor; and these defendants insist that by a proper construction of said will and codicils, it must be decreed that the said lands and premises were not included in and did not pass thereby, nor was the said executor given any power or authority whatever over the same.

4. These defendants further answering admit that a hearing was had at or about the time in said cross bill named upon the pleadings heretofore filed in this cause, and that upon such hearing, the Court expressed a doubt as to the power of this Court in the then condition of the pleadings, to make a decree directing the executor to sell said lands for the payment of the legacies named in the said will and codicils.

And these defendants likewise admit that they believe that the legatees and heirs at law of the said Daniel Price, deceased, are correctly stated in said cross bill, although some of the persons there named as heirs at law,

of the said testator, are entirely unknown to these defendants.

5. These defendants further answering say that they are ignorant as to whether there will be sufficient proceeds of the personal property belonging to the said estate to pay the whole or any portion of the specific legacies named in said will, and they are likewise ignorant as to what extent, if any, such legacies will remain unpaid, unless said real estate be sold, and its proceeds applied to the payment thereof; but they again deny that such real estate should be so applied, and claim that the same belongs to the heirs at law of the said testator as aforesaid. All of which matters and things these defendants are ready to aver, maintain and prove, as this Honorable Court shall direct, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

McCARTER, WILLIAMSON & McCARTER,

Solicitors and of counsel with said defendants.

In Chancery of New Jersey.

BETWEEN
MATTHAIS PRICE, Executor, &c., of
DANIEL PRICE, deceased,
Complainant,
and
HENRY PRICE, et. als.,
Defendants.

On Bill, &c.

On Cross Bill.

The answer of Matthais Price (who as executor of the last will and testament of Daniel Price, deceased, is complainant in the above stated cause), one of the defendants named in the cross bill of the defendant. The German Theological School of Newark, New Jersey, exhibited against this defendant and others.

1. This defendant answering says and admits that Daniel Price, late of the City of Newark, in the State of New Jersey, departed this life on or about the twenty-third day of April, eighteen hundred and ninety-two, having first made and published his last will and testament in writing, with the codicils thereto, of the date, purport and effect, respectfully, as in the said cross bill set forth; and that said last will and codicils were duly admitted to probate by the Surrogate of the said County of Essex and letters testamentary thereon duly issued to said complainant, and that said complainant has taken upon himself the burthen

of the execution of said will and codicils and the administration of the estate of the said deceased, and is now engaged thereon.

2. And this defendant further answering admits that the said Daniel Price died seized of those certain pieces or parcels of real estate situate in the Counties of Essex and Union, in the State of New Jersey, in the said cross bill particularly described.

3. And this defendant further answering admits the allegation of the defendant, The German Theological School of Newark, New Jersey, in said cross bill set forth, that in and by his said last will and testament and his codicils thereto, according to the true intent and meaning thereof, the said Daniel Price intended to and did in effect direct that the parcels of land and premises in said cross bill particularly described, and each of them should be sold by his executor and converted into money, and the proceeds thereof distributed among certain legatees particularly named in the said will and codicils, of whom said defendant, The German Theological School of Newark, New Jersey, is one, but this defendant denies that the said will and codicils contain ample power and authority authorizing and empowering the said executor and perfect title thereto for the purposes aforesaid.

4. This defendant further answering admits that this cause on to be heard before the Court on the third day of May last upon the bill, answers and replications, filed in said cause, and the testimony produced at said hearing, and that the Court upon said hearing expressed a doubt as to the power of this Court in the then condition of the pleadings to make such a decree as was requested by said defendant, The German Theological School of Newark, New Jersey, directing the said executor to sell said real estate, and to apply the proceeds thereof toward the payment of the legacies and bequests named in the said will and codicils, and suggested the exhibition of said cross bill.

