

N. Y. Court of Appeals, &c.

Between HENRY I. CODDINGTON,
Appellant,

and

MARGARET C. BISPHAM and ORS.,
exrs.,
Respondents.

*On Appeal from
Order.*

Statement.

The order appealed from (pages 20-22) was made on the petition of the respondents (pages 14-20), filed in the cause of Henry I. Coddington and others, complainants, and the executors of Smith Coddington and others, defendants. The bill in this cause (pages 1-6) was filed November 18th, 1879, by the complainants, children of Smith Coddington. It sets forth the death of Smith Coddington in 1868; the probate of his will, dated March 3d, 1868, by which he appointed the defendants, Brewster and Coddington, executors, bequeathed the amount of his life insurance policy to the defendant, Gridley, in trust for the benefit of his minor children; to his sons James S. and Edward, if living, each the sum of one hundred dollars; and to his son Henry I. (the appellant), the sum of four hundred dollars, to be paid him on his reaching the age of twenty-one. That said will directed that in case his personal estate should be insufficient to pay said legacies his real estate should be sold for that purpose, all

the residue of his property to be divided between his children equally on their attaining the age of twenty-one. That Edward died before his father; that all of the other children were minors at the time of testator's death, and that all were of full age when the bill was filed; that the life insurance money was paid to the trustee; that the defendants, Brewster and Coddington, qualified as executors, and took possession of all the testator's personal estate, and of his real estate—a house and lot in Rahway; that said executors never accounted, and have in their hands, or in the hands of one of them, a large surplus of the personal estate, over and above all debts of the testator; that the legacy to Henry I. has not been paid. The bill prays an accounting, payment of the legacy to Henry I., and a distribution of the balance, for an injunction restraining the executors from further collection of the rents of the real estate, and for a receiver of the same.

By order entered December 4, 1879 (page 6), Jacob R. Shotwell was appointed receiver of said rents.

On February 11, 1880, a decree *pro confesso* was taken against all the defendants, except the executor, Coddington, who filed an answer (pages 7-10) denying that he was liable to account.

On October 24, 1881, a decree was entered that both executors account, reserving all other questions (pages 10 and 11). Since then nothing further has been done in the cause, which is still pending.

In July, 1882, the receiver filed a petition (pages 12-14), setting forth his appointment; that he had in his hands a balance of \$337.85 of rents collected by him; that said house and lot had been sold on foreclosure of mortgage, and prayed that his account, annexed to his petition, be allowed, for directions as to the payment of the balance in his hands, and for his discharge.

The respondents then filed their petition (pages 14-19), alleging that said Smith Coddington, in his lifetime, executed his bond, dated February 25,

1863, to the respondent's testator, securing the same by a mortgage on said house and lot. That a bill to foreclose said mortgage was filed March 23, 1881, and said house and lot sold under decree on said foreclosure suit in June, 1882; and that there remained a deficiency of some \$1,200. The petition prays that the petitioners be admitted as parties defendant in the said suit against the executors of Smith Coddington, and that the receiver appointed in that suit be directed to pay the money in his hands to them, to be applied on said deficiency. From the order granting the prayer of this petition the appellant appealed to this Court (page 22).

No answer was filed or appearance entered by any of the defendants in this foreclosure suit. No receiver was applied for in that suit. The bill did not ask for any decree for deficiency, nor was such a decree made.

On the hearing before the Vice Chancellor it was admitted that there were no other unpaid debts of the said Smith Coddington. The question was, therefore, practically as stated by the Vice Chancellor in his opinion (pages 25-28), that is: should this money in the receiver's hands go to the respondents, or to the legatees under the will.

There was, however, no claim formally made to this fund on behalf of any legatee, although it was stated on the argument that such an application would be made in the event of a decision that the respondents were not entitled.

I.

The foreclosure bill of the respondents was filed March 23, 1881, after the approval of the Act of March 12, 1880 (P. L., p. 255).

By this Act the power of the Court of Chancery to render a decree for deficiency in a foreclosure suit

is taken away ; nor can payment of such deficiency be enforced by the process of that Court. And yet by this order such payment is enforced.

The Act further provides that a recovery at law of a deficiency shall open the foreclosure sale and revive the right to redeem. This order entirely ignores this beneficial provision of the Statute.

II.

This Act of 1880 has been held to be constitutional.

Newark Savings Ins. *v.* Forman, 6 Stew., 436.
Naar *v.* Land Co., 7 Stew., 111.

It will be noticed also that this bond and mortgage was executed in 1863 (p. 15, fol. 57), before the passage of the Act of 1866, which gave power to the Court of Chancery to render a decree for deficiency.

III.

If this money can lawfully be ordered paid to the respondents, it must be by virtue of some lien by judgment, attachment, or otherwise, the remedy at law being exhausted or inadequate.

Hunt *v.* Field, 1 Stock., 36.
Young *v.* Frier, 1 Stock., 465.
Dunham *v.* Cox, 2 Stock., 437.
Roberts *v.* Hodges, 1 C. E. Gr., 300.
Green *v.* Tantum, 6 C. E. Gr., 364.

The respondent's claim for deficiency is a mere claim not reduced to judgment, and one which can only be reduced to judgment by action at law, subject to the conditions imposed by the Act of 1880.

IV.

That this fund is the proceeds of rents of the mortgaged premises gives the respondents no lien on it.

The rule is well settled, both at law and in equity, that a mortgagor or his tenant cannot be made to account for rents of mortgaged premises received before foreclosure or entry.

- Souder v. Van Syckle, 3 Halst., 313.
 Price v. Smith, 1 Gr. Ch., 516.
 2 Washburn Real Property, 131.
 Bank v. Arnold, 5 Paige, 38.
 Post v. Dorr, 4 Ed. Ch., 412.
 Manhattan Co. v. Bank, 4 Ed. Ch., 315.
 Howell v. Ripley, 10 Paige, 43.

Sanders v. Price 1 Zab. 637.

V.

Nor does the fact that this fund was in the hands of a receiver, appointed by the Court of Chancery, alter the case.

A mortgagee, before foreclosure or entry, obtains a lien on the rents of the mortgaged premises only by the appointment of a receiver in his suit to foreclose.

He cannot compel a receiver, appointed in another suit, to account to him, no matter how superior may be his equity, to that of the parties to the suit in which the receiver was appointed.

- Thomas v. Brigstock, 4. Russell, 64.
 Bank v. Arnold, 5 Paige, 38.
 Howell v. Ripley, 10 Paige, 43.
 Post v. Dorr, 4 Ed. Ch., 412.
 Manhattan Co. v. Bank, 4 Ed. Ch., 315.

VI.

