HOLBROOKS' STEAM PRINTERY, 11 Mechanic St., Newark, N. J.

N. J. Court of Errors and Appeals.

EXECUTORS OF MOSES SAYRE, Dec'd,
Appellants,
AND
JAMES R. SAYRE, JR., AND AL.,
Respondents.

Brief for Appellants.

The question is as to the construction of the will so far as it disposes of the residue of the estate.

The provision in substance is (taking the will and codicil together) that the whole residue is given to the testator's son and grandson, Marcus Sayre and James Higbie, in trust, to invest it and to pay one-sixth to his grandchildren, the children of a deceased daughter, and to pay the interest of the remaining five shares to his children, in equal shares, during their lives, and upon the death of each to their respective children and their issue.

He then says: "It is my intention to make an equal division of my estate among my *children*, and to that end I direct that any obligations I may hold against either of them, and all advances I may have made to any of them and charged against them in my accounts, *shall constitute a portion of their respective shares*, and that they shall receive the income only on the residue of their respective shares, after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parents' share after such deductions shall have been made."

When this will was made he had five children living, all of whom had living issue.

He had also grandchildren, the children of a deceased daughter. None of his children were childless.

When he died the only child of his son James had recently died—leaving him the only one without issue, sixty-six years old with a wife living of about the same age.

He had obligations against James for much more than the amount of his share of the estate—each share being about $20,000.

The question is what is the duty of the executors as to the share of James?

Are they to collect from him the amount of his obligations in excess of his share, and pay no attention to the amount of such obligations constituting his share? Or is his share—made up of his unpaid obligations—to be looked after by the executors as part of their trust, and at his death to be collected as part of the residue to be disposed of under the provisions of the will?

The decree of the Chancellor is according to the first view. I claim for the executors that the second should be adopted.

It is a question of construction, in view of the circumstances of the testator's family and his affairs, which may, by the settled rules of construction, be looked into for the purpose of determining the objects of his bounty, or the quantity of interest intended to be given.

The lawful intent of the testator is the cardinal rule of construction. To that intent all inconsistent and incongruous expressions must yield, but the intent must be inferred from the whole and not from a part only.

O'Hara (Wigram), 30.

What was the controlling purpose of the testator?

That his estate—the whole residue and principal of it—should go to his *grandchildren.*

It is true that he took care to provide for his widow and his children, but the provision for the widow was entirely outside of the residue, and at her death her portion was to be held by the executors under the same trusts and go at last to the grandchildren. And the provision for his children was carefully restricted to the *income* of the estate, payable only during their lives.

The grandchildren were the special objects of his bounty, and his chief desire was that his estate should go undiminished to them. He was a very aged man, his children being advanced in years, and this disposition of his property was natural.

To this object the entire will as to the residue is directed.

As to the grandchildren whose mother was dead, he gave them their share at once.

As to the others, he carefully instructed the executors to keep and invest the shares until the death of the respective parents, and then to pay it over.

Every child then had children, and in the order of nature the purpose would have been accomplished without question. As each child died, having enjoyed the income, his children would take the principal.

But he guarded against the contingency that in fact occurred,

and provided that if any child died without *leaving* issue, his share was to sink into the residue and so go to the living grandchildren.

Thus far there is no difficulty; but he goes on to say that his intention is to make *an equal division of his estate among his children*, and *to that end* he directs that debts due from, and advances made to any of them, shall constitute a portion of their respective shares, and they shall receive the income only on the residue of the shares, and that the issue of each shall take the share after such deductions.

What did he mean by this provision? Certainly the words cannot be taken literally, for, in fact, he does not make an equal division of *his estate* among his children. Indeed, he does not give them his estate at all, but only the income of it for their lives. He gives it all to his grandchildren—and not equally, but *per stirpes*.

He must be held to have meant only that he intended to serve his children alike, and *to that end*—because he wanted to treat them with equality—he provided that those who had already received his bounty, or had diminished his estate by borrowing from him, should not share the income of the residue equally with the others, but should be made equal with them by treating their debts and advances as *constituting their shares pro tanto*, and drawing no income from the executors for the amount of these debts and advances so long as they chose to retain them.

And that their children should take the parents' share from the executors, less such debts and advances—presuming that the amount of the share composed of the debt and advances would be already in the parent's hands for his children.

Thus only would all the children be made equal in respect to the income of the estate, which alone is given to them, and thus only the purpose of the will in distributing the principal of the estate among the grandchildren *per stirpes* can be fulfilled.

So that if the estate had been just $100,000 in money and $20,000 in a bond and mortgage given by James, this bond and mortgage and the money would be the estate, amounting to $120,000, and each share would be $20,000.

The executors would pay $20,000 to the Higbie grandchildren. They would invest $80,000 and divide the income among the four children, excluding James. As to James they would do nothing—he has his share, and gets no income and pays nothing, so long as he lives. His $20,000 bond and mortgage *constitutes part* of the estate—in the very language of the will. When he dies it goes to his children, if he has any. In the words of the will, his child will "take the principal of the parent's share after such deductions shall have been made"—that is, in the case supposed, will take nothing from the executors, the whole share of the parent having been in his own hands, and going to the child through him.

But what if James leaves no child? Is this $20,000, constituting part of the estate of Moses Sayre, to go to whomsoever James chooses to leave it? Are the grandchildren never to get it? And is the cardinal purpose of the testator thus to be defeated by his kindness in lending James this large sum? And would *equality* among the children be thus promoted?

The will provides that if *any* child die leaving no issue his share shall sink in the residue and be distributed among the grandchildren.

It also provides that a debt from a child shall constitute his share *pro tanto*.

James' bond and mortgage constitute his share, and if he dies childless it must sink into the residue or the purpose of the testator fails.

If one not indebted dies childless, after enjoying the income for life, the executors must hold his $20,000 in trust for the living grandchildren. He cannot dispose of it by will, nor can it go to pay his debts.

If James can do so, it is *because* he was indebted to the estate in the whole amount of his share.

Is this the "end" which the testator sought to reach when he declared that it was his intention to make an equal division among his children, and *to that end* directed that debts due from them should constitute a portion of their shares?

It is not equality. The result is that four of his children get the income of their shares only, and the fifth gets his share of the income and the principal also—diminishing to that extent the provision for the grandchildren, the chief objects of the testator's bounty.

Again: Suppose James only owed $10,000. Then the executors would pay him the income of $10,000 during his life, and on his death $10,000, or half his share, would go to the grandchildren, and the other half would go to his legatees, or to pay his debts, and would be withdrawn from the estate given wholly to the grandchildren of the testator.

These are the results to which the decree of the Chancellor leads, and it is submitted that they are contrary to the intention of the testator, and subversive of the main purpose of the will, and that the decree takes from the chief objects of the testator's bounty one-sixth of his estate.

The decree defeats the purpose of the will in these particulars:

1. By the will, the ultimate destination of the whole principal —including the debts from children which constitute part of it—is to the grandchildren. By the decree, all of the estate which consists of these debts goes to the children owing them.