5. And this defendant further answering admits that said defendant, The German Theological School of Newark, New Jersey, is the corporation named as one of the legatees receiving specific legacies, and also as one of the two resid

uary legatees named in said will and codicils, and that upon the settlement of said estate one-half of all the residue of the proceeds after the sale of the said real estate will belong to said defendant, The German Theological School of Newark, New Jersey.

6. And this defendant further answering admits that the persons named in said cross bill as the heirs at law of the said Daniel Price are in fact the heirs at law of the said Daniel Price, deceased, and that the husbands and wives respectively of said heirs at law are truly named in said cross bill so far as is known to this defendant, and said defendant, The German Theological School of Newark, New Jersey.

7. And this defendant further answering admits that there will not be sufficient proceeds of the personal property belonging to the said estate to pay one-half of the amount of specific legacies named in said will, and that unless the said real estate is sold and its proceeds applied by the executor in payment of said legacies; that the same will remain unpaid to a large extent, and admits the fact to be that there will be no funds whatever to go to the residuary legatees referred to in said will and codicils, unless the said real estate is sold and the proceeds thereof applied as aforesaid by the said executor.

8. And this defendant further answering admits that the defendant, The German Theological School of Newark, New Jersey, has, by its counsel, applied to said executor and requested him to proceed to sell said real estate, and after the settlement of said estate to apply the balance of the assets thereof first toward the payment of the said specific legacies, and secondly, to pay the balance thereof to said defendant, The German Theological School of Newark, New Jersey, and "The Trustees of the Theological Seminary of the Presbyterian Church" at Princeton, as directed by said will, and that the said executor has refused and still does refuse to sell said lands, stating as a reason for his said refusal that he is not empowered by the said will to sell and convey the said premises or to receive and appropriate the proceeds thereof as aforesaid, and that he cannot make a valid title thereto without the special order and decree of this Court.

9. And this defendant further answering says that while it may be true that some of the said named heirs at law of said Daniel Price, deceased, claim that the lands and premises in said cross bill particularly described were not devised in and by said will and codicils, and that the said Daniel Price died intestate as to the same, and said lands passed directly by descent to the heirs at law of said Daniel Price, and that said heirs are the proper owners thereof and entitled to the possession of the same, yet, it is not true that this defendant makes any such claim, nor is it true that the defendant, Emily C. Price, the wife of this defendant, claims to have an inchoate right of dower in and to the said land and premises or any part thereof.

And this defendant joins with the said defendant, The German Theological School of Newark, New Jersey, in this prayer that the lands and premises in said cross bill particularly described and any real estate of which the said Daniel Price, died seized, excepting that referred to in said will and situate in the County of Marquette, in the State of Michigan, may be decreed by this Honorable Court to have been directed by the said Daniel Price, deceased, in and by his said last will and testament and the said codicils to be sold by said executor to pay the legacies mentioned in the said will and codicils, and that a decree may be made authorizing and directing Matthias Price, the executor of the said Daniel Price, deceased, to sell and convey the said real estate and premises and every part thereof, and the proceeds thereof to apply toward the payment of the said legacies, and that such other and further order or decree may be made in the premises as shall be just.

All of which matters and things this defendant is ready to maintain, aver and approve as this Honorable Court shall direct, &c.

DAVID A RYERSON,

Solicitor and of counsel with Matthias Price, defendant
in said cross bill.

To these answers a replication was duly filed and hearing had before Vice-Chancellor Pitney.

On such hearing it is admitted that the following facts appeared: The testator died April 23, 1892, leaving last will dated May 6, 1875, and codicils dated respectively, February 22, 1881, and July 16, 1889. The will and codicils were duly proved before the Surrogate of the County of Essex, by him admitted to probate, and no appeal is pending therefrom.

