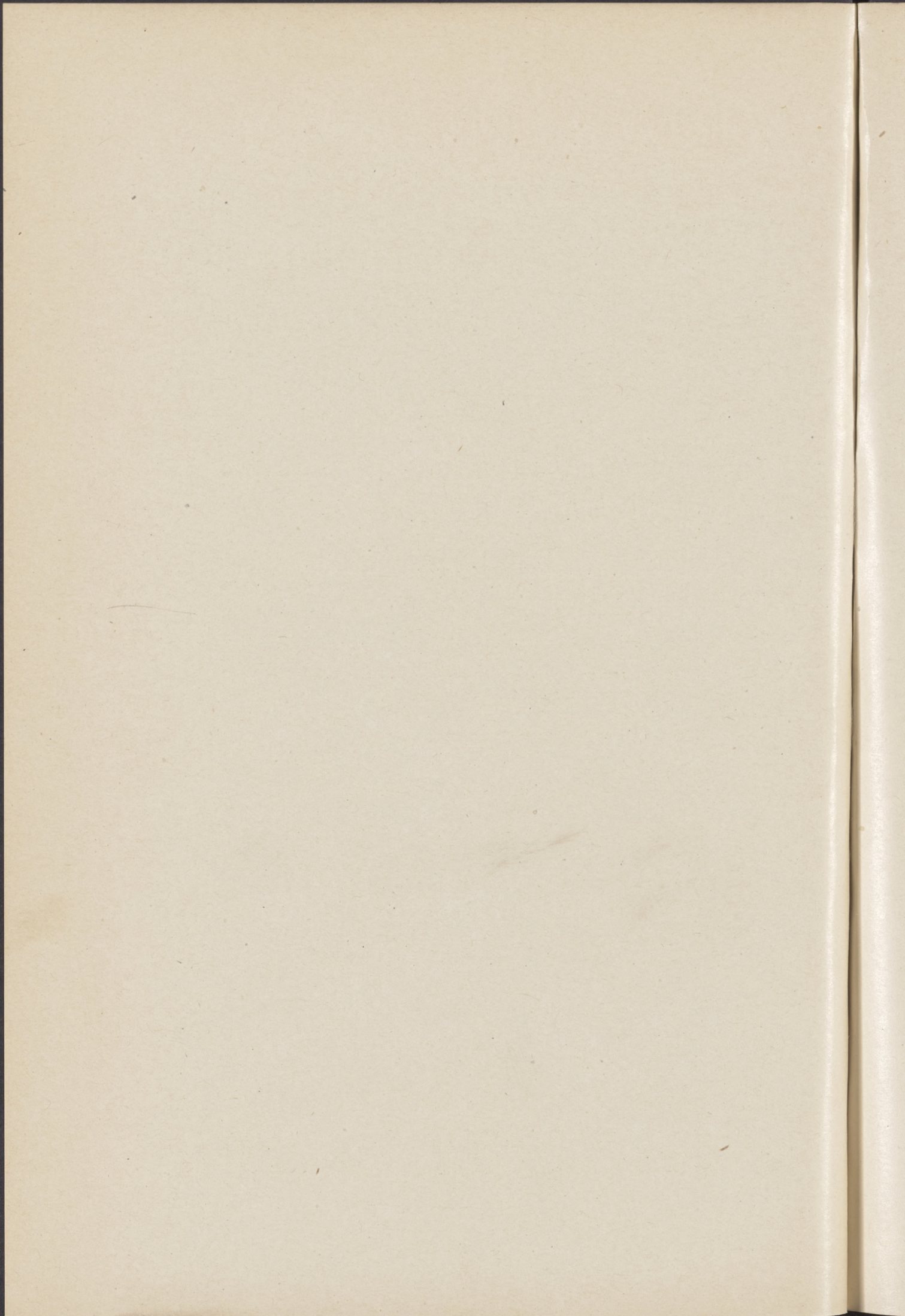


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New Jersey Court of Errors and Appeals

Notice of Appeal.

(Filed July 2, 1920.)

IN CHANCERY OF NEW JERSEY.

Between

Magdalena Hoffman and
William J. Friend,

Complainants

and

Christian Friend, Jr., individually
and as executor of the estate of
Christian Friend, Sr., decd., et al.,
Defendants.

10

On Bill, Etc.

Notice of
Appeal.

20

The defendant hereby appeals from the whole of the final decree in this Court in the above-stated cause to the Court of Errors and Appeals in the last resort in all causes.

HART & VANDERWART,
Solicitors for Defendant,
Christian Friend, Jr.,
individually.

Dated June 28th, 1920.

30

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

ARCHIBALD C. HART,
Of Counsel with the Defendant.

40

Petition of Appeal.

(Filed August 5, 1920.)

COURT OF ERRORS AND APPEALS.

10	Between Magdalena Hoffman and William J. Friend, Complainants-Appellees, and Christian Friend, Jr., individually and as executor of the estate of Christian Friend, Sr., decd., et al., Defendants-Appellants.	} On Bill, Etc. } Petition of } Appeal.
----	--	---

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

The petition of Christian Friend, Jr., the appellant
 in the above-stated cause, respectfully shows that your
 petitioner finds himself aggrieved by a final decree
 made in the Court of Chancery by His Honor

EDWIN R. WALKER,

30 Chancellor of New Jersey, bearing date the seventeenth
 day of May, in the year 1920, wherein the said Mag-
 dalena Hoffman and William J. Friend were complain-
 ants and the said Christian Friend, Jr., individually
 and as executor of the estate of Christian Friend, Sr.,
 deceased; John Kent, Lillian Kent, Addie Turse and
 Sarah Van Ostenbridge were defendants, in this re-
 spect, to wit: that the said decree adjudges that the
 complainants are entitled to the relief sought and
 prayed for by them in their bill of complaint against
 Christian Friend, Jr., individually and that the said
 Christian Friend, Jr., has accepted the provisions of
 40 the last will and testament of Christian Friend, Sr.,

Petition of Appeal.

and has thereby charged himself personally with the obligation to pay the legacies of \$2,000.00 each, given to the said complainants under the provisions of paragraphs 5 and 6 of the last will and testament of said Christian Friend, deceased, together with interest thereon from January 14, 1917, the date when said legacies became payable, being the date of the death of Barbara Friend, the wife of the said Christian Friend, deceased, and that the defendant Christian Friend, individually, do pay to the complainant Magdalena Hoffman the sum of \$2,398.66, being the amount of said legacy with interest thereon at the rate of 6 per cent. per annum from January 14, 1917, to the date of this decree and that the defendant Christian Friend, individually, do pay to the complainant William J. Friend the sum of \$2,398.66, being the amount of said legacy with interest thereon at the rate of 6 per cent. per annum from January 14, 1917, to the date of this decree.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that: 1. The same is erroneous for that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint against Christian Friend, Jr., individually. 2. The said Christian Friend, Jr., in accepting the provisions of the last will and testament of Christian Friend, Sr., did not charge himself personally with the obligations to pay the legacies of \$2,000.00 each, given to the said complainants under the provisions of paragraphs 5 and 6 of the last will and testament of said Christian Friend, Sr., deceased. 3. The Court of Chancery was without jurisdiction over the subject matter of the complaint inasmuch as the complainants have a complete and adequate remedy at law. 4. The Chancery Court may not charge the legacies aforesaid against the real and personal property bequeathed to

Petition of Appeal.

the defendant Friend in the eighth clause of the said will, until he is possessed thereof. The defendant will not be possessed of the said personalty before an order of distribution has been executed by the proper court directing the executor of the estate to distribute the personalty of the estate to those to whom the same was bequeathed. 5. The defendant-appellant is not yet
10 legally seized of the personalty bequeathed to him under Clause 8 of the said will, and hence the bequests to the complainants may not now be charged against him. 6. While it is true that the devise to defendant-appellant in the eighth paragraph of the said will was therein charged with a payment by him of the legacies therein bequeathed in the third, fourth, fifth and sixth paragraphs thereof, the testator later and at the close of the eighth clause of the said will, provided "the
20 payment of which charges, however, are not to create any lien upon said farm or the personal property herein devised and bequeathed to my son, Christian," this defendant-appellant. This defendant says that in and by the said last-mentioned direction the properties bequeathed to him were relieved from the charge thereinbefore created. 7. The devise and bequest contained in the eighth clause of the said will is as follows:

30 "Eighth: I give, devise and bequeath unto my beloved son, Christian Friend, Jr., all and singular my homestead farm of upwards eighty acres, upon which I now reside, being at Harrington, Bergen County, aforesaid, with all and singular the buildings, tenements, hereditaments thereunto belonging, as well as all the easement, waterways and rights of way necessary to the enjoyment thereof, and also all the livestock, crops, farming implements, fixtures, fodder, seeds upon and about the same, and used in the cultivation thereof, and in the disposition of the produce thereof. But I
40 charge this bequest and devise to my said son, Chris-

Petition of Appeal.

tian Friend, Jr., with the payment by him of the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to \$4,600.00. The payment of which charges are not, however, to create any lien upon said farm or the personal property herein devised and bequeathed to my son, Christian."

If the land devised is charged, the personalty bequeathed is as well. 10

This personalty the defendant never received, excepting only "two lumber wagons, one wooden and one iron axle. They had been on the place over fifty years, and there was also a rusted-out reaper there that had been there about thirty-five years or forty years. There was an old depot wagon and one horse market wagon, and an old Acme harrow." And when he received these (upon the death of Barbara) he received them, not individually, but officially. 20

He, in short, has not possession of the personalty, which the testator charged should support at least a part of the charge of the several specific bequests.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court may seem meet. 30

HART & VANDERWART,
Solicitors and of Counsel
with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Magdalena Hoffman and
William J. Friend,

Complainants-Appellees,

and

Christian Friend, Jr., individually
and as executor of the estate of
Christian Friend, Sr., deceased,

Defendant-Appellant.

Acknowledg-
ment of Service.

10

Due and legal service of the petition of appeal in the
above-entitled cause is acknowledged this 4th day of
20 August, 1920.

COULT & SMITH,
Solicitors for Complainants-Appellees.

30

40

Answer to Petition of Appeal.

(Filed August 22, 1920.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Magdalena Hoffman and
William J. Friend,
Complainants-Appellees,

and

Christian Friend, Jr., individually
and as executor of the estate of
Christian Friend, Sr., decd., et al.,
Defendants-Appellants.

On Bill, Etc. 10

Answer to
Petition of
Appeal

To the Honorable, the New Jersey Court of Errors and Appeals in the last resort in all causes: 20

The answer of the above-named appellee to the petition of appeal of the above-named appellant. This respondent, not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the seventeenth day of May 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, this appeal, prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity and he prays that the same may be affirmed with cause to be adjudged to this appellee. 30

COULT & SMITH,
Solicitors for and of
Counsel with Appellees. 40

Bill of Complaint.

(Filed October 27, 1917.)

IN CHANCERY OF NEW JERSEY.

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

10 The complainants, Magdalena Hoffman and William J. Friend, of the Town of Dumont, in the County of Bergen and State of New Jersey, respectfully show:

1. That Christian Friend, the father of complainants, departed this life on the 1st day of November, 1892, leaving a last will and testament dated February 3, 1891, which was duly admitted to probate on the 13th day of December, 1892, by the Surrogate of Bergen County in the State of New Jersey, a true copy of which will is hereto annexed and made part hereof.