This fund, which includes rents collected before the foreclosure bill was filed, has been given to the mortgagee because "the legatee stands simply in the rights of the testator, and he, in this case, is a debtor, and that, too, by a decree of this Court" (Op., fol. 106).

The order cannot stand upon any such basis, for it is not true that the testator or any representative of his is a debtor by the decree of the Court of Chancery.

No decree of that or any Court has adjudged anyone indebted upon the claim asserted by respondents.

Nor has the Court of Chancery the power to so adjudge.

The claim can be adjudged to be a debt only in a court of law, in a suit upon the bond, after giving the alleged debtor an opportunity of a trial by jury.

The fund in question is admitted to be the property of the legatee, because under the will he is entitled to it; the Court has given it to respondents upon the assumption that their claim against the testator is a debt. Not only is that assumption unfounded, but the Court, in making and acting upon it, has deprived the legatee, or the testator's legal representative, of his right of trial by jury, cut him off from defending the claim in a court of law, has unconstitutionally deprived him of his property without due process of law, and has further deprived him of the beneficial provision of the Statute of 1880, that a recovery at law on the bond opens the sale, and revives the right to redeem.

VII.

The matters alleged in the respondents' petition are not sufficient to have authorized the Court of Chancery to appoint a receiver, if it had been applied to for that purpose.

And yet by this order they receive what they could not have obtained if asked for directly ; and receive even more, since they get the rents collected from December, 1879, while the bill was not filed till March, 1881.

VIII.

As to the "equity" or "justice" of the matter—

The bill in the cause alleges and the only answer does not deny, that the executors, or the acting executor, has in hand a large surplus of the testator's personal estate.

This mortgage debt was one created by the testator himself. Is not this personal estate, therefore, the proper fund out of which to pay this debt ?

The money ordered paid to the respondents is the proceeds of rents of the real estate. This real estate is charged by the will with the payment of the legacies. The effect of this order is to compel these special legatees to pay this deficiency, while the residuary legatees, who should pay it, if payable at all, go free.

So far as appears in the case, the claim of the respondents has never been presented to the executors. Should there not have been at least an attempt to collect from the executors out of the personal estate in their hands, before applying to the Court of Chancery, to sequester the proceeds of the real estate ?

IX.

The appeal is also from that part of the order admitting the respondents as parties defendant.

If they are not entitled to this fund, there is no reason why they should be parties. They ask to be admitted, and are admitted, solely on this ground.

If they had presented their claim to the executors and had been refused payment, there might perhaps be a reason for admitting them, in order that they might prove their claim, and be paid out of the sum found to be due from the executors, although it is difficult to see how an order so admitting them could be supported even on this ground.

X.

The order in the particulars appealed from should, therefore, be reversed, with costs.

H. K. CODDINGTON,
of Counsel with Appellant.

Court of Errors and Appeals.

HENRY I. CODDINGTON,

Appellant,

and

MARGARET C. BISPHAM, and others
Executors, &c., of Charles Bis-
ham, deceased.

Respondents.

*On Petition, &c.
On Appeal.*

POINTS OF RESPONDENTS.

- I. The Respondents are proper parties defendants to the original suit.
- II. The Respondents as mortgagees of Smith Coddington, deceased, are entitled to the payment of their debt before any of the legacies under the will of Smith Coddington, deceased, can be paid.

III. There being a deficiency of the proceeds of sale of the mortgaged premises to pay the mortgage debt, and a receiver having been appointed in the original suit to collect the rents of the mortgaged premises, under the well known rules of equity, the Respondents are entitled to such rents in the hands of the receiver, to be applied and credited by them on account of such deficiency.

High on Receivers, Section 4.

Mahon vs. Crothers, 1 Stewart, 567.

Stockman vs. Wallis, 3 Stewart, 449.

Chetwood vs. Coffin, 3 Stewart, 450.

Conover vs. Grover, 4 Stewart, 539.

Warwick vs. Hammell, 5 Stewart, 427.

ROB'T E. CHETWOOD,
Solicitor of Respondents.

COURT OF ERRORS AND APPEALS.

HENRY I. CODDINGTON, <i>Appellanti,</i> and MARGARET C. BISHAM and others Executors, &c., of Charles Bisp- ham. deceased, <i>Respondents.</i>	}	<i>On Petition, &c.</i> <i>On Appeal.</i>
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BRIEF OF RESPONDENTS.

- I. The Respondents are proper parties defendants to the original suit.

The bill was filed by three of the legatees under the will of their father, Smith Coddington, deceased, against the executors thereof, charging that they were mismanaging and wasting the estate under their control, and praying that an account might be taken of the debts and funeral expenses of said deceased, and of the rents and profits of the mortgaged premises, and that the said mortgaged premises might be sold, and that the proceeds of such sale be first paid to the legatees named in the said will; and also, that a receiver be appointed to collect the

rents of the mortgaged premises. The bill charged the executors with collecting the rents of the said mortgaged premises, and refusing to pay the taxes thereon. The mortgage of the Respondents was executed by the testator several years before his death. It was open on the record at the time the complainants filed their bill, and they, therefore, had notice of an existing and outstanding indebtedness of their testator, as far as the record thereof was notice. The complainants having come into the Court of Chancery, asking that an account of the debts of the deceased may be had and taken, and for a settlement of the estate of their testator, all creditors of the estate are necessary and proper parties to the suit, and are entitled to have their several claims adjudicated upon and settled by the Court, both as to their amount and priority of payment. A settlement cannot be made by the Court to be final and effectual, unless the Court is informed, who are the creditors of the estate, and of the amount and priority of the claims. The Respondents testator was living at the time the bill was filed, and should have been made a party defendant to the suit, by reason of holding the mortgage, and being a creditor of the estate. The Respondents are equally

entitled to be made defendants, after the death of their testator, and for the same reasons

- II. The Respondents as mortgagees of Smith Coddington, deceased, are entitled to the payment of their debt, before any of the legacies under the will of Smith Coddington, deceased, can be paid.

It is admitted by the counsel of both parties, as recited in the opinion of the Vice Chancellor, that the expenses of administration, and all of the debts of the testator, except the balance due on the Respondents mortgage, have been paid; and that the only persons who have any right to the balance in the hands of the receiver, are the Respondents and the legatees under the will of Smith Coddington, deceased. The single question, therefore, is, who is entitled to the moneys in the hands of the receiver, the mortgage creditor or the legatees? Debts of a testator must always be paid before legacies. The whole estate of a testator, personal and real, is pledged for the payment of his debts. It does not seem to me that the question admits of argument. The settlement of the estate cannot be had, nor can the Court order that any of the legacies be paid, until the debts of the testator are first

paid. Upon the Court being informed that a debt, and, as in this case, the only debt of the testator, is unpaid, the order of necessity must be that the debt or the balance due upon it be first paid, before any portion of the legacies are paid. The reasoning of the Vice Chancellor is conclusive on this subject.

