

# INDEX

|   | Page |
|---|------|
| Notice of Appeal .....  | 1    |
| Amended Notice of Appeal .....                                | 2    |
| Petition of Appeal .....                                      | 3    |
| Bill of Complaint .....                                       | 5    |
| Answer to Bill of Complaint .....                             | 9    |
| Amended Bill of Complaint .....                               | 11   |
| Answer to Amended Bill of Complaint .....                     | 15   |
| Order of Reference .....                                      | 17   |
| Designation .....   | 18   |
| Opinion (of Vice-Chancellor Lewis) and Con-<br>clusions ..... | 19   |
| Decree .....  | 22   |
| Exhibits "C-1" .....  | 24   |



## AMENDED NOTICE OF APPEAL

Filed July 2nd, 1931.  
IN CHANCERY OF NEW JERSEY.

|    |                               |  |
|----|-------------------------------|--|
|    | Between                       |  |
|    | Delia Burke Murray,           | }  |
|    | Complainant,                  |  |
| 10 | and                           |  |
|    | Mary Donahue and Patrick      |  |
|    | Donahue, her husband, et al., |  |
|    | Defendants.                   | On Bill, &c.,<br>Amended Notice<br>of Appeal |

TAKE NOTICE that the complainant, Delia  
Burke Murray hereby appeals from the final de-  
cree made in the above entitled cause on May  
20th, 1931, by the Chancellor on the advice of  
Vice Chancellor Lewis, and from the whole and  
every part thereof, to the Court of Errors and  
Appeals, in the last resort in all causes.

Dated: June 30th, 1931.

Hart and Vanderwart,  
Solicitors of Complainant.

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

A. C. Hart,  
Of Counsel with Complainant.

PETITION OF APPEAL

Filed July 16th, 1931.  
 NEW JERSEY COURT OF ERRORS AND  
 APPEALS

|   |   |   |
|---|---|---|
| Between<br>Delia Burke Murray,<br>Complainant-Appellant,<br>and<br>Mary Donahue and Patrick<br>Donahue, her husband, et al.,<br>Defendants-Appellees. | } | On Appeal from<br>Court of Chan- 10<br>cery.<br>Petition of<br>Appeal |
|---|---|---|

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

The petition of Delia Burke Murray, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable Vice-Chancellor Lewis, bearing date of May 20, 1931, in a certain cause in said Court of Chancery, wherein the said Delia Burke Murray was complainant and the said Mary Donahue and Patrick Donahue, her husband, et al., were defendant, in this respect, to wit: That the said decree adjudges 20  
 30 that the word "principal" as used in the last will and testament of Hanorah Tiernay, deceased, late of Ho-Ho-Kus, Bergen County, New Jersey, does not include the real estate of which she died

*Petition of Appeal*

seized, and that such real estate of which the said Hanorah Tiernay died seized, after the termination of the life estate given to one James Schilte under the will of said Hanorah Tiernay, descends to the heirs at law of the said testatrix, Hanorah Tiernay.

2. The petitioner appeals from the decree of the Chancellor, which decree as aforesaid, upon  
10 the ground that the same is erroneous in that the word "principal" as used in the last will and testament of Hanorah Tiernay, deceased late of Ho-Ho-Kus, Bergen County, New Jersey, does include the real estate of which the said testatrix, Hanorah Tiernay, died seized, and that it was not the intention of the said Hanorah Tiernay to die  
20 intestate as to said real estate.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed,  
20 set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall deem proper.

Hart and Vanderwart,  
Solicitors for and of Counsel  
with Complainant-Appellant.

## BILL OF COMPLAINT

Filed June 6th, 1929.  
IN CHANCERY OF NEW JERSEY

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

The complainant, Delia Burke Murray, of the Borough of Ho-Ho-Kus, in the County of Bergen and State of New Jersey, respectfully shows that: 10

1. Hanorah Tiernay, late of the Borough of Ho-Ho-Kus, died on December 24, 1911 leaving a last will and testament which was on January 30, 1912, duly admitted to probate by the Surrogate of said County of Bergen, and letters testamentary were issued thereon to Napoleon B. Barry, as sole qualifying executor, who thereafter departed this life, whereupon complainant, on January 9, 1913 was granted substitutionary administration of the goods, chattels, rights, credits and 20 estate of the aforesaid Hanorah Tiernay. A true copy of said will and the proceedings is hereby annexed and made a part hereof.

2. In and by her said will, the said Hanorah Tiernay provided as follows:

"First: After my lawful debts are paid, I give to my sister, Jane Schilte, the use of my house, out buildings, land, furniture and all appurtenances, also the interests on my deposits in the Paterson Savings Institution, the Industrial Emigrants 30 Savings Bank, Savings Department of Ridgewood, N. J. to use during her lifetime and after her death the said interests

*Bill of Complaint*

and principal are all to be given to my grand niece, Delia Burke, who has been my helper and friend since the death of my brother-in-law, Marinus Schilte."

3. Complainant resided with the testatrix seven years prior to her decease and decedent informed complainant on several occasions that the residue of the said testatrix's estate would be given  
10 to complaint under the terms of said testatrix's will, complainant being a grand-niece of the said testatrix and the sole relative of the said testatrix who resided with her at the time of her death and at least seven years prior thereto.