20 2. That in and by said will all of the decedent's real and personal property was given and devised to his wife, Barbara Friend, for life.

3. That in and by the fifth paragraph of his said will the said Christian Friend gave and bequeathed to the complainant Magdalena Hoffman the sum of \$2,000.

30 4. That in and by the sixth paragraph of his said will the said Christian Friend gave and bequeathed to the complainant William J. Friend the sum of \$2,000.

5. That in and by the fourth paragraph of his said will the said Christian Friend gave and bequeathed the sum of \$500 to his son, John Friend.

40 6. That in and by the third paragraph of his said will the said Christian Friend gave and bequeathed unto the children of his deceased daughter, Maria Kind, or Kent, named John, Lillian, Addie and Sarah, the sum of \$100, in full payment of their share of his estate.

Bill of Complaint.

7. That the legacy to the said John Friend, herein-before mentioned, was paid during the lifetime of the said Barbara Friend.

8. That the said Christian Friend by the eighth paragraph of his said will gave, devised and bequeathed unto the defendant Christian Friend, Jr., his homestead farm of upwards of eighty acres, upon which he resided, being located in the Village of Harrington, now known as Borough of Harrington Park, Bergen County, New Jersey; but in and by said paragraph of said will the said decedent charge this bequest and devise to his son Christian Friend, Jr., with the payment by him of the legacies bequeathed in the third, fourth, fifth and sixth paragraphs of his said will, amounting in all to \$4,600. 10

Said farm is particularly described as follows: 20

First Tract:

Being parts of the land conveyed to said Isaac Blauvelt by James I. Blauvelt and wife by deed dated May 24, A. D. 1854 (the first lot being the homestead) beginning at the southeast corner thereof at the mill-pond; thence eighty-three degrees west twenty chains; thence south six and one-half degrees west eight chains and sixty-eight links; thence north eighty-eight degrees west thirty-six chains and fifteen links to Hackensack River; thence northeasterly along said Hackensack River about fourteen chains to woodland of Tunis S. Blauvelt; thence south eighty-two and one-half degrees east twenty-three chains and thirty links; thence north five degrees west four chains and eighty links; thence north thirteen degrees west two chains; thence northwesterly six degrees west one chain; thence north thirty-six and one-quarter degrees west one chain; thence north ten degrees east one chain and eighty-four links; thence north twenty-seven degrees 30 40

Bill of Complaint.

east ten chains and fifty-five links; thence south eighty degrees east thirty-three chains to said millpond; thence along the same south twenty and one-half degrees west eleven chains and fifteen links to the place of beginning.

10 Containing seventy acres and eighty-hundredths of an acre.

Bounded on the north by land of Harman C. Raub and Tunis J. Blauvelt, south by land of Tunis J. Blauvelt, east by said millpond, and west by land of said Harman C. Raub and said Hackensack River.

Second Tract:

20 The other lot is a lot of woodland beginning at the southwest corner of said lot at the northwest corner of woodland of Tunis J. Blauvelt at the east side of Hackensack River; from thence running south seventy-six and one-half degrees east thirteen chains and sixty-one links; thence north thirteen degrees east six chains and sixty links; thence north seventy-five and one-half degrees west eight chains and sixty-nine links; thence north seventy-six and one-half degrees west four chains to said Hackensack River; thence southerly along said river to the place of beginning.

30 Containing nine acres and thirty-five hundredths of an acre. Bounded on the north and east by land of Harman C. Raub, south by land of Tunis J. Blauvelt and west by said Hackensack River.

9. That Barbara Friend, the wife of Christian Friend, survived, and that she died on the 14th day of January, 1917.

40 10. That since the death of the said Barbara Friend the defendant Christian Friend, Jr., has taken possession of the homestead farm referred to in the eighth paragraph of the will of the said Christian Friend.

Bill of Complaint.

11. That said Christian Friend, Jr., although he qualified as executor of the last will and testament of his father, Christian Friend, has failed and neglected to file any inventory or account of said estate in the Orphans' Court of Bergen County or elsewhere.

12. That the complainants have made repeated demands for the payment of the legacies respectively given and bequeathed to them in and by the fifth and sixth paragraphs of the said Will of said Christian Friend, but that the said defendant, Christian Friend, Jr., has failed, neglected and refused to pay said legacies. 10

13. That insofar as complainants have been able to ascertain, the legacies given and bequeathed to the children of the deceased daughter, Maria Kind, or Kent, in the third paragraph of the will of Christian Friend, have not as yet been paid, and complainants show that John Kent, Lillian Kent, Addie Tures and Sarah Van Ostenbridge are the said children referred to as the children of the deceased daughter Maria Kind or Kent, and that they are living. 20

14. Complainants have no knowledge as to the value of the farm referred to in paragraph eight of the will of Christian Friend, nor as to what liens or encumbrances there are thereon, nor as to the value thereof, but complainants show and charge that it is necessary that said property be sold in order to satisfy the legacies so given to complainants and that an account be taken to properly distribute the proceeds. 30

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

(1) That the said Christian Friend, Jr., individually and as executor of the last will and testament of Christian Friend, John Kent, Lillian Kent, Addie Tures and Sarah Van Ostenbridge, who are the defendants in 40

Bill of Complaint.

this suit, may answer this bill of complaint, and each statement therein made, without oath.

10 (2) That a decree may be made fixing the amount due on the complainants' legacies and that the defendant Christian Friend, Jr., individually and as executor of the estate of Christian Friend, Sr., pay to the complainants the amount thereof, and that in default of such payment the property hereinbefore referred to and more particularly described in the eighth paragraph of the will of Christian Friend, may be sold, and that an account may be had of the proceeds and the amount realized therefrom distributed among those entitled thereto, including the payment to the complainants of the legacies given and bequeathed to them under the last will and testament of Christian Friend.

20 (3) That complainants be allowed a reasonable counsel fee and the costs of this suit to be taxed.

(4) That a writ of subpoena may issue, commanding the said defendants to answer this bill and to abide by such decree as this court shall make in the premises.

COULT & SMITH,

Solicitors for and of Counsel
with Complainants.

30 IN THE NAME OF GOD, AMEN:

I, CHRISTIAN FRIEND, also known as CHRISTIAN FREUND, of the Village of Harrington, Bergen County, in the State of New Jersey, sixty-nine years of age, being of sound and disposing mind, but considering the uncertainty of this life, do make, publish and declare this to be my last will and testament:

40 First: I order and direct my just debts and funeral expenses to be paid, as soon as can be, after my decease.

Bill of Complaint.

Second: I give, devise and bequeath unto my beloved wife Barbara Friend, all my estate, both real and personal, and wheresoever situate, in the States of New York and New Jersey or elsewhere, to have and to hold the same, and the rents, issues and profits thereof, for and during the term of her natural life, free from any control of my executor hereinafter appointed, and without impeachment for waste, and without in any wise securing the remaindermen for the preservation thereof, by bond or otherwise, and I declare that all devises and bequests, herein contained ~~and~~ ^{are} subject to this devise and bequest, and all legacies herein bequeathed are only to be paid from and after her decease, and without interest by my executor hereinafter named. 10

Third: I give and bequeath unto the children of my deceased daughter Maria Kind, named John, Lillie, Ad- 20
die and Sarah, the sum of One Hundred Dollars, in full payment of their share out of my estate, the reason why I do not remember them to a greater extent is that they nor has their mother, during her lifetime, evinced that degree of affection and respect for me, which I believed to be entitled to.

Fourth: I give, devise and bequeath unto my son, John Friend, or in case of his decease before me, leaving lawful issue him surviving, then unto his lawful 30
issue, the sum of Five Hundred Dollars, and also my corner lot 50 feet by 150 feet in Norwood, Bergen County, New Jersey.

Fifth: I give and bequeath unto my daughter Magdalena Hoffman, also known as Maggie Hoffman, the sum of Two Thousand Dollars, and in case of her death before me, leaving lawful issue her surviving, then I give and bequeath the same unto said issue.

Sixth: I give and bequeath unto my son William 40

Bill of Complaint.

Friend, the sum of Two Thousand Dollars, and in case of his death before me, leaving lawful issue him surviving, then I give and bequeath the same unto said issue.

10 Seventh: I give, devise and bequeath unto my daughter Emma Friend, the house and lot of land in 76th Street in the City of New York, which I bought from William Holbein and wife, and the deed of which is in my name and the name of my wife. It is my wish that my wife, in case she survives me, devises said house and lot to my said daughter Emma, or in some other way secures the same to her.

20 Should I and wife have sold said house and lot and have purchased some other house and lot in the City of New York, then I give and devise unto my said daughter Emma said newly purchased house and lot in the City of New York; and in case the same is again deeded to me and my wife, it is my wish that my wife, in case she survives me, devises said house and lot to my said daughter, or in some other way secure the same to her. Should I, however, die, leaving no real estate in the City of New York, coming within the above description, so that my daughter Emma ^{will} take and receive the same, then I give and bequeath unto my said daughter Emma, the sum of Eight Thousand Dollars. I also give and bequeath unto my said daughter 30 Emma all my household furniture, bedding, household linen and family stoves which may be in my homestead, and not disposed of at the time of the decease of my beloved wife Barbara, who shall have the control, disposition and management of the same, during her life-time.

40 Eighth: I give, devise and bequeath unto my beloved son Christian Friend, Jr., all and singular my homestead farm of upwards eighty acres, upon which I now reside, being at Harrington, Bergen County, aforesaid,

Bill of Complaint.

with all and singular, the buildings, tenement hereditaments thereunto belonging, as well as all the easements, waterways and rights of way necessary to the enjoyment thereof, and also all the live stock, crops, farming implements, fixtures, fodder, seeds upon and about the same and used in the cultivation thereof and in the disposition of the produce thereof. But I charge this bequest and devise to my said son Christian Friend, Jr., with the payment by him of the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to Four Thousand, Six Hundred Dollars. The payment of which charges are not, however, to create any lien upon said farm ~~of~~ the personal property herein devised and bequeathed to my son Christian. 10

Ninth: For the purpose of enabling my executrix and executor hereinafter named, and the survivor of them, to better manage my estate, and for such other purpose as may arise, I do hereby authorize and empower them, and the survivor of them, to contract for, sell and convey, any part or all of my real estate, where-soever situate at public or private sale and upon such terms as to them may seem proper; and also to lease the same, or any part thereof, and also to mortgage the same or any part thereof, and to execute and deliver any and all instruments necessary in the law for any or all of these purposes. 20 30

Tenth: All the rest, residue and remainder of all my real and personal estate, including lapsed and ineffectual legacies I give, devise and bequeath unto my children, Emma Friend and Christian Friend, Jr., and unto their heirs, executors, administrators and assigns forever.

Lastly: I do hereby nominate, constitute and appoint my beloved wife Barbara Friend executrix, and 40

Bill of Complaint.

my son Christian Friend executor, of this my last will and testament, and request that letters testamentary be issued to them, both in the States of New York and New Jersey, without they or either of them being required to give any bonds or other security for the faithful performance of their duties; and further, I do hereby revoke all former wills by me made.

10 In Witness Whereof I have hereunto set my hand and seal this third day of February, A. D. 1891.

CHRISTIAN FRIEND.

WITNESSES:

Edward F. Hassey,

August Hassey,

Emile A. Hassey.