III. There being a deficiency of the proceeds of sale of the mortgaged premises to pay the mortgage debt, and a receiver having been appointed in the original suit to collect the rents of the mortgaged premises, under the well-known principles of equity, the Respondents are entitled to such rents in the hands of the receiver, to be applied and credited by them on account of such deficiency

The receiver was appointed in the suit brought by the legatees, not in the foreclosure suit. The legatees suit was commenced before the suit to foreclose the Respondents mortgage, and a receiver had been appointed in the legatees suit, at the time of the filing of the bill to foreclose the Respondents mortgage. The object of the appointment of a receiver, is to secure the fund for the person who may ultimately be found entitled thereto. High on Receivers, Sec. 4. The appointment of a receiver in the legatees suit,

precluded the necessity for the appointment of one in the foreclosure suit. The deficiency of the proceeds of sale of the mortgaged premises, to pay the mortgage debt, amounted to the sum of \$1,200.93. The Respondents filed their petition, and were made defendants in the legatees suit, after the sale of the mortgaged premises in the foreclosure suit, and after the amount of the deficiency had been legally ascertained. Under the principles and practice of the Court of Chancery, the Respondents are entitled to the rents collected by the receiver in the legatees suit, to be applied and credited by them on account of such deficiency.

Mahon vs. Crothers, 1 Stewart, 567.

Stockman vs. Wallace, 3 Stewart, 449.

Chetwood vs. Coffin, 3 Stewart, 450.

Conover vs. Grover, 4 Stewart, 539.

Warwick vs. Hammell, 5 Stewart, 427.

There can be no question, under the rulings in the above cases, that had Smith Coddington (the testator) been living at the time of the commencement of the foreclosure suit, a receiver would have been appointed in that suit to collect the rents of the mortgaged premises. There can also be no question, that if no receiver had been appointed in the legatees suit, a receiver, upon application, would have been appointed in the foreclosure suit.

As is said by the Vice Chancellor, "the legatee stands simply in the rights of his testator," and the Respondents would have been as well entitled to the appointment of a receiver in the foreclosure suit against the legatees and owners of the mortgaged premises, as they would have been entitled to such receiver, if the foreclosure suit had been against their testator in his lifetime. There was, therefore, no necessity for the appointment of a receiver in the foreclosure suit. A receiver had already been appointed in the legatees suit. The sale of the mortgaged premises did not pay the mortgage debt in full. After the ascertainment of that fact, the Respondents were made defendants in the legatees suit, and ask the Court to pay them the rents of the mortgaged premises collected by the receiver, to be applied by them towards the payment of the balance due on the mortgage debt. The respondents are clearly entitled to these rents, and not the legatees, for the payment of their legacies.

I submit, therefore, that the Respondents are proper parties defendants to the suit brought by the legatees, that they are entitled to the balance of the rents in the hands of the receiver, and that the decree of the Chancellor should in all things be affirmed, with costs.

ROBT. E. CHETWOOD,
Solicitor of Respondents.

To His Honor THEODORE RUNYON, Chancellor of 1
the State of New Jersey.

Humbly complaining showeth unto your honor
your orators, Henry I. Coddington, Charles E.
Coddington and Annie B. Coddington, all of the
city of New York, in the county of New York, and
state of New York, that Smith Coddington, the
father of your orators, late of the city of Rahway,
in the county of Union and state of New Jersey, 2
duly made and published his last will and testa-
ment in writing, bearing date the third day of March,
in the year eighteen hundred and sixty-eight, in
and by which he bequeathed to one Edward Grid-
ley by said will appointed guardian of his children,
the sum of seven thousand three hundred dollars,
the amount of his life insurance policy in trust for
the benefit of his children, and also bequeathed to
his sons, James S. and Edward, if living, the sum of
one hundred dollars each, and to your orator, Hen- 3
ry I. Coddington, the sum of four hundred dollars
to be paid to him on his attaining the age
of twenty-one years, and said will further di-
rected that in case his personal estate should be
insufficient to pay said legacies then his execu-
tors were authorized and empowered to sell all or
any of his real estate for that purpose. All the rest
and residue of his estate said will devised and be-
queathed unto your orators and their brothers and
sisters, Maggie I., now the wife of William D.
Hennen, Fannie W., now the wife of Hart Jackson, 4
and Walter B. Coddington, equally to be paid to
them on their attaining the age of twenty-one years,
excepting the share of the said Fannie W., which
was by said will directed to be used by the said Ed-
ward Gridley for her benefit as he might think best
her good.

5 And said will appointed Walter Brewster and John C. Coddington executors, as in and by said will or the probate thereof when produced will appear.

And your orators further show that afterwards, and on or about the eleventh day of May, eighteen hundred and sixty-eight, the said Smith Coddington died, leaving him surviving your orators and the said James S., Maggie I., Fannie W. and Walter B., the said Edward having died before his father.

6 That the said will was on the eighth day of June, eighteen hundred and sixty-eight, duly admitted to probate by the surrogate of Union county, and the said Walter Brewster and John C. Coddington qualified as executors thereof and as such executors possessed themselves of the personal estate and effects of the said Smith Coddington, to an amount much more than sufficient to pay all his debts and the said legacies ; and your orators further show that the said Walter Brewster and John C. Coddington have paid to the said Edward Gridley the

7 said sum of seven thousand three hundred dollars, but whether the said legacy has been paid to the said James S. your orators are not informed.

And your orators further show that the said Walter Brewster and John C. Coddington have not paid to your orator Henry I. Coddington, his legacy of four hundred dollars, although they have often been requested so to do ; and that the said Walter Brewster and John C. Coddington, or one of them, have now in their possession and under their control, or should so have, a large surplus of the said

8 personal estate which should be paid to your orators and other residuary legatees of the said Smith Coddington, according to the directions of said will. And your orators further show that the said Walter Brewster and John C. Coddington, or either of them, have not hitherto rendered any account of their administration of said estate, although the time limited therefor by statute has long since expired.

And your orators further show that in addition to

said personal estate the said Smith Coddington died 9
 seized and possessed of a certain house and lot of
 land, situate on the corner of Milton avenue and
 Second street in said city of Rahway.

That after the death of the said Smith Coddington
 and after the probate of his will as aforesaid, the
 said Walter Brewster and John C. Coddington, or
 one of them, as executor of the said Smith Coddington
 entered into possession of said house and lot,
 and have received the rents and profits thereof from
 that time until now, and the said Walter Brewster 10
 and John C. Coddington, or one of them, has now in
 their or his possession, or under their or his control,
 or should so have a large sum of money, being the
 rents and profits of said house and lot.