2. By the will, the children are to be equal in the enjoyment of the estate, and are to enjoy income only. By the decree' those who owe debts constituting part of the estate are to have these parts absolutely, thus creating palpable inequality.
3. By the will, the *one-fifth* part of the residue (case, page 2, line 28) is to be paid to the children of each child dying, and if he leaves no children this share—*one-fifth of the whole* —is to sink into the residue. By the decree, the whole share of James, and so much of the share of any as may consist of debts due from him, is *not* to sink into the residue, but to go to the indebted child's representatives or legatees absolutely.
4. By the will, the debts due from children are carefully made a part of the estate and put in trust, to allow the debtor to keep it for life, and then to go to his children, if he has any, and if not, into the residue. By the decree, these debts are substantially cancelled in the hands of the debtors, and do *not*, in effect, constitute part of the estate, as directed by the will.

Thus the will is defeated by the decree, and it ought to be reversed.

A. Q. KEASBEY,
Of Counsel with Appellants.

June 28, 1881.

ADDENDUM.

The Chancellor arrives at his conclusion from an interpretation of the will which is inconsistent with its terms.

He says "the testator declared that it was his intention to make an equal division of his property among his children, and that to that end they *were to be charged with* all advances made to them on that account, and charged against them in his accounts and any obligations he should hold against them."

And from this provision so stated he draws the inference that the share of any child is one-sixth of the estate, less the debts and advances; or, in other words, that each share is the difference only between the clear sixth and the debts and advances.

Now, if the statement were exact, the result might follow. If the testator really said that the debts due from a child were to be charged to him as part of his share, he might be supposed to have meant to cancel the debts absolutely.

But he said something quite different. His words are, "to that end I direct that any obligations I may hold against either of them, and all advances I may have made to any of them, and charged against them in my accounts, *shall constitute a portion* of their respective shares, and that they shall receive the income only on the residue of their respective shares after deducting the amount of such *advances*, and that the lawful issue of any child shall take the principal of their parent's share after such deductions shall have been made."

Here he plainly declares that the debts and advances shall be a part of the share, and being part of the share, he naturally directs that they shall receive the income only on the residue.

But he was not speaking of what was to be done with the share itself. He had in the preceding paragraph expressly provided that the whole share—distinctly calling it one-fifth of the residue after paying one-sixth of the whole to the Higbie grandchildren—should sink into the residue in case of any child's death without leaving issue. This is wholly inconsistent with the idea that these debts and advances, taken as part of the aggregate estate of which division was to be made into six parts, one for each set of grandchildren, were really not part of the estate at all, but given to the children.

Moreover, it should be observed that in speaking of what income the executors shall pay, and what the issue shall take, he speaks of deducting the *advances*—omitting to include the debts.

This may be claimed to be an inadvertence, but it is more reasonable and consistent to suppose that he spoke accurately, and meant that as to the debts—evidenced as they were by obligations—the interest would be paid to the executors and returned as part of the income of the share; while as to the advances no such course would be necessary or practical.

And also that when the parent came to die the advances should be deducted from the share of his issue, while the debts, being part of the estate, would be collected by the executors and go to make up the fund out of which the rest of the share should be made up.

If these views of the meaning of the will are correct, the view of the Chancellor that the share that was to sink into the residue was that on which the executors were to pay income, and that the parts of shares, after deducting debts and advances, were alone to be subjected to administration under the trust, cannot be sustained.

It is confidently claimed that the interpretation of the will as a whole—with careful reference to its exact terms—must lead to

REPLY TO DEFENDANT'S BRIEF.

In reply to the brief of the defendant's counsel I have only to add, that his statement on page 5 that "the proposition that James R. Sayre, Jr., shall be bound to pay his whole debt to the estate and impoverish himself so as to enrich his nephews and nieces, is contrary to the whole tenor and to three express declarations of the will, and such a will would be most unnatural," is founded on a misconception of the position taken by the complainant. It is not claimed that James R. Sayre Jr., is bound to pay his debt constituting his share, nor to impoverish himself to enrich the grand children, but only that his debt shall, as the will provides, constitute his share, and that his share so constituted shall, if he dies childless, go as the other shares go, to the grand children, as the will also provides. He is not to impoverish *himself*, but to enjoy the income (or immunity from interest on his debt) while he lives; and, as the learned counsel says, this is "all that is valuable in it to *him*—all else is burden." But he is not to enrich his creditors or legatees, who may be strangers, by transmitting the share formed of his debt to the estate, to them by will or by the law of distribution, for this would be to pervert the express purpose of the will that the shares of all children, however constituted, shall go to the children of the others, if any one dies childless.

Whether it is the duty of the trustees to require security for debts constituting shares, during the life of the debtor, or whether they may leave them for action when death occurs and the share consisting of a debt comes to be distributed, is one of the questions which the complainant submits to the court for its instruction.

Much stress is laid on the provision of the will that "the lawful issue of any child shall take the principal of their parents' share *after such deduction shall have been made.*"

This is the necessary result when any such issue exists, and the provision is made for such contingency only. The testator had in mind the case of a child leaving issue and had no thought of reversing the provision just made for the case of one dying childless. He had already provided that when no issue remained, the parents' share which, in the case of a child indebted, must consist of the debt constituting it, should go, with the other shares otherwise constituted, to the grand children, and not to the indebted child's creditors or legatees.

Thus only can all the expressions of the will be harmonized and its purposes fulfilled.

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N. J. Court of Errors and Appeals.

MARCUS SAYRE, *et al.*, EXECUTORS, &c., OF MOSES SAYRE, &c.,
Appellants,
and
JAMES R. SAYRE, *et al.*,
Respondents.
} *On Bill, Answer & Proof.*

BRIEF OF FRED'K FRELINGHUYSEN.

The bill is filed for the construction of the will of Moses Sayre, deceased.

It appears by the will that Mr. Sayre provided first for his widow, secondly for his children, and thirdly for his grandchildren.

First. He gives to his widow the use of a house and pew, and an income of $1,000 per annum, which he charges on his whole estate for his life—she died before the testator.

Secondly. He gives the residue of his estate to his son Marcus, and to his grandson James Higbie, in trust.

Before considering the terms of the trust, it is well to observe that the testator had six children; one had died, leaving five children. The trustee, Marcus, was one of the five children, and of his share of the estate, James Higbie was made the sole trustee, excepting that Marcus was not to be his own trustee; his share is made subject to like trusts as were the shares of the other children who survived the testator.

Harriet Higbie died before the testator, and Marcus Sayre and James Higbie, trustees, were directed to pay over the one-sixth part of the testator's estate to her children. The trust upon which James Higbie held the share of Marcus, and upon which James Higbie and Marcus held the shares of the other four children, viz: Elizabeth, Mary, James and George, is by the will expressed as plainly as any other words can express it, and is as follows:

"It is my intention to make an equal division of my estate *among my children*, and to that end I direct that any obligations I may hold against either of them, and all advances I may have made to any of them and charged against them in my accounts, *shall constitute a portion of their respective shares, and that they shall receive the income only on the residue* of their respective shares after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parent's share *after such deduction shall have been made;*" the testator's care, after providing for his widow, is his children.