[SEAL]

20 The foregoing will was, on the date thereof, signed, sealed, published and declared by Christian Friend, the testator therein named, as and for his last will and testament, in the presence of each of us, and we in his presence and in the presence of each other, have, at his special request, signed our names as witnesses thereto.

Edward F. Hassey, 113 W. 63d Street, New York.

30 August Hassey, 14 Second Street, New York.

Emile A. Hassey, 14 Second Street, New York.

Decree Pro Confesso.

(Filed June 18, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

Magdalena Hoffman and
William J. Friend,

Complainants,

and

Christian Friend, Jr., individually
and as executor, etc., et al.,
Defendants.

10

On Bill, Etc.

Decree Pro
Confesso.

This cause being opened to the Court by Coult & 20
Smith, of counsel with the complainant, and it appear-
ing that process of subpoena for the appearance of the
defendants Lillian Kent and Sarah Van Ostenbridge has
been duly issued and returned, served by the Sheriff of
the County of Passaic; and it also appearing that proc-
ess of subpoena for the appearance of the defendants
John F. Kent and Addie Turse has been duly issued and
returned, served by the Sheriff of the County of Ber-
gen; and it also appearing that the complainants
omitted to take a decree pro confesso within four 30
months after the time they were entitled to such decree
against the defendants; and it also appearing that the
order of this Court made on the 23d day of May, 1919,
directing the above-named defendants to file their an-
swers to complainants' bill within ten days from the
service upon them of a true copy of the order, has been
served upon the said defendants and that the said de-
fendants have not filed any plea, demurrer or answer
to said bill within the time specified in said order, but
have wholly failed and neglected so to do: 40

Decree Pro Confesso.

IT IS THEREUPON, on this 18th day of June, 1919, ordered, adjudged and decreed, that the said bill be taken as confessed as against defendants Lillian Kent, Sarah Van Ostenbridge, John F. Kent and Addie Turse, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER.

Chancellor.

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30

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Answer.

(Filed June 24, 1919.)

IN CHANCERY OF NEW JERSEY.

Between Magdalena Hoffman and William J. Friend, <div style="text-align: right;">Complainants,</div> and Christian Friend, Jr., et al., <div style="text-align: right;">Defendants. </div>	}	On Bill, Etc. 10 Answer.
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The defendant, Christian Friend, Jr., individually and as executor of the last will and testament of Christian Friend, deceased, residing at Harrington Park, in the County of Bergen and State of New Jersey, answering the bill of complaint in the above-entitled cause, says:

1. He admits the allegations contained in the 1st, 2d, 3d, 4th, 5th, 6th and 7th paragraphs of the bill of complaint.

2. He admits the allegations contained in the 8th paragraph of the bill of complaint, excepting that he says that the said Christian Friend by the 8th paragraph of the said will, charged the bequests and devises to this defendant individually with the payment by him of the legacies described, but subsequently in the said will, and at the close of the 8th clause thereof, provided that the payment of the said charges are not, however, to create any lien upon said farm or the personal property therein devised and bequeathed to this defendant.

3. This defendant admits the allegations contained

Answer.

in the 9th, 10th and 11th paragraphs of the said bill of complaint.

4. This defendant denies the allegations contained in the 12th paragraph of the said bill of complaint.

10 5. This defendant admits that the legacies described in the 13th paragraph of the said bill of complaint, have not been paid.

6. This defendant leaves the complainant to such proof of the allegations contained in the 14th paragraph of the said bill of complaint as the complainant may present.

First Defense:

20 This defendant, by way of defense, alleges that this Court is without jurisdiction over the subject matter of the said bill of complaint, inasmuch as the complainants have a complete and adequate remedy at law.

Second Defense:

30 This defendant, by way of further defense, alleges that this Court is without jurisdiction over the subject matter of the said bill of complaint, inasmuch as the Orphans' Court of the County of Bergen is possessed of jurisdiction, the will described in the pleadings herein having been probated within the jurisdiction of the latter Court.

Third Defense:

40 This defendant, by way of further defense, alleges that this Court is without jurisdiction over the subject matter of the said bill of complaint. It is alleged that the bequests to this defendant in the eighth clause of the said will is charged with the payments of the legacies bequeathed therein in the 3d, 4th, 5th and 6th paragraphs thereof. This defendant says that this

Answer.

Court may not charge the legacies aforesaid against the real and personal property bequeathed to him in the 8th clause of the said will until he is possessed thereof. This defendant will not be possessed of the said personalty before an order of distribution has been executed by the proper Court directing him to distribute the personalty of the estate to those to whom the same was bequeathed. 10

Fourth Defense:

This defendant, by way of further defense to the said bill of complaint, says that he is not yet legally seized of the personalty bequeathed to him under Clause 8 of the said will.

Fifth Defense:

This defendant, by way of further defense to the said bill of complaint, says that while it is true that the devise to him in the 8th paragraph of the said will was therein charged with a payment by him of the legacies therein bequeathed in the 3d, 4th, 5th and 6th paragraphs thereof, and the testator later at the close of the 8th clause of the said will, provided: "The payment of which charges, however, are not to create any lien upon the said farm, or the personal property herein devised and bequeathed to my son, Christian," this defendant. This defendant says that in and by the said last-mentioned direction the properties bequeathed to this defendant was relieved from the charge thereinbefore created. 20 30

This defendant prays to be hence dismissed.

A. C. HART & VANDERWART,

Solicitors of and of Counsel
with Defendant. 40

Final Decree.

last will and testament of Christian Friend, Sr., deceased, and that the said Christian Friend, Jr., has accepted the provisions of the last will and testament of Christian Friend, Sr., and has thereby charged himself personally with the obligations to pay the legacies of \$2,000.00 each, given to the said complainants under the provisions of paragraphs 5 and 6 of the last will and testament of said Christian Friend, deceased, together with interest thereon from January 14, 1917, the date when said legacies became payable, being the date of the death of Barbara Friend, the wife of the said Christian Friend, deceased. 10

It is, on this seventeenth day of May, 1920, on motion of Coult & Smith, solicitors for complainants, by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this Court, does hereby order, adjudge and decree that the defendant Christian Friend, individually, do pay to the complainant Magdalena Hoffman the sum of \$2,398.66, being the amount of said legacy with interest thereon at the rate of 6 per cent. per annum from January 14, 1917, to the date of this decree. 20

It is further ordered, adjudged and decreed that the defendant Christian Friend individually do pay to the complainant William J. Friend, the sum of \$2,398.66, being the amount of said legacy with interest thereon at the rate of 6 per cent. per annum from January 14, 1917, to the date of this decree. 30

It is further ordered, adjudged and decreed that the defendant Christian Friend individually do pay to the complainants their costs of this suit to be taxed, including a counsel fee of One Hundred and Fifty Dollars, and that execution issue for the sums hereinbefore de- 40

Final Decree.

creed to be paid to the complainants and for said costs.

And it is further ordered, adjudged and decreed that the bill of complaint be dismissed, without costs, as against the defendant Christian Friend as executor of the last will and testament of Christian Friend, deceased.

E. R. WALKER.

Chancellor.

10

Respectfully advised,

EUGENE STEVENSON,

Vice-Chancellor.

20

30

40

Discussion.

THE COURT:—Now read the 8th paragraph of the will.

MR. SMITH:—The 8th paragraph is as follows:

“Eighth: I give, devise and bequeath unto my beloved son Christian Friend, Jr., all and singular my homestead farm of upwards eighty acres, upon which I now reside, being at Harrington, Bergen County, aforesaid, with all and singular the buildings, tenements and hereditaments thereunto belonging, as well as all the easements, waterways and rights of way necessary to the enjoyment thereof; and also all the livestock, crops, farming implements, fixtures, fodder, seeds upon and about the same and used in the cultivation thereof and in the disposition of the produce thereof. But I charge this bequest and devise to my said son Christian Friend, Jr., with the payment by him, or the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to \$4,600, the payment of which charges is not, however, to create any lien upon said farm or the personal property herein devised and bequeathed to my son Christian.”

THE COURT:—Read the first lines of that again.

MR. SMITH:—“I give, devise and bequeath unto my beloved son Christian Friend, Jr., all and singular my homestead farm of upwards eighty acres, upon which I now reside, being at Harrington, Bergen County, aforesaid, with all and singular”——

THE COURT:—That is enough of it. But the widow had a life estate?

MR. SMITH:—That is in the second paragraph:

“I give, devise and bequeath unto my beloved wife Barbara Friend, all my estate, both real and personal, and wheresoever situate, in the States of New York

Discussion.

10 and New Jersey or elsewhere, to have and to hold the same, and the rents, issues and profits thereof for and during the term of her natural life, free from any control of my executor hereinafter appointed and without impeachment for waste, and without in any wise securing the remaindermen for the preservation thereof, by bond or otherwise; and I declare that all devises and bequests herein contained are subject to this devise and bequest, and all legacies herein bequeathed are only to be paid from and after her decease and without interest by my executor hereinafter named."

Then comes the bequest to John Friend. He got a legacy of \$500. And then:

20 "Fifth: I give and bequeath unto my daughter Magdalena Hoffman, also known as Maggie Hoffman, the sum of \$2,000, and in case of her death before me leaving lawful issue her surviving then I give and bequeath the same unto said issue."

Then the sixth is a bequest to his son William Friend, and then the seventh bequest is to Emma Friend in New York.

THE COURT:—Do counsel agree as to the payment of the legacies?

30 MR. SMITH:—In the third paragraph of the will there is given \$100 to the four children. That has not been paid, but the children are made parties to this action and a decree pro confesso made.

THE COURT:—They are made parties defendant?

MR. SMITH:—Yes.

THE COURT:—Why?

40 MR. SMITH:—If there is to be a charge on this land I thought they had to be made parties to this proceeding.

Discussion.

THE COURT:—Now, the other legacy to John Friend is paid?

MR. SMITH:—And then \$100 to be divided among the four children.

THE COURT:—Those are the only legacies that appear in the third, fourth, fifth and sixth paragraphs?

MR. SMITH:—Yes, sir; that is true. 10

THE COURT:—And your bill alleges, I suppose, that they were applied to and were made parties because they were applied to and refused to make conveyance?

MR. SMITH:—No, I say: That insofar as complainants have been able to ascertain, the legacies given and bequeathed to the children of the deceased daughter Maria Kind or Kent in the third paragraph of the will of Christian Friend have not as yet been paid, and complainants show that John Kent, Lillian Kent, Addie Tures and Sarah Van Ostenbridge are the said children referred to as the children of the deceased daughter Maria Kind or Kent, and that they are living. 20

Now, I take it they would be entitled to apply to be made parties complainants if they so desired.

THE COURT:—Well, the case is peculiar. In one aspect you ask for a decree making the defendant Christian Friend, Jr., individually liable, on the theory that he has elected to take under the will and therefore he must perform the conditions; and in the other aspect you are foreclosing a lien on the charge. One is a suit quasi in rem and all the parties who are interested in the charge are necessary parties in that capacity, and they should be all lined up and brought in as complainants. Is there any objection to stipulating in this cause that the parties are made defendants because they were not willing to be made complainants? 30

MR. HART:—No. 40

Discussion.

THE COURT:—It is a mere technicality. They are parties to the suit.

MR. SMITH:—And it is further stipulated that John Friend has been paid his legacy.

10 MR. SMITH:—Now, I wish to offer in evidence copy of the last will and testament of Christian Friend, together with the certificate of the Surrogate of Bergen County, showing that Barbara Friend, executrix, and Christian Friend proved the same before me and are duly authorized to take upon themselves the administration of the estate. And that certificate is dated the 30th day of December, 1892.