And your orators further show that at the time of
 the death of their father as aforesaid, they and all
 his other children except the said James S. were
 under the age of twenty-one years, and that all are
 now of full age.

And your orators further show that the said Wal- 11
 ter Brewster and John C. Coddington have allowed
 the taxes on the said real estate to remain unpaid
 since the year eighteen hundred and seventy-one,
 although they have received the rents and profits of
 the same as aforesaid to an amount much more than
 sufficient to pay the same.

And your orators further show that they have fre-
 quently and in a friendly manner applied to the said
 Walter Brewster and John C. Coddington and re-
 quested them and each of them to come to a just
 and full account of the money received by them as
 executors of the said Smith Coddington and their 12
 administration of said estate, and of the rents and
 profits of said house and lot received by them or
 either of them.

And that they then refused and still refuse to ac-
 count to your orators or in any manner concerning
 the same.

To the end therefore that the said Walter Brew-
 ster and John C. Coddington may on their corporal

- 13 oaths answer the premises, and that an account may be taken of the personal estate of the said Smith Coddington which has come to the hands, possession and control of the said Walter Brewster and John C. Coddington, or either of them, and that an account may be taken of the debts and funeral expenses of the said Smith Coddington, and that the remainder of his personal estate may be ascertained, and that an account may be taken of the rents and profits of the said house and lot which have been received by the said Walter Brewster and John C. Coddington, or either of them, and that in taking the said accounts the said Walter Brewster and John C. Coddington be not allowed any commission or compensation for their services and that they or one of them be decreed to pay to your orators costs in this suit:

- And that your orator Henry I. Coddington may have decreed it be paid to him the said legacy of four hundred dollars, and that your orators Charles E. Coddington and Annie B. Coddington and the other residuary legatees of the said Smith Coddington and the said Edward Gridley as guardian of the said Fannie W. Jackson may be decreed to have paid to them their respective distributive shares of the remainder of said personal estate, and of the said rents and profits under such reasonable legal or equitable conditions as this honorable court may impose, and in case it shall appear that there is not sufficient of the said personal estate or of the surplus of said rents of said real estate to pay the said legacy of four hundred dollars to your orator, Henry I. Coddington, that the said real estate may be decreed to be sold under the direction of this honorable court and the proceeds thereof applied first to the payment of said legacy and the surplus to be divided as in said will directed; and that the said Walter Brewster and John C. Coddington be enjoined from collecting the rents of said real estate, and from selling or attempting to sell the same, or in any manner intermeddling there-

with, and that a receiver of the rents of said real 17
 estate may be appointed by this honorable court ;
 and that your orators may have such further or
 other relief as the nature of the case may require,
 and as shall be agreeable to equity and good con-
 science. May it please your honor, the premises
 considered, to grant unto your orators not only the
 state's writ of injunction issuing out of and under
 the seal of this honorable court, to be directed to
 the said Walter Brewster and John C. Coddington,
 restraining them and each of them in manner afore- 18
 said, but also the state's writ of subpœna, to be direct-
 ed to the said Walter Brewster and John C. Cod-
 dington, executors of the said Smith Coddington,
 to James S. Coddington, to Edward Gridley Guar-
 dian of the said Fannie W. Jackson, to the said
 Maggie I. Hennen and William D. Hennen, her
 husband, the said Fannie W. Jackson and Hart
 Jackson, her husband, and the said Walter B. Cod-
 dington, therein and thereby commanding them on
 a certain day, and under a certain penalty, to be 19
 therein specified, to be and appear before this honor-
 able court, then and there to answer all and singular
 the premises contained in this, your orator's bill of
 complaint, and to stand to and abide by such order
 and decree in the premises as shall seem meet and
 agreeable to equity and good conscience, and your
 orators will ever pray, etc.

H. K. CODDINGTON,
 Solicitor and of Counsel
 With Complainants.

Filed November 18, 1879.

21

IN CHANCERY OF NEW JERSEY.

Between HENRY I. CODDINGTON *et al.*,
Complainants,

and

WALTER BREWSTER, and JOHN C.
CODDINGTON, Executors, *et als.*,
Defendants.

On Bill, &c.

22

This cause coming on to be heard on an order to show cause why a receiver of the rents of the house and lot described in the bill, situate on the corner of Milton Avenue and Second street, in the city of Rahway, should not be appointed, Now, on reading the bill and affidavit thereto annexed, and after having heard H. K. Coddington, counsel for the complainants for the motion, the defendant, John C. Coddington, appearing by B. A. Vail, Esquire, his counsel, and the defendant Walter Brewster appearing in person, and consenting to the granting of said motion, It is ordered, on this twenty-fourth day of November, eighteen hundred and seventy-nine, that Jacob R. Shotwell, of the city of Rahway, be and he is hereby appointed receiver of the rents of said house and lot, and, it is further ordered, that the said receiver give bond with surety in the sum of seven hundred and fifty dollars, to the chancellor of this state, for the faithful performance of his duty, the form of said bond and the sufficiency of the sureties to be approved by Leslie Lupton, Esq., a master of this court.

23

24

Respectfully advised.
A. V. VAN FLEET, V. C. }

THEODORE RUNYON,
Chancellor.

Filed Dec. 4, 1879.

A decree *pro con.* was entered February 11, 1880, 25
as to all the defendants except John C. Coddington,
who filed the following answer :

IN CHANCERY OF NEW JERSEY.

Between HENRY I. CODDINGTON *et als.*,
Complainants,

and

WALTER BREWSTER *et als.*,
Defendants.

*On Bill for Re-
lief.*

26

The answer of John C. Coddington, one of the
defendants to the bill of complaint of Henry I.
Coddington, Charles E. Coddington and Annie B.
Coddington, complainants.

This defendant, now and at all times hereafter,
saving and reserving to himself all, and all manner
of benefit and advantage of exception to the many 27
errors, uncertainties and imperfections in the said
bill of complaint contained, for answer thereto, or
unto so much thereof as this defendant is advised
it is material or necessary for him to make answer
unto answering, says :

That he admits it to be true that Smith Coddington,
the father of said complainants, departed this
life on or about the eleventh day of May, in the year
eighteen hundred and sixty-eight, having first made
his last will and testament in due form of law, as in 28
said bill mentioned and set forth ; that by said will
this defendant and the said defendant, Walter
Brewster, were appointed executors thereof ; that
said will was on the eighth day of June, in the year
eighteen hundred and sixty-eight, duly admitted to
probate by the surrogate of the county of Union, in
this state, and that the said Walter Brewster and
this defendant qualified as the executors thereof.