The will and codicils were written by the testator himself, who was born in 1799, and who was therefore over 92 years of age when he died. The testator left no descendants, and his wife died in 1882, between the execution of the first and second codicils. Three brothers, however, survived him, all of whom were over 80 years of age, and one of whom is the sole acting executor, who was likewise his partner in a business enterprise. The most cordial relations existed between the testator and his surviving brothers, all of whom lived in Newark, where the testator lived and died. Two of these surviving brothers are very poor, and were frequent recipients of bounty from the testator during his life. The only other relations of the testator are some twenty-five nieces and nephews, children of the surviving brothers, and of a deceased sister and two deceased brothers, who live scattered throughout the country.

The testator possessed a strong and vigorous mind up to the time of his death. He was a religious man, for years an elder in the Third Presbyterian Church in Newark. He had also in his lifetime given generously to some of the institutions made beneficiaries by his will, particularly The German Theological School of Newark, N. J. He was a man of great intelligence, strength of mind and independence, and boasted of his not needing a lawyer to dispose of his property.

The personal estate was inventoried at \$67,533.63, upon which there has been a small shrinkage (about made good however by income) and besides some real estate in Michigan, to which special reference is made in the will and codicils, he died seized of his homestead property where he

had live a great many years, and two other houses on Mulberry Street in the City of Newark, and a farm of about 37 acres on the outskirts of the city, which had in 1890 become more valuable by reason of the construction and operation through it of the Lehigh Valley Railroad Company's main line to New York, making it accessible.

The charitable bequest in the will and codicils amount to \$75,000.00, against \$32,000.00 required to pay the pecuniary legacies to brother, nieces and nephews.

It further appeared in the case that between 1875 and 1881, the testator lost, or expected to lose, a considerable amount of his personal property, while no shrinkage had occurred in the value of his New Jersey real estate during the same time.

Opinion.

MATTHIAS PRICE, Executor, &c., of
DANIEL PRICE, dec'd,
vs.
HENRY PRICE, et. als.

PITNEY, V. C. (Orally):

I am certainly very much obliged to counsel for the argument he has made, and having recently had occasion to go through the line of cases which he has cited, I perhaps was better able to appreciate it, and am sorry to say that for the same reason he did not convince me that he was right in this case.

I have looked at this will carefully, and have compared it in my mind with the case of *Bragaw v. Bolles*, recently decided by me, and also with the cases there cited and the principles illustrated, and I come to the conclusion that in this case the legacies are charged on the lands. I can state very briefly my reasons, and give the parties an opportunity to take an appeal much quicker than if I took the case home and wrote out my views at length.

In the first place the very first devise that the testator makes, is, "I give, devise and bequeath to my wife Charity, all of my real and personal estate,"—that is a complete devise of all his property, real and personal—"to have and

to hold during her natural life," &c., "and dispose of at any time she may deem advisable, by will or otherwise, but should she die intestate then I direct distribution of *my property* to be made according to the following bequests."

Now, that direction of distribution of his property to be made "according to the following bequests," must, as it seems to me, be held to refer to the property he has just spoken of, that is, all his "real and personal estate." That shows what property he had in his mind and intended should be distributed by the bequests he afterwards made.

Now, he goes on and makes bequests, and in every one he uses the words "give and bequeath," except where he gave land in Michigan. After that he uses the words "I give and bequeath" in all these fifteen or twenty bequests, and counsel made a strong argument based on the use of those words, but I think it fails entirely when we consider that what he gave was money. It was perfectly proper to use those words, even though that money was the result of the sale of land.

Now, after giving those bequests he uses this language: "Should *my property* fall short in the settlement of my estate of the within named bequests,"—What property? He had in the beginning of his will used the words—"all of my real and personal property" as I have already said, and he wished the—"distribution of my property according to the following bequests." Now, when he spoke of—"Should my property fall short in the settlement of my estate of the within named bequests,"—he referred to the same property that he had referred to in the second item of his will, where he had given and devised all his real and personal estate to his wife; so that I have not any doubt that the property he referred to in that clause was real and personal property both. He goes on then and uses this language: "Should my property fall short in the settlement of my estate of the within named bequests, I wish the legacies to individuals, the professorship to the College at Princeton, the Old Ladies' Home of Newark, and German Theological School, to be paid in full and deductions made from the various bequests made to benevolent societies,"—it means other bequests to benevolent societies

—"in proportion to the amount given to each, and should the amount of *my estate* exceed the bequests, then I wish the Theological Seminary at Princeton, and German Theological School in the care of the Newark Presbytery, to be made my residuary legatees in equal shares."