He realizes that his estate, and consequently the shares coming to his children, can suffer no diminution, if what any one of them owes him is at once paid out of that one's share. The payment of the debt is the best investment for the child who is indebted, and for the estate which is to be divided, and so he says that "any obligation I may hold against either of them, and all advances I may have made any of them and charged against them in my accounts, shall constitute a portion of their respective shares, and that they shall receive the income *only* on the residue of their respective shares after deducting the amount of such advances," such advances, according to the words of the will as are evidenced by obligation or by charge in the testator's accounts, and the issue of any child is only to take its parents' share after such deduction for advances evidenced by obligation or book account shall have been made; thus clearly instructed on what principles the estate is to be

settled, the trustees are directed to pay half yearly the income on the five one-sixth parts of the residue to the testator's children, Elizabeth, Mary, James, George and Marcus.

I can add no words making the trust plainer than are the words quoted as used in the will.

The will further provides "That if any of my children should die leaving no lawful issue, the share of such child to sink into the residue of my estate and be disposed of under the provisions of this my will."

James R. Sayre, one of the sons of the testator, had, when the will was made, one daughter, who died, and he has now no child or children; he had borrowed money from his father for which his father at his death held his obligation, and it is claimed that the executors shall collect of James R. Sayre the amount of such obligation, and pay the principal of the same on his death into the testator's estate, to be divided among the children of James R. Sayre's brothers and sisters. *The will three times says the executors shall do no such thing.*

a. The will says "I direct that any obligation I may hold against either of them, (his children,) and all advances I may have made to any of them and charged against them in my accounts, shall constitute a portion of their respective shares." That is to say, the debt of the child is to be given to the child or canceled, instead of the child having in the trustee's hands a fund created by his paying the debt upon which he is to receive the income.

b. The will says further that "the child shall receive the income *only* on the residue of their respective shares after deducting the amount of such advances."

If James R. Sayre has to pay into the fund his father's advances to him, why should he not receive the income thereon as well as if such payment was made by a stranger? There is no reason why he should not. This the will forbids, while if James R. Sayre had received the money from his father and was not required to repay

it, there is every reason why he should only receive the income on the balance of his share if any.

c. And again the will says that the grandchild "shall take the principal of their parents' share *after such deduction shall have been made*," and yet we are told that no deduction should be made.

James has no children, and it is claimed if he died without issue the whole of his share, without deducting the advances made by the testator on his obligation, would sink into the residue of the estate.

This cannot be so without violating the clear and repeated directions of the will. That part of James' share will sink into the residue of the estate which would go to his child, if he had one, on his decease, and no more. What would go to James' child, on his death, is stated in the will in these words: "And that the lawful issue of any child shall take the principal of their parents' share *after such deduction shall have been made.*" And the deduction referred to is for all advances made any child evidenced either by obligation or book account.

Let me now, in a word, answer the brief of the counsel of the executors.

His whole argument is based upon the position that it was the intent of the testator that his estate should go to his grandchildren; counsel says:

"What was the controlling purpose of the testator?" And then answers that it was "that his estate, the whole residue and principal of it, should go to his *grandchildren.*" Unfortunately for this corner stone of the learned counsel's argument, the testator in his will says, "It is my intention to make an equal division of my estate *among my children*," (State of the Case, p. 2, l. 38,) and to that end their obligations to me the testator, and the charges I the testator have made against them, shall constitute a part of their share and so be canceled, and their children only take the principal of their parents' share "after such deduction shall have been made."

The learned counsel says again that the construction given by the decree makes the will inequal, in this, a

child to whom the testator had made advances gets the principal, while one to whom he had not made advances gets only the income on the principal of his share, while the principal goes to his children.

If it be inequality, whose business is it if the testator so directs; can he not do what he will with his own?

But there is no inequality in the provision; a child who is out of debt and whose share of the estate is held in trust, so that he can receive the income, while any possible future creditors cannot reach the principal, and which at his death goes to his children, has all there is of the share of the estate that falls to him. All there is that is valuable in property is its use or its income, all else is burden. A child receiving his portion or such a trust is quite as much favored as one to whom the father says, "You shall only receive such part of your share that remains, if any there be, after you are charged with a debt you owe my estate."

The proposition that James R. Sayre, Jr., shall be bound to pay his whole debt to the estate and impoverish himself, so as to enrich his nieces and nephews, is contrary to the whole tenor and to three express declarations of the will; and such a will would be most unnatural.

James R. Sayre must suffer that part of his share of the estate which exceeds the advances his father had made him, to remain in the hands of the trustees, he receiving only the income thereon; if he died leaving children, the children taking the principal of their parents' share *after such deduction*, (that is deduction for obligations held or advances made by the testator,) *shall have been made.* And if he died not leaving children, the share his children would have taken sinks into the estate and goes to his nieces and nephews.

There is a claim, if possible, still stranger set up, which is, that from the share of Elizabeth a deduction shall be made for $1,400 which it is claimed she owes the estate. If a deduction should not, as they claimed, be made from James' share, how can it be made from the share of Elizabeth?

But while any obligation or any advance charged on the book account of the testator should be deducted from the share of the child so charged, the deduction from the share of Elizabeth should not be made because she did not owe the testator the $1400; it does not appear, in the testimony, that there was an obligation therefor held, or any such advance charged, and consequently does not come within the provision of the will, but it does appear in the complainants' testimony that the testator formerly held a mortgage for that amount on property in Pennsylvania, owned by the husband of Elizabeth, and several years ago assigned the same to her, making no entry thereof in his books and holding no obligation therefor.

Had the counsel who drew the will reversed the order of the two paragraphs in question, found on second page of the case, no one could have been found to doubt what the will meant. Reverse the paragraph and we first have the statement of what each child's share consisted, to wit, of one-sixth of the estate of which the child's own obligations shall constitute a part, and of what each grandchild's share consists, to wit, "of the parents' share after such deductions shall have been made." *Case*, p. 3, l. 5.

And now we have the provision directing what disposition shall be made of a child's share at death.

"It is my intention to make an equal division of my estate *among my children*, and to that end I direct that any obligations I may hold against either of them, and all advances I may have made to any of them and charged against them in my accounts, *shall constitute a portion of their respective shares, and that they shall receive the income only on the residue of* their respective shares after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parents' share *after such deductions shall have been made.*"

The will is so clear that argument cannot make it plainer.

DEFENDANTS' BRIEF,

In Answer to the Complainants' Reply.

N. J. COURT OF ERRORS AND APPEALS.

MARCUS SAYRE *et al.*, EXECUTORS, &c.,
OF MOSES SAYRE, &c.,

Appellants,

and

JAMES R. SAYRE *et al.*,

Respondents.

On Bill, Answer, and Proof.

BRIEF OF FRED'K FRELINGHUYSEN,
For Respondents.

The Defendants' Answer to the Complainants' Reply.

The position now taken by the complainants is, that by the will the testator's son, James R. Sayre, is for his life to remain indebted to the estate for the amount his father had advanced to him, *but not to pay interest on such advance*, and whether he is now to give security for the payment of the debt at death, is a question submitted to the court.

This position may seem plausible, but is only that. It makes but slight difference to James R. Sayre whether he diminishes his estate, by his father's advances to him being paid by him now, or by such advances being paid by his executors. The provision for his widow or other objects of his care would (interest for a few years excepted) be equally diminished.