And this defendant, further answering, denies that

29 any part of the personal estate of the said Smith Coddington ever came into the possession of this defendant, or into the possession or under the control of any other person or persons for or on behalf of this defendant, except the sum of one hundred dollars, which said sum was afterwards paid by this defendant upon order of said Brewster, but on the contrary, further answering saith, and charges the truth to be that the said Walter Brewster, immediately upon the proving of said will, assumed the entire management and control of the estate of the said
 30 Smith Coddington; took into his possession all of the personal property belonging to said estate, and has continued in the full possession of all of the said property up to the present time, excepting of such part thereof as may have been applied to the payment of the debts of the said Smith Coddington, or been distributed under and according to the purposes of said will.

And this defendant, further answering, denies that this defendant with the said Walter Brews-
 31 ter ever paid to the said Edward Gridley the sum of seven thousand three hundred dollars or any other sum, but further saith that he is informed and believes it to be true that said sum has been paid by the said Brewster to the said Gridley.

And this defendant, further answering, saith and charges the truth to be that the said complainants have always known that the said Walter Brewster was the acting and managing executor of the estate of the said Smith Coddington, and that all of the
 32 property belonging to said estate was in the sole and absolute possession and control of the said Brewster, from and after the proving of the said will.

And this defendant, further answering, denies that the said complainants or any of them have ever requested this defendant to pay to them any of the legacies bequeathed to them by said will, and further denies that he has now in his possession or under his control any property belonging to said estate.

And this defendant, further answering, admits that 33
 no account has ever been filed by this defendant,
 and further answering saith that he is informed and
 believes it to be true that there was a certain house
 and lot in the city of Rahway, as mentioned and
 described in said bill, which belonged to the said
 Smith Coddington at the time of his death, but this
 defendant denies that he ever entered into the pos-
 session of said premises or any part thereof, or ever
 received any of the rents and profits thereof as
 charged in said bill.

And this defendant, further answering, saith that 34
 as to all the other matters and things charged in
 said bill this defendant has no knowledge, informa-
 tion or belief save as he is informed by said bill, and
 therefore leaves the complainants to make such
 proof thereof as they may deem proper.

And this defendant denies all and all manner of
 unlawful combination and confederacy wherewith
 he is by the said bill charged, without that, that any
 other matter or thing in the said complainants' said 35
 bill of complaint contained, material or necessary
 for this defendant to make answer unto and not
 herein and hereby well and sufficiently answered,
 confessed or avoided, traversed or denied, is true to
 the knowldge or belief of this defendant ; all which
 matters and things this defendant is ready and will-
 ing to aver, maintain and prove as this honorable
 court shall direct, and humbly prays to be hence
 dissmised with his reasonable costs and charges in
 this behalf most wrongfully sustained.

VAIL & WARD, 36
 Solicitors for and of Counsel
 with said defendant.

Filed January 31, 1882.

Replication was duly filed.

37

IN CHANCERY OF NEW JERSEY.

Between HENRY I. CODDINGTON *et*
al.

Complainants,

and

On Bill, etc.

38 WALTER BREWSTER and JOHN C.
CODDINGTON, executors, etc., of
SMITH CODDINGTON, deceased, and
others,

Defendants.

This cause having been referred to Hon. Joseph D. Bedle, one of the advisory masters of this court for hearing on bill, answer of the defendant, John C. Coddington, replication and proofs, a decree *pro confesso* having been heretofore entered as against all the other defendants, and the cause coming on to be heard before said advisory master, and the pleadings and proofs having been read, and counsel for complainants and said defendant John C. Coddington, having been heard, and due deliberation being had thereon, it is ordered, adjudged and decreed that the defendants Walter Brewster and John C. Coddington, executors of Smith Coddington, deceased, account in this court for all the assets of the estate of Smith Coddington, deceased, received by them, or either of them, or for which they are liable as executors, and for the rents and profits of the real estate of the said Smith Coddington received by them or either of them, and of all their disbursements, and that the accounts of said executors be settled in this court, and that it be referred to Thomas M. Moore, Esquire, one of the masters and examiners of this court, to take and state the accounts herein provided for, and to take evidence and hear the parties, and do whatever else is necessary according to law and the practice of this

39

40

court, fully to carry out the terms of this decree, 41
and the question of the extent of the respective liabilities of the said executors, whether jointly or separately is hereby referred to said master for investigation, hearing and determination, and for his report thereon, and said master is to use the pleadings and testimony already taken, so far as the same may legally and equitably bear upon the matters herein referred to him.

It is also further ordered that said Walter Brewster and John C. Coddington file in this court under oath an account of the assets of the estate of said Smith Coddington, received by them or either of them, and of the rents and profits of the real estate received by them, or either of them, and of their disbursements, within thirty days after the service of a copy of this decree upon them, and that the complainants file exceptions to said account within thirty days after the filing of said account, and notice of the same served upon their solicitor. 42

And said master is to report, with all convenient speed and all further equities are reserved until the the coming in of said report. 43

Respectfully advised,	} THEODORE RUNYON, Chancellor.
J. D. BEDLE,	
Advisory Master.	
Dated October 24, A. D. 1881.	

Filed October 24, 1881.

44

A copy of this decree was, immediately after its entry, served on each of the defendants, Brewster and John C. Coddington. No notice of the filing of account by either has been served on the complainants or their solicitor, and no further steps have been taken in the cause, which is still pending.

45

IN CHANCERY OF NEW JERSEY.

Between HENRY I. CODDINGTON
and others
Complainants,

and

46 WALTER BREWSTER and JOHN C.
CODDINGTON, Executors, etc., and
others,
Defendants.

On Bill, etc.

To Hon. THEODORE RUNYON, Chancellor of New
Jersey :

47 The petition of Jacob R. Shotwell respectfully
shows : That by order of this court in the above
entitled cause, entered the fourth day of December
eighteen hundred and seventy-nine, your petitioner
was appointed receiver of the rents of the house and
lot described in the complainants' bill, and situate
on the corner of Milton avenue and Second street,
in the city of Rahway ; that your petitioner gave
bond, as directed by said order, and entered upon
his duties as such receiver ; that he collected the
rent of said house from the quarter ending April
first, eighteen hundred and eighty, to the quarter
ending April first last ; that he expended for repairs
48 of thirty-two dollars and two cents, and that he has
now in his hands a balance of three hundred and
thirty-seven dollars and eighty-five cents, as more
fully appears by the account hereunto annexed.

And your petitioner further shows, that in the
month of June last, said house and lot was sold
under and by virtue of an execution issued out of
this court, on foreclosure of mortgage, and that the
purchaser at said sale notified the tenant of said

house and lot to pay all rent thereafter accruing 49
to him.

