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Notice of Appeal.

(Filed October 7, 1930.)

In Chancery of New Jersey 10

74-685.

Between

FRED BREZINSKY and FRED ZEIDLER, Executors of the Last Will and Testament of Robert August Hafer, Deceased,

Complainants,

and

HARRY BREVES,

Defendant.

On Bill, &c.

20

The complainants, Fred Brezinsky and Fred Zeidler, Executors of the Last Will and Testament of Robert August Hafer, deceased, hereby appeal from the final decree made by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor John O. Bigelow, in the above entitled cause on September 25, 1930, and from the whole and every part thereof to the Court of Errors & Appeals in the last resort in all causes.

30

Dated September 26th, 1930.

SCHUMANN & SCHUMANN,
Solicitors of Complainants.

E. W. A. SCHUMANN,
Of Counsel with Complainants.

40

Petition of Appeal.

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

E. W. A. SCHUMANN,
Of Counsel with Complainants.

10

Petition of Appeal.

(Filed October 8, 1930.)

NEW JERSEY COURT OF ERRORS & APPEALS.

FRED BREZINSKY and FRED ZEIDLER,
Executors of the Last Will and
Testament of Robert August
Hafer, deceased,
Complainants-Appellants,

20

v.

HARRY BREVES,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.

To the Honorable the Court of Errors & Appeals,
in the Last Resort in All Causes:

30 The petition of Fred Brezinsky and Fred Zeidler,
Executors of the Last Will and Testament of
Robert August Hafer, deceased, the appellants in
the above entitled cause, respectfully shows that:

40 1. Petitioners find themselves aggrieved by a
final decree made in the Court of Chancery by
His Honor Edwin Robert Walker, Chancellor of
the State of New Jersey, on the advice of Vice-
Chancellor John O. Bigelow, bearing date Septem-
ber 25, 1930, in a certain cause in said Court
of Chancery, wherein the said Fred Brezinsky and

Bill of Complaint.

Fred Zeidler, Executors of the Last Will and Testament of Robert August Hafer, deceased, were complainants, and the said Harry Breves, was defendant; in this respect to-wit, that the said decree adjudges that the bill of complaint herein should be dismissed; and 10

2. Petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that the Chancellor should not have adjudged as aforesaid, but should have adjudged that the complainants are entitled to the relief prayed for by them and that the Chancellor should have made a decree for specific performance against the defendant Harry Breves. 20

Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that petitioners may have such other relief in the premises as to this court shall seem proper.

SCHUMANN & SCHUMANN,
Solicitors of Appellants.

E. W. A. SCHUMANN,
Of Counsel with Appellants. 30

Bill of Complaint.

(Filed September 23, 1929.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey:

The complainants Fred Brezinski and Fred Zeidler, executors of the last will and testament of 40

Bill of Complaint.

Robert August Hafer, deceased, of the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows that:

10 1. On May 19, 1928, complainants Fred Brezinski and Fred Zeidler, as executor of the last will and testament of Robert August Hafer, deceased, were seized in fee simple, of the premises known as 61½ Bowers Street, Jersey City, New Jersey, referred to in the Seventh Paragraph of the last will and testament of said Robert August Hafer, deceased, and which is more particularly described as follows:

20 ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which is bounded and described as follows, to wit:

30 COMMENCING at a point in the southerly line of Bowers Street, distant thirty-nine feet and seventy-one one-hundredths of a foot (39.71') westerly from the corner formed by the intersection of the said westerly line of Webster Avenue with the southerly line of Bowers Street, which point of beginning is the point opposite the center line of a party wall standing partly on the premises hereby intended to be conveyed and partly on the premises next adjoining the same to the east; running thence southerly at right angles to Bowers Street, ninety (90) feet to, through and beyond the center line of said party wall last aforesaid to a point; thence running westerly and parallel with Bowers Street, twenty (20) feet to a point opposite the center line of a party wall standing partly on
40 the premises hereby intended to be conveyed and partly on the premises next adjoining same to the

Bill of Complaint.

west; running thence northerly and parallel with the first course run, to, through and beyond the center line of said party wall last aforesaid ninety (90) feet to a point in the said southerly line of Bowers Street; running thence easterly, along the said southerly line of Bowers Street, twenty (20) feet to the point or place of beginning. 10

2. On the date last mentioned complainants Fred Brezinski and Fred Zeidler, as executor of the last will and testament of Robert August Hafer, deceased, entered into a certain agreement in writing with Harry Breves, wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty, on or before June 15, 1928, to the said Harry Breves, in consideration of the payment by said Harry Breves, of the sum of \$50.00 and the said Harry Breves, agreed to pay to complainants the purchase price of \$5,500.00, by the payment of \$50.00 at or before the execution of said agreement, and the payment of \$5,450.00 in cash, the said deed to be delivered at the office of Schumann and Schumann, 283 Central Avenue, Jersey City, New Jersey, on or before June 15, 1928, and it was provided therein that the time of passing title to be of the essence thereof. A true copy of said written agreement is hereto annexed and made a part hereof. 20 30

3. The said Harry Breves paid to complainants the said sum of \$50.00 at the time of the execution and delivery of the said agreement in writing.

4. On said June 15, 1928, at the hour of ten o'clock in the forenoon, complainants duly attended at the office of Schumann and Schumann, at 283 Central Avenue, Jersey City, New Jersey, with a warranty deed conveying the said lands and 40

Bill of Complaint.

10 premises hereinabove referred to to the said Harry Breves, duly executed and acknowledged by complainants, for the purpose of delivering the said deed to the said Harry Breves, upon the payment by the said Harry Breves, of the balance of the purchase price pursuant to the terms of the aforesaid agreement; but the said Harry Breves did not appear at said time and place, nor at any time before ten o'clock in the forenoon, although complainants remained there until 11:30 o'clock.

20 5. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the said agreement, and, on being paid the remainder of said purchase money, with interest, to convey the said lands and premises to the said Harry Breves, by a warranty deed, duly executed by complainants.

Complainants are without adequate remedy in the Courts of law, and therefore pray:

1. That Harry Breves, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

30 2. That the said Harry Breves, may be compelled by the decree of this Court specifically to perform the said agreement with complainants, and to pay to complainants the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainants to said Harry Breves, of a deed executed by complainants, as in said agreement provided.

40 3. That in case the said defendant Harry Breves, should, within the time limited by this Court, for such performance of said contract, fail

Bill of Complaint.

and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such lien so impressed on said lands and premises; and that in case a deficiency should arise upon the said sale, that the said defendant may be ordered by this Court to pay said deficiency, together with interest and costs to these complainants. 10

4. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 20

E. W. A. SCHUMANN,
Solicitor for and of Counsel
with Complainants.

SCHUMANN & SCHUMANN,
Solicitors.