4. In the first paragraph of the will of said testatrix, Jane Schilte was given a life estate, and thereafter in said paragraph, it was the intention of said testatrix to give and devise the rest of her estate to the said Delia Burke Murray. The  
20 wording in said paragraph, however, is ambiguous and sufficiently indefinite as to raise an objection to the title of complainant to lands devised in said will.

5. Complainant, by virtue of said will, has held possession of lands in the Boroughs of Ridgewood and Ho-Ho-Kus, Bergen County, New Jersey, since April 1912, the aforesaid Jane Schilte having departed this life during the month of April, 1912.

30 6. Complainant, within the last year, has endeavored to dispose of the premises by sale but has not been able to do so by reason of the indefinite wording of the will of said testatrix, Hanorah Tiernay.

*Bill of Complaint*

7. Complainant has always paid municipal taxes and assessments levied against the said property and has had continuous possession of the same since the month of April, 1912.

8. The sole remaining heirs at law and next of kin of the said Hanorah Tiernay now living are:

Mary Donahue, sister of complainant, and Patrick Donahue, her husband, 444 Jersey Avenue, Jersey City, N. J. 10

Elizabeth Flanagan, sister of complainant, and Michael Flanagan, 295 Eighth Street, Jersey City, N. J.

Nellie Kearns, sister of complainant, and Cornelius Kearns, her husband, 133 Pavonia Avenue, Jersey City, N. J.

John Murphy, son of Nora Murphy, deceased sister of complainant, and Nora Murphy, his wife, 437 West 13th Street, New York City.

Rose Kessler, daughter of Nora Murphy, deceased sister of complainant, and Charles Kessler, her husband, 437 West 13th Street, New York City. 20

Daniel Considine, who was the second husband of Nora Murphy, deceased sister of complainant, 437 West 13th Street, New York City.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Mary Donahue and Patrick Donahue, her husband, Elizabeth Flanagan and Michael Flanagan, her husband, Nellie Kearns and Cornelius Kearns, her husband, John Murphy and Nora Murphy, his wife, and Rose Kessler and Charles Kessler, her husband, and Daniel Considine, who are the defendants to this suit, may answer this 30

*Bill of Complaint*

bill of complaint and each statement therein made:

2. That this court may construe the said last Will and Testament of said Hanorah Tiernay, deceased, and declare complainant's right thereunder:

10 3. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

Hart and Vanderwart,  
Solicitors for and of Counsel  
with Complainant.

20

30



*Answer to Bill of Complaint*

4. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 4. Defendants beg leave to refer to the Will of said Hanorah Tiernay as to the contents thereof and the effect of same.

10 5. Defendants admit that Jane Schilte is dead but they have no knowledge or information sufficient to form a belief as to the other statements set forth in paragraph 5 and beg leave to refer to the will of said Hanorah Tiernay, if any, as to the rights of all parties hereto in and to the estate of the said Hanorah Tiernay.

6. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 6 and 7.

20 7. In answer to paragraph 8 these defendants say that in addition to those heirs of Hanorah Tiernay mentioned in said paragraph are John Burke and Patrick Burke, brothers of complainant. John Burke is married and his wife's name is Margaret Burke. Patrick Burke is married and his wife's name is Mary Burke. Said John Burke and Patrick Burke are residents of the Irish Free State.

Mark A. Sullivan,  
Solicitor of Defendants.

## AMENDED BILL OF COMPLAINT

Filed October 19th, 1929.  
IN CHANCERY OF NEW JERSEY

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

The complainant, Delia Burke Murray, of the Borough of Ho-Ho-Kus, in the County of Bergen and State of New Jersey, respectfully shows that: 10

1. Hanorah Tiernay, late of the Borough of Ho-Ho-Kus, died on December 24, 1911 leaving a last will and testament which was on January 30, 1912, duly admitted to probate by the Surrogate of said County of Bergen, and letters testamentary were issued thereon to Napoleon B. Barry, as sole qualifying executor, who thereafter departed this life, whereupon complainant, on January 9, 1913 was granted substitutionary administration of the goods, chattels, rights, credits 20 and estate of the aforesaid Hanorah Tiernay. A true copy of said will and the proceedings is hereby annexed and made a part thereof.

2. In and by her said will, the said Hanorah Tiernay provided as follows:

"First: After my lawful debts are paid, I give to my sister, Jane Schilte, the use of my house, out buildings, land, furniture and all appurtenances, also the interest on my deposits in the Paterson Savings Institution, the Industrial Emigrants Savings Bank, 51 Chambers St., New York and the First National Bank, Savings Department 30

*Amended Bill of Complaint*

of Ridgewood, N. J. to use during her lifetime and after her death the said interest and principal are all to be given to my grand niece, Delia Burke, who has been my helper and friend since the death of my brother-in-law, Marinus Schilte."

10 3. Complainant resided with the testatrix seven years prior to her decease and decedent informed complainant on several occasions that the residue of the said testatrix's estate would be given to complainant under the terms of said testatrix's will, complainant being a grandniece of the said testatrix and the sole relative of the said testatrix who resided with her at the time of her death and at least seven years prior thereto.