Your petitioner, therefore, prays that he have
leave to present the annexed account ; that it be al-
lowed by your honor ; that your honor direct to
whom said balance in your petitioner's hands as
aforesaid be paid, and that upon payment being
so made your petitioner be discharged as such re-
ceiver.

And your petitioner will ever pray, etc.

J. R. SHOTWELL. 50

New Jersey, Union County, ss :

JACOB R. SHOTWELL, the petitioner in the fore-
going petition named, being conscientiously scrupu-
lous of taking an oath, and being duly affirmed ac-
cording to law, says that the matters, facts and
things in the foregoing petition set forth are true.

J. R. SHOTWELL.

Affirmed and subscribed before }
me, this 12th day of July, 1882. }

51

B. F. VAIL,
M. C. C.

The account of Jacob R. Shotwell, receiver of
rent of house and lot, corner of Milton avenue and
Second street, in the city of Rahway, part of estate
of Smith Coddington, deceased.

This accountant chargeth himself :

52

To cash received for rent of said house and lot, from April 1, 1880, to April 1, 1882, two years at \$180 per year.....	\$360 00
" interest received on savings bank de- posit.....	9 87
	<hr/>
	\$369 87

53 This accountant prays allowance for the following bills paid for expenses of necessary repairs to said house :

1880.

May 11.	R. C. Voorhies.....	\$18 60
“	C. Banks.....	5 00
“	D. C. Marsh.....	3 62

1881.

June 10.	Moses Turner.....	2 30
	Charles Screnshaw.....	2 50

54 32 02

Balance in hands of accountant, \$337 85

J. R. SHOTWELL.

Union County, ss :

JACOB R. SHOTWELL, receiver as aforesaid, being conscientiously scrupulous of taking an oath, and being duly affirmed according to law, says that the above account is in all things just and true, both as to the charge and discharge thereof.

J. R. SHOTWELL.

55 Affirmed and subscribed this }
12th day of July, before me }
B. F. VAIL,
M. C. C.

IN CHANCERY OF NEW JERSEY.

56 Between HENRY C. CODDINGTON,
et al.,
Complainants,

and

WALTER BREWSTER and JOHN C.
CODDINGTON, Executors, etc., of
SMITH CODDINGTON, dec'd, *et al.*,
Defendants.

} *On Bill, etc., Pe-*
tition.

The petition of Margaret C. Bispham, Charles Bispham, and Frederick H. Levey, executors of the

last will and testament of Charles Bispham, deceased, respectfully shows, that on the twenty-fifth day of February, eighteen hundred and sixty-three, Smith Coddington, the father of the complainants in the above stated cause, made, executed and delivered to the said Charles Bispham his bond, conditioned for the payment of the sum of two thousand dollars, payable in one year from the date thereof, with interest for the same at the rate of seven per cent. per annum, payable semi-annually ; and in order to secure the payment of the said bond and the said sum of money therein mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto the said Charles Bispham, his mortgage upon a certain lot of land and premises, situate in the city of Rahway, in the county of Union, and state of New Jersey, and which is the same tract of land and premises mentioned and described in the bill of complaint in the above stated cause. That the said mortgage was duly acknowledged according to law by the said Smith Coddington before William J. Magie, Esquire, one of the masters of this court, and duly registered in the office of the clerk in and for the said county of Union, in Book 3 of Mortgages, page 552, on the day of the date of said mortgage, as by the certificate of the clerk of said county, indorsed on the said indenture of mortgage, more fully appears, and to which your petitioners for greater certainty beg leave to refer, if it be necessary so to do.

And your petitioners further show, that on or about the twenty-third day of March, eighteen hundred and eighty-one, the said Charles Bispham filed his bill of complaint in this court, against the said defendants and complainants in the above stated cause, and others, for the purpose of foreclosing the said mortgage and for a sale of the said mortgaged premises ; that on the twentieth day of March, 1882, a final decree was obtained in said cause, adjudging that there was due to the said

- 61 complainant the sum of two thousand four hundred and twenty-eight dollars and ninety-two cents, the amount of the principal and interest due upon said mortgage, besides costs of suit to be taxed; and also adjudging and decreeing the sale of the said mortgaged premises for the payment of the said sums, with interest thereon; that on the sixth day of April, eighteen hundred and eighty-two, a *feri facias* was issued upon said final decree, directed and delivered to the sheriff of the county of Union,
- 62 commanding the said sheriff to sell the said mortgaged premises, and to make the said sum of two thousand four hundred and twenty-eight dollars and ninety-two cents, and also the further sum of one hundred and seventy-eight dollars and three cents of costs, together with interest on said sums; that on the tenth day of May, eighteen hundred and eighty-two, the said Charles Bispham departed this life, having made a last will and testament, in which, among other things, he appointed your petitioners the executors thereof, who proved
- 63 the said last will and testament before John R. Howell, surrogate of the county of Burlington, in this state, on the twenty-fourth day of May, eighteen hundred and eighty-two, and took upon themselves the burden of administering the same; that on the fifteenth day of June, eighteen hundred and eighty-two, an order of this court in said cause was made, substituting your petitioners executors as aforesaid, as complainants in the place of Charles Bispham deceased, and reviving and continuing
- 64 said suit in the name of your petitioners as executors as aforesaid; that the sheriff of the county of Union duly advertised the sale of the said mortgaged premises, and on the twenty-eighth day of June last past, sold the same to Margaret B. Neale and Eliza Neale, for the sum of fifteen hundred dollars, they being the highest bidders therefor, which said sale was duly confirmed by an order of this court, and the said sheriff was therein directed to execute a good and sufficient conveyance in law

to the said Margaret B. Neale and Eliza Neale, 65
 which said conveyance has been delivered to the
 said Margaret and Eliza Neale, in pursuance of said
 order.

And your petitioners further show, that the pro-
 ceeds of the sale of the said mortgaged premises
 were insufficient to satisfy and discharge the said
 mortgage debt, taxed costs and interest thereon,
 and that the deficiency arising from such sale
 amounts to the sum of twelve hundred dollars and
 ninety-three cents, as appears from the statement of 66
 the said sheriff annexed to this petition.

And your petitioners further show, that Jacob R.
 Shotwell, the receiver appointed by this court, in
 the suit of Henry C. Coddington and others, com-
 plainants, and Walter C. Brewster and John C.
 Coddington, executors of Smith Coddington, de-
 ceased, defendants, has lately filed his petition in
 said suit, showing that he has received the sum of
 three hundred and sixty-nine dollars and eighty-
 seven cents, the amount of rents collected by him as
 such receiver, from the said mortgaged premises, 67
 including interest on the amount of the rents so col-
 lected by him, and that he has made disbursements
 to the amount of thirty-two dollars and two cents,
 leaving the sum of three hundred and thirty-seven
 dollars and eighty-five cents still remaining in his
 hands as such receiver.