The position of the complainants is met by the flat declaration of the testator that neither James R. Sayre, or his executors, shall ever be called upon to pay the advances made by the testator.

The testator says, "all allowances I may have made to *any of them* (his children) shall constitute a portion of their respective shares, and they shall receive the income only on the residue of their respective shares, *after deducting the amount of such advances.*"

Again, the testator in his will, says, "it is my intention to make an equal division of my estate among my children."

If the testator had advanced his son, James R. Sayre, $15,000, and each sixth of the estate amounts to $20,000, (and this is perhaps not far from the fact,) then, by the complainant's position, James R. Sayre, would receive only a fourth of what the other children receive. No plausibility of statement can make that "an equal division."

Again, the complainants in their reply, inform the court

that the provision of the will, "that the *lawful issue* of any child shall take the principal of their parents share, *after such deductions have been made*," has no application to James R. Sayre, because he has no lawful issue.

The foregoing provision of the will is referred to by the defendants to show, beyond question, that the deduction for advances is to be made *during the life, and for the* benefit of the testator's children, and at a time when it could not be known whether they would or would not leave issue, and to show that the testator's children are not to pay or have their estates charged with such advances.

It is plain that James R. Sayre is entitled to have the advances his father made him treated as part of his share and cancelled, and the balance of his share, if he die without issue, is to go back into his father's estate.

Wm. S. Sharp, Printer, 21 West State St., Trenton, N. J.

COURT OF ERRORS AND APPEALS

EXECUTORS OF MOSES SAYRE, DECEASED,
Appellants,
and
JAMES R. SAYRE, JR., et al.,
Respondents.
} *On Bill, &c.*

Bill of Complaint.

[Filed September 13, 1878.]

To the Honorable Theodore Runyon, Chancellor of the State of New Jersey:

Humbly complaining, showeth unto your Honor your orators, Marcus Sayre and James S. Higbie, of the city of Newark, county of Essex, and State of New Jersey, executors of the will and codicils of Moses Sayre, late of the city of Newark, deceased, that the said Moses Sayre made and published his last will and testament, bearing date the fifteenth day of November, eighteen hundred and seventy, in and by which will the said

Moses Sayre, after making certain provisions for his wife, who afterwards died during his lifetime, did, by the second and third clauses of his will, provide as follows:

"All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, I give, devise and bequeath unto my son, Marcus Sayre, and my grandson, James Higbie, and the survivor of them, except the share intended for my son, Marcus Sayre, which I give, devise and bequeath to said James Higbie, upon the following trusts, stipulations and conditions, that is to say, to keep the same at interest, and receive the rents, issues and profits of my real estate, and whenever it shall be necessary to make investments of moneys of the estate, the same to be invested on bonds secured by mortgages on lands worth at least double the amount loaned; and in trust to pay over the one-sixth part of the residue of my estate to the children of my deceased daughter, Harriet Higbie, in equal shares or portions; and upon the further trust to pay the interest, income and profits arising from the remaining five shares or parts of my estate in equal shares to and among my children, in semi-annual payments, as follows: one share to my daughter Elizabeth upon her separate receipt, one share to my daughter Mary upon her separate receipt, one share to my son James, one share to my son George, and one share to my son Marcus, for and during their natural lives; and upon the death of either of my said children, the said one-fifth part of the said residue of my estate to be paid over to the issue of such child in equal portions, and if any of my children should die leaving no lawful issue, the share of such child to sink into the residue of my estate and be disposed of under the provisions of this my will.

"It is my intention to make an equal division of my estate among my children, and to that end I direct that any obligations I may hold against either of them, and all advances I may have made to any of them and charged against them in my accounts, shall constitute a

portion of their respective shares, and that they shall receive the income only on the residue of their respective shares after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parent's share after such deductions shall have been made. Upon the decease of my wife, I give, devise and bequeath that portion of my estate set apart for her use during her life, to the persons named as trustees in the preceding clause of this my will, to be held and disposed of by them upon the same trusts and conditions therein expressed and contained.

"I authorize and empower my executors hereinafter named, and the survivor of them, in their discretion, at public or private sale, to sell and convey all or any portion of my real estate, wheresoever situate, and apply the proceeds of such sale according to the trusts hereinbefore mentioned."

That the said Moses Sayre afterwards, on the twelfth day of March, eighteen hundred and seventy-four, duly made and executed a codicil to his will, making some change as to the disposition of his household furniture, and ratifying and confirming his will in all other respects; and on the twenty-fifth day of March, eighteen hundred and seventy-eight, he duly made and executed a further codicil to his will, which provides as follows:

"I, Moses Sayre, the testator named in the foregoing will, do make and publish this as a further codicil to my said will, dated November fifteenth, 1870, viz., I do hereby annul and strike out from the second clause of my said will the following words, viz.: 'Except the share intended for my son, Marcus Sayre, which I give and bequeath to said James Higbie,' so that the said second clause shall read as if those words were erased, it being my intention to devise and bequeath all the residue of my estate to my two executors upon the trusts declared in my will."

That the said Moses Sayre departed this life on the twentieth day of July, eighteen hundred and seventy-eight, without having revoked the said will or the codi-

cils thereto, save as such will is revoked or altered by the said codicils; that on the second day of August, eighteen hundred and seventy-eight, the said will and codicils were duly proved by the said executors before the surrogate of the county of Essex, and letters testamentary were thereupon issued to your orators, who have taken upon themselves the burden of the execution thereof.

And your orators further show that the five children of the said testator, mentioned in his said will, are still living, viz., James R. Sayre, Jr., George D. Sayre, Marcus Sayre, Elizabeth C., wife of Charles E. Neville, and Mary O., wife of Archibald Shafer; and the children of his deceased daughter, Harriet S. Higbie, are also living, viz., Samuel Higbie, Moses S. Higbie, Mary Elizabeth Polhemus, wife of Abraham Polhemus, and James S. Higbie, one of your orators; that all of the said children of the testator have issue now living, except James R. Sayre, Jr., whose only daughter departed this life since the execution of the said will.

And your orators further show that they have ascertained that in some instances the said testator made certain loans and advances to some of his children, to an amount less than the respective shares of the estate which will be held by the executors in trust under the provisions of the will, and that in one instance, that of James R. Sayre, Jr., such loans and advances greatly exceed the amount of the share to be held by the executors in trust to pay the income to him during his life, and the principal to his issue at the time of his death, or, if he shall leave no issue, to sink into the residue and be disposed of under the provisions of said will.

And your orators further show that in view of these facts, it is claimed and insisted on the part of some of the said devisees, that in case the said James R. Sayre, Jr., shall die without issue, the sixth part of the estate devised in trust for him during his life will become a part of the residue of the estate to be divided among the other children and grandchildren, and that it is the duty of

your orators, as executors, to collect or fully secure the whole amount due to the estate from the said James R. Sayre, Jr., in order that the purpose of the will may be fully carried out; while, on the part of the said James R. Sayre, Jr., it may be contended that inasmuch as the said James R. Sayre, at the time of the execution of said will, had a child living, and the will provided that the issue of any child who had been advanced should take only the principal of the parent's share after deducting such advance, it was not the intention of the testator that the amount so advanced should sink into the residue and be divided among the other children, but should remain the absolute property of the child to whom the advances had been made, and his legal representatives.