20 4. In the first paragraph of the will of said testatrix, Jane Schilte was given a life estate and thereafter in said paragraph, it was the intention of said testatrix to give and devise the rest of her estate to the said Delia Burke Murray. The wording in said paragraph, however, is ambiguous and sufficiently indefinite as to raise an objection to the title of complainant to lands devised in said will.

30 5. Complainant, by virtue of said will, has held possession of lands in the Boroughs of Ridgewood and Ho-Ho-Kus, Bergen County, New Jersey, since April 1912, the aforesaid Jane Schilte having departed this life during the month of April, 1912.

6. Complainant, within the last year, has endeavored to dispose of the premises by sale but has not been able to do so by reason of the in-

*Amended Bill of Complaint*

definite wording of the will of said testatrix, Hanorah Tiernay.

7. Complainant has always paid municipal taxes and assessments levied against the said property and has had continuous possession of the same since the month of April, 1912.

8. The sole remaining heirs at law and next of kin of the said Hanorah Tiernay now living are:

Mary Donahue, sister of complainant, and Patrick Donahue, her husband, 444 Jersey Avenue, Jersey City, N. J. 10

Elizabeth Flanagan, sister of complainant, and Michael Flanagan, 295 Eighth Street, Jersey City, N. J.

Nellie Kearns, sister of complainant, and Cornelius Kearns, her husband, 133 Pavonia Avenue, Jersey City, N. J.

John Murphy, son of Nora Murphy, deceased sister of complainant, and Nora Murphy, his wife, 20 437 West 13th Street, New York City.

Rose Kessler, daughter of Nora Murphy, deceased sister of complainant, and Charles Kessler, her husband, 437 West 13th Street, New York City.

Daniel Considine, who was the second husband of Nora Murphy, deceased sister of complainant, 437 West 13th Street, New York City.

John Burke, brother of complainant, and Margaret Burke, his wife, Irish Free State, Ireland. 30

Patrick Burke, brother of complainant, and Mary Burke, his wife, Irish Free State, Ireland.

Complainant is without adequate remedy in the courts of law, and therefore prays:

*Amended Bill of Complaint*

1. That Mary Donahue and Patrick Donahue, her husband, Elizabeth Flanagan and Michael Flanagan, her husband, Nellie Kearns and Cornelius Kearns, her husband, John Murphy and Nora Murphy, his wife, and Rose Kessler and Charles Kessler, her husband, and Daniel Considine, and John Burke and Margaret Burke, his wife, and Patrick Burke and Mary Burke, his wife, who are  
10 the defendants to this suit, may answer this bill of complaint and each statement herein made:

2. That this court may construe the said last Will and Testament of said Hanorah Tiernay, deceased, and declare complainant's right thereunder:

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

20 Hart and Vanderwart,  
Solicitors for and of Counsel  
with Complainant.

**ANSWER TO AMENDED BILL OF  
COMPLAINANT**

Filed October 22, 1929.  
IN CHANCERY OF NEW JERSEY

|  |   |  |
|--|---|--|
| <p style="text-align: center;">Between<br/>Delia Burke Murray,<br/>Complainant,<br/>and<br/>Mary Donahue and Patrick<br/>Donahue, her husband, et al.,<br/>Defendants.</p> | } | <p style="text-align: center;">On Bill, &amp;c. 10</p> |
|--|---|--|

The answer to the defendants Mary Donahue, Patrick Donahue, Elizabeth Flanagan, Michael Flanagan, Nellie Kearns, Cornelius Kearns, John Murphy, Nora Murphy, Rose Kessler, Charles Kessler, Daniel Considine, John Burke, Margaret Burke, Patrick Burke and Mary Burke to the amended bill of complaint. 20

These defendants answering the amended bill of complaint say that:

1. They admit that Hanorah Tiernay is dead but they have no knowledge or information sufficient to form a belief as to the other statements set forth in paragraph 1.

2. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 2. 30

3. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 3, except that they admit that

*Answer to Amended Bill of Complaint*

complainant is a grand-niece of the said Hanorah Tiernay.

4. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 4. Defendants beg leave to refer to the Will of said Hanorah Tiernay as to the contents thereof and the effect of same.

10 5. Defendants admit that Jane Schilte is dead but they have no knowledge or information sufficient to form a belief as to the other statements set forth in paragraph 5 and beg leave to refer to the will of said Hanorah Tiernay, if any, as to the rights of all parties hereto in and to the estate of the said Hanorah Tiernay.

6. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 6 and 7.

7. Defendants admit paragraph 8.

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Mark A. Sullivan,  
Solicitor of Defendants.

30





## OPINION AND CONCLUSIONS

Filed April 13th, 1931.

---

Delia Burke Murray,  
Complainant,

v.

Mary Donahue and Patrick  
Donahue, her husband, et al.,  
Defendants.

---

10

(Decided April 13th, 1931.)

1. Wills, construction. In the context, the word "principal" held to refer to deposits in bank and not to include real estate.

2. In its ordinary meaning "principal" means a sum or fund which is producing interest and conveys no idea of land or any right therein.

20

Mr. Archibald C. Hart, for the complainant.

Mr. Mark A. Sullivan, for the defendants.

Lewis, V. C.