Now, what did he mean by the words "my estate?"

Now, there are abundant authorities for the position that where a person uses the words "my property" and "my estate," and he has immediately before that been dealing with real estate as well as personality, that by those words he means real and personal estate. A leading case in that line is *Laing v. Barbour*, 119 Mass. 523, referred to in *Bragaw v. Bolles*. And in order to arrive at the conclusion that by the words "my estate" and "my property" in this last clause—the residuary clause here referred to—was meant real and personal estate, we have by no means to go anything like as far as the Court went in *Laing v. Barbour*, in which I think they went too far. But the same line of reasoning which led to the conclusion that was arrived at there, leads to the same conclusion here.

Then we go on, and in the first codicil to his will he says: "I hereby expressly confirm my former will dated 6th day of May, 1875, except so far as the disposition of my property is changed by this codicil." Now, he uses the general phrase "property" there; and the presumption is that he means *the* property that he had spoken of in his will, and there he spoke of real and personal property both.

Then we come to the second or last part of it, and to the last clause of it. I confess I don't see how it is possible to escape the effect of that. I listened attentively and with great satisfaction to the very ingenious and instructive argument of Mr. McCarter on that subject, and I am unable to adopt his solution of it. "And lastly, as I have no debts or demands against my estate, I hope the legacies may be paid by my executors without such waste"—(or "haste," whichever you may choose to make it—say "waste" is a mistake for "haste"—"as will call for large sacrifice of real estate or undue pressure in the collection of mortgages." I think it would be a strained construction to

say that the sacrifice of real estate there did not refer to the sacrifice in its sale in order to pay these legacies, or that it referred only to the sacrifice of real estate which should be sold under foreclosure—other people's real estate. It seems to me that the natural construction to put upon that language is that it referred to the real estate of the testator which he expected to be sold.

Therefore, I think that the testator meant that his real estate should be included in the property which was to go to pay these bequests. But the difficulty which I stated some time ago has not yet been spoken of by counsel, and if they wish to be heard I will hear them, and that is whether or not under the implication contained in this last codicil there is a power of sale in the executors on which they can go on and sell and give a good title, or whether or not it is not best that they should file a cross bill, to which, of course, all the heirs at law must be made parties, by which the property may be ordered sold. It is not clear that there is not a power of sale, the language is: "And lastly, as I have no debts or demands against my estate I hope the legacies may be paid by my executors without such waste as will call for large sacrifice of real estate or undue pressure in the collection of mortgages." A very ingenious argument may be made, and I have no doubt counsel have in their briefs a very ingenious argument in favor of the position that that gives a power of sale. But *cui bono*, why ask a purchaser to take title under that, when, if my view of the will is right, the property can be sold under a bill in which some of the legatees or the residuary legatee shall be actors, and a perfect title made? There the sale will be not by the executors as such under the will, but by the Court—by decree of the Court that it be sold to pay these legacies, and so much only of it shall be sold as is necessary for that purpose, and no question could be made about the title at all.

Now, there is one other thing bearing upon the construction of this will, and that is the amount of property. I may as well mention it. It is clear that there is a deficiency of personal estate to pay these legacies—a very large deficiency, and probably to satisfy them it will re-

quire nearly or quite all the real and personal property. There has been no valuation of the real estate, but the personal property only amounted to \$60,000, and the legacies are over \$100,000. Now, the testator knew that; he was a man of intelligence, and yet he gave these large legacies. Now, while that, standing by itself, as has been decided in this State, is not sufficient, except in the case where there are no heirs at law—is not of itself sufficient to hold that the legacies are charged on the real estate, yet it is a very strong circumstance, as I think was said by Judge Dodd in his opinion in *Johnson v. Poulson*—a very strong circumstance to indicate that the testator did intend that his real estate should pay his legacies. In addition to what I find on the face of the will I feel that it is in confirmation of my view.