And your petitioners further show, that by rea-
 son of holding such mortgage, and by reason of the
 deficiency of the proceeds of sale of said mortgaged
 premises to pay the mortgage debt, including in- 68
 terest thereon, taxed costs, and sheriff's execution
 fees, your petitioners are entitled to the said sum of
 three hundred and thirty-seven dollars and eighty-
 five cents, the balance of said rents, in the hands of
 the said Jacob R. Shotwell, receiver as aforesaid.

Your petitioners therefore pray that they may be
 admitted as parties defendants to said suit of
 Henry C. Coddington and others, complainants, and
 Walter Brewster and John C. Coddington, executors

69 of Smith Coddington, deceased, defendants, and
 - that an order of this Court may be made, directin
 and requiring the said Jacob R. Shotwell, receive
 as aforesaid, to pay to your petitioners, or their so-
 licitor, the said sum of three hundred and thirty-
 seven dollars and eighty-five cents, the balance of
 said rents of said mortgaged premises, collected by
 him and in his hands as such receiver, and that out
 of the said sum when received, your petitioners may
 retain the taxed costs upon this petition and all
 70 proceedings upon the same.

ROBT. E. CHETWOOD.

Solicitor and of Counsel with Petitioners.

STATE OF NEW JERSEY, { ss:
 Burlington County. }

MARGARET C. BISPHAM and CHARLES BISPHAM,
 two of the above named petitioners, being duly sworn
 according to law, on their several oaths say, that
 the matters and things set forth in the above peti-
 71 tion are true.

MARGARET C. BISPHAM,
 CHARLES BISPHAM.

Subscribed and sworn this 31st }
 day of July, A. D. 1882, be- }
 fore me at Mount Holly.

F. B. LEWIS,
 Master in Chancery.

IN CHANCERY OF NEW YORK.

BETWEEN CHARLES BISPHAM,
Complainant,

and

WALTER BREWSTER & JOHN C. COD-
DINGTON, Executors, etc., of SMITH
CODDINGTON, DECEASED, *et al.*,
Defendants.

74

Fi. fa., for sale of mortgaged premises.

Returnable term 18.

Levy decree for	\$2,428 92	
Interest from March 20-June 21	37 14	
Taxed costs	178 03	
Interest from March 27-June 21	2 50	
		75
	\$2,646 59	
Net proceeds	1,445 66	
Deficiency	1,200 93	

By virtue of the above stated writ of *feri facias*, to me directed, I did sell at public vendue, at the Court House, in the city of Elizabeth, Union County, N. J., on the 21st day of June, 1882 [pursuant to advertisement], all that tract or parcel of land and premises described in said writ to Margaret B. Neale and Eliza Neale, being the highest bidders for the same. 76.

Sheriff's fees, \$54.34.

This is to certify that the above statement is correct, that I did duly advertise and sell the property described in the above stated execution, as required

77 by law, and the proceeds of said sale, after deducting therefrom sheriff's fees, amount to \$1,445.66.

THOS. FORSYTH,
Sheriff.

STATE OF NEW JERSEY, }
County of Union. } ss:

THOMAS FORSYTH, Sheriff of Union County aforesaid, being duly sworn, on his oath says that the above statement is true.

78 THOS. FORSYTH.

Subscribed and sworn before me }
this 27th day of July, A. D. 1882. }

W. H. REYNOLDS,
Notary Public.

A copy of this petition, and of notice of motion thereon, was duly served on all parties. It was conceded on the argument before the Vice-Chancellor that there are no unpaid debts of the said Smith Coddington.

79

IN CHANCERY OF NEW JERSEY.

Between HENRY I. CODDINGTON *et al.*,
Complainants,

and

80 WALTER BREWSTER and JOHN C. CODDINGTON, Executors, &c., of Smith Coddington, deceased, *et al.*

Defendants.

*On Bill, &c.,
Order.*

A motion having been made before the chancellor on the petition of Margaret C. Bispham, Charles

Bispham and Frederick H. Levey, executors of the 81
 last will and testament of Charles Bispham, deceased, that they be made parties defendants in the above stated cause and for relief, and the matters having been debated by the counsel for the petitioners and the counsel of the complainants, and the chancellor having considered of said matters and being of opinion that the said petitioners are proper parties defendants to this cause,

It is, on this fourth day of September, eighteen hundred and eighty-two, on motion of Robert E. Chetwood, solicitor of said petitioners, ordered, 82
 that the said Margaret C. Bispham, Charles Bispham and Frederick H. Levey, executors of the last will and testament of Charles Bispham, deceased, be admitted as parties defendants in this cause; and it further appearing that Jacob R. Shotwell, the receiver appointed in this cause, has in his hands the sum of three hundred and thirty-seven dollars and eighty-five cents, the amount of rents collected by him and interest thereon (after allowing the disbursements made by him as appears by his 83
 report now on file in this cause) from certain lands and premises in the city of Rahway, belonging to the estate of Smith Coddington, deceased, and that the said lands and premises were sold on the twenty-eighth day of June last past by the sheriff of the county of Union, upon the foreclosure of the mortgage of the said petitioners given by the said Smith Coddington in his lifetime, and that the proceeds of the sale of the said mortgaged premises were insufficient to satisfy and discharge the mortgage debt, 84
 taxed costs of the foreclosure suit and sheriff's execution fees, and that the deficiency arising from such sale amounts to the sum of twelve hundred dollars and ninety-three cents, besides interest thereon. It is further ordered, that the said receiver pay to the complainants in this cause or to their solicitor, their costs to be taxed upon the application for an order appointing said receiver, and upon the petition of the said receiver for his discharge, and the

- 85 order discharging said receiver, and that the said receiver pay the balance of said moneys in his hands to the solicitor of the said petitioners, and that out of the moneys so received the said solicitor retain the costs to be taxed upon the petition filed by said petitioners, and all subsequent, proceedings thereon, and the balance thereof he pay to the said petitioners, which amount so received from said receiver shall be credited by the said petitioners as payment on account of the deficiency on said mortgage debt.
- 86 Respectfully advised, } THEODORE RUNYON,
A. V. VAN FLEET, V. C. } Chancellor.

COURT OF APPEALS

IN THE LAST RESORT, &C.

87	Between HENRY I. CODDINGTON, Appellant,
	<i>and</i>
	MARGARET C. BISPHAM, CHARLES BISPHAM and FREDERICK H. LE- VEY, Executors, &c., of Charles Bis- pham, deceased,
	Appellees.