(The same is admitted in evidence and marked Exhibit C-1.)

20 MR. HART:—Mr. Christian Friend is now the executor of the estate, but he did not qualify at the time of the probating as executor; he only qualified as executor after the death of Barbara Friend.

MR. SMITH:—I don't agree with that, Your Honor. The certificate of the Surrogate, made in 1892, shows that he was.

THE COURT:—These are the letters testamentary, are they not?

30 MR. HART:—They are not in the possession of Christian Friend and he denies that he qualified.

THE COURT:—Why, the Surrogate never gives this certificate without swearing in the executor. How is that, Mr. Hart? No other paper is issued excepting this.

MR. HART:—All I know is what Mr. Friend tells me. I didn't have charge of this matter until lately.

40 THE COURT:—This is the certificate which the Surrogate issues, certifying to the will and certifying also that the executors are authorized. Oh, no Surrogate

Emma Friend—Direct.

would ever sign this in this form unless the executor was sworn in. He certified under his seal.

MR. HART:—I don't think it is material in the cause, anyway.

THE COURT:—On this record I shall have to assume that Mr. Friend was appointed.

MR. SMITH:—Suppose I put in the petition for the probate of the will and then Mr. Hart may put this in if he wants to. I imagine there must be some record of that sort, because that is a copy from my office. 10

MR. HART:—I ask Your Honor to allow me the reservation of introducing documentary proof that Christian Friend did not qualify and was not appointed executor and did not take upon himself the administration of the estate.

MR. SMITH:—I offer in evidence, by consent, the petition for the probate of the will of Christian Friend, Sr., or a copy, together with the oath of the executors, and the order for probate thereon. 20

(The same is marked Exhibit C-2.)

MR. SMITH:—I will call Emma Friend.

(Miss) Emma Friend sworn on behalf of the complainant, testified as follows: 30

Direct Examination by Mr. Smith.

Q. You are the daughter of Christian Friend, Sr., and Barbara Friend? A. Yes, sir.

Q. Were you living with them at the time of your father's death? A. Yes, sir.

Q. And where were you living? A. In the house with mother.—the same old house; the old home. 40

Emma Friend—Direct.

Q. That is, the farm? A. The farm at Harrington Park.

Q. The one referred to in the 8th paragraph of the will? A. Yes, sir.

Q. And that farm was given to your mother for life under the will? A. Yes, sir.

10 Q. How long did you continue to live on the farm? A. Well, of course as long as my mother was there.

Q. And when did she die? A. She died January 14th, 1917.

Q. And at that time you left the farm? A. The first of February, 1917.

20 Q. Now, at the time of your father's death do you know whether he left any property outside of the farm, the stock on the farm and the implements and other things conveyed with the farm? A. He did not leave any property except a house in the City of New York. There was a house and lot in the City of New York standing in the joint names of my mother and father—Christian Friend and Barbara Friend.

Q. That is the only property that he left? A. That is the only property that he had. He had no cash money, or anything of that sort.

30 Q. Now, what became of the stock and implements, farm utensils and other personal property that was on the farm at the time of your father's death? A. Of course, they were used on the farm.

MR. HART:—I object to that, if Your Honor please.

THE COURT:—On what ground?

MR. HART:—I withdraw my objection.

40 A. (continuing) They were used on the farm, to work and cultivate the farm.

Emma Friend—Direct.

Q. And when you left the farm was any of the personal property which was on it left? A. Yes, sir.

Q. What was left there? A. Well, everything that father had that went to brother Chris. after mother's death.

Q. And what happened to the stock? A. Well, of course, that got old and after it got old it was replaced again, and that's the way it kept on, don't you know. 10

Q. Now, at the time of your father's death who ran the farm and took care of it? A. Brother Chris., of course, worked the farm.

Q. Did he have any arrangement with your mother in regard to working that farm?

MR. HART:—I object to that as immaterial.

MR. SMITH:—Did Christian Friend have any arrangement with the mother of this witness? 20

MR. HART:—I object, because it involves a transaction with the deceased.

THE COURT:—She is not a party to this suit.

A. There were arrangements made under those conditions that we each would have a share of the money.

Q. That each would have a share of the money?

A. What was made, don't you know.

Q. An equal share? A. An equal share. After father died it was the same as it was when father was living. 30

Q. That was the arrangement that was made while your father was living? A. Well, I reckon for the two or three years that father was living he gave us that chance—Chris. and I, and so they took—mother and father took a share, and Chris. had a share, and I had a share; and when father died my mother said to go on the same way.

Q. (By the Court) What did you do in the business 40

Emma Friend—Direct.

of running the farm? A. I did all kinds of work—domestic work; I did everything, what good many others wouldn't do—worked like a man helping brother Chris., and did everything.

Q. Did you have a servant in the house? A. No, sir.

10 Q. You did all the housework? A. I did all the housework?

Q. Was your mother able to do housework? A. She wasn't able to more than wash and wipe dishes and peel potatoes.

Q. (Direct examination resumed) How old was your mother when she died? A. She was ninety-four years and ten months.

20 Q. And she was, towards the last, very feeble? A. Well, she was. Of course, she had it on her heart and when she got excited she was worse, more or less bad. She was up to her mind the last moment she died, because I gave her a drink of water and I says, "Mamma, it is me"; I says, "I give you a drink of water," and she drank it down the same as she did when she was well.

30 Q. Now, I want to go back. You testified to the arrangement that each of you got a share of the income; was that arrangement changed? A. To my recollection, I think we had that three years; that each had a share, and from then on, of course, the crops didn't turn out the way they ought to, and the prices weren't up to standard, and so brother couldn't give us that, so he had the whole income then—everything outside of the chicken money.

40 Q. (By the Court) Who paid for running the house, buying the groceries, and so forth? A. Of course, we had cows and I sold the milk, and with that I run the

Emma Friend—Direct.

house; and, of course, one time we didn't sell such a whole lot, and then brother would turn over, say, \$50; and outside of that I run the place and everything, at least the housework.

Q. Did he live there with his five children? A. He had no children. He married in 1912 and lived there five months with us there.

10

Q. Now, as I understand it, it finally developed in his running of the farm that he took the proceeds of the farm?

MR. HART:—I don't understand that at all.

Q. Just state over again what the arrangement was towards the latter part that your brother Chris. was on the farm. A. There was no arrangement made at all; he simply kept the money and run the farm. That was his own doing, the way he wanted to do. He sold the things and he never gave anything up to his mother.

20

Q. Did you receive any money from him? A. Not outside of the chicken money and the milk from the cows, and it took all that money to run the house. We had what we called the "change box," and with that money I run the house and supplied what I needed for the table.

Q. What about the proceeds from the hay? A. Brother Chris.—

30

MR. HART:—I object as immaterial.

A. (continuing) Brother Chris. took all that.

Q. What happened in 1912?

MR. HART:—I object to that as indefinite.

Q. Well, was there any change in this relationship during 1912? A. There was.

MR. HART:—I object to that as well. What bearing has the relation of family duties on the case, 40

Emma Friend—Direct.

in determining whether the bequest in the 8th paragraph of the will is chargeable upon this property?

MR. SMITH:—The only reason why I want this in is to show that this personal property, whatever it was, was either used up by this defendant—

10 MR. HART:—We will admit that the property described in the 8th paragraph of the will in question, at the time of the death of Christian Friend, Sr., passed into the possession of Barbara Friend, the mother, and that Christian lived in the house, and Emma lived in the house and continued to live there, and they used that property. The mother was in possession of the property and it was all used up when Barbara died. There wasn't anything left.

A. (continuing) There wasn't anything used up because we didn't use the farm. He had it all stored
20 away, and then what belonged to him he had stored in the wagonhouse.

30 THE COURT:—Let me see if I understand you, gentlemen; you agree that the personal property named in the 8th paragraph of the will was taken possession of upon the death of the testator, Christian Friend, Sr., in 1902, and that that property was partly used by her and renewed from time to time, and finally, upon her death, what was left of that property—the property that was to take the place of the consumed portion—passed into the possession of Christian Friend—

MR. HART:—What then remained?

THE COURT:—Whatever there was, if any, passed into his possession?

MR. SMITH:—I think that is satisfactory.

40 THE COURT:—And I understand counsel also agree that the testator, Christian Friend, Sr., left nothing else of any kind—left no personal property

Emma Friend—Direct.

—and the whole estate then consisted of this farm, the plant, etc., upon it, and the house and lot in New York City. Does it appear what became of the house and lot in New York City?

MR. SMITH:—The will provides that it go to this witness.

A. (continuing) Yes, it was in mother's and father's own name, and I got that. 10

MR. SMITH:—The 7th paragraph of the will says: "I give, devise and bequeath unto my daughter Emma Friend the house and lot or land in 76th Street in the City of New York." There is a copy of the will attached to the bill, Your Honor—the will of Christian Friend, Sr.

THE COURT:—The will of Barbara has not been put in evidence? 20

MR. SMITH:—I don't think the will of Barbara is of any importance in this case. The legacies are not charged against Emma's share.

THE COURT:—Counsel are evidently proceeding upon the assumption, which according to my recollection of the law of New York is entirely correct, that a deed which has been proved by parole evidence without objection of the New York house and lot, to Christian Friend, Sr., and Barbara his wife, made them tenants in common, there being no estate by the entirety in New York. Is that the understanding of counsel? 30

MR. SMITH:—No, I don't consider that the devise to Emma has any relevancy in this case.

THE COURT:—If an estate by the entirety exists in New York, then, of course, upon the decease of the husband the wife surviving the whole estate vests in the wife, and this paragraph seven of the will would seem to be inoperative. If, however, the 40

Emma Friend—Direct.

10 estate by the entirety has been abolished in New York, which, according to my recollection, is the case, and if my further recollection is also correct that a deed from a man to his wife creates a tenancy in common, then this clause in the 7th paragraph vests only half of the property in the daughter Emma and it leaves the status of the other half in the air. I don't know whether it makes any difference.

MR. SMITH:—I will offer in evidence a copy of the will of Barbara Friend.

THE COURT:—As a matter of fact, does it contain a devise of the New York property?

MR. SMITH:—No, it doesn't mention it. I will ask this witness:

20 Q. Did your father and mother leave the property in 76th Street without disposing of it other than by this will? A. After father was dead mother leaves it to me.

Q. Your mother gave you a deed of it? A. She deeded it to me, and Mr. Hassey made out the deed.

MR. SMITH:—Now, I would like to have the defendant admit that the payment of these legacies has been demanded. I think that is denied in the answer.

30 MR. HART:—You had better prove that by some other witness.

MR. SMITH:—Now, will counsel admit that no inventory was taken and no order for distribution filed?

MR. HART:—Surely; I will admit that in the case. I will admit that Christian Friend has taken possession.

40 MR. SMITH:—Then it is agreed that Christian Friend, upon the death of Barbara Friend, took pos-

Emma Friend—Direct.

session of the real estate and whatever personal property as remained upon it; and that he subsequently procured a loan of \$2,000 from the Lodi Trust Company, secured by a mortgage recorded in Book 387, page 172 of the book of mortgages for Bergen County, the mortgage being dated April 27, 1917, and recorded on the same day; that it bears interest at 6 per cent., and covers the farm property described in the bill of complaint in this suit. 10

THE COURT:—The bank was not made a party defendant in this suit?