This proceeding is brought to interpret a clause of the will of Hanorah Tiernay. The clause now before the court provides that a sister of testatrix shall have "the use of my house, outbuildings, land, furniture and all appurtenances, also the interests from my "deposits" in three certain banks, "to use during her lifetime, and after her death 30 the said interests and principal are all to be given to my grandniece, Delia Burke." The sole question is whether the real estate of testatrix passed under this clause to Delia Burke on the death of the sister, or whether the real estate descended to the heirs-at-law of the testatrix.

*Opinion and Conclusions*

The will is not artificially drawn, but the intent of the testatrix in my opinion appears to be clear that she intended that only the sums on deposit in the banks should go to Delia Burke, so that testatrix died intestate as to the remainder in the real estate after the death of the sister as life tenant.

10 This conclusion is reached from an examination of the words used by the testatrix. The language used creates a life interest in the various kinds of property enumerated. These are set forth as being "my house, outbuildings, land, furniture and all appurtenances" as one group, and then there is a distinct clause which is set forth as "also the interests on my deposits." Thus the income from the bank deposits, three in number, are specifically referred to by the word "interests." In making the provision for a disposition after death of the life tenant, no mention is made of the house, 20 outbuildings, land, furniture or appurtenances. The sole provision upon the death of the life tenant is that "the said interests and principal" are to go to Delia Burke. The words "the said interests" can only refer to the interests on the bank deposits. It is argued that the word "principal" refers not only to the bank deposits but also refers to the house, outbuildings, land, furniture and appurtenances. To give this meaning to the word "principal" in my opinion requires a highly 30 strained construction of the word. In its ordinary meaning principal means a sum or fund which is producing interest and conveys no idea of land

*Opinion and Conclusions*

or any right therein. Particularly in the use in the clause in question as coupled with the unquestionable use of the word "interests" to mean the proceeds of the bank deposits, the word "principal" clearly refers to these deposits and can have no reference to the real estate.

Therefore no remainder in the real estate was devised to Delia Burke and the realty descended to the heirs-at-law of the testatrix. A decree accordingly will be advised. 10

20

30

## DECREE

Filed May 20th, 1931.

IN CHANCERY OF NEW JERSEY

73-440

|    |                               |   |              |
|----|-------------------------------|---|--------------|
|    | Between                       | } | On Bill, &c. |
| 10 | Delia Burke Murray,           |   |              |
|    | Complainant,                  |   |              |
|    | and                           |   |              |
|    | Mary Donahue and Patrick      |   |              |
|    | Donahue, her husband, et al., |   |              |
|    | Defendants.                   |   |              |

This cause coming on to be heard in the presence of Hart and Vanderwart, Solicitors of the Complainant and Mark A. Sullivan, Solicitor of the Defendants and the Court having examined the pleadings and taken proofs orally in open court and having read and considered the arguments contained in the briefs filed by Counsel for the respective parties and it appearing to the satisfaction of the Court that Hanorah Tiernay, late of the Borough of Ho-Ho-Kus, Bergen County, New Jersey died on December 24th, 1911, leaving a Last Will and Testament which was duly admitted to probate by the Surrogate of the said County of Bergen on January 30th, 1912, a copy of which will is attached to the amended bill of complaint filed herein; and it further appearing that the word "principal" in said last will and testament of Hanorah Tiernay, deceased, refers only to the several bank deposits mentioned in said last will and testament and does not include

*Decree*

the real estate of which said Hanorah Tiernay died seized;

IT IS, THEREFORE, on this 20th day of May, 1931, ORDERED, ADJUDGED AND DECREED that the word "principal" as used in the said last will and testament of said Hanorah Tiernay, deceased, late of Ho-Ho-Kus, Bergen County, New Jersey, does not include the real estate of which she died seized and that such real estate, after the termination of the life estate given to Jane Schilte under said will, descends to the heirs at law of said testatrix Hanorah Tiernay. 10

IT IS FURTHER ORDERED that the fixing of counsel fees be deferred until the further order of the Court.

Edwin Robert Walker, C.

Respectfully advised,  
Vivian M. Lewis, V.C.

20

30

**COMPLAINANT'S EXHIBIT "C1"**  
**CERTIFIED COPY OF PROCEEDINGS IN**  
**BERGEN COUNTY SURROGATE'S**  
**COURT**  
**BERGEN COUNTY SURROGATE'S COURT**

|    |  |   |           |
|----|--|---|-----------|
| 10 | In the Matter of Proving the<br>Last Will and Testament of<br>Hanorah Tiernay,<br><div style="text-align: right; padding-right: 20px;">Deceased.</div> | } | Petition. |
|----|--|---|-----------|

To J. Blauvelt Hopper, Surrogate of the County of Bergen, State of New Jersey:

The Petition of Napoleon B. Barry, of Ho-Ho-Kus, N. J. respectfully shows that your petitioner is one of the executors named in the last will and testament of Hanorah Tiernay, late resident of the Borough of Ho-Ho-Kus, in the County of Bergen, aforesaid, deceased, who departed this life at  
 20 Ho-Ho-Kus, in said Borough, on the twenty-fourth day of December in the year of our Lord nineteen hundred and eleven; and your petitioner further shows that the heirs and next of kin, etc., of the said deceased are as follows:

Jane Schilte, sister, residing at Ho-Ho-Kus, N. J.

Delia Burke Murray, grand-niece, residing at Ho-Ho-Kus, N. J. her only next of kin and of full age.