AGREEMENT, made the nineteenth day of May, A. D., 1928, BETWEEN Fred Brezinski and Fred Zeidler, executors of the last will and testament of Robert August Hafer, deceased, the first party, and Harry Breves, of 61 Bowers Street, Jersey City, N. J., the second party, in manner following: 30

The first party in consideration of fifty (\$50.00) dollars to them duly paid, hereby agree to sell unto the second party.

The premises known as 61½ Bowers Street, Jersey City, N. J. referred to in the Seventh Paragraph of the last will and testament of said Robert Au- 40

Bill of Complaint.

gust Hafer, deceased, and which is more particularly described as follows:

10 ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which is bounded and described as follows, to wit:

20 COMMENCING at a point in the southerly line of Bowers Street, distant thirty-nine feet and seventy-one one-hundredths of a foot (39.71') westerly from the corner formed by the intersection of the said westerly line of Webster Avenue, with the southerly line of Bowers Street, which point of beginning is the point opposite the center line of a party wall standing partly on the premises hereby intended to be conveyed and partly on the premises next adjoining the same to the east; running thence southerly, at right angles to Bowers Street, ninety (90) feet to, through and beyond the center line of said party wall last aforesaid to a point; thence running westerly and parallel with Bowers Street, twenty (20) feet to a point opposite the center line of a party wall standing partly on the premises hereby intended to be conveyed and partly on the premises next adjoining same to the west; running thence northerly and parallel with the first course run, to, through and beyond the center line of said party wall last aforesaid ninety (90) feet to a point in the said southerly line of Bowers Street; running thence easterly, along the said southerly line of Bowers Street, twenty (20) feet to the point or place of beginning.

40 Being the same premises described in a certain deed made by Nellie Duffy, widow, and John Earls, unmarried, to the said Robert August Hafer, in said deed named Robert Hafer, dated January 14,

Bill of Complaint.

1921, and recorded in the Register's Office of the County of Hudson on the 18th day of January, A. D., 1921, in book 1389 of Deeds for said County, on page 395, for the sum of fifty-five hundred (\$5500.) dollars, which the said second party hereby agrees to pay to the said first party, as follows: 10

On execution of this agreement....	\$50.00
On delivery of deed, cash	5550.00
	<hr/>
Total	\$5500.00

Taxes, water rents and insurance premiums to be apportioned on and as of date July 1, 1928.

AND the said first party on receiving payments as above set forth, shall deliver to the said second party or to his assigns a duly executed conveyance (Executor's Deed), conveying to him the fee simple of said premises, free from all incumbrance, said deed to be delivered at the office of Schumann and Schumann, No. 283 Central Avenue, Jersey City, N. J., on or before June 15, 1928, said time of passing title to be of the essence hereof. 20

IN WITNESS WHEREOF, the parties to these presents have hereto set their hands and seals the day and year first above written. 30

FRED BREZINSKI L.S.

FRED ZEIDLER L.S.

Executors of the last will and testament of Robert August Hafer, deceased

HARRY BREVES L.S.

Sealed and delivered in the presence of: 40

KATHERINE A. TIETJEN

Answer in Lieu of Plea.

(Filed February 13, 1930.)

IN CHANCERY OF NEW JERSEY.

74-685

10

Between

FRED BREZINSKI and FRED ZEIDLER,
 Executors of the last will and
 testament of Robert August
 Hafer, Deceased,

Complainants,

and

HARRY BREVES,

Defendant.

On Bill, &c.

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The answer of the defendant, Harry Breves, in lieu of plea. This defendant, answering the bill of complaint, says that:

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1. The complainants as executors of the last will and testament of Robert A. Hafer, entered into the contract, a copy of which is annexed to the bill of complaint, without power and authority so to do, in that the last will and testament of said Robert A. Hafer, deceased, gives no power of sale to said complainants as executors or otherwise; neither does it give them power to execute a deed therefor.

40

2. The title of complainants, if any, is derived under the last will and testament of Robert A. Hafer, deceased, which will was admitted to probate by the Surrogate of Hudson County on July 14th, 1927. Said will is indefinite and uncertain, in that the provisions for the disposition of the

Replication.

proceeds of sale and of the residuary estate are uncertain and indefinite, and this defendant is unable to determine to what extent the provisions of said will affect the sale of said premises.

ERWIN, ERWIN & DAVIDSON,
Solicitors of Defendant. 10

Replication.

(Filed July 21, 1930.)

IN CHANCERY OF NEW JERSEY.

74-685

Between

FRED BREZINSKI and FRED ZEIDLER,
Executors of the Last Will and
Testament of Robert August
Hafer, Deceased,

Complainants,

and

HARRY BREVES,

Defendant.

On Bill, &c.

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The complainants join issue on the answer in lieu of plea of the defendant.

SCHUMANN & SCHUMANN,
Solicitors of Complainants.

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Notice of Argument.

(Filed July 21, 1930.)

IN CHANCERY OF NEW JERSEY.

74-685

10

Between

FRED BREZINSKI and FRED ZEIDLER,
Executors of the Last Will and
Testament of Robert August
Hafer, Deceased,

Complainants,

and

HARRY BREVES,

Defendant.

On Bill, &c.

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To

ERWIN, ERWIN & DAVIDSON, Esqs.,
Solicitors of Defendant:

30

Take notice that on Monday, July 21st, 1930, at
10 o'clock in the forenoon (daylight savings time)
or as soon thereafter as counsel can be heard, at
the Chancery Chambers in Jersey City, we shall
move the above entitled cause for argument before
the Honorable Vice-Chancellor John O. Bigelow.

SCHUMANN & SCHUMANN,
Solicitors of Complainants.

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Memorandum.

(Filed August 4, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

FRED BREZINSKI, and other,
 Executor, etc.,
Complainants,

and

HARRY BREVES,
Defendant.

10

On Bill, &c.
 Memorandum.
 74/685.

July 31, 1930.

Messrs. SCHUMANN & SCHUMANN, For the
 Complainants.

20

Messrs. ERWIN, ERWIN AND DAVIDSON, For
 the Defendant.

(This memorandum is not to be published in the
 official or unofficial reports.)

MEMORANDUM.

30

BIGELOW, V.-C.:

The bill of complaint was filed for the specific performance of a contract for the sale of real estate, 611½ Bowers Street, Jersey City, made between the complainants as vendors and the defendant as vendee. The defendant resists the bill on the ground that the complainants cannot give

40

Memorandum.

10 a marketable title. The solution of the controversy depends upon the construction of the will of the Reverend Robert Hafer, deceased, of which complainants are executors. The will is very long and was evidently drawn by the testator himself without the aid of counsel. The provision relating to this property reads:

20 "SEVENTH: DISPOSITION OF MY HOUSE. My 2 family Frame-House at 61½ Bowers Street, Jersey City * * * kitchen and cellar shelves, window and door screens included in sale for absolutely cash. I wish it to be sold, if possible, to a decent german-american, private family, preferably my next door neighbor, Mr. Harry Breves of 61 Bowers Street; not at auction but by free-hand sale at as high a market price cash as can be secured for charitable purposes; Mr. C. C. Schrader, the realtor of 119 Bowers Street, might be given the preference to effectuate the sale at two and one-half percent. commission."