MR. SMITH:—No. I suppose we might stipulate that the property is upwards of \$25,000 in value.

MR. HART:—We don't care anything about that.

MR. SMITH:—The Court would like to have it appear, so as to cover these legacies. 20

MR. HART:—I will agree that it is worth upwards of \$25,000; and I will furthermore admit that a demand for the payment of these legacies was made by Magdalena Hoffman and William J. Friend.

THE COURT:—I suppose your valuation placed upon the land relates to today?

MR. HART:—Yes.

THE COURT:—Are you prepared to admit what the value of the farm was when the testator made the will? 30

MR. HART:—No.

THE COURT:—The present value is no aid in the construction of the will. What is the date of the will?

MR. HART:—The will was dated February 3, 1891.

THE COURT:—Well, in construing a will, gentlemen, nothing is more important than to put the 40

Emma Friend—Direct.

10 Court in possession of all the facts—physical facts—surrounding the testator; and when you are determining the status of a donation of any kind in a will the value of the testator's estate at the time he made the will is very often important if not a controlling consideration. And you will bear in mind that the date as of which you are proving the circumstances is not the date when the testator died, but the date when he made his will.

MR. HART:—I will tender an admission to this effect: That at the time of the execution of the will, February 3, 1891, Christian Friend, Sr., told Christian Friend, Jr., that he believed his farm was worth about \$8,000, because a neighboring farm of less value sold for about \$6,000.

20 MR. SMITH:—His sisters say that the father thought it was worth \$10,000, and that was the basis on which he considered the matter.

THE COURT:—Well, this fact that I refer to is not of very great importance. I don't know how important it is; I can't tell. Perhaps counsel can agree on what the value was at the time the will was made.

MR. SMITH:—Say between eight and ten thousand dollars.

30 MR. HART:—The defense says \$8,000 and the other side \$10,000, and we admit that it was \$10,000.

MR. SMITH:—And this figure which you have given as to the value of this real estate will also apply at the time of the expiration of the life estate?

MR. HART:—Its value then was over \$25,000.

MR. SMITH:—Then it is stipulated that the value of the farm in question at the expiration of the life estate was upwards of \$25,000.

40 THE COURT:—That has a very, very remote con-

Christian Friend—Direct.

nection, if any, unless it may be inferred that the testator looked forward to a very large increase in the value of his land. When a farmer makes his will he generally thinks of the value of the farm at the time.

MR. SMITH:—The complainant rests.

The Defense.

10

Christian Friend, sworn in his own behalf, testified as follows:

Direct Examination by Mr. Hart.

Q. Mr. Friend, you are the defendant in this case?

A. Yes, sir.

Q. Did you, at the time of the death of Barbara Friend, receive any personal property whatsoever that was bequeathed to you in the 8th paragraph of the will of your father, Christian Friend; and if you did receive any such personal property, describe it and its condition at the time you received it. A. Well, there were two lumber wagons there, one with a wooden axle and one with an iron axle. They had been on the place over fifty years; and there was also a rusted-out reaper there that had been there about thirty-five or forty years. There was an old depot wagon there, and a one-horse market wagon; an old Acme harrow. That is about all that was on the place of personal property when I got on it.

20

30

Q. When Barbara died? A. Yes.

Q. You didn't live on it five years preceding the death of your mother? A. I did not.

Q. And you had possession of this personal property at the time of Barbara's death? A. It was on the farm there.

Q. When you took possession of the farm and real 40

Christian Friend—Cross.

estate you also took possession of these few articles of personal property? A. Yes.

Q. Were you ever one of the executors of the will of your father? A. Yes.

Cross-Examination by Mr. Smith.

10 Q. You left the farm in 1912, did you not? A. Yes, I did.

Q. And you held an auction at that time? A. Yes.

Q. You sold the cattle on the farm? A. Only what I bought myself.

Q. I say, you sold the cattle? A. My own cattle, yes.

MR. HART:—I object, unless it is shown that it was personal property.

20 Q. Those cattle were purchased to replace those that had been on the farm before? A. Yes.

Q. And you took the proceeds from the sale of these cattle? A. Yes.

Q. What else did you sell besides cattle?

MR. HART:—I object unless it is shown to be the same personal property.

THE COURT:—Objection overruled.

30 A. From the personal property mentioned in the 8th clause of the will all the cows were sold. My mother took one-third of those proceeds, sister took one-third, and I only got one-third of it.

Q. I asked you what goods were sold at this auction when you left the farm in 1912. A. Simply the stuff that I had bought myself—forks, rakes and shovels, whiffletrees and wagons.

40 Q. What was left there in the shape of personal property at the time you left the farm in 1912? A. I

Christian Friend—Cross.

left everything that was there what wasn't worn out and what father left.

Q. What was it? A. These couple of old wagons I mentioned.

Q. So that is what you left there, and that was still there when you took over the property in 1917? A. Yes, it is there yet. 10

Q. Was the farm worked during the time you were away? A. Mother had to cut the hay off of it.

Q. That is about all that was done? A. I guess so.

MR. HART:—Defendants rest.

THE COURT:—What is the wish of counsel in respect to the argument?

MR. SMITH:—I would suggest that we argue it and submit briefs at the same time. 20

MR. HART:—Is it to be argued or briefed?

THE COURT:—Whichever counsel decides to do.

MR. SMITH:—Briefed.

MR. HART:—But you must serve me with a copy of your brief.

30

40

Exhibit C-2.

SURROGATE'S OFFICE, BERGEN COUNTY

In the Matter of Proving the Last Will and Testament of CHRISTIAN FRIEND, Deceased.	}	Petition.
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To David A. Pell, Surrogate of the County of Bergen,
 State of New Jersey:

The petition of Barbara Friend respectfully shows
 that your petitioner is the widow and one of the ex-
 ecutors named in the last will of Christian Friend, late
 of the Township of Harrington, in the County of Ber-
 gen aforesaid, deceased, who departed this life at Har-
 rington in said township on the first day of November
 20 in the year of our Lord Eighteen Hundred and Ninety-
 two, and your petitioner further shows that the heirs
 and next of kin and heirs-at-law of the said deceased
 are as follows:

Barbara Friend, your petitioner, residing at Harring-
 ton, N. J.; Christian Friend, residing at Harrington,
 N. J.; John Friend, residing at Sparkill, N. Y.; Will-
 iam Friend, residing at Schraalenburg, N. J.; Maggie,
 wife of Charles Hoffman, residing at Schraalenburg,
 30 N. J.; Emma Friend, residing at Harrington, N. J., his
 only children; John F. Kurt, aged 20 years; Addie
 Kurt, aged 15 years; Liddie Kurt, aged 17 years; Sarah
 Kurt, aged 8 years, residing at Hillsdale, N. J., chil-
 dren of deceased daughter Mary.

Your petitioner therefore prays that said last will
 and testament may be admitted to probate and letters
 thereon granted according to law.

BARBARA FRIEND.

40 Dated Hackensack, Dec. 13, 1892.

Exhibit C-2.

BERGEN COUNTY, SS.:

Barbara Friend, the above-named petitioner, of full age, being duly sworn on her oath, says that the foregoing petition is in all things correct and true of her own knowledge and belief.

BARBARA FRIEND. 10

Sworn to before me this 13th day of December, A. D. 1892.

DAVID A. PELL,
Surrogate.

OATH OF EXECUTORS.

Book V. of Wills, p. 115. 20

BERGEN COUNTY, SS.:

Barbara Friend and Christian Friend, the executors in the annexed writing named, being duly sworn, do depose and say that the said annexed writing contains the true last will and testament of Christian Friend, the testator therein named, deceased, so far as they know and as they verily believe. That they will as executors thereof well and truly perform the same, first by paying the debts of said deceased and then the legacies therein specified so far as the goods, chattels and credits of the said deceased will thereunto extend, and the law charge them; that they will make an exhibit unto the said Surrogate's Office of the County of Bergen, a true and perfect inventory of all and singular the said goods, chattels and credits, so far as the same have or shall come to their possession or knowledge, or to the possession of any other person or persons to 30 40

Exhibit C-2.

their use and that they will well and truly account when thereunto lawfully required.

BARBARA FRIEND.
CHRISTIAN FRIEND.

Sworn at New Barbadoes, Dec. 13th, A. D. 1892, before me.

10

DAVID A. PELL,
Surrogate.

SURROGATE'S OFFICE, BERGEN COUNTY.

In the Matter of Proving the Last
Will and Testament of
CHRISTIAN FRIEND,
Deceased.

20

Order for
Probate.

Application having been made to me by Barbara Friend for probate of the last will and testament of Christian Friend, deceased, and letters testamentary thereon and the depositions of two of the subscribing witnesses to the same having been duly taken, and it appearing to me upon such proof that the will produced was duly executed according to law, and the probate of said will not having been contested, and that more than ten days have elapsed since the death of said testator,

30

It is, on this thirteenth day of December, A. D. 1892, ordered and adjudged that the instrument offered for probate in this matter is the last will and testament of the said deceased and the same is hereby admitted to probate and that letters testamentary be granted thereon.

40

DAVID A. PELL,
Surrogate.

Exhibit.

SURROGATE'S OFFICE, BERGEN COUNTY.

<p style="text-align: center;">In the Matter of Proving the Last Will and Testament of CHRISTIAN FRIEND, Deceased.</p>	}	Petition.	10
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To David A. Pell, Surrogate of the County of Bergen,
State of New Jersey:

The petition of Barbara Friend respectfully shows that your petitioner is the widow and one of the executors named in the last will of Christian Friend, late of the Township of Harrington, in the County of Bergen, aforesaid, deceased, who departed this life at Harrington, in said Township, on the first day of November in the year of our Lord eighteen hundred and.....; and your petitioner further shows that the heirs and next of kin, etc., of the said deceased are as follows:

Barbara Friend, your petitioner, residing at Harrington, N. J.; Christian Friend, residing at Harrington, N. J.; John Friend, residing at Sparkill, N. Y.; William Friend, residing at Schraalenburg, N. J.; Maggie, wife of Charles Hoffman, residing at Schraalenburg, N. J.; Emma Friend, residing at Harrington, N. J., his only children; John F. Kent, aged 20 years; Addie Kent, aged 15 years; Liddie Kent, aged 17 years; Sarah Kent, aged 8 years, residing at Hillsdale, N. J., children of deceased daughter Mary.

Your petitioner therefore prays that the said last 40

Exhibit.

will and testament may be admitted to probate, and letters thereon granted according to law.

Dated Hackensack, Dec. 13, 1892.

BARBARA FRIEND.

BERGEN COUNTY, S.S.:

10 Barbara Friend, the above named petitioner, of full age, being duly sworn, on her oath, says that the foregoing petition is in all things correct and true, of her own knowledge and belief.

BARBARA FRIEND.

Sworn to before me this 13th day of December, A. D. 1892.

DAVID A. PELL,

20

Surrogate.

BERGEN COUNTY, S. S.:

30 Barbara Friend and Christian Friend, the executors in the annexed writing named, being duly sworn do depose and say, that the said annexed writing contains the true last will and testament of Christian Friend, the testator therein named, deceased, as far as they know and as they verily believe. That they will, as the executors thereof, well and truly perform the same, first: by paying the debts of said deceased, and then the legacies therein specified, as far as the goods, chattels and credits of said deceased will thereunto extend, and the law charge them; that they will make and exhibit into the Surrogate's Office of the County of Bergen, a true and perfect inventory of all and singular the said goods, chattels and credits, as far as the same have or shall come to their possession or knowledge, or
40 to the possession of any other person or persons, to

Exhibit.

their use, and that they will well and truly account when thereunto lawfully required.