30 Your Petitioner therefore prays that the said Last Will and Testament of Hanorah Tierney may be admitted to probate, and letters thereon granted according to law.

Dated Hackensack, January 30th, 1912.

Napoleon B. Barry.

Bergen County, ss:

Napoleon B. Barry, the above named petitioner, of full age, being duly sworn, on his oath, says

*Exhibit "C-1"*

that the foregoing petition is in all things correct and true, of his own knowledge and belief.

Napoleon B. Barry

Sworn to before me this 30th  
day of January, A.D. 1912.

James M. Harkness,  
Deputy Surrogate.

## WILL

10

I, Hanorah Tiernay being of sound and disposing mind and memory and considering the uncertainty of this life, do make, publish and declare this to be my last will and testament, as follows, hereby revoking all other and former Wills by me at any time made.

FIRST: after my lawful debts are paid I give to my sister Jane Schilte the use of my home, out-buildings, land, furniture and all appurtenances also the interests on my deposits in the Paterson Savings Institution, the Industrial Emigrants Savings Bank, 51 Chambers St. New York and the First National Bank, Savings department of Ridgewood, N. J. to use during her lifetime and after her death the said interests and principal are all to be given to my grand niece Delia Burke, who has been my helper and friend since the death of my brother in law Marinus Schilte. 20

I hereby appointed Michael H. Nagle, M. J. Laughlin, and Napoleon B. Barry without bonds 30 to be Executors of this my last will and testament.

In witness Whereof, I have hereunto subscribed

*Exhibit "C-1"*

my name and affixed my seal the eighteenth day of March, in the year one thousand nine hundred and five.

Her  
Hanorah X Tiernay  
Mark

Witnesses:

- 10 Mary E. Laughlin  
Elizabeth Brown  
Mary E. Goode

Subscribed by Hanorah Tiernay the Testatrix named in the foregoing will, in the presence of each of us and at the time of making such subscription the above instrument was declared by the said testatrix to be her last will and testament and each of us, at the request of said testatrix and in her presence and in the presence of each other, signed our names as witnesses thereto.

- 20 Mary W. Laughlin residing at Ho-Ho-Kus, N. J.  
Elizabeth Brown, residing at Ho-Ho-Kus, N. J.  
Mary E. Goode, residing at 185 Paterson St., Paterson, N. J.

## RENUNCIATION

To All Whom It May Concern:

- 30 Whereas, Hanorah Tiernay, late of the Borough of Ho-Ho-Kus, in the County of Bergen, deceased, in and by her last Will and Testament, bearing date the Eighteenth day of March A.D., 1905, did appoint the subscriber the Executor thereof.

Now Bt It Known, That for divers good causes I have and I hereby do Renounce the Executorship and Execution of the said last Will and Testa-

*Exhibit "C-1"*

ment, and do refuse to take upon myself the burden of the same.

In Witness Whereof, I have hereunto set my hand and seal this 18th day of November in the year of our Lord one thousand nine hundred and twelve.

Mary J. Laughlin (L.S.)

Signed, sealed and delivered 10  
in presence of

David D. Zabriskie.

State of New Jersey }  
County of Bergen } ss.

Be It Remembered, That on this 18th day of November A.D. 1912, before me, the undersigned, personally appeared M. J. Laughlin, who, I am satisfied, is the grantor in the above renunciation named, and who executed the same; and I having first made known to him the contents thereof he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. 20

David D. Zabriskie,  
M. C. C. of N. J.

#### RENUNCIATION

To All Whom It May Concern:

Whereas, Hanorah Tiernay, late of the Borough of Ho-Ho-Kus, in the County of Bergen, deceased, in and by her last Will and Testament, bearing date the eighteenth day of March A. D., 1905, did appoint the subscriber the Executor thereof. 30

Now Be It Known, That for divers good causes I have and I hereby do Renounce the Executorship

*Exhibit "C-1"*

and Execution of the said last Will and Testament, and do refuse to take upon myself the burden of the same.

In Witness Whereof, I have hereunto set my hand and seal this sixth day of December in the year of our Lord one thousand nine hundred and twelve.

10 Michael H. Nagle (L.S.)

Signed, sealed and delivered

in presence of

David D. Zabriskie

State of New Jersey }  
County of Hudson } ss.

20 Be It Remembered, That on this 6th day of December A.D. 1912, before me, the undersigned, personally appeared Michael H. Nagle, who, I am satisfied, is the grantor in the above renunciation named, and who executed the same; and I having first made known to him the contents thereof he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

David D. Zabriskie,  
M. C. C. of N. J.

## AFFIDAVIT

30 State of New Jersey }  
County of Bergen } ss:

Elizabeth Brown of 71 South St., Newark, N. J., one of the Witnesses of the annexed writing purporting to be the Last Will and Testament of Hannah Tiernay, the Testatrix therein named, deceased, being duly sworn, doth depose and say that she saw the said Testatrix sign and seal the

*Exhibit "C-1"*

annexed writing and heard her publish and declare the same as and for her last Will and Testament. That at the time of the doing thereof, the said Testatrix was of sound disposing mind, memory and understanding, as far as this deponent knows, and as he verily believes; that Mary E. Laughlin and Mary E. Goode the other subscribing witnesses thereto were also present at the signing, sealing and publication thereof; and that they and this deponent subscribed their names thereto as witnesses, in the presence of the Testatrix, and of each other, and at the request of the Testatrix. Sworn at New Barbadoes, before

Elizabeth Brown.

me, January 30th, A.D., 1912,

James M. Harkness,

Deputy Surrogate.