30 No express power of sale is given to the executors and no words from which a power may be implied except those above quoted. No express disposition is made of the proceeds of the sale of the house and no definition of the charitable purposes for which it is to be sold. There are, however, a number of charitable bequests totalling about \$15,000. The residuary clause follows:

"THIRTEENTH: RESIDUARY ESTATE. All cash residuary funds I give and bequeath 'procentaaliter' to my 13 herein named German Relatives."

40 The only parties to this suit are the executors and the vendee. No one claiming an interest in the real estate under the will can be concluded by the decree in the clause and therefore there should not be a decree for specific performance unless the

Memorandum.

power of sale is so clear that it cannot be plausibly contested in another action.

The bill of complaint does not state the amount of personal property which the testator left or the amount of debts and it does not allege that a sale of this real estate is necessary in order to raise the amount of the bequests. I may therefore assume that all the bequests can be satisfied out of the personal estate. The residuary clause is limited to "cash residuary funds" and does not seem to include the real estate or the proceeds thereof, if sold. 10

The seventh paragraph of the will directs a sale of the house "for charitable purposes"—or at least so the will may be construed. A gift for such purposes in order to be valid must be sufficiently definite to permit the testator's intention to be carried out. To what charitable purposes are the proceeds of this sale to be applied? There is no guide by which that question can be answered. The heirs may plausibly contend that the implied gift of the proceeds of the property is invalid. If so, the implied power of sale would probably likewise fail. 20

The power of sale is not so clear that the vendee should be required to accept title. I will therefore advise a decree dismissing the bill of complaint. 30

Decree.

(Filed September 25, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between FRED BREZINSKI and FRED ZEIDLER, Executors of the Last Will and Testament of ROBERT AUGUST HAFER, deceased, <i>Complainants,</i> and HARRY BREVES, <i>Defendant.</i>	} 74—685. } On Bill, &c. } Decree.
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20 This matter being open to the court by Schumann & Schumann, Solicitors of the complainants, in the presence of Emil W. A. Schumann and Thomas B. Davidson of Erwin, Erwin & Davidson, Solicitors of the defendant, and the court having read the briefs upon which said case was submitted and being of the opinion that the bill of complaint in this cause should be dismissed;

30 It is on this 25th day of September, 1930, ordered, adjudged and decreed that the bill of complaint filed herein, be and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully Advised.

JOHN O. BIGELOW,
V. C.

We do hereby approve the foregoing decree as to form.

40

SCHUMANN & SCHUMANN,
Solicitors of Complainants.
ERWIN, ERWIN & DAVIDSON,
Solicitors of Defendant.

Exhibit C-1.

(page I)

IN THE NAME OF GOD, THE FATHER AND OF THE SON
AND OF THE HOLY GHOST! AMEN!

I, Robert August Hafer, of Jersey City, N. J., a
citizen of U. S. A. since Oct. 22 A.D. 1886 being 10
of sound and disposing mind and memory, and
considering the uncertainty of this life, do make,
publish and declare this to be my last WILL and
TESTAMENT as follows, hereby revoking all other
and former Wills by me at any time made.

Born in the town of Ohrdruf, Thuringia, Ger-
many, on Decbr. 23d A.D. 1852; immigrated on
July 13th A.D. 1872—(with 3 years' military Fur-
logh-Pass; preceding my required one-year ser- 20
vice)—after due collegiate and seminary prepara-
tion, ordained to the holy Ministry of the Ev-Luth-
eran Church by the venerable Synod of New York
and New Jersey on Sept. 22d A.D. 1879; retired
from full active service, owing to impaired health,
on Easter, A.D. 1910, but for 10 years more serving
as 'occasional supply' and now yet of sound and
disposing mind and memory, herewith do make,
publish and declare this my last Will and Testa-
ment, no other 'will' ever having been made by 30
me.— I commend my spirit to my merciful Crea-
tor, Redeemer and Sanctifier and commit my
body in Christian burial to the Earth, according to
the direction, herein given, to my two Executors
hereinafter named:

(§ I:)

FIRST: FUNERAL.

I direct that all my just lawful debts, including
funeral expenses, not to exceed \$500.00, expenses 40

Exhibit C-1.

of administration and inheritance taxes, etc. be paid as soon after my decease as can conveniently be done. My funeral from my house to 'St. Trinitatis' and from there to my grave-plot in Weehawken Cemetery, North-Bergen N. J. I wish to take
 10 place under the auspices of the "Southern Conference of the venerable Synod of New York" and the management by Mr. John Burk, the undertaker of St. Trinitatis, as simple as possible, somewhat of the same order of churchly lutheran style as that of of my beloved wife's, on Jan. 11. A.D. 1918.—

Over!

(page II.)

20 The following ministerial Brethren and Friends, more or less acquainted with my past history in St. Trinitatis, I wish to be notified by my Executors immediately after my demise and courteously invited to actively participate in my Obsequies with but a few friendly brotherly words of 'farewell.:

- 1/ The Rev. F. H. Knubel D.D. L.L.D., Pres. of U.L.C. 437—5th Av. New York—
- 2/ " then Pres. of the Southern Conference of the Synod of N. Y.
- 30 3/ " Rev. G.W. Wenner D.D. L.L.D; 406 E 19 Str. New York—
- 4/ " " Wm. Popcke Ph.D. (?) 424 E 84 Str. New York—
- 5/ " " John W. Heindel D.D. 39 Warner Ave Jersey City NJ
- 6/ " " James Parker D.D. L.L.D. 100 Hancock Av Jersey City NJ
- 7/ " " Aug. Bender P.D. Dutsch Ref. Ch: 940 Summit Ave Jersey City NJ

40

Exhibit C-1.

- 8/ " Ed. of the Jersey Observer with Death & Funeral notice (and copy of Will) notice to appear three days,
- 9/ " " " " German Herold & Staats Zeitung 22/24 N William Str New York— 10

my own

I request ~~the~~ letters of notification, resp invitation, be used without any delay after carefully filling in dates. A telephone announcement may precede the letters. It is of special importance that Dr. Knubel be at once notified by telephone, who has very kindly volunteered to assist as far as officially and physically able.

It is also my special desire concerning my Obsequies which ought to take place at 2 O'clock p.m. that in place of an extended curriculum vitae this my perhaps more interesting 'Last Will & Testament' be read in the english original by my worthy successor The Rev. F. Brezinski, also appointed as one of my two Executors, without any comment, so that my still beloved former congregation will become fully and correctly acquainted with my never ceasing pastorally friendly and well wishing sentiments,— As my 'pallbearers' I take pleasure to appoint all the then yet living members of my former ever faithful Church Council, kindly assisted by the new members of the present Council. (page: III)

As to the musical part of my funeral, I wish Prof. Pistor to furnish (softly) the melodies of the following of my favorite hymns, interspersed and during the final leave-taking procession subject to the kind management of Rev. Brezinski, the Pastor:

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30

40

Exhibit C-1.