And your orators further show that in the cases of some of the payments of money, and the transfer of securities to certain of said children, questions have arisen as to whether such payments and transfers are properly to be considered loans or advances within the meaning of the said second clause of the said will, which questions can only be determined upon a full examination of the facts and circumstances attending such loans and transfers, which examination cannot be made by your orators without the aid of this honorable court.

And your orators further show that they are advised by their counsel that the questions thus arising respecting the construction of said will, and the proper administration of their trusts, are difficult, and cannot safely be determined by your orators or solved by means of the advice of counsel, but require the authoritative decision of this honorable court, to the end that the trusts imposed upon your orators, which may extend over a long period of time, may be properly fulfilled.

And your orators further show that the estate of the said testator is almost wholly personal, consisting mainly of stocks and bonds and mortgages, now in possession of your orators as executors, and that a large part of the said estate consists of bonds and mortgages and other

securities given by the said James R. Sayre, Jr., one of the devisees, and that the debts of the testator are trifling in amount, and will be speedily settled out of the personal property on hand, so that the duty of your orators will consist mainly in investing the assets and paying out the income thereof in the manner prescribed by said will, and especially in dealing with and disposing of the large claim of the estate against the said James R. Sayre, Jr., in accordance with such construction of the provisions of the said will in respect to the same as may be given by this honorable court.

In consideration whereof, and for as much as your orators can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable: to the end therefore that the said James R. Sayre, George D. Sayre, Elizabeth C. Neville and Charles E. Neville, her husband, and Mary O. Shafer and Archibald Shafer, her husband, Samuel Higbie, Moses S. Higbie and Mary E. Polhemus, may answer the premises, and that the said will and codicils may be established, and that the trusts thereof may be performed and carried into execution, by and under the direction of this court, and that an account may be taken of the said testator's estate and effects not specifically bequeathed, and of his funeral expenses and debts, and of the legacies bequeathed by the said will and codicils, your orators being ready, and hereby offering to account for all such parts of the said estate as have come into their possession, and that the said estate may be applied in payment of the said funeral expenses, debts and legacies, in a due course of administration, and that the residue may be ascertained and invested and distributed in pursuance of the terms of said will, and under the directions of this court, and that an account may be taken of the several amounts loaned and advanced by the said testator to the said children respectively, and that proper directions may be given to your orators as to their duty in the collection of such

loans and advances, and the application of the same to the purposes of said will, and that all necessary directions may be given to your orators touching the construction of said will, and the execution of their trust under the same, and that your orators may have such further and other relief as the nature of the case may require.

May it please your Honor, the premises considered, to grant unto your orators a writ of subpœna, issuing out of, and under the seal of this honorable court, to be directed to the said James R. Sayre, Jr., George D. Sayre, Elizabeth C. Neville and Charles E. Neville, her husband, and Mary O. Shafer and Archibald Shafer, her husband, Samues Higbie, Moses S. Higbie and Mary E. Polhemus and Abraham, her husband, therein and thereby commanding them and each of them to appear before your Honor, in this honorable court, then and there to answer the premises, and to stand to, abide and perform such order and decree therein as to your Honor may seem meet.

A. Q. KEASBEY & SONS,
Sols. and of Counsel with Complainants.

Answer.

The joint and several answer of James R. Sayre, Jr., and Elizabeth C. Neville and Charles E. Neville, defendants to the bill of complaint of Marcus Sayre and James S. Higbie, executors of the last will and testament of Moses Sayre, deceased, complainants.

These defendants respectively, now and at all times hereafter, saving and reserving to themselves all and all manner of benefit and advantage of exception to the many errors, uncertainties and imperfections in the said bill of

complaint contained, for answer thereunto, or unto so much thereof as these defendants are advised is material and necessary for them to make answer unto, severally answering, say that they admit that Moses Sayre made his will and the codicils thereto, and that the same were proven, and left him surviving the children, as in said bill stated; and the said James R. Sayre, Jr., admits that he, during his father's lifetime, was indebted to him a considerable sum of money, for which his father then and at the time of his decease, held his obligations, but whether such indebtedness was equal to or exceeded his, the said James R. Sayre, Jr.'s, share of his father's estate, cannot with absolute certainty be determined until the property belonging to his father's estate is sold and the estate settled, but he believes that the obligations which his father held, and which are now held by his executors, do not differ much from the amount of said James R. Sayre, Jr.'s, share; and he further admits that at the date of said will he had one child, who is since deceased.

And the said Elizabeth C. Neville, and Charles E. Neville for the said Elizabeth C. Neville, admit that Charles E. Neville was indebted to the father of Elizabeth C. Neville, said Moses Sayre, in his lifetime, and he held the obligation of Charles E. Neville for such indebtedness, but that before his decease her father assigned such obligation to her under his hand and seal, so that at the time of her father's decease he had no charge against either her or her husband, and held no obligation of her or either of them.

And these defendants, further answering, admit that the will of the said Moses Sayre, deceased, does expressly and plainly provide how his estate shall be administered, in the following words, to wit:

"It is my intention to make an equal division of my estate among my children, and to that end I direct that any obligation I may hold against either of them, and all advances I may have made to any of them and charged

against them in my accounts, shall constitute a portion of their respective shares, and that they shall receive the income only on the residue of their respective shares after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parent's share after such deduction shall have been made."

And the said James R. Sayre, Jr., further answering, insists that the will provides, as plainly as words can, that his obligation held by his father constitutes a part of his share of the estate, and that his child, if living, would only take the principal of her father's share after the amount of said obligation had been deducted.

And the said Elizabeth C. Neville and Charles E. Neville, further answering, say and insist that no deduction can be made from the share of said Elizabeth C. Neville, because the testator held no obligation and had made no charge for advances against her.

And these defendants respectfully submit that it is entirely plain that, under the provisions of the will, each child was to receive the income of one-sixth of the estate after deducting therefrom the amount of any obligation held by said Moses Sayre against either of them, together with all advances against either of them which are charged in his accounts, and that at the decease of any of the said children without leaving child or children, such share, or the balance of such share, was to sink into the residue of the estate, and be disposed of under the provisions of said will.

And these defendants deny that any other matter, cause or thing in the complainants' bill of complaint contained, material or necessary for these defendants to make further answer unto, and not herein and hereby well and sufficiently answered, avoided, traversed or denied, is true, to the knowledge or belief of these defendants.

All which matters and things these defendants are

ready to aver, maintain and prove as this honorable court shall direct, &c.

FRED. FRELINGHUYSEN,

Sol'r and of Counsel with Defendants James R. Sayre, Elizabeth C. Neville and Charles E. Neville.

Decree pro Confesso.

[Filed December 2, 1878.]

This cause, being opened to the court by Edward Q. Keasbey, of counsel with the complainants, and it appearing that process of subpœna for the appearance of the defendants hath been duly issued and returned, with due and legal service thereof acknowledged for James R. Sayre, Jr., by George F. Tuttle, Esq., his solicitor, and by each of the other defendants for himself or herself, the signature of each being verified by affidavit; and that the said defendants have not filed any plea, demurrer, or answer to said bill, within the time limited by law and said order, but have wholly failed and neglected so to do:

It is thereupon, on this second day of December, in the year of our Lord one thousand eight hundred and seventy-eight, ordered, adjudged, and decreed that the said bill be taken as confessed as against all the defendants, to the end that such decree may be made against them as the Chancellor shall think equitable and just; and it is further ordered that the complainants do proceed to take proofs *ex parte*, and establish the truth of their bill by testimony.