I therefore hold that these legacies are charged on the land, and that the legatees have a right to have the land sold to pay them. I hold, of course, that there is no doubt as to the identity of the benevolent institutions, and the bequest in that one case may be given to that institution—Board of Church Erection.

In Chancery of New Jersey.

BETWEEN

MATTHIAS PRICE, EXECUTOR, &c., of

DANIEL PRICE, deceased,

Complainant.

and

HENRY PRICE, et. als.,

Defendants.

*On Cross Bill,
&c. Decree.*

This cause coming on to be heard on the cross bill filed by the defendant the German Theological School, of Newark, New Jersey, in the presence of David A. Ryerson, of counsel with the complainant, and of McCarter, Williamson & McCarter, of counsel with the defendants, Henry Price, Thompson Price and Francis Price, his wife, and of Frederic Adams, Esq., of counsel with defendants the Trustees of Liberia College and the trustees of Donations for Education in Liberia, and of Frederick G. Burnham, Esq., of counsel with defendants The German Theological School of Newark, New Jersey, The American Bible Society, the Board of Home Missions of the Presbyterian Church in the United States of America, The Board of Foreign Missions of the Presbyterian Church in the United States of America, American Seamen's Friend Society, The Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America, The

American Tract Society and the Trustees of the Presbyterian Board of Publication and Sabbath School work, and of Henry B. Taylor, Esq., of counsel with defendants The Newark Female Charitable Society, Hattie Hare and Nettie Tuchfarber, and of John A. Miller, Esq., of counsel with the defendant The Society for the Relief of Respectable Aged Women, the said defendant's cross bill having been heretofore ordered to be taken as confessed against the defendants Marion Price, Frances Price, Emily C. Price, Elizabeth M. Price, Sarah W. Porter, Samuel F. Fowler, J. Wilber Price, Hannah C. Price, his wife; Charles C. Price, Helen T. Price, his wife; Mary A. Hopkins, Emma A. Bond, Theopolis Bond, her husband; Jane C. Bruen and William Bruen, her husband; Thomas E. Price and Jane S. Price, his wife; Anna A. Gould, D. Frank Price and Margarette B. Price, his wife; Adele S. Langstroth and James Langstroth, her husband; Eliza Burnham, Daniel P. Burnham, Jennie J. Burnham, his wife.; Phebe Taylor, Harriet B. Marot and Benjamin Marot, her husband; Emma B. Moore and William J. Moore, her husband; Frank Tuckfarber, Scott Richardson and Jennie W. Richardson, his wife; Edward Hare and the heirs, devisees of personal representatives of Phebe Burnham, known as Phebe Kemp, and that Allan McDermott, Esq., has been appointed the guardian *ad litem* of the infant defendant Annie L. Fowler, and has entered an appearance for said infant defendant, to this suit, and the pleadings having been read, the depositions of witnesses taken, the exhibits produced, considered and counsel heard thereon, and it appearing to the Court that this is a proper case for the advice, aid and direction of the Court, to the executor of the last will and testament of Daniel Price, deceased, as to his duty in administering the estate and for the construction of the said will.

It is on this twelfth day of October, in the year of our Lord, one thousand eight hundred and ninety-three, on motion of said counsel of the defendant, The German Theological School of Newark, New Jersey, by his Honor Alexander T. McGill, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chan-

cellor by virtue of the power and authority of this Court, does hereby order, adjudge and decree that Daniel Price, named in the cross bill or the defendant, The German Theological School of Newark, New Jersey, and late of the City of Newark, died seized of certain real estate situate in the Counties of Essex and Union, respectively, in the State of New Jersey, particularly described in the cross bill filed in this suit.