- | | | | |
|----|---------------------------------|---|---------|
| | 1/ "Jesus meine Zuversicht" | } | German |
| | 2/ "Befiehl du deine Wege" | | |
| | 3/ "O Haupt voll Blut & Wunden" | | |
| | 4/ Jesus, Lover of my Soul" | } | English |
| 10 | 5/ "Abide with me" | | |
| | 6/ "Nearer my God to Thee" | | |
| | 7/ "Rock of ages, cleft for me" | | |
| | 8/ "Lead kindly Light" | | |

Concerning the Decorations, as a life long friend of God's ever lovely and comforting children of Flora including "Palms" with which during my long pastorate I have decorated with my own hands St. Trinitatis a hundred times to the glory of God and the edification of my beloved people, I beg leave to suggest that at least \$25.00 be spend

20 by my Executors at the expense of my estate, our old-church-friend Mrs. Vollmer to be favored as far as she then may yet be able. One large Cross and an Ancre to match to be placed respectively at the two ends of my remains in front of the Altar, banked by decent Palms—Hearse and 5 or 6 Autos —(one for flowers)—will suffice, to be used by the Clergy, Council and the hereinafter appointed Ladies' Committee of Honor.—

30

Over!

(page: IV)

(§ II:)

SECOND: RELATIVES

a. I give and bequeath to my nephew CARL SPINTLER manufacturer of Cöln-Müngersdorf, Germany the sum of dollars "Two thousand (\$2000.00)" and to his four daughters: MARGARETE, HANNA, AGNES and HELENE, the sum of dollars "One

40 Thousand" \$1000.00" each, in five individual checks;

Exhibit C-1.

b. I give and bequeath to my nephew ALFRED SPINTLER apothecary of Kirchweyhe b/ Bremen, Germany the sum of dollars Two Thousand, (\$2000.00);

c. I give and bequeath to my nephew PROF. DR. RUDOLPH SPINTLER, of Park Str. 14 A, Berlin-Pankow, Germany, the sum of dollars "Two Thousand, (\$2000.00); 10

d. I give and bequeath to my niece MARGARETE BECHSTEIN, nee SPINTLER, wife of Ingenieur Bechstein of Einswarden, Oldenburg, Germany, the sum of dollars "Two Thousand, (\$2000.00), and to each of her three children; FRITZ, EDITH and LUDWIG the sum of dollars "One Thousand, (\$1000.00), in four individual checks; 20

e. I give and bequeath to my nephew, Ober-Lehrer FERDINAND REINHOLD Dir. of Church Music, of Ohrdruf Thuringia, Germany, the sum of dollars "Two Thousand and Five Hundred, (\$2500.00), and to his daughter AGATHE, teacher, the sum of dollars "One Thousand, (\$1000.00); in two individual checks. These aforementioned 13 living relatives of mine, all personally unbeknown to me, the children and grandchildren of my two departed sisters AGNES and OLGA are therefore to receive the sum of dollars 18500.00 and " " " 30

(page: V)

In case of death of any of these named 13 legatees, then the respective sum is to be divided among his wh nearest relatives and heirs.

And it is my special wish and prayer that all these beloved Beneficiaries, after their terrible experiences of the world-war, will invest and preserve 40

Exhibit C-1.

these hard-earned and with much self-denial accumulated sums of legacy, so as to serve them as a nucleus of reserve and support in their days of old age.

(§ III:)

10

THIRD: CONTRIBUTIONS OF CHARITY:

I give, devise and bequeath as a "Rev. R. A. Hafer-Memorial Fund" the sum of dollars Five Thousand, (\$5000.00) in form of forty (40) shares, of the Northern Pacific R. Rd. Co., bearing 5% interest, face value \$100.00 per share, and also 10 shares 7% pref. Public Service Co of New Jersey to the "UNITED LUTHERAN CHURCH IN AMERICA", only the interest of which sum is to be expended. The interest on three-fifth (3/5) thereof to be devoted to German and German-English Home Mission and Church Extension Work including Foreign Missions and the interest on two-fifth thereof to be devoted to Education and Ministerial Pensions.—

20

Further particulars to be left to the discretion of the Executive Bd of the U.L.C.

(§ IV:)

30

FOURTH: LOCAL CHARITY

I give, divise and bequeath as "Rev. R. A. Hafer-Memorial Funds", only the interest to be used, to the following six religious and charitable Institutions, all of Jersey City NJ:

- | | |
|--|-----------|
| 1/ St. Trinitatis Ev. Luth. Church 66 & 68
Bowers St. | \$1000.00 |
| 2/ Children's Friend: Orphans' Home
Grant Ave. | "1000.00 |
| 3/ Christ Hospital, Palisade Ave. | "1000.00 |

40

Exhibit C-1.

4/ Raymond Roth Pioneer Old People's Home Greenville	"1000.00	
5/ "Salvation-Army" of Jersey City NJ	" 500.00	
6/ Old Peoples Home Nelson Ave Jersey City	" 500.00	10
all to be paid in form of 7% & 6% pref. Public Service shares		
	over.	

(page: VI)

(§ V:)

FIFTH: CHARITY FOR GERMAN WAR-SUFFERERS

While I have given already since the fateful "Armistice day" A.D. 1918, in various forms, far over \$2000.00, I take pleasure in being able to give and bequeath furthermore as a "Pastor Robert A. Hafer-Memorial Fund", tax-free, the sum of dollars Five Thousand, (\$5000.00), to the carefully selected deserving "Poor" of my beloved native town of Ohrdruf, Thuringia, Germany, in care of the honorable Mayor and the venerable Clergy, subject to the laws and ordinances of the town and state. Only the highest possible interest is to be distributed annually about Christmas-time, if possible, by a special committee, consisting of the hon. Mayor, the venerable Pastors of "St. Michaelis" and "St. Trinitatis", the Overseer of the Poor and at least one of my yet resident relatives, available. The Beneficiaries shall comprise: the aged, widows, orphans, the sick, cripples and poor candidates for the holy confirmation; but in all entirely free, subject alone to City-Law and Order, nor do I care for any ostentation and publicity;—all I care for is: "To do the greatest amount of 'good' to the greatest possible number!"—

Exhibit C-1.

(§ VI:)

SIXTH: GIFTS OF HONOR AND MERIT

10 I give and bequeath to my faithful and trusted friend and former artistic assistant and treasurer of St. Trinitatis, Mr. F. W. Zeidler of 198 Congress Str. Jersey City N.J. in grateful recognition of his most faithful, valuable and self-denying services

Over.