10

## AFFIDAVIT

20

State of New Jersey  
County of Bergen } ss.

Napoleon B. Barry, the executor in the annexed writing named, being duly sworn, do depose and say that the annexed writing contains the true Last Will and Testament of Hanorah Tiernay, the Testatrix therein named, deceased, as far as he knows and as he verily believes; that he will, as the Executor 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 charges; that he will make and exhibit into the Surrogate's Office of the County of Bergen, a true and perfect

30

*Exhibit "C-1"*

inventory of all and singular the said goods, chattels and credits, as far as the same have, or shall come to his possession or knowledge, or to the possession of any other person or persons to his use, and that he will well and truly account when thereunto lawfully required.

Napoleon B. Barry.

10 Sworn at New Barbadoes, before  
me, January 30th, 1912.

James M. Harkness,  
Deputy Surrogate.

*Exhibit "C-1"*

## BERGEN COUNTY SURROGATE'S OFFICE

|   |   |   |
|---|---|---|
| In the matter of the Probate<br>on the Alleged Will of Han-<br>orah Tiernay,<br><br>Deceased. | } | On Petition for<br>Probate.<br><br>Order for<br>Probate |
|---|---|---|

On reading and filing the petition of Napoleon 10  
 B. Barry for probate of the Last Will and Testa-  
 ment of Hanorah Tiernay, deceased, and for Let-  
 ters Testamentary thereon, the Surrogate having  
 inquired into the circumstances and taken proof,  
 and being satisfied of the genuineness of the Will  
 produced, the validity of its execution and the  
 competency of the testatrix, and it further appear-  
 ing that the said testatrix died on the twenty-  
 fourth day of December, Nineteen Hundred and  
 Eleven, and more than ten days ago, and that no 20  
 caveat has been filed against the probate of said  
 Will;

It is, thereupon, on this thirtieth day of January,  
 Nineteen Hundred and Twelve, ordered and ad-  
 judged that the instrument offered for probate in  
 this matter, be and the same hereby is established  
 as the Last Will and Testament of the said Han-  
 orah Tiernay, deceased, and that the same be and  
 hereby is admitted to probate.

It is further ordered that Letters Testamentary 30  
 thereon be issued to the Executor, Napoleon B.  
 Barry, named in said Will upon his qualifying as  
 such Executor.

James M. Harkness,  
 Deputy Surrogate.

State of New Jersey  
BERGEN COUNTY SURROGATE'S COURT

I, James M. Harkness, Deputy Surrogate of the County of Bergen, do Certify the annexed to be a true copy of the Last Will and Testament of Hannah Tiernay, late of the County of Bergen, deceased, and that Napoleon B. Barry, the executor  
10 therein named, proved the same before me, and is duly authorized to take upon himself the Administration of the Estate of the Testatrix agreeably to the said will.

Seal

Witness my hand and seal of office,  
the 30th day of January in the year  
of our Lord one thousand nine hundred and twelve.

James M. Harkness.

20

30

*Exhibit "C-1"*

## BERGEN COUNTY SURROGATE'S OFFICE

|  |   |          |
|--|---|----------|
| In the Matter of the Estate of<br>Hanorah Tiernay,<br><div style="text-align: right; padding-right: 20px;">Deceased.</div> | } | Petition |
|--|---|----------|

On Application for Letters of Administration with  
the Will Annexed. 10

To J. Blauvelt Hopper, Surrogate of the County  
of Bergen:

The petition of Delia Burke Murray of the Borough of Ho-Ho-Kus, in the County of Bergen and State of New Jersey, respectfully shows, that she is the only next of kin, Hanorah Tiernay late of the Borough of Ho-Ho-Kus, in the County of Bergen and State of New Jersey, died on the twenty-fourth day of December, 1911, leaving a last Will and Testament wherein and whereby she appointed Napoleon B. Barry and Michael H. Nagle and M. J. Laughlin, Executors thereof; that said Will was duly proved before the Surrogate of said County of Bergen, on the thirtieth day of January, nineteen hundred and twelve and by him duly recorded in his office, and that Letters Testamentary were thereupon issued by the Surrogate to the said Napoleon B. Barry as such Executor. 20

Your Petitioner further shows, that the said Michael H. Nagle and M. J. Laughlin have renounced the said executorship; and that said Napoleon B. Barry after taking upon himself the bur- 30

*Exhibit "C-1"*

den of the administration of said estate, departed this life; leaving certain property and assets of the assets of the estate of the said Hanorah Tiernay unadministered and that the value of the property so remaining unadministered as aforesaid does not exceed the sum of eight hundred dollars.

10 Your Petitioner further shows, that the next of kind and heirs-at-law of the said testator, with their respective residences or Post Office addresses and the manner and degree in which they severally stand related to said testator so far as the same are known to your petitioner, are as follows, to wit:

Your petitioner, Delia Burk Murray, residing at Ho-Ho-Kus, N. J. of full age.

Your petitioner therefore prays that.