And it is further ordered, adjudged and decreed that it was the intention of the said Daniel Price, deceased, the testator named in said will and codicils, to have his whole estate, both real and personal (remaining after the death of his said wife intestate), excepting such as is in said will specifically devised, and including all the real estate whereof he died seized, situate in the State of New Jersey, converted into money and the same distributed among the persons and corporations designated in said will and the codicils thereto, as legatees, in the amounts and proportions therein set forth and provided, and that the said testator did intend in and by his said will to authorize, empower and direct the executors therein named to sell all of the real estate and personal estate of which he should die seized or possessed as aforesaid, excepting the tract and parcel of pine timber land, situate and being in the County of Marquette, State of Michigan, specifically referred to in said will, and to apply the proceeds thereof in accordance with the terms and directions contained in said will and codicils; and this Court doth further order and direct Matthais Price, the executor of said will and codicils, who proved the same and accepted the burthen of the execution thereof, to sell in his discretion, either at public auction or private sale, the said real estate, situate in the Counties of Essex and Union, in the State of New Jersey, and to turn the said real estate into money, and after such sales shall have been confirmed, to execute and deliver good and sufficient deeds of conveyance therefor, and to distribute the proceeds thereof in accordance with the terms and directions of the decree made in this cause on the third day of June, one thousand eight hundred and ninety-three.

And it is further ordered, adjudged and decreed that the said executor, upon making sale of any of said parcels of property, and before executing any deed therefor, shall make his report to this Court, to be signed and verified by him, of such sale or sales, giving a description of the premises so sold and the price obtained therefor, and such statement to be filed with the clerk of this Court; and such sale or sales shall not be confirmed by this Court until after the said report has remained on file with the said clerk for at least ten days, and upon five days notice to the solicitors of record of the various defendants who have heretofore appeared in this suit, and that only upon the confirmation of said report, shall the executor execute and deliver his deed or deeds of conveyance of said premises.

ALEX. T. MCGILL,
C.

Respectfully advised,

H. C. PITNEY. *V. C.*

And it is further ordered that the said executor pay to the solicitor of the complainant and the solicitors of the defendants who have filed answers in this cause, the amounts of their costs respectively to be taxed by the clerk of this Court.

And it is further ordered that the complainant or either of the answering defendants may apply to this Court for further relief or instructions from time to time.

Respectfully advised,

H. C. PITNEY, *C. C.*,
ALEX. T. MCGILL.

In Chancery of New Jersey.

BETWEEN

MATTHIAS PRICE, Executor, &c., of

DANIEL PRICE, dec'd,

Complainant,

AND

HENRY PRICE, et. als.,

Defendants.

On Cross Bill.

Notice of Appeal

from Decree.

Henry Price, Thompson Price and Frances Price, three of the defendants to the cross bill filed in the above stated cause, hereby appeal from so much of the final decree made in this Court in said cause, as adjudged that it was the intention of the said Daniel Price, deceased, the testator named in said will and codicils, to have his whole estate, both real and personal (remaining after the death of his said wife intestate) excepting such as is in said will specifically devised, and including all the real estate whereof he died seized, situate in the State of New Jersey, converted into money and the same distributed among the persons and corporations designated in said will and the codicils thereto as legatees in the amounts and proportions therein set forth and provided, and that the said testator did intend in and by his said will to authorize, empower and direct the executors therein named to sell all of the real and personal estate of which he should die seized or possessed as

aforesaid, excepting the tract and parcel of pine timber land situate and being in the County of Marquette, State of Michigan, specifically referred to in said will, and to apply the proceeds thereof in accordance with the terms and directions contained in said will and codicils, and this Court doth further order and direct Matthias Price, the executor of said will and codicils, who proved the same and accepted the burthen of the execution thereof, to sell in his direction, either at public or private sale, the said real estate, situate in the Counties of Essex and Union, in the State of New Jersey, and to turn the said real estate into money, and after such sales shall have been confirmed, to execute and deliver good and sufficient deeds of conveyance therefor, and to distribute the proceeds thereof in accordance with the terms and directions of the decree made in this cause on the third day of June, one thousand eight hundred and ninety-three.