(page: VII.)

20 during a periode of over 30 years, including those of 'Executorship, the sum of dollars—One Thousand, (\$1000.00) in form of either ten shares 7% pref. "National Lead" or else, if enough on hand, ten shares of 7% pref. Public Service; also, all my tools of house and garden, hardware, 2 step-ladders, the almost new basement dining room large rug, magnifying glass, and the blue set of dishes and any thing he may especially care to accept as a token of remembrance when conscientiously dividing and distributing the multifarious contents of my dear old house.— I also give and bequeath the modest sum of dollars Two Hundred and Fifty, 30 (\$250.00)—to my worthy Successor, the Rev. F. Brezinski, Pastor of 'St. Trinitatis' in due recognition of his eventual conscientious service "without Bonds" as one of my two Executors, attending as such especially to the financial distribution and correspondence of the settlement required, using all the already by me carefully prepared matter, needing only dates and signatures—

(§ VII.)

40 SEVENTH: DISPOSITION OF MY HOUSE.

My 2 family Frame-House at 61½ Bowers Str. Jer-

Exhibit C-1.

sey City, 20 x 90 feet, 2 story and basement officially rated at \$....., free of all debts and encumbrances, taxes all paid. It has been rated by 2 competent realtors as being worth at least \$....., kitchen and cellar shelves, window and door screens included in sale for absolutely cash. 10

Over!

(page VIII.)

I wish it to be sold, if possible, to a decent german-american private-family, preferably my next door neighbor, Mr. Harry Breves of 61 Bowers Str; not at auction but by free-hand sale at as (market)

high a (price,) cash, as can be secured for charitable purposes; Mr. C. C. Schrader, the realtor of 119 Bowers Str. might be given the preference to effectuate the sale at two and a half percent commission. 20

(§ VIII.)

EIGHTH: CONTENTS OF THE HOUSE.

a:—I give and bequeath my valuable Library to the Ev. Luth. Wagner-College of Staten-Island N. Y. 30

b:—I give and bequeath all such of my Furniture as will be desirable to St. Trinitatis E. L. Church to be used partly, as church-property, in the Parsonage and partly in the proposed or then already established parochial Church-Society House, including all crockery, cutlery, table cloths and any yet useful carpets and mats as well as all objects of decoration, including pictures. 40

Exhibit C-1.

c:—All the rest of my furniture and contents not yet otherwise disposed of, including bedding and wash etc. as well as all the remnant boxes in the upper front-store-room, I give and bequeath to the
 10 Raymond Roth Pioneer Old Peoples Home Garfield Ave. Jersey City (incl. old sewing machine & all sewing & repairing stuff spectacles scissors darn-
 ing materials, etc.)

(§ IX:)

NINTH: MY FEW VALUABLES, CLOTHES, ETC.

a:—I give and bequeath my own valuable gold watch, a present of Honor 'from St. Trinitatis, to my nephew, Prof. Dr. Rud. Spintler, of 14A Park
 20 Str., Berlin-Pankon Germany.

Over!

(page: IX)

b:—I give and bequeath my sainted wife's gold watch to my grandniece Miss Agathe Reinhold of No. 1 Reinhard's brunner Str. Ohrdruf Thüringen
 Germany.

c:—I give and bequeath my Goldhead cane and umbrella to the latter's father, my nephew: Herrn
 30 Ober-Lehrer and K. Mus. Dir. Ferd. Reinhold of the same address, both gifts to be sent together with some other articles, stated below.

d:—I give and bequeath both my Diamond and Wedding rings together with the saphir-pin to my niece, Frau Ing. Margareta Bechstein, Einswarden, Oldenburg, Germany.

e:—I give and bequeath all my personal under-ware wash and clothing, yet worth sending, to my
 40 nephew Herrn Apotheker Alfred Spintler, Kirch-

Exhibit C-1.

weyhe b/Bremen, Germany, to be distributed by him between himself and the family of his sister Frau Marg. Bechstein and the ministerial clothing to be given to a poor German lutheran Pastor of his town or neighborhood; to be sent in 2 or 3 packages (Marked: Liebes-Gabe) 22 pds. each. 10

f:—I give and bequeath all remaining coal and kindling-wood to my faithful wash-lady, Mrs. Ida Kaufmann of 211 Webster Ave. Jersey City who may also clean the house, when clear, at suitable remuneration; \$10.00 while to her boy Charles

g:—I give and bequeath \$25.00 as a little memorial to remind him of his Friend, the Giver and "Thrift. 20

h:—All my old silk hats I wish to be send to my undertaker, Mr. John Burk for distribution among his drivers.

i:—All papers and rubbish: to the Salvation-Army.

Over!

(page: X)

(§ X:)

TENTH: BANK-BUSINESS 30

All Bank-Business I wish to be attended to by the Vice-President Mr. Huberti of the Central Ave branch of my Bank, the Trust Co. of New Jersey. Checks to be made out to reliable Banks, respectively

at Cologne, (for 'Cöln-Mungersdorf')

Bremen, (for 'Kirchweyha b/Bremen')

Berlin, (for 'Berlin-Pankow')

Bremen, (for 'Einswarden') 40

Gotha, (for 'Ohrdruf.')

All legacies to be paid out in American money.

Exhibit C-1.

(§ XI:)

ELEVENTH: EXECUTORS

As my two 'Executors' I beg leave to appoint 1/
 10 my worthy successor, the Rev. Fred. Brezinski,
 Pastor of St. Trinitatis Ev. Luth. Church of 64
 Bowers Str. Jersey City NJ 2/ my worthy friend,
 Mr. Fred Zeidler, of 198 Congress Str. Jersey City,
 N.J. No Bonds being required!

(§ XII:)

TWELFTH: LADIES-COMMITTEE OF HONOR

Kindly to assist the Executors in the proper dis-
 tribution of the contents of my house I take pleas-
 20 ure in appointing the following ladies:

- 1/ Mrs. Helene Koster, 209 Hutton Str.
 Pres. of the Ladies Aid Society
2. Mrs. Chas. Janssen
3. Mrs. Lillian Büdinger
4. Mrs. Henrietta Koven

These worthy Ladies are also especially invited
 to accompany my earthly Remains to their last
 resting-place in Weehawken cemetery.

30 (§ XIII:)

THIRTEENTH: RESIDUARY ESTATE

All cash residuary funds I give & bequeath 'pro-
 centaaliter', to my 13 herein named German Rela-
 tives

(page: XI.)