BARBARA FRIEND,
CHRISTIAN FRIEND,

Sworn at New Barbadoes, Dec. 13th, A. D. 1892, before me.

DAVID A. PELL, 10
Surrogate.

BERGEN COUNTY SURROGATE'S OFFICE.

<p>In the Matter of Proving the Last Will and Testament of CHRISTIAN FRIEND, Deceased.</p>	}	<p>Order for Probate.</p>	20
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Application having been made to me by Barbara Friend for probate of the last will and testament of Christian Friend, deceased, and letters testamentary thereon and the deposition of two of the subscribing witnesses to the same having been duly taken, and it appearing to me upon such proofs that the will produced was duly executed according to law, and the probate of said will not having been contested, and that more than ten days have elapsed since the death of said testator, 30

It is, on this thirteenth day of December, A. D. 1892, ordered and adjudged that the instrument offered for probate in this matter is the last will and testament of the said deceased and that the same is hereby admitted to probate, and that letters testamentary be granted thereon.

DAVID A. PELL, 40
Surrogate.

Exhibit.

I, David A. Pell, Surrogate of the County of Bergen,
do certify the annexed to be a true copy of the last
will and testament of Christian Friend, late of the
County of Bergen, deceased, and that Barbara Friend,
the executrix therein named, proved the same before
me, and is duly authorized to take upon herself the ad-
ministration of the estate of the testator, agreeably to
10 the said will.

Witness my hand and seal of office the thirteenth day
of.....our Lord One Thousand, Eight Hun-
dred and ninety-two.

DAVID A. PELL,
Surrogate.

[SEAL]

20 BERGEN COUNTY SURROGATE'S COURT.

In the Matter of the Last Will and
Testament of

CHRISTIAN FRIEND

or

CHRISTIAN FREUND,

Deceased.

} Petition.

30

To the Surrogate of the County of Bergen:

The petition of Christian Friend, of the Borough of
Harrington Park, in the County of Bergen and State
of New Jersey respectfully shows:

That he is a son of and one of the executors named
in the last will and testament of Christian Friend or
Christian Freund, deceased, who departed this life on
40 the first day of November, 1892. That Barbara Friend,

Exhibit.

wife of decedent, was also named as one of the executors of said will.

That said will was duly admitted to probate by the Surrogate of the County of Bergen on the 13th day of December, 1892, and your petitioner and the said Barbara Friend took the oath of executor of said will as appears by the record thereof in Book V. of Wills, page 115. That on the record of said last will and testament, David A. Pell, Surrogate of the County of Bergen, certified the annexed to be a true copy thereof in the following language: 10

"I, David A. Pell, Surrogate of the County of Bergen, do certify the annexed to be a true copy of the last will and testament of Christian Friend, late of the County of Bergen, deceased, and that Barbara Friend, the executrix therein named, proved the same before me and is duly authorized to take upon herself the administration of the estate of the testator, agreeably to the said will. 20

Witness my hand and seal of office this 13th day ofour Lord One Thousand, Eight Hundred and Ninety-two."

That the name of your petitioner was inadvertently omitted from said certification and from the letters testamentary issued on said will and your petitioner has never acted as such executor. 30

That the said Barbara Friend is now dead and the assets of said estate have not been administered and it is necessary that the error heretofore made be corrected, and that your petitioner be authorized to act as such executor.

Your petitioner, therefore, prays that letters testamentary be issued to him as sole surviving executor of 40

Exhibit.

the last will and testament of Christian Friend, deceased.

Dated Hackensack, N. J., January 8th, 1918.

CHRISTIAN FRIEND.

10 STATE OF NEW JERSEY }
COUNTY OF BERGEN } SS.:

Christian Friend, being duly sworn on his oath, says that the matters and things stated in the foregoing petition are true to the best of deponent's knowledge and belief.

CHRISTIAN FRIEND.

Sworn and subscribed to before me this eighth day of January, 1918.

20

ROBT. A. SIBBALD,
Surrogate.

BERGEN COUNTY SURROGATE'S COURT.

30 In the Matter of the Last Will and Testament of
CHRISTIAN FRIEND
or
CHRISTIAN FREUND,
Deceased. } Order.

40 The petition of Christian Friend, of the Borough of Harrington Park, in the County of Bergen and State of New Jersey, having been duly filed in this office, whereby it appears that he is a son of and one of the executors named in the last will and testament of Chris-

Exhibit.

tian Friend or Christain Freund, deceased, who departed this life on the first day of November, 1892, and that Barbara Friend, wife of the decedent, was also named as one of the executors of said will and that said will was duly admitted to probate by the Surrogate of the County of Bergen on the 13th day of December, 1892, and that the said Christian Friend and Barbara Friend took the oath of executor of said will, as appears by the record thereof in Book V. of Wills, page 115, and that by inadvertence the name of the said Christian Friend, executor as aforesaid, was inadvertently omitted from the certification of said last will and testament upon the record aforesaid and from the letters testamentary issued on said will. 10

And it further appearing that the said Barbara Friend is now dead, and assets of said estate have not been administered, and it is necessary that the error heretofore made be corrected, and that said petitioner be authorized to act as such executor. 20

It is, therefore, on this eighth day of January, 1918, ordered that letters testamentary be issued to the said Christian Friend as sole surviving executor of the last will and testament of Christian Friend or Christian Freund, deceased.

ROBT. A. SIBBALD,
Surrogate. 30

BERGEN COUNTY SURROGATE'S OFFICE.

STATE OF NEW JERSEY }
COUNTY OF BERGEN } SS.:

I, J. Blauvelt Hopper, Surrogate and Clerk of the Surrogate's Court of the said County of Bergen, in said State, do hereby certify that I have compared the annexed copy of the Petition for Probate, Oath of Execu- 40

Exhibit.

tors, Order for Probate, Letters Testamentary, Petition and Order declaring Christian Friend, sole surviving executor of the estate of Christian Friend or Christian Freund, deceased, with the record thereof now remaining in this office, and have found the same to be a true transcript therefrom.

10 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this twenty-first day of July, A. D. One Thousand, Nine Hundred and Nineteen.

J. BLAUVELT HOPPER,
Surrogate and Clerk of
the Surrogate's Court.

[SEAL]

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New Jersey Court of Errors and Appeals

NOVEMBER TERM, 1920.

*Between*MAGDALENA HOFFMAN and WILLIAM J.
FRIEND,*Complainants-Respondents,**and*CHRISTIAN FRIEND, JR., individually and
as executor, etc., *et al.*,*Defendants-Appellants.**On Appeal from
the Court of
Chancery.***BRIEF OF COULT & SMITH FOR RESPONDENTS.**

This case comes before this Court on an appeal by Christian Friend, the defendant below, from a decree of the Court of Chancery directing said defendant, individually, to pay two legacies, of \$2,000.00 each, bequeathed to the complainants by the will of Christian Friend, Sr.

The complainants and the defendant Christian Friend, Jr., are all children of Christian Friend, Sr.

Christian Friend, Sr. made a will dated February 3, 1891. He died on November 1, 1892, leaving as his estate a large farm located in what is now known as the Borough of Harrington Park, Bergen County, New Jersey, the live stock thereon and farming equipment used in connection therewith, and a piece of property located in New York City. The real estate situated in New York City stood in the names of Christian Friend, Sr. and his wife; therefore it did not pass under the will.

The will was probated on December 13, 1892, and Barbara Friend, the wife of Christian Friend, Sr., and defendant Christian Friend, Jr. qualified as executors.

By his will Christian Friend, Sr. gave his wife a life estate in the farm, without impeachment of waste, with remainder to Christian Friend, Jr., who was also given the live stock, crops, farming implements, fixtures, fodder and seed upon and about the farm and used in the cultivation thereof and in the disposition of the produce thereof.

The will makes specific legacies aggregating \$4,600.00—one of \$2,000.00 to complainant Magdalena Hoffman; one of \$2,000.00 to complainant William J. Friend; one of \$500.00 to John Friend, and one of \$100.00 to the four children of the testator's daughter, Maria Kind. These four children are parties to the suit, their legacies not having been paid. The legacy of \$500.00 to John Friend was paid during Barbara Friend's lifetime. Barbara Friend died on January 14, 1917.

The legacies to the complainants were given under the fifth and sixth clauses of the will, which read as follows:

Fifth. I give and bequeath unto my daughter, Magdalena Hoffman, also known as Maggie Hoffman, the sum of two thousand dollars, and in case of her death before me, leaving lawful issue her surviving, then I give and bequeath the same unto said issue.

Sixth. I give and bequeath unto my son William Friend the sum of two thousand dollars, and in case of his death before me, leaving lawful issue him surviving, then I give and bequeath the same unto said issue.

Under the second clause of the will, the payment of the legacies and the devise of the farm to defendant, Christian Friend, Jr., were postponed until after the death of the wife.

By the eighth clause of his will, the testator devised and bequeathed to his son Christian Friend, Jr., the defendant herein, his farm and the live stock and farming implements upon and about the same, charged with the payment of the legacies, in the following words:

Eighth. I give, devise and bequeath unto my beloved son Christian Friend, Jr., all and singular my homestead farm of upwards eighty acres, upon (which) I now reside, being at Harrington, Bergen County, aforesaid, with all and singular, the buildings, tenements, hereditaments thereunto belonging, as well as all the easements, waterways and rights of way necessary to the enjoyment thereof, and also all the live stock, crops, farming implements, fixtures, fodder, seeds upon and about the same, and used in the cultivation thereof and in the disposition of the produce thereof. But I charge this bequest and devise to my said son Christian Friend, Jr., with the payment by him of the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to four thousand six hundred dollars. The payment of which charges are not, however, to create any lien upon said farm or the personal property herein devised and bequeathed to my son Christian.

After his father's death, Christian Friend, Jr. continued to run the farm with the assistance of his sister, Emma Friend; for awhile he shared the proceeds with his mother and this sister, but later he took practically all of the proceeds. He purchased cattle to replace some of the stock that was on the farm when he took possession. He left the farm before his mother's death. He sold the stock at auction and took the proceeds of sale (case, p. 40); what personal property was left he stored on the farm, and this personal property was finally received by him on his mother's death. (Case, pp. 30, 34, 39 and 40.) The property that was left consisted of two lumber wagons, one with wood axles and one with iron axles (over fifty years old), a rusted-out reaper (thirty-five to forty years old), an old depot wagon, a one-horse market wagon and an old Acme harrow. (Case, p. 39.)

At his mother's death, Christian Friend, Jr. took possession of the farm and he has been in possession thereof ever since that time. He has executed a mortgage thereon for a small amount.

It is established in this case that outside of the live stock and farming equipment there was no personal property left by Christian Friend, Sr., that all of the stock that was left was sold at auction and the proceeds of sale received by the defendant, and that the remainder of the farming equipment was received by him on his taking possession of the farm.

The personal property—live stock and farming equipment—consumed on the farm was so consumed while Christian Friend, Jr. was running the farm.

It is admitted in evidence that at the present time the farm is valued at upwards of \$25,000.00 (case, p. 37), and that at the time the will was made the property was worth between \$8,000.00 and \$10,000.00 (case, p. 38).