THEODORE RUNYON, *C.*

Testimony.

[Filed January 6, 1880.]

Examination of witnesses, &c., in the above-stated cause, before me, Walter J. Knight, one of the masters and examiners of the Court of Chancery, taken at the office of Messrs. A. Q. Keasbey & Sons, No. Broad street, Newark, N. J., on Tuesday, the 10th day of December, A. D. 1878, in pursuance of an order of said court, made in the above cause on the day of A. D. 1878, on a decree *pro confesso* against all the defendants. The said examination being *ex parte* and in the presence of A. Q. Keasbey, Esq., solicitor and of counsel for the said complainants.

WALTER J. KNIGHT, *M. C.*

Marcus Sayre, a witness produced on the part of the aforesaid complainants, being duly sworn, deposeth and saith—

I am one of the sons, and one of the executors of Moses Sayre, deceased; he died on the 20th day of July last; my co executor, Mr. Higbie, and myself, proved the will, and I am now engaged in the administration of his estate under the will; Moses Sayre left five children; their names are James R. Sayre, Elizabeth C. Neville, wife of Charles E. Neville, Mary O. Shafer, wife of Archibald S. Shafer, George D. Sayre and Marcus Sayre; there are also the children of a deceased daughter, Mrs. Harriet A. Higbie, as follows: Samuel Higbie, James S. Higbie, Moses S. Higbie and Mary Elizabeth Polhemus, the wife of Abram Polhemus; all the children of Moses Sayre, and those of Mrs. Harriet A. Higbie, are of age; some of the devisees have minor children; George D. Sayre has one child living, who is now about fourteen years of age; I have two children under age; I think, also, that Mrs. Neville has one child under age;

the estate left by Moses Sayre consists of bonds and mortgages, railroad stock, notes, insurance stock, bank stock and real estate; the value of the real estate is in the neighborhood of $18,000; the entire value of the estate, as near as I can form an estimate, is about $120,000, so that the shares will be somewhere about $20,000 each; there have been advances or loans made to some of the devisees; the largest loans have been made to James R. Sayre; I think his indebtedness to the estate is $41,371.16; that is the face of the indebtedness besides the interest; that indebtedness is shown as follows: *First*, by a bond and mortgage dated November 15th, 1866, for $3000, the mortgage being on property on the north side of Walnut street, and also on eighteen vacant lots in Newark; the mortgage being recorded in S 4 of Mortgages, p. 125; it is understood to be a first mortgage. *Second*, bond and mortgage for $23,200 dated December 7th, 1874, which mortgage covers seventy-five feet of the dock property owned by James R. Sayre in the city of Newark, and which is a fourth mortgage on that property—the prior mortgages are held by the Mutual Benefit Life Insurance Company for $8000 and $7000 respectively. *Third*, a bond and mortgage for $11,000 dated July 3d, 1877, given by James R. Sayre, Jr. and James S. Higbie upon property in the town of Kingstown, in Ulster county, New York, and recorded on the 14th of September; 1877, in Book 139, p. 536; this is understood to be a second mortgage, the first encumbrance on the premises being $3000; the property is a lime and cement quarry with a railroad leading to the dock on the Hudson river. *Fourth*, a promissory note of James R. Sayre, Jr., & Company dated January 3d, 1878, for $4171.16, payable on demand, with interest from date; interest is endorsed on the bond for $3000, first mentioned, up to November 15th, 1878, and in the bond secondly mentioned up to June 7th, 1878, and on the bond thirdly mentioned, up to July 3d, 1878, and upon the note, no interest has

been paid; the mortgage, secondly stated, for $23,200 was not recorded by the testator in his life-time, but has been lately put on record by the executors; Mr. James R. Sayre has no children living; he had one daughter who was living at the date of the will, and the time of the making of the first codicil thereto; she died in 1875; Moses Sayre, at the time of his death, was ninety-one years of age; James R. Sayre, Jr., is now about sixty six years of age; there were other loans or advances made to the other children; Elizabeth C. Neville stated to me she had a gift of a bond and mortfor about $4000, which was upon the real estate upon which she lived, in Pennsylvania; Moses Sayre gave her an assignment of that bond and mortgage; the mortgage was given to Moses Sayre by Mr. Neville, and her father assigned it to her as a gift; this happened within four or five years; there is also a bond and mortgage of Marcus Sayre dated April 1st, 1878, on property in Bleeker street, Newark, for $6658.91—it is a first mortgage; there is a bond and mortgage of Mary O. Shafer dated April 11th, 1878, on property in Harrison street, Orange, for $5000—that is a second morgage; there is a note of Mary O. Shafer dated April 11th, 1878, for $134.43; another note of Mary O. Shafer dated May 11th, 1878, for $2253; another note of Mary O. Shafer dated August 8th, 1876, for $260; there is a note of Elizabeth C. Neville dated May 24th, 1878, for $100; there is a note of Mary Elizabeth Polhemus dated May 10th, 1878, for $100; I know of no other claims than those I have stated of the estate against the devisees; the reason I desired, as executor, to obtain the direction of the court as to the manner in which I should treat the devisees who are indebted to the estate, is that I might act intelligently in the matter, there having been different opinions and claims in regard to the meaning of the will; it has been claimed on behalf of some of the devisees that the money due should be paid in and invested—that the whole amount of the money of the

estate should be paid in and invested in bond and mortgage, and in order that we might settle the estate according to the terms of the will, my attorney, for me, has made application to Mr. James R. Sayre to make some disposition of his indebtedness to the estate, in order that I might settle the estate according to the will; I wish to obtain the direction of the court in order that I may be guarded against any liability in the execution of my trust, arising out of the manner in which I shall deal with the indebtedness of Mr. Sayre.

MARCUS SAYRE.

Sworn to and subscribed before me, at Newark, N. J., this 10th day of December, A. D. 1878.

WALTER J. KNIGHT, *M. C.*

James S. Higbie, a witness produced on the part of the aforesaid complainants in the above-stated cause, being duly sworn, deposeth and saith—

I am one of the executors of the estate of the late Moses Sayre, and am one of the children of Mrs. Harriet Higbie, deceased; I am also a partner in business of James R. Sayre, Jr.; we are engaged in business in the manufacture and sale of masons' materials; I have heard the statement made by Mr. Marcus Sayre as to the indebtedness of Mr. James R. Sayre and the firm to the estate; it is correct, so far as I know and believe without consulting the papers; the property at Kingstown has a mortgage of $3000 on it ahead of ours, making the whole encumbrance $14,000; the property is used in connection with our business; in regard to the gift of a mortgage to Mrs. Neville, I know I saw the assignment from Mr. Moses Sayre to her; her son had it at Mr. George Sayre's house, and he showed it to me; my recollection is that the assignment was of a mortgage which Moses Sayre held upon Mrs. Neville's husband's property in Pennsylvania; I do not recollect the date or amount of it.