(§ XIV:)

40 FOURTEENTH: SOME COURTEOUS INSTRUCTIONS FOR
 MR. ZEIDLER AS PER HIS REQUEST.

a:—All the small card-pictures & photographs

Exhibit C-1.

except those of Germany, are to be send to the Children's Friend Orphan's Home, while all the German ones are to be placed in the "Liebes Gaben Package for my nephew Ferd Reinhold of Ohrdruf, Germany, together with my two Gold-Fountain-Pens and the other valubles, as per Item "Ninth". 10

b: All letters and script of any sort by my own hand, yet found, are to be carefully burned up.

c: All Packages of Valuables to Germany are to be send registered as "old tokens of remembrance". ("alte Andenken"), thus marked; if advisable: with "Extra Insurance".

d: the old once valuable Chickering-Piano, with defect stool in front of my desk, might be sold if not otherwise disposable. 20

e: All my Papers of Identification in the strong-box are to be send to my nephew Ferd Reinhold together with a copy of this my "last will".—

f: Have the date of Death inscribed on our Cemetery-Monument.

(§ XV:)

FIFTEENTH: BANK-SAFETY-LOCK BOX DEPOSIT 30

I direct my Executors to deposit in my Safety-Lock box No..... at the Peoples' Safe Deposit & Trust Co. of N. J. yet to be engaged for 3 months immediately after my death, all papers and documents of value, now contained in my brown metal strong box at my house viz. my account book and the 2 Bank Passbooks; 220 7% pref. shares of National Lead; 40 5% shares of Northern Pacific RR Co and 7 & 6% pref. Public Service together with deed and tax receipts of my house etc. 40

(page: XIII)

Exhibit C-1.

(§ XVI:)

SIXTEENTH: BROKERS NEEDED

10 For many years Messrs. P. H. & F. W. Pelzer, the wealthy and reliable sons of my friend, the long since departed Grocer-merchant Pelzer of Palisade Ave near South Str. have served me well in occasional investments Their office is No. 61 Broadway N. Y. They will have to sell perhaps all my 220 shares of 7% pref. National Lead at best market price, somewhere near 116 or more; while all the other shares, 40 of Northern Pacific and 50 of Public Service will have to be transferred as per specified Legacies. Their commission is fixed.

20 (§ XVII:)

SEVENTEENTH: OFFICIAL RECORDS ETC.

All my official Church-Records I direct to be carefully preserved in my cu 150 years old brown wooden little trunk, (a relic which has seen various Institutions of Learning both in Europe and here) and stored in the Archive of St. Trinitatis— All the rest of its contents I give & bequeath to the Church, as well as my mimiograph etc—

30

(§ XVIII:)

EIGHTEENTH: MY CEMETERY GRAVE PLOT

I give and bequeath to the Weehawken Cemetery Company dollars One Hundred and Fifty (\$150.00) in addition to the already donated \$100.00 for the eternal proper caretaking of our two graves. Three decent Geraniums I wish to be planted on each grave annually, together with a suitable well-trimmed perennial boarder of

40 both graves always to be in good order at the an-

Exhibit C-1.

nual Decoration-day. A kindly consideration on part of my Friends, will be greatly appreciated.

Over.

(page XIV)

(§ XIX.)

10

NINETEENTH: CONCLUSION

—And now in conclusion, my heart filled with gratitude to God, the ever-present Giver of every good and perfect gift, for all His wonderful guidance and mercies during all my long eventful but modest life, having at last arrived not only at the end of this my unavoidably minute and complicated but I trust withal clear 'last will and Testament', as well as at that of my laborious earthly pilgrimage, the evening shadows gathering more and more closely around me—As an unceasing seeker and striver for truth and righteousness, quite well versed, even if but superficially, in all the realm of divine and human wisdom and progressive science, up to date, the great and serious question still remains: "What of the final "Balance" at the gate of Eternity?—" True enough, as it has often been stated, also in my hearing at this Sanctuary: St. Trinitatis with its actually enormous pioneer-struggles under most adverse circumstances, out of practically 'nothing', inspite of repeated most serious physical down-breaks on my own part, even to the extent of incipient consumption and almost lifelong chronic Bronchitis, may always for years to come speak somewhat kindly in my favor, no matter what some may say in their pardonable ignorance or

20

30

Over

40

Exhibit C-1.

(Page: XV)

10 some may have said for other reasons, as long as
 even at closest scrutiny a steward be found faith-
 ful even in smallest things as before the judge-
 ment seat of the omniscient God.—When, accord-
 ing to St. Luke, the Jews pleaded with Christ for
 the Roman Centurian of Capernaum, praising him,
 because as they said. “he has build us a syna-
 gogue”, we read that the Saviour accepted their
 plea and graciously granted his wonderful miracu-
 lous intervention on behalf of the Centurion’s
 servant.—But still St. Paul’s gospel stands, to our
 eternal comfort—“Man is not saved by works but
 by faith alone, without them”.—Yea, with all due
 20 respect to the wonderful achievements of modern
 Science, amidst all the turmoil and godless rush
 for riches and pleasure and crime, where do we
 find the only safe ancre-place for our ever floun-
 dering little ship of life, except with Him who
 says: “Come unto me all ye that are weary and
 heavy-laden, and I will give you rest”, “I am the
 Way, the Truth and the Life, no one cometh unto
 the Father but by me”; “Abide in me, abide in my
 love”; and again: “I am the Resurrection and the
 30 Life; he that believeth in me, though he were dead,
 yet shall he live and he that liveth and believeth
 in me shall never die, my peace I give unto you,
 not as the world giveth it!”—Therefore,

over!

(page XVI)

40 let me plead with you once more, my beloved for-
 mer Congregation of “St. Trinitatis”, in the blessed
 words of the everlastingly beloved holy Apostle St.
 John, as my last and dying prayer; no matter how-

Exhibit C-1.

ever great the temptation: "Hold fast to that which
—by God's grace in Christ,—thou hast, that no one
take thy crown"; ever praying and singing on:

"Abide with me; fast falls the even-tide;
"The darkness deepens; Lord, with me abide; 10
"When other helpers fail, and comforts flee,
"Help of the helpers, oh, abide with me!—

"Hold Thou Thy cross before my closing eyes;
"Shine through the gloom, and point me to the
skies,
"Heaven's morning breaks, and earth's vain
shadows flee
"In life, in death, O Lord abide with me!"

AMEN! 20

IN WITNESS WHEREOF, I have hereunto sub-
scribed my name, and affixed my seal, the 4th day
of May in the year one thousand nine hundred and
twenty-six.

Witnesses:

Hyman Hordes

Robert August Hafer

Bernhard Begemann

Subscribed by Robert August Hafer the Testator 30
named in the foregoing Will, in the presence of
each of us, and at the time of making such sub-
scription, the above Instrument was declared by
the said Testator to be his last Will and Testament,
and each of us, at the request of said Testator and
in our presence and in the presence of each other,
signed our names as witnesses thereto.

Hyman Hordes Residing 461 Central Ave. J. C.

Bernhard Begemann Residing 74 Bower Street J. C. 40

New Jersey Court of Errors and Appeals

FRED BREZINSKI and FRED ZEIDLER,
 Executors of the Last Will and
 Testament of ROBERT AUGUST
 HAFFER, deceased,
Complainants-Appellants,

v.