** On Petition, &c.
Petition of Ap-
peal.*

To the Honorable the Court of Appeals in the Last Resort in all causes of law :

- 88 The humble petition of Henry I. Coddington, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by an order made in the Court of Chancery, bearing date the fourth day of September, eighteen hundred and eighty-two, in a cause pending in said court, wherein your petitioner and others are complainants, and Walter Brewster and John C. Coddington, executors, &c., of Smith Coddington, deceased, and

others are defendants, on petition filed in said cause 89
 by the said Margaret C. Bispham, Charles Bispham
 and Frederick H. Levey, executors, &c., of Charles
 Bispham, deceased, in these respects, to wit: That
 said order admits said petitioners as parties defend-
 ant in said cause, and directs Jacob R. Shotwell,
 the receiver theretofore appointed therein, after
 paying certain costs of the complainants, to pay the
 balance in his hands as such receiver to the solicitor
 of said petitioners. And your petitioner humbly
 appeals from so much of said order as orders as 90
 aforesaid, upon the ground that the same is errone-
 ous, for that said petitioners should not be admitted
 as defendants in said cause, and that no part of the
 money in the hands of said receiver should be paid
 to them or for their benefit or use.

Your petitioner therefore prays that the said order
 may be, in the particulars aforesaid, reversed, set
 aside, and for nothing holden. And that your peti-
 tioner may have such relief in the premises as to the
 honorable court shall seem meet.

Dated September 29th, 1882.

91

H. K. CODDINGTON,
 Solicitor, and of Counsel with Appellants.

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93

COURT OF ERRORS AND APPEALS.

Between HENRY I. CODDINGTON,
Appellant,

and

94 MARGARET C. BISPHAM, CHARLES
BISPHAM and FREDERICK H. LEVEY
Executors, etc., of CHARLES BIS-
HAM deceased,
Respondents.

*On Petition, etc.,
Answer to pe-
tition of Ap-
peal.*

The answer of the above-named respondents to the petition of appeal of the above named appellant:

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

96

ROBERT E. CHETWOOD,
Solicitor of and of Counsel
with respondents.

HENRY I. CODDINGTON

v.

THE EXECUTORS OF CHARLES
BISPHAM, Deceased.

97

On application for money in the hands of a receiver appointed by the Court.

98

Mr. R. E. CHETWOOD, for creditor.
Mr. H. K. CODDINGTON, for legatee.

Van Fleet, V. C. :

The question in dispute between the parties to this application is, whether certain moneys under the control of the Court, and which represent the rents received from certain mortgaged premises, shall be paid to the person who holds the mortgage thereon, or to the legatees of the mortgagor? The facts out of which the controversey arises may be summarized as follows. Three legatees under the will of Smith Coddington, deceased, brought suit in this Court against the executors thereof, charging that they were mismanaging and wasting the estate under their control, and praying that they might be required to account here, that the estate might be settled here, and the legatees paid under the direction of this Court, and also for the appointment of a receiver. Among the property which the executors were charged with mismanaging was a lot, with a dwelling thereon, situate in the city of Rahway. They were charged with collecting the rents and wrongfully refusing to apply them to the discharge of the taxes assessed against the house and lot. The house and lot were subject to a mortgage of \$2,000 executed by the testator. Shortly after the bill was filed, a receiver, to take charge of the house and lot and collect the rents, was appointed

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101 with the consent of the executors. Afterwards the mortgage was foreclosed, and the house and lot were sold, under a decree of this Court, for \$1,200 less than the amount decreed to be due on the mortgage. The receiver has accounted, and there remains in his hands, of the rents received, a balance of over \$300. It is admitted that the expenses of the administration and all the debts of the testator have been paid, except the balance due on the mortgage, and that the only persons who have any right to the balance in the hands of the receiver are the mortgage creditor and the legatees under the will of the mortgagor.

102

Counter claims to the moneys are made: One of the legatees asserts his claim on affidavit and notice, and the mortgage creditor makes his claim by petition, in which he asks that he may be made a party to the suit instituted by the legatees and, after being so admitted, that the moneys may be ordered paid to him.

When the matter was first fully opened, so that the nature of the opposing claims could be clearly seen, 103 I thought it proper to intimate to counsel that it was probable neither of the parties could successfully claim the moneys, and that if they were disposed of in a strictly legal way, they would have to be ordered paid to the mortgagor's executors in order that they might be put in due course of administration. Both counsel at once said that nobody wanted that course adopted; that if the moneys reached the hands of the executors, it was quite probable they would be lost to both creditor and legatees; and that, in view of that fact, and because the amount in dispute was so small, that if proceedings were taken to have the executors removed, and some other representative of the testator appointed in their place, a large part of it would be consumed in legal expenses, they had agreed to bring the matter informally to the attention of the Court, and all they desired was an opinion, whether, in the due administration of the fund, it should be paid to the mortgage creditor or to the legatee. All matters of substance, as well

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as of form, standing in the way of reaching that question regularly and deciding it so as to bind the parties, were to be considered, waived. 105

On the question so presented, I do not think there can be two opinions. The money in dispute represents income from the property which was pledged to pay the mortgage debt; the money is in the possession of a tribunal to which both claimants have appealed for aid—the legatee to be protected against the wrongful conduct of the executors, and the mortgagee for the collection of his debt—and in disposing of the money that tribunal must have a careful regard for the relative rights and position of the parties. The legatee stands simply in the rights of his testator, and he, in this case, is a debtor, and that too by the decree of this Court. If he were the claimant, and it appeared, as it now does, that he stood, by the decree of this Court, indebted to the other claimant, in a sum largely in excess of the sum in the possession of the Court, it could scarcely be regarded as respectful for him to ask the Court to hand the money over to him, and let its decree go unperformed. Such a request might very properly be regarded as a solicitation to the Court to allow its decree to be contemned before its face. His legatee cannot stand a whit higher. He must trace his right through his testator, and if the Court would not give the money to his testator, it should not give it to him. 106 107

And of what advantage to the legatee would an order be that the money should be paid to him? There is no estate properly applicable to the payment of legacies until the testator's debts are paid. Legatees have no rights, as such, until the creditors of the testator are satisfied. A legatee is not entitled to the payment of his legacy until he has given a refunding bond. And though a creditor may be barred of his action against the executor of his debtor, he is entitled to a remedy against his debtor's legatee, if the legatee has received his legacy, (*Rev.* 765, § 67). A payment should, under no circumstances, be or- 108

109 dered to be made to the legatee, except on condition that he first executed a refunding bond, and if he received the money upon such terms it would do him no good—for he would be bound to return it unless he is in such indigent condition that his bond is worthless, and then to order the money paid to him would, to state the truth plainly, be handing the money over to him that he might retain it against his testator's creditor. That the Court cannot do.

As between the two claimants the creditor is entitled to the money.

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