JAS. S. HIGBIE.

Sworn to and subscribed before me, at Newark, N. J., this 10th day of December, A. D. 1878.

WALTER J. KNIGHT, *M. C.*

George D. Sayre, a witness produced on the part of the aforesaid complainants in the above cause, being duly sworn, deposeth and says—

I am one of the children and devisees of the late Moses Sayre; I have heard the statement of Mr. Marcus Sayre as to the situation and value of the estate, and the nature of the indebtedness from James R. Sayre; it is correct, so far as I understand; at the time of my father's death, I was not very familiar with his affairs; the first actual knowledge I had of it was on the unsealing of his papers after his death; I think on that day, when the papers were looked over, Marcus opened the papers and handed them to me to look at in the presence of my brother James and Mrs. Neville and Mrs. Shafer and their children, and then I saw the papers in their order as they were opened, and a list was made of them; I had known that previous to that time he held a mortgage for a certain amount against the property of Mr. or Mrs. Neville, and we did not find it; it was not there, and my brother spoke of it; he said "Amongst these papers we don't find that mortgage;" this is my impression of what occurred at the time; and then Mrs. Neville said, "Father gave me that mortgage;" and then it occurs to me that in the conversations afterwards she promised to send in the assignment, so that it should be examined; after that—I am not certain of the date—I was at home, at No. 42 Halsey street, and her son came there with Mr. Higbie, and he had a letter and the assignment of the mortgage with him; the letter stated that Mrs. Neville did not like to trust the assignment by mail, so she committed it to the charge of her son, and the assignment was read in the presence of ourselves and Mr. Higbie, together with the letter, and the date and amount were taken down, and a memorandum made of them for the purpose of

showing them to Marcus; my impression is the amount of the mortgage was $4000.

GEORGE D. SAYRE.

Sworn to and subscribed before me, at Newark, N. J., this 10th day of December, A. D. 1878.

WALTER J. KNIGHT, *M. C.*

Complainant's counsel offered in evidence the following papers:

Paper purporting to be probate copy of the will and codicils thereto attached of Moses Sayre, deceased. Marked *Exhibit* 1 for complainants.

Mortgage given by James R. Sayre, Jr., and wife to Moses Sayre, for $3000, dated the 15th day of November, A. D. 1866, acknowledged same day, and registered in the register's office of the county of Essex on the 9th of January, 1867, in Book S 4, pages 125 and 126. Marked *Exhibit No.* 2 for complainants.

Bond accompanying the above mortgage, dated same day, and given in penal sum of $6000. Marked *Exhibit No.* 3 for complainants.

Mortgage given by James R. Sayre and others, to Moses Sayre, for $23,200, dated the 7th day of December, A. D. 1874. [This mortgage, at the time of offering, is understood to be in the register's office of the county of Essex, but it is understood to be offered, and marked as an exhibit.] Marked *Exhibit No.* 4 for complainants.

Bond accompanying the said last above mortgage, dated the same day, and given in the penal sum of $46,400. Marked *Exhibit* 5 for complainants.

Mortgage given by James R. Sayre, Jr., to Moses Sayre, dated the 3d day of July, 1877, acknowledged on the 4th day of July, 1877, for $11,000. Registered in the office of the county clerk of Ulster county, New York State, in Book 139, pages 536, &c. Marked *Exhibit* 6 for complainants.

Bond accompanying the last above mortgage, dated

the same day and given for the penal sum of $22,000. Marked *Exhibit No.* 7 for complainants.

Promissory note given by James R. Sayre, Jr., to Moses Sayre, payable on demand, dated Newark, N. J., January 3d, 1878, for $4171.16. Marked *Exhibit No.* 8 for complainants.

At the request of Mr. Keasbey, the solicitor and counsel of the complainants, I adjourned the further examination of witnesses in the above-stated cause until the day of A. D. 1878, at the office of Messrs. A. Q. Keasbey & Sons, at 2:30 o'clock P. M.

WALTER J. KNIGHT, *M. C.*

Final Decree.

[Filed March 8, 1881.]

This cause coming on to be heard in the presence of A. Q. Keasbey, of counsel with the complainants, of Frederick Frelinghuysen, solicitor, and of counsel with the defendants, James R. Sayre, Jr., and Elizabeth C. Neville and Charles E. Neville, her husband, and on reading the pleadings filed and the testimony taken herein, and the other defendants, Mary O. Shafer and Archibald Shafer, her husband, Samuel Higbie, Moses S. Higbie, Mary E. Polhemus and Abraham Polhemus, her husband, having filed no plea, answer or demurrer within the time limited by law for that purpose.

And it appearing that the will of Moses Sayre, deceased, after certain provisions for his wife, who afterwards died before the testator, in the second and third clauses provides as follows: All the rest, residue and remainder of my estate, real and personal, wherever and whatsoever, I give and bequeath unto my son, Marcus

Sayre, and my grandson, James Higbie, and the survivors of them, except the share intended for my son, Marcus Sayre, which I give, devise and bequeath to said James Higbie, upon the fellowing trusts, stipulations and conditions, that is to say, to keep the same at interest and receive the rents, issues and profits of my real estate, and whenever it shall be necessary to make investments of money of the estate, the same to be invested on bonds secured by mortgages, on lands worth at least double the amount loaned and in trust to pay over the one-sixth part of the residue of my estate to the children of my deceased daughter, Harriet Higbie, in equal shares or portions, and upon the further trust to pay the interest, income and profits arising from the remaining five shares or parts of my estate in equal shares to and among my children, in semi-annual payments, as follows: one share to my daughter Elizabeth, upon her separate receipt, one share to my daughter Mary, upon her separate receipt, one share to my son, James, one share to my son George, and one share to my son Marcus, for and during their natural lives, and upon the death of either of my said children, the said one fifth part of the said residue of my estate to be paid over to the issue of said child in equal portions, and if any of my children should die, leaving no lawful issue, the share of said child to sink into the residue of my estate, and be disposed of under the provisions of this my will.

It is my intention to make an equal division of my estate among my children, and to that end I direct that any obligation that I may hold against either of them, and all advances I may have made to any of them, and charged against them in my accounts, shall constitute a portion of their respective shares, and that they shall receive the income only on the residue of their respective shares, after deducting the amount of such advances, and that the lawful issue of any child shall take the principal of their parent's share, after such deduction shall have been made:

It is on this eighth day of March, eighteen hundred and eighty-one, ordered, adjudged and decreed that as no charge was made by the testator against Elizabeth C. Neville, and no obligation of hers was held by him, no deduction is to be made from her share in the estate by the executors of said will; and it appearing that the testator had made advances to his son, James R. Sayre, Jr., and that the testator, at the time of his death, held the obligation of said James R. Sayre, Jr., for such advances, said advances are to be deducted from the amount of the share of the said James R. Sayre, Jr., in the estate, and if the said share of said James R. Sayre, Jr., is in excess of such advances, the same is to be held in trust by the said executors, as in said will is directed; and if said advances shall exceed the amount of the share of said James R. Sayre, such excess shall be paid over to said executors.

THEODORE RUNYON, *C.*

Notice of Appeal.

[Filed March 10, 1881.]