HARRY BREVES,
Defendant-Appellee.

On Appeal from
 the Court of
 Chancery.

Appeal by Com-
 plainants from
 Decree Denying
 Relief.

Heard Below
 Before
 BIGELOW, V.C.

BRIEF FOR APPELLANTS.

Statement of the Case.

The bill of complaint was filed to compel the specific performance of a contract for the sale of a parcel of real estate known by the house No. 61½ Bowers Street, Jersey City, Hudson County, New Jersey, made between the complainants as vendors and the defendant as vendee. The defendant resists the bill on the ground that the complainants cannot give a marketable title, in that the will of the Rev. Robert August Haffer, deceased, of which the complainants are executors, contains no power of sale, either expressed or implied, and on the further ground that the will is indefinite and uncertain, in that the provisions for the disposition of the proceeds of sale and of the residuary estate are uncertain and indefinite.

It is admitted that the will contains no express power of sale but the complainants contend that it

contains an uncontrovertible implied *power of sale*.

Vice-Chancellor JOHN O. BIGELOW, who sat below for the Chancellor, has filed a memorandum (Case p. 13, *et seq.*), wherein he opines that the power of sale is not so clear that the vendee should be required to accept title and therefore advises a decree dismissing the bill of complaint.

Specification of Grounds of Appeal.

The appellants contend that the decree dismissing the bill of complaint is erroneous and that the Court should have advised a decree compelling the defendant to specifically perform his contract.

ARGUMENT.

POINT I.

The will contains an implied power of sale in the executors both to sell the realty and to execute a proper deed therefor.

The doctrine that even though no expressed power of sale is contained in a will, such a power will be implied where it is apparent from the whole instrument that the testator intended that the property should be sold, is well established. Thus a power of sale will be implied from the power and duty to make distribution in money.

39 Cyc., pages 351-352.

The plain rule is that if the will contemplates an actual division of the estate by the personal representatives and payment to the beneficiaries in money, a power of sale of land is to be inferred.

Vanness v. Jacobus, 17 N. J. Eq. 153;
Wurts v. Page, 19 N. J. Eq. 365, at 375;
Haggerty v. Lanterman, 30 N. J. Eq. 37;
Belcher v. Belcher, 38 N. J. Eq. 126;
Parker v. Seeley, 56 N. J. Eq. 110, at 115.

The mere fact that the avails of real estate after it is converted into money are directed to go in such a direction that it will have to pass through the hands of the executors in the form of money, will, by implication, give a power of sale.

Whitehead v. Wilson, 29 N. J. Eq. 396, at 398.

We find no case directly in point with the one *sub judice* and a perusal of the cases covering the construction of wills discloses that the meaning of wills is a matter of interpreting the intention of each testator from his will read as a whole, and, therefore, the cases are helpful only in so far as they afford us the general principles of law from which that intention is to be ascertained.

The seventh paragraph of the will (Case p. 24) reads as follows:

“Disposition of my house. My 2 family Frame-House at 61½ Bowers Str. Jersey City 20 x 90 feet, 2 story and basement officially rated at \$, free of all debts and encumbrances, taxes all paid. It has been rated by 2 competent realtors as being worth at least \$ kitchen and cellar shelves, window and door screens included in sale for absolutely cash. I wish it to be sold, if possible, to a decent german-american private-family, preferably my next door neighbor, Mr. Harry Breves of 61 Bowers Str; not at auction but (market) by free-hand sale at as high a (price,) cash as can be secured for charitable purposes; Mr. C. C. Schrader, the realtor of 119

Bowers Str. might be given the preference to effectuate the sale at two and a half percent commission.”

Stripping this paragraph of surplusages and reducing it to plain English without distorting it would read, we submit: “I wish my 2 family Frame-House at 61½ Bowers Str., Jersey City, to be sold to Mr. Harry Breves, not at auction but by free-hand sale at as high a market price cash as can be secured, free of all debts including encumbrances and taxes.”

It must be clear to both the casual and careful reader that that is the meaning of the seventh paragraph of the will.

By whom did the testator intend this sale to be made?

The payment of his debts is to be made by his executors. Surely, the encumbrances and taxes are debts.

The proceeds of the sale shall be *cash*.

The fifth bequest entitled “Charity For German War-Sufferers” is to be made in money (Case p. 23).

The residuary estate is to consist only of cash (Case p. 28, Paragraph 13 of will).

Obviously, the testator contemplated a complete liquidation of his estate.

No matter where the avails of the sale of this parcel of realty are to go, whether for debts, in payment of the specific bequest made by the fifth clause or to make up the residuary estate, these monies must pass through the hands of the executors, for it is their duty to distribute. That is, sufficient to vest in them the implied power to sell this parcel of real estate under the well established principles of law hereinabove referred to and enumerated.

POINT II.

The will is certain and definite.

The learned Vice-Chancellor who sat below and counsel for the defendant say that this seventh clause of the will may and/or should fall for uncertainty, because the phrase "for charitable purposes" is uncertain.

Precedent and sound public policy dictate that every presumption is to be resolved in favor of the validity of a will and further, that words in a will are to be given their plain and common meaning.

An examination of the whole will discloses that the testator has chosen his own charities and has not left that choice to anyone else. We submit that it would be an unfair dealing with his intention to assume that the charitable purposes he had in mind are not set forth in the will and particularly in the fifth paragraph of that will. Such a presumption is as logical as a presumption in favor of an unannounced charity. There is no more reason to resolve in favor of the unannounced charity than there is to choose the specified one and where, as in this case, there is an even balance between the two possibilities, that one should be chosen which makes the will valid.

Our research has brought us to the conclusion that the word "procentaaliter" appearing in the residuary clause (Case p. 28) was partially coined by the testator or that he was in ignorance of the correct spelling of the word in his mind. We have been unable to find a meaning for that word in any of the well recognized German dictionaries or reports. In Flugel's German-English dictionary, "procent" refers to "prozent," which is defined as "per cent." The ending "aaliter" is such as might be used to give the word an adverbial form, al-

though possibly not an exactly correct form. In such use, the word would mean "proportionally," which according to Webster's Revised Unabridged Dictionary, means "in proportion; in due degree; adapted relatively." In short, it gives to the residuary clause the meaning that the residuary cash estate shall be divided proportionally among the beneficiaries named in the second paragraph of the will. By that paragraph he does not bequeath equal sums of money. Wherefore, we conclude that the residuary estate is to be distributed among them in the same proportion as the specific bequests made in the second paragraph.

At all events, we fail to see in what manner the residuary clause, assuming the word "procentaaliter" to be incapable of exact definition, can affect the title of the real estate in question, for it at most defines the manner of distribution.