20 Letters of Substitutionary Administration with the Will of the said Hanorah Tiernay, deceased, annexed may be granted to her.

Dated December 19th, 1912.

Delia Burke Murray.

State of New Jersey }  
County of Bergen } ss:

Delia Burk Murray being duly sworn upon her oath says that the statements in the foregoing petition are true to the best of her knowledge and belief.

30 Delia Burke Murray.

Subscribed and sworn to this 19th day of December, 1912.

James M. Harkness,  
Deputy Surrogate.

*Exhibit "C-1"*

## BOND

Now All Men By These Presents,

That We, Delia Burke Murray, of Ho-Ho-Kus, N. J. as Principal; and George A. Hofmeyer and Ellsworth M. Pell, as sureties are held and firmly bound unto the Ordinary of the State of New Jersey, in the sum of Fifteen hundred Dollars, lawful money of said State, to be paid to said Ordinary; to which payment we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. 10

Sealed with our seals, and dated the seventh day of January A.D. nineteen hundred and thirteen.

THE CONDITIONS OF THIS OBLIGATION IS SUCH, That if the above bounden Deila Burke Murray, Administratrix of all and singular the goods, chattels, rights, credits, and estate of Hanorah Tiernay, deceased, with the last Will of said deceased annexed, do make or cause to be made a true and perfect inventory of all and singular the said goods, chattels, rights, credits, and estate of said deceased, which shall come to the hands, possession or knowledge of the said Administratrix or into the hands or possession of any person or persons for the said administratrix. And the same so made do exhibit, or cause to be exhibited into the Registry of the Prerogative Court, in the Secretary's office of this State, or unto the Surrogate's office of the County of Bergen, at or before the expiration of three calendar months from the date of the above written Obligation, and the same goods, chattels, rights, credits, and estate of the said deceased at the time 20 30

*Exhibit "C-1"*

of her death, which, at any time after, shall come into the hands or possession of the said Administratrix or into the hands or possession of any other person or persons for the said Administratrix do well and truly administer according to law; AND FURTHER, do make, and cause to be made a just and true account of her administration according to the statute in such case made and provided; and  
 10 all the rest and residue of said goods, chattels, rights, credits, and estate which shall be found remaining upon the account of the said administration, the same being first examined and allowed of by the Judges of the Orphans' Court of the County, or other competent authority, shall deliver and pay unto such person or persons respectively as is, are, or shall by law be entitled to receive the same; and shall execute the powers and perform the trusts contained in said Testatrix's Will,  
 20 and do all acts necessary for the administration of said Testatrix's estate, then the above Obligation to be void and of none effect, or else to be and remain in full force and virtue.

Delia Burke Murray (Seal)

George A. Hofmeyer (Seal)

Ellsworth M. Pell (Seal)

Signed, sealed and delivered

in presence of

David D. Zabriskie.

30 Bergen County, ss:

George A. Hofmeyer and Ellsworth M. Pell of the subscribers to the foregoing bond, being sworn, say that they are residents and freeholders within this State, and are each worth the sum specified in the foregoing Bond, over all their debts and lia-

**37**  
*Exhibit "C-1"*

bilities, and exclusive of property except by law from execution.

George A. Hofmeyer  
Ellsworth M. Pell

Sworn before me this 8th day of  
January, A.D., 1913.

David D. Zabriskie,  
M. C. C. of N. J.

Bergen County, ss:

10

Delia Burke Murray, Substitutionary Adminis-  
tratrix with the Will annexed, within named, be-  
ing duly sworn according to law, did depose and  
say that she will well and truly administer all and  
singular the goods, chattels, rights, credits, and  
estate of Hanorah Tiernay, deceased, which, were  
of said deceased at the time of her death, that  
have or shall come to her possession or knowledge,  
or to the possession of any other person or persons  
for her use; and that she will make and exhibit in- 20  
to the Surrogate's office of the County of Bergen,  
a true and perfect inventory of all and singular  
the said goods, chattels, rights, credits and estate,  
and render a just and true account of her admin-  
istration.

Delia Burke Murray.

Sworn at New Barbadoes, this  
ninth day of January, A.D., 1913  
before me,

James M. Harkness,  
Deputy Surrogate.

30

*Exhibit "C-1"*State of New Jersey  
BERGEN COUNTY SURROGATE'S OFFICE

To all to whom these presents shall come,  
Greeting-:

Whereas Hanorah Tiernay late of the Borough  
of Ho-Ho-Kus, County of Bergen, in the State of  
New Jersey, died, having made and executed a  
10 Last Will and Testament, which aforesaid has been  
duly proved, according to law, before the Surro-  
gate of the County of Bergen:

And Whereas, Napoleon B. Barry acting execu-  
tor departed this life leaving certain assets unad-  
ministered;

And Whereas Michael H. Nagle and M. J.  
Laughlin have renounced and refused to take upon  
themselves the burden of administration

Therefore I, James M. Harkness, Deputy Sur-  
20 rogate of the County of Bergen, do certify that  
on the ninth day of January, in the year of our  
Lord one thousand nine hundred and thirteen,  
substitutionary administration of the goods, chat-  
tels, rights, credits and estate which were of the  
said Hanorah Tierney, deceased, with the Last  
Will of said deceased annexed, was granted by  
me to Delia Burke Murray, who is duly author-  
ized, to administer the same agreeably to law  
and to the uses in said last will expressed whereof  
30 the annexed is a true copy.