The complainants hereby appeal to the Court of Errors and Appeals in the last resort in all causes from so much of the decree made in this court, in the above-stated cause, on the eighth day of March instant, as declares that the testator had made advances to his son, James R. Sayre, Jr., and that the testator, at the time of his death, held the obligation of said James R. Sayre, Jr., for such advances, and that said advances are to be deducted from the amount of the share of the said James R. Sayre, Jr., in the estate, and that in case the share of the said James R. Sayre, Jr., should exceed

such advances, the excess is to be held in trust for him by the executors.

Dated March 9th, 1881.

A. Q. KEASBEY & SONS,
Solicitors and of Counsel.

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

EDWARD Q. KEASBEY,
Counselor-at-Law.

Petition of Appeal.

[Filed March 19, 1881.]

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

The humble petition of Marcus Sayre and James S. Higbie, executors of Moses Sayre, deceased, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Court of Chancery by his Honor, Theodore Runyon, Chancellor of New Jersey, bearing date the eighth day of March, in the year one thousand eight hundred and eighty-one, in which these petitioners were complainants, and James R. Sayre, Jr., George D. Sayre, Elizabeth C. Neville and Charles E. Neville, her husband, Mary O. Shafer and Archibald Shafer, her husband, Samuel Higbie, Moses S. Higbie, Mary E. Polhemus and Abraham Polhemus, her husband, were defendants, in this repect, to wit, that the said decree adjudges that the testator had made advances to his son, James R. Sayre, Jr., and that the testator, at the time of his death, held the obligation of the said James R. Sayre,

Jr., for such advances, and that said advances are to be deducted from the amount of the share of the said James R. Sayre, Jr., in the estate, and that in case the share of the said James R. Sayre, Jr., should exceed such advances, the excess is to be held in trust for him by the executors.

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 sums received by the said James R. Sayre, Jr., during the lifetime of the testator, were not advanced to him as his absolute property, and are not to be deducted from his share, but must be paid or fully secured to the executors so that they may be held in trust by the executors under the provisions of the will, and may form a part of the residue of the estate in case said James R. Sayre, Jr., should die without issue.

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

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

A. Q. KEASBEY & SONS,
Solicitors.

EDWARD Q. KEASBEY,
Of Counsel.

Opinion.

[Filed January 2, 1880.]

Bill for construction of will, &c.

Mr. A. Q. Keasbey, for complainants.

Mr. F. Frelinghuysen, for James R. Sayre and Mrs. Neville.

THE CHANCELLOR. Moses Sayre, deceased, late of Newark, by his will, after certain provision for his widow, for her life, (she is now dead,) gave all the residue of his estate to his executors, Marcus Sayre and James Higbie, and the survivor of them, in trust, to pay over one-sixth of it to the children of his deceased daughter, and to pay the interest, income and profits arising from the remaining five shares to and among his children for and during their natural lives, and on their death, their shares to go to their issue. And he provided that if any of his children should die leaving no lawful issue, the share of such child should sink into the residue and be disposed of under the will. He then declared that it was his intention to make an equal division of his estate among his children, and, to that end, directed that any obligations he might hold against either of them, and all advances he might have made to any of them, and charged against them in his accounts, should constitute a portion of their respective shares, and that they should receive the income only of the residue of their respective shares after deducting the amount of such advances, and that the lawful issue of any child should take the principal of their parents' share after such deductions should have been made. At the time of the testator's death, four of his children were

indebted to him on their obligations held by him; one of them to an amount exceeding his share of the estate. That son had a child, a daughter, living when the will and the codicil thereto were made, but she has since died.

The testator assigned as a gift to one of his daughters a bond and mortgage given by her husband (she joining in the latter) on his property in Pennsylvania. Whether the testator made any charge of this gift against her in his accounts does not appear.

The questions propounded are, what is the duty of the executors, with respect to the shares of those children whose obligations the testator held, and as to the gift to the testator's daughter.

The testator declared that it was his intention to make an equal division of his property among his children, and that, to that end, they were to be charged with all the advances made to them on that account and charged against them in his accounts, and any obligations he should hold against them. What, then, is the share of any of his children in his estate? It is the one-sixth, less the amount of advances charged against him, or her, in the testator's accounts, and the amount of any obligations held by the testator against him or her; in other words, it is the difference, if any there be, between the amount of the one-sixth and the advances and obligations to and against the donee thereof. In the case of the son before mentioned, the sixth has already been received in his obligations held by the testator. Had his daughter lived to survive him, she, clearly, would have had no claim upon the testator's estate with respect to the share. The intention of the testator was to subject to the limitations declared in his will, only such shares, or parts of shares, as might, at his death, be coming to his children out of his estate after making the deductions. It was such shares, or parts of shares, and them alone, that he intended to subject to administration under the trust.

The "share" that was to sink into the residue in case of the death of the child, without issue, was that on which the child would, under the will, be entitled to re-receive the income for life at the hands of the executors as trustees, and which was limited over to the issue of the child if it should leave any. He first declared, in the will, what shares his children were to have, and to what limitations they were to be subject, and then declared how the shares were to be constituted. The construction is to be the same as if he had first declared how the shares were to be constituted, and then declared the limitations to which they were to be subject. He did not intend that any of his children should be required to furnish security to his executors for the payment, in the contingency of death, without issue, of the amounts deducted, nor that they should be required to pay the amount deducted, in any event, to any one, but the deductions are treated as a permanent reduction, *pro tanto*, of the amount of the share.

It is laid down as a rule of construction of wills in the English courts that the word "leaving," in a gift upon death, without leaving issue, will, if possible, be so construed as not to destroy prior vested interests, and it will, in fact, be taken as equivalent to "without having had children who take vested interests." Thus, where there is a bequest or devise to one for life, and after his death to his children, whether a particular time is fixed for the vesting of the share or not, followed by a gift over, upon the death of the life tenant, without leaving children, the children of the life tenant, either at their birth or at the particular time appointed, as the case may be, take indefeasible interests not liable to be defeated by death in the lifetime of the life tenant. *Theobald on Wills* 381; *Hawkins on Wills* 217, and cases cited. *In re Brown's Trust, L. R.*, 16 *Q. B.* 239, a testator gave a fund to trustees to pay the dividends to his daughter for life, and after her decease, to transfer the principal equally amongst all her children, whether by her

then putative husband or any other person whom she might marry, who should attain to the age of twenty-one years, their executors, administrators and assigns, and provided that in case his daughter should die, leaving no issue, the principal should go to the testator's other children. His daughter, at the time of making the will, had a son of four years of age by her putative husband. It was held (her putative husband being dead, and she being sixty-seven years old and having no other child) that the son who had attained to the age of twenty-one, was entitled absolutely to the capital; the word "leaving" being construed as "having." See, also, *Treharne* v. *Layton*, *L. R.*, 10 *Q. B.* 459. This rule, however, has not, that I am aware, been adopted in our courts, and it seems to me as a rule far more likely to defeat than to effectuate the intention of testators.

As to the gift to the testator's daughter, if the testator has not charged that against her as an advance in his accounts, it is not within the description of the advances which he intended should be deducted.

Of course, the son is to be required to pay what he owes the estate over and above the amount of his share.