The real estate in New York City, referred to in the will, was held in the names of the father and mother, and therefore, on the death of the father, it passed automatically to the mother. The mother subsequently conveyed the property to defendant's sister, Emma Friend.

It is not disputed that Christian Friend, Jr. accepted the devise of the farm and the bequest of the stock and equipment thereon.

The Court below found that the devise and bequest to Christian Friend, Jr. was made with the express proviso that its acceptance imposed a personal obligation upon the donee to pay the legacies in question.

Through inadvertence, the opinion of the Vice-Chancellor was omitted from the state of the case; by consent of counsel for the defendant it is printed with this brief—the original opinion is now on file in the office of the Clerk in Chancery.

The conclusions of the Vice-Chancellor as to the liability of the defendant are clear, and we here rest our argument on the Court's opinion—both on the question of the construction of the will and on the jurisdiction of the Court of Chancery.

Instead of printing Exhibit C. 1 (the will of Christian Friend, Sr.) with the surrogate's certificate attached, defendant's counsel printed the copy of the will which was attached to the bill of complaint, and thereby omitted the certificate of the surrogate attached to the will (Ex. C. 1). By agreement between counsel, we are printing this certificate in this brief. It reads as follows:

STATE OF NEW JERSEY.

Bergen County Surrogate's Office.

I, David A. Pell, Surrogate of the County of Bergen, do certify the annexed to be a true copy of the Last Will and Testament of Christian Friend, late of the County of Bergen, deceased, and that Barbara Friend, the executrix, and Christian Friend, the executor therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the Estate of the Testator agreeably to the said will.

Witness my hand and seal of office, the thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-two.

(SEAL)

DAVID A. PELL.

We submit that the affidavit of the executrix (case, p. 42), the order made by the surrogate on December 13, 1892, which admits the will to probate and provides that letters testamentary be granted thereon (case, p. 44), together with a certified copy of the will, with certificate attached, certified by the surrogate on December 13, 1892, form a sufficient qualification of Christian Friend, Jr. as acting executor. The exhibits printed in the case at pages 48 to 52 can not change this liability; the proceedings there set out are *ex parte* before a different surrogate. We submit, however, that if Christian Friend, Jr. did not

qualify until after his mother's death, that fact cannot affect his personal liability.

In reference to the construction of the will, we wish to call to the Court's attention the fact that the will charges the devise and bequest to the son with payment *by him* of the legacies referred to.

It is clear that the testator intended that Christian Friend, Jr., on accepting the devise and bequest, should become personally obligated to pay the legacies.

In addition to the case of *Bird v. Hawkins*, 58 N. J. Eq. 229, which is cited by the Vice-Chancellor in his conclusions, we wish to cite the following cases:

Stephenson v. Brown, 4 N. J. E. (2 C. E. Gr.) 503;

Yawger's Ex'r v. Yawger, 37 N. J. E. 216;

Van Duyne v. Van Duyne, 14 N. J. E. 49.

The decree should be affirmed with costs.

Respectfully submitted,

COULT & SMITH,
Solicitors for Respondents.

WM. A. SMITH,
Of Counsel.

OPINION.

(April 30th, 1920.)

IN CHANCERY OF NEW JERSEY.

*Between*MAGDALENA HOFFMAN and WILLIAM J.
FRIEND,*Complainants,**and*CHRISTIAN FRIEND, JR. *et al.*,*Defendants.**Opinion.*

On bill, answer and proofs taken in open court.

Messrs. Coult & Smith for complainants.

Messrs. A. C. Hart & Vanderwart for defendant, Christian Friend, Jr., individually and as executor.

STEVENSON, V.-C.

My conclusion is that the complainants are entitled to a personal decree for the amount of their legacies, against the defendant Christian Friend, Jr. individually but not as executor of his deceased father.

My further conclusion is that the complainants are not entitled to have any lien or charge established in their favor upon the land which the defendant Christian Friend, Jr. took as devisee under his father's will.

In my judgment, although this will is inaccurately drawn, the intention and meaning of the testator with respect to the subject matter of the present controversy, are clear and fully capable of being carried out. After eliminating the New Jersey and New York real estate there was plainly no estate from which the legacies to the complainants and to other beneficiaries, amounting in the aggregate to \$4,600, could be paid. The assets of the estate which possessed value seem to be a piece of real estate in New York, the value of which does not appear, and which was owned by the testator and his wife as tenants in common, and the farm in New Jersey with which we have to deal, worth at the time the will was made, or at the time of the death of the testator, about ten thousand dollars, and later about twenty-five thousand dollars. The testator gave his en-

tire estate, real and personal, to his widow for life, and subject to that life estate devised the New York land to his daughter Emma, and the New Jersey farm and its equipment to his son, the defendant Christian Friend, Jr. The testator plainly recognized the fact that the legacies to the complainants and to others, amounting in all to \$4,600, required special provision for their payment if the scheme of his will was to be carried out. The usual course which a testator under advice of counsel would take in such a situation would be to charge the legacies upon the land, probably upon the New Jersey farm, which was devised to the son subject to the life estate of the widow—a life estate which presumably would not endure many years. This testator, however, for a reason which I think may be surmised, after devising and bequeathing the farm with its equipment, subject to the widow's life estate, to his son, the defendant Christian Friend, Jr., provides as follows:

“But I charge this bequest and devise to my said son Christian Friend, Jr., with the payment by him of the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to forty-six hundred dollars. The payment of which charges are not, however, to create any lien upon said farm or the personal property herein devised and bequeathed to my son Christian.” It is important to note that all the legacies were made payable at the time of the death of the widow, the life tenant, and without interest.

It has been argued that we have here a case of repugnancy between two successive provisions of this will. I think, however, that full force may be given to both of these clauses. The testator immediately following these clauses provides that his executrix (his widow) and executor (his son, the defendant) and the survivor of them, “to better manage my estate and for such other purpose as may arise,” are authorized and empowered to sell any part or all of the said real estate, and to lease the same, etc. The indications are distinct that the testator and his adviser, if he had one, in drawing this will were dealing with matters about which they lacked accurate technical knowledge. The intention, I think, was to avoid a lien or charge upon this land which might remain upon it for some time and interfere with a sale of the land or the accomplishment of other purposes of the testator. It will be observed that the testator charges the bequest and devise to his son with the payment “by him” of the legacies in question. I think that the language of the will under all the circumstances amounts to a declaration

by the testator that he makes his gift to his son upon condition that the son shall pay the amount of the legacies. The will in effect says to the son: "This gift is made to you, but if you accept it you must take upon yourself personally the burden of paying the legacies." It will be observed that the two clauses follow one after the other and indicate that the whole subject was in the mind of the testator. That he intended in the first clause to create a lien upon the land by charging the legacies upon it and then in the next clause to declare that there should be no such lien, should not, I think, be found if there is any other reasonable interpretation giving force to the two clauses when taken together. It may be noticed that the second clause indicates the inartificial character of the will. It declares that the "payment" of the "charges are [sic] not to create any lien" upon the land or personal property. This use of the word "charges", I think, indicates that in the preceding clause in which the testator says: "I charge this bequest and devise to my son," etc., the word "charge" may well be given a special meaning somewhat different from the technical meaning of similar language when accurately employed.

That a testator may make a gift of real or personal property, or both, with an express provision that the acceptance of the gift shall impose a personal obligation upon the donee to pay money or do anything else for the benefit of a third party, cannot, I think, be questioned. This is a common instance to which the equitable doctrine of election is applied. The donee is not required to accept; no duty is cast upon him; he is left to act voluntarily either in rejecting the gift with its personal burden or accepting the gift and assuming the personal burden.

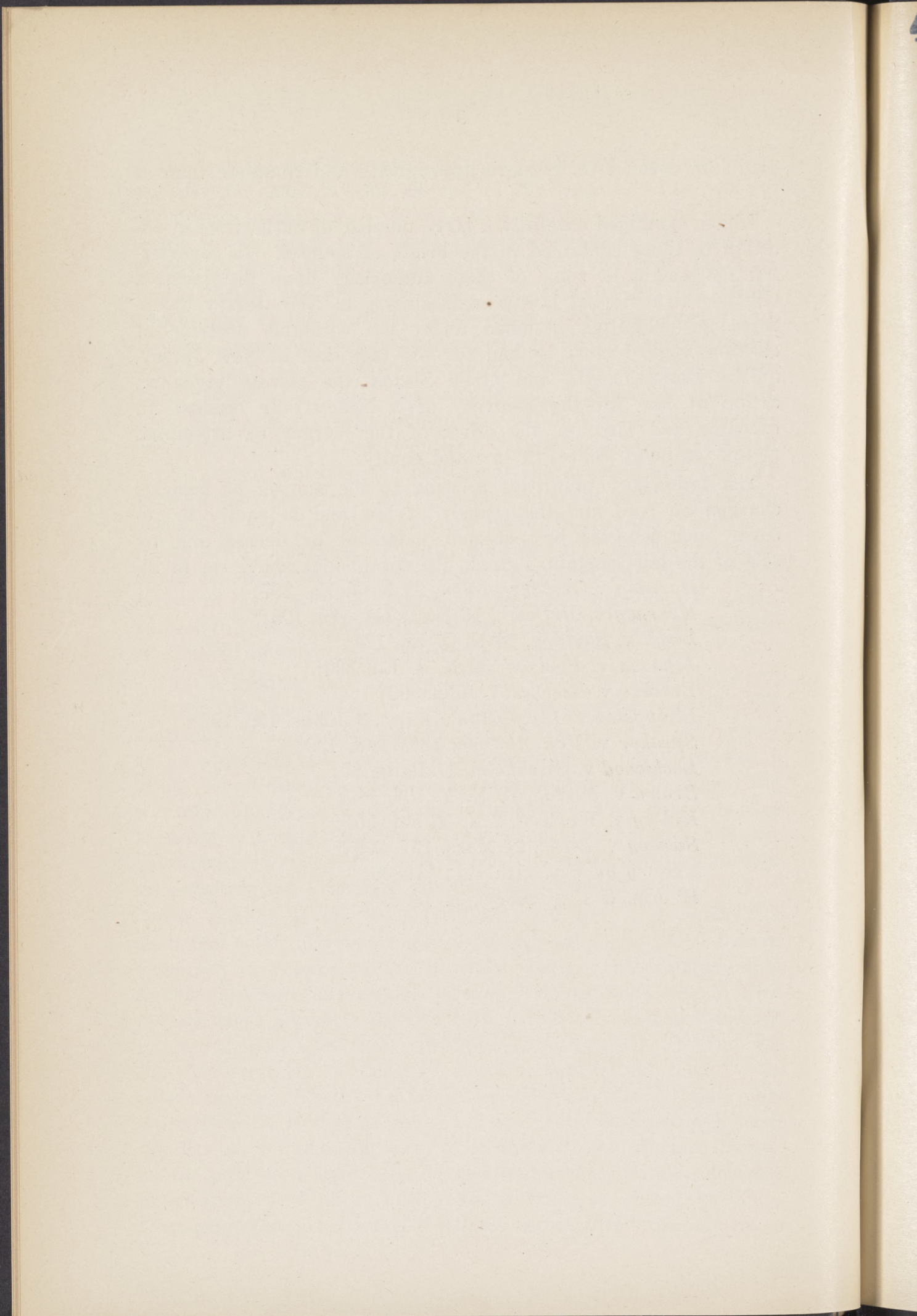
The remedy in this case, I think, is properly in equity. I shall not undertake to discuss the numerous cases which I have examined in regard to the question whether the complainants in this case have any remedy at law. I know of no case in New Jersey which supports the proposition that this sort of personal liability imposed, in fact self-imposed, on Christian Friend under the equitable doctrine of election, can be enforced by an action at law. See *Bird v. Hawkins*, 58 N. J. Eq. 229, and particularly what is said at pages 247 and 248. If there be a legal liability as yet undeclared by the courts of law of New Jersey, on the part of a legatee or devisee under the equitable doctrine of election, I think it still remains true, as stated by Vice-Chancellor Grey in *Bird v. Hawkins*, *supra*, that "the remedy in

equity is deemed to be more appropriate and complete than at law.”