Finally, we conclude that the decree of the Court of Chancery is erroneous and should be reversed and that a decree for specific performance should issue compelling the defendant to perform the contract.

Respectfully submitted,

SCHUMANN & SCHUMANN,
Solicitors of Complainants.

E. W. A. SCHUMANN,
Of Counsel.

19 MAY. 7 1931

New Jersey Court of Errors and Appeals

FRED BREZINSKI and FRED ZEIDLER,
executors of the last will and
testament of Robert August
Hafer, deceased,
Complainants-Appellants.

v.

HARRY BREVES,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.

Appeal by Com-
plainants from
Decree Denying
Relief.

Heard Below
Before
BIGELOW, V.C.

BRIEF FOR APPELLEE.

The defendant contends that the complainants cannot give a good marketable title in that the will of the Reverend Robert August Hafer, deceased, of which complainants are executors, contains no power of sale, either expressed or implied, and that the will is indefinite and uncertain both as to the disposition of the proceeds of sale and of the residuary clause.

ARGUMENT.

POINT I.

Implied power of sale.

The doctrine of implied power of sale will only apply where the implication is clear from the terms

of the entire will and is necessary for the executor to carry out some duty.

Schlosstein v. Worthington. 113 Atl. 610
(N. J. E.).

In this instance neither that part of the will from which it is contended that the implied power arises nor the will as an entirety is either clear or definite. The contradiction contained in the seventh paragraph, wherein the testator first names the defendant as a preferred purchaser and then states that the property is to be sold for charitable purposes, is vague and confusing. The blank spaces where the testator evidently intended to fill in the assessed and market values would indicate some uncertainty and lack of clarity in the mind of the testator himself. Such contradictions and blanks appear throughout the entire will, and were this Court to imply a power of sale it would do so at the risk of contradicting the testator's intentions.

In the opinion of the defendant, this case differs from those cited by the complainants in that neither the intention or the implication is clear. The will is indefinite, incomplete and contradictory. It is an instrument drawn by a layman, whose devotion to God is very beautiful, but whose thoughts being applied to the contemplation of death, emphasized the spiritual rather than the material.

From a reading of the entire will it would appear safe to say that the testator himself was not clear in his own mind, how or in what form he wanted his worldly goods distributed.

The complainants indicate that the words "for charitable purposes" as used in the seventh paragraph refer to the proceeds of sale, but this defendant contends that they refer to the property itself. Furthermore, even assuming that complainants are correct and that the testator refers to the proceeds,

the assumption that the testator had in mind the provisions of Paragraph 5, is clearly unwarranted. Might there not be other assets of the estate from which the legacy of \$5,000 to German War Sufferers could be paid? Is the power of complainants to be determined by the total value of the estate? In the absence of specific directions for the application of the proceeds of sale, an assumption of the intentions of the testator cannot give the complainants such a power.

That specific performance of an unmarketable title will not be enforced, and that equity will not compel the purchase of lands where the purchaser may be exposed to the hazard of litigation, are too elemental to require further emphasis.

In the case of *Zane v. Weintz* (65 N. J. E. 214), in which specific performance of a contract for the sale of lands is denied, but in which, to be sure, there is no question of an implied power of sale, Vice-Chancellor GREY, on page 220, says:

“This will is so inartistically drawn that it is difficult to put any construction upon it which will not leave the vendee, if he is decreed to perform his agreement and take title under it, in danger of losing the property conveyed, at the suit of some future claimant. The decree in this suit, even if favorable to the complainant, would, of course, afford no protection to the defendant against the attack of any claimant of the lands in dispute, who is not a party to this suit.

“The doubt as to the complainant’s power to convey the lands, if it is not resolved against her, must at least be admitted to be so forceful that her right is fairly debatable. This is sufficient to defeat her attempt to compel specific performance. *Vreeland v. Blauvelt*, 8 C. E. Gr. 483; *Lippincott v. Wikoff*, 9 Dick. Ch. Rep. 120.

“The declaration of Lord-Justice JAMES in *Alexander v. Mills*, 6 Ch. App. 131, to the effect

that specific performance will not be decreed where the doubt of the vendor's power to convey a good title arises in ascertaining the true construction of some ill-expressed instrument, is also applicable in this case. *Richards v. Knight*, 19 Dick. Ch. Rep. 196."

It is respectfully submitted that neither a clear implication or a necessity exists and that the complainants have, therefore, no power of sale.

POINT II.

The will is indefinite and uncertain.

The objection that the will is indefinite and uncertain not only defeats the complainants' alleged power of sale, but also raises a barrier of doubt and leaves the defendant lost in an impenetrable maze of uncertainty. He must determine whether he will be bound to see to the proper application of the purchase money and, in the event of an affirmative determination, how and to what it is to be applied.

Among the many indefinite and uncertain words and phrases that are used by the testator is the word "procentaaliter." The explanation advanced by the complainants is based on suppositions and conclusions and it is just as reasonable to suppose or conclude that its meaning refers to the disposal of the property itself or the proceeds thereof, if it was the intention of the testator that the property be sold.

One of the arguments advanced by the complainants in support of an implied power of sale is that the testator contemplates that the proceeds should be used for the German War Sufferers' legacy and the balance distributed according to the terms of the residuary clause. This argument

would indicate that the meaning of the word "procentaaliter" and the proceeds of the sale, if there be an implied power of sale, have a direct bearing each upon the other and that there is, therefore, a duty on the purchaser to see that the proceeds are properly applied. Assuming that such a duty exists, what then is the meaning of the word and how should the proceeds be applied?

This situation is certainly an unusual one. No case that this defendant has been able to find has proved of assistance in determining what course he should follow in an attempt to find the meaning and, having no meaning to point the direction, the defendant is at a loss.

Where the purpose to which the money arising from the sale of lands by a fiduciary is required to be applied is of a definite and limited nature, it seems that the purchaser is bound to see to the proper application of the purchase money.

St. Mary's Church v. Stockton, 8 N. J. Eq. 520.

If the words "for charitable purposes" refer to the proceeds of sale the purpose is general and unlimited and there would be no such duty. If, on the other hand, the proceeds are to be distributed according to the residuary clause and, by the contention of the complainants themselves, at least that part in excess of the legacy to German War Sufferers is to be so applied, then, who is to say whether the meaning of the word "procentaaliter" is in its nature definite and limited or not?

In conclusion, and referring to both the question of power of sale and the application of the proceeds, this defendant respectfully submits that the attractiveness of both the property itself and the purchase price are lost to him, if by taking title from the complainants, he becomes subject

to even the possibility of litigation. In view of the informality and the vagueness of the instrument under which the complainants claim the power to convey, that degree of certainty to which the defendant is entitled is lacking.

This defendant-appellee respectfully submits that the decree dismissing the bill of complaint should be affirmed.

ERWIN, ERWIN & DAVIDSON,
Solicitors and of Counsel for
Defendant-Appellee.

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