To the Court of Errors and Appeals in the last resort in all causes.

Dated November 19th, 1893.

McCARTER, WILLIAMSON & McCARTER,
Solicitors of Appellants.

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

ROBERT H. McCARTER,
of Counsel.

N. J. Court of Errors and Appeals.

BETWEEN

HENRY PRICE, et. als.,

Appellants,

AND

MATTHIAS PRICE, Executor, &c., of

DANIEL PRICE, dec'd, et. als.,

Respondents.

Petition of Appeal.

To the Honorable, the Court of Errors and Appeals, in the last resort of all causes.

The humble position of Henry Price, Thompson Price and Frances Price, his wife, the Appellants in the above stated cause, respectively shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Alexander T. McGill, Chancellor of the State of New Jersey, bearing date the twelfth day of October, in the year of our Lord, one thousand eight hundred and ninety-three, in a cause wherein the said Matthias Price, executor of Daniel Price, deceased, was complainant, and the said Henry Price and others were defendants on a cross bill filed therein by the defendant, The German Theological School of Newark, New Jersey, in this respect, to wit: that the said decree adjudged that the intention of the said Daniel Price, deceased, the testator named in said will and codicils to have his whole estate, both real and personal (remaining after the death of his

said wife intestate) excepting such as is in said will specifically devised, and including all the real estate whereof he died seized, situate in the State of New Jersey, converted into money and the same distributed among the persons and corporations designated in said will and the codicils thereto, as legatees, in the amounts and proportions therein set forth and provided, and that the said testator did intend in and by his said will to authorize, empower and direct the executors therein named to sell all of the real and personal estate of which he should die seized or possessed as aforesaid, excepting the tract and parcel of pine timber land, situate and being in the County of Marquette, State of Michigan, specifically referred to in said will, and to apply the proceeds thereof in accordance with the terms and directions contained in said will and codicils, and said decree did further order and direct Matthias Price, the executor of said will and codicils, who proved the same and accepted the burthen of the execution thereof, to sell in his discretion, either at public or private sale, the said real estate, situate in the Counties of Essex and Union, in the State of New Jersey, and to turn the said real estate into money, and after such sales shall have been confirmed to execute and deliver good and sufficient deeds of conveyance therefor, and to distribute the proceeds thereof in accordance with the terms and directions of the decree made in this cause on the third day of June, one thousand eight hundred and ninety-three. And your petitioners humbly appeal from that part of the decree of the Chancellor, which decrees as aforesaid upon the ground that the same is erroneous, for that the said decree should have adjudged that the said testator died intestate as to the lands and premises therein described, situate, lying and being in the State of New Jersey, and that the said testator did not intend in and by his said will to authorize, empower and direct the executors therein named to sell all of the real and personal estate of which he should die seized or possessed, excepting the tract and parcel of pine timber land, situate in the State of Michigan, and specifically referred to in said will, and that the proceeds thereof should be applied in accordance with the terms and directions contained in said

will and codicils, and that said Court should not have ordered and directed the said executor to sell in his discretion the said real estate, situate in the State of New Jersey, and to turn the same into money and apply the proceeds thereof in accordance with the terms and directions of said will, but it should have been by said decree, adjudged and ordered that the said lands and premises belonged and descended to the heirs at law of the said Daniel Price, deceased.

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

McCARTER, WILLIAMSON & McCARTER,

Solicitors for and of counsel with Appellants.

ROBERT H. McCARTER,

of Counsel.

Answers in appeal filed by the German Theological School of Newark, and by Matthias Price, Executor.