I have examined carefully a large number of authorities in addition to those contained in the briefs of counsel. In considering the weight of some of these authorities upon the question whether an action at law is maintainable in New Jersey to enforce an obligation assumed under the equitable doctrine of election, regard must be had for the fact that in New Jersey, unlike Massachusetts and other States, the statute gives an action at law for the recovery of a legacy only against an executor and also for the effect of the merger or attempted merger in many States of law and equity.

The following authorities relating to the subject of legacies charged on land and the remedy at law and in equity to recover such legacies by personal judgment or decree and by sale of the land sustain, I think, the conclusions above set forth.

- Horning v. Wiederspealen*, 28 N. J. Eq. 387;
Kearney v. McComb, 16 N. J. Eq. 189, 195;
Leigh v. Savidge, 14 N. J. Eq. 124;
Johnson v. Poulson, 32 N. J. Eq. 390;
Beecker v. Beecker, 7 Johns. 99;
Livingston v. Livingston's Exrs., 3 Johns. 189, 192;
Spraker v. Van Alstyne, 18 Wend. 199;
Lockwood v. Stockholm, 11 Paige 87;
Brown v. Knapp, 79 N. Y. 136, 143;
Kelsey v. Western, 2 N. Y. 501, 507;
Swasey v. Little, 21 Mass. 297, 299;
2 Story on Eq., 11th Ed., §1080a;
19 Am. & Eng. Ency., p. 1366.



New Jersey Court of Errors and Appeals.

IN CHANCERY OF NEW JERSEY.

Between Magdalena Hoffman and William J. Friend, <div style="text-align: center;"><i>Complainants,</i></div> and Christian Friend, Jr., et al, <div style="text-align: center;"><i>Defendants.</i></div>	}	<i>On Bill, Etc.</i> <i>Defendant's Brief.</i>
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The Bill herein alleges the death of Christian Friend, Sr., testate, on November 1st, 1892; the probate of his will in the Bergen County Surrogate's Office on December 13th, 1892; that Christian Friend, Jr., the defendant, qualified as Executor of his father's Estate; that certain specific bequests were made, none of which excepting that to John Friend (4th paragraph of Will) have been paid; that in the 8th paragraph of the will the payment of these bequests was charged against a devise and bequest therein made to Christian Friend, Jr.; that Barbara Friend had a life estate, and was in possession of the property devised and bequeathed to Christian Friend, Jr., until her death in January 14th, 1917, since which time Christian Friend has been in possession thereof!

The complainant prayed that Christian Friend individually and as Executor of the estate of Christian Friend, Sr., be ordered to pay the complainants the amounts of their specific legacies, and that in default thereof the property devised and bequeathed to Christian Friend, Jr., be sold, etc.

The death of Christian Friend, Sr., testate on November 1, 1892, and the probate of his will is admitted.

That Christian Friend, Jr., the defendant, qualified as executor of this estate is denied.

At the hearing, the defendant, with the Court's permission, (p. 29) reserved the right to introduce documentary proof that Christian Friend, Jr., did not qualify, and did not take upon himself the administration of the Estate of Christian Friend, Sr., until after the death of Barbara Friend.

This was done (page 48 T. R. 10)

From this it appears that Barbara Friend alone petitioned for probate, and that she was granted letters thereon, and whilst Christian Friend, Jr., joined her in executing an affidavit concerning the will, letters testamentary were granted to Barbara alone! That subsequently, *after the death of Barbara*, Christian Friend, Jr., petitioned for administration and on January 8th, 1918, letters were issued to him!

Therefore, from the time of the death of Christian Friend, Sr., until January 8th, 1918, Christian Friend, Jr., had no possession or control of the assets of the Estate of Christian Friend, Sr., and was not executor thereof!

“The fact, however, that one is named in the will as executor, does not make him so in fact, but only gives him the legal right to become executor upon complying with the condition required by law. He derives his right and title to the estate, as well as his appointment, from the will, but his power of administration over the Estate does not become substantial until letters testamentary authenticating his appointment and right have been issued to him by the proper court.”

Kochers—140; Woods v. Cosby, 76.
Ala.—557; Stagg v. Green, 47 Mo. 500;
Wankford v. Wankford, 1 Solk, 299.

It is admitted that the specific bequests of Christian Friend, Sr., have not been paid.

It is admitted that Babara Friend came into possession of the real and personal property of Christian Friend, Sr., at his death, and that she continued in possession of his real estate until her death on January 14, 1917, but that ad interim, she had dissipated the personal property.

The defendant has opposed the petition herein, because he believes:

FIRST.

The Court of Chancery is without jurisdiction over the subject matter of the said Bill of Complaint, inasmuch as a Court of Law or at least of General Jurisdiction (3 Har. 73) the Orphans' Court of the County of Bergen is possessed of jurisdiction, the will described in the pleadings herein having been probated within the jurisdiction of the latter court, and proceedings toward a liquidation of the estate having been inaugurated therein.

The prayer of the complainant in part is that the defendant "as Executor of the Estate of Christian Friend, Sr., pay, etc." This may best be enforced by proceeding toward an order of distribution in the Orphans' Court of Bergen County, nor may the Court of Chancery direct the payment of the legacies without evidence of the closing of the Estate in an orderly way by an accounting after the payment of debts.

The residue of the personal estate must first be consumed before the realty may be charged with the payment of the specific legacies of the Complainant's, and until the Orphans' Court has ascertained by accounting, just what

that residue is, the Chancery Court may not charge the defendant as a devisee—and much less individually, as the trial court decreed—with the payment of the specific bequests.

It appears that the personal estate was wasted by the life tenant, who was likewise the Executrix, and the land is therefore released from the charge of the specific legacies.

U. S. v. Parker, 2 MacArthur (D. C.) 444.

Hanna's Appeal, 31 Par. St.—53.

SECOND.

It is alleged that the devise and bequest to this defendant in the Eighth Clause of the said Will are charged with the payment of the legacies bequeathed in the third, fourth, fifth and sixth paragraphs thereof. The Chancery Court may not charge the legacies aforesaid against the real and personal property bequeathed to the defendant, Christian Friend, Jr., in the Eighth Clause of the said Will, until he is possessed thereof. The defendant will not be possessed of the said personalty before an order of distribution has been executed by the proper court directing the Executor of the Estate to distribute the personalty of the Estate to those to whom the same was bequeathed.

“Where land devised is charged with the payment of a legacy no personal liability can attach to the devisee until he comes into possession of the Estate charged.”

Talbot v. Rountree, 3 Ill. App. 275.

Wilson v. Moore, 86 Ind. 244.

If the land devised is charged, the personalty bequeathed is as well.

This personalty the defendant never received, excepting only “two lumber wagons, one wooden and one iron axle. They had been on the place over fifty years, and there was

also a rusted-out reaper there that had been there about thirty-five years or forty years. There was an old depot wagon and one-horse market wagon, and an old Acme harrow." And when Christian Friend, Jr., received these (upon the death of Barbara) he received them, not individually but officially.

He, in short, has not possession of the personalty, which the testator charged should support at least a part of the charge of the several specific bequests.

I submit that the court may not now charge the Christian Friend, Jr., devise with the payment of these bequests.

"If personal property is included in a general residuary bequest for life, it must be sold and the principal reserved for the remainderman."

Ackerman v. Vreeland, 14 N. J. Eq. 23.

THIRD.

That while it is true that the devise to defendant appellant in the Eighth paragraph of the said Will was therein charged with a payment by him of the legacies therein bequeathed in the third, fourth, fifth and sixth paragraphs thereof, the testator later and at the close of the Eighth clause of the said Will, provided "the payment of which charges, however, are not to create any lien upon said farm, or the personal property herein devised and bequeathed to my son, Christian." This defendant says that in and by the said last mentioned direction the properties bequeathed to him were relieved from the charge thereinbefore created.

The devise and bequest contained in the eighth clause of the said Will is as follows:

"Eighth: I give, devise and bequeath unto my beloved son, Christian Friend, Junior, all

and singular my homestead farm of upwards eighty acres, upon which I now reside, being at Harrington, Bergen County aforesaid, with all and singular the buildings, tenements, hereditaments thereunto belonging, as well as all the easements, water ways and rights of way necessary to the enjoyment thereof, and also all the live stock, crops, farming implements, fixtures, fodder, seeds upon and about the same, and used in the cultivation thereof, and in the distribution of the produce thereof. But I charge this bequest and devise to my said son, Christian Friend, Jr., with the payment by him of the legacies herein bequeathed in the third, the fourth, the fifth and the sixth paragraphs of this my will, amounting in all to \$4,600.00. The payment of which charges are not however to create any lien upon said farm or the personal property herein devised and bequeathed to my son Christian."

At the close of the Eighth Clause of the Will, and *after* the charging words, we read: "The *payment* of which charges are not however to create any *lien* upon said farm or the personal property herein devised and bequeathed to my son, Christian."

The Court will observe that the testator constantly joins the "devise" and "bequest" as indicating what Christian Friend is to receive and what if anything is to be charged.

We respectfully submit that this defeats the earlier provision!

"It is a well-settled rule that where there is an irreconcilable conflict between two clauses of a Will the latter clause will prevail as being the latest expression of the testator's intention."

Hendershot v. Shields, 42 N. J. Eq. 317.

What did the testator mean? For one provision defeats the purpose of the other!

"The payment . . . are not . . . to create any lien!" Then the devisee must have received the farm without "lien"—without encumbrance, and the Court may not now impose one!

The construction placed by the complainant is not tenable as the words used by the testator do not limit the devise and bequest, or create as a condition precedent to the acceptance thereof the payment of these legacies! And were complainant right, the defendant has not received the bequeathed personalty.

The very personalty which the testator attempted to "charge" he gave a life interest in to Barbara, with the provision "free from any control of my executor hereinafter appointed and without any impeachment for waste, and without anywise securing the remaindermen for the preservation thereof by bond or otherwise." How may the complainant charge the defendant with responsibility for its dissipation?

"Lien is a technical term that means a charge upon lands, running with them and incumbering them, in any change of ownership as mortgages, judgments, ground rents, etc."

Ingles v. Bringhurst, (Pa.) 1 Dall 341.

"The word 'lien' includes every case in which personal or real property is charged with the payment of a debt."

Words & Phrases, Vol. 5, p. 4144, etc.
definitions and cases therein cited.

Respectfully submitted,

Hart & Vanderwar

Attorneys of and of
Counsel with defendant.

Dated:

October 10, 1920

[The page contains extremely faint, illegible text, likely bleed-through from the reverse side of the paper. The text is too light to be transcribed accurately.]

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