Witness my hand and seal of office  
this ninth day of January in the  
Seal year one thousand nine hundred  
and thirteen.

James M. Harkness.

*Exhibit "C-1"*

## BERGEN COUNTY SURROGATE'S COURT

State of New Jersey     }  
 County of Bergen        } ss:

I, J. Blauvelt Hopper, Surrogate and Clerk of the Orphans' Court of the said County of Bergen, in said State, do hereby certify that I have compared the annexed copy of the entire Probate Proceedings and Substitutionary Administration C. T. A. Proceedings in the Matter of the Estate of Hanorah Tiernay, 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 fourteenth day of October, A.D. one thousand nine hundred and thirty.

J. Blauvelt Hopper,                     20  
 Surrogate and Clerk of the Orphans' Court of Bergen County.  
 By Chas E. Garland,  
 Deputy Surrogate.

Seal

10

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64 FEB.T.1932

## New Jersey Court of Errors and Appeals

Between

Delia Burke Murray,  
Complainant-Appellant,

-and-

Mary Donahue and Patrick  
Donahue, her husband,

et als.,

Defendants-Appellees.

On Appeal  
from Court  
of Chancery.

Brief of  
Complainant-  
Appellant.

### STATEMENT

This is an appeal from a decree of the Chancellor advised by Vice-Chancellor Lewis, which adjudged that the word "*principal*", as used in the last will and testament of one, Hanorah Tiernay, deceased, does not include the real estate of which she died seized and as to such real estate the testatrix died intestate. The bill is filed for a construction of the will of Hanorah Tiernay. The will (State of Case, page 25) is a short inartistically drawn instrument and provides in the first paragraph thereof;

"FIRST: after my lawful debts are paid I give to my sister Jane Schilte the use of my home, out-buildings, land, furniture and all appurtenances also the interests on my deposits in the Paterson Savings Institution, the Industrial Emigrants Savings Bank, 51 Chambers St., New York and the First National Bank, Savings department of Ridgewood, N. J., to use during her lifetime and after her death the said interests and prin-

cipal are all to be given to my grand niece Delia Burke who has been my helper and friend since the death of my brother-in-law Marinus Schilte." (State of Case, page 25.)

POINT ONE

*IT WAS NOT THE INTENTION OF THE TESTATRIX TO DIE INTESTATE AS TO ANY OF HER PROPERTY, HENCE THE WORD "PRINCIPAL" INCLUDES THE REAL ESTATE.*

Since the ambiguity, if any, is patent we must look to the will and to the circumstances surrounding the drawing of the will to arrive at the intention of the testatrix. This is another of those peculiarly unfortunate cases wherein the court is asked to determine what the intention of the testatrix was more than twenty years ago, and the only question before the court is that intention. The Vice-Chancellor, who sat below, determined (State of Case, page 20) that the will is inartistically drawn. Indeed this is apparent from a reading of the will. What then did the testatrix mean, or rather, what is this Court to believe she meant? The minds of the Court are oriented as nearly as is possible to the mind of the testatrix at the time the will was executed.

The life tenant mentioned in the will died in 1912 and the complainant, who is the residuary legatee, has been in possession of the personalty and has had full possession and occupied the real estate mentioned in the will since then. The complainant has paid the taxes and assessments and no one, least of

all, the defendants had made any attempt to eject the complainant from the premises, although her use and occupancy has extended over a period of nineteen years.

In construing the will before the court, let us bear in mind the praiseworthy and, at this time, almost overwhelming presumption that a person who makes a will intends to dispose of all of the property owned by the testator. The court is reluctant indeed to impute to a testator an intention to die intestate, or as the rule is expressed by Vice-Chancellor Grey in the case of *Carter vs. Gray*, 58 N. J. E., 311 at page 415:

“A will ought not to be construed so as to impute to the testator a purpose to die intestate of the fee if it can be avoided. *Wadley vs. North C Ves.* 367.”

To the same effect see also:—

*Tzeses vs. Tenez Construction Co.*, 95 N. J. E., 145.

*Johnson vs. Bowen*, 85 N. J. E. 76.

Examine next the language of the testatrix. It is noted that she mentions “her house, out-buildings, land, furniture and all appurtenances, also the interests on my deposits,” \*\*\* “to use during her life time and after her death (the life tenant) the said interests and principal are all to be given to my grand-niece, Delia Burke.” The testatrix was an ignorant and illiterate woman, as is amply evidenced by the fact that she signed her name to the will by scrawling an “X” thereon. One cannot speak too highly of the inability of the draftsman of the will. Is it too much to ask of the court in its

4

quest for the intention of the testatrix and in fundamental justice to assume that the incompetent individual who drew the will particularized, "my house, out-buildings &c." upon instructions from the testatrix, that she wanted to dispose of *all* her property and then concluded that he had particularized far enough. It will be noticed that the particularization ceases with the creation of the life tenancy. The residuary estate was apparently of no great importance to his mind, since he apparently concluded that the entire estate had been provided for by the use of the following words "the said interests and principal are *all* to be given to my grand-niece." The attention to the court is respectfully directed to the use of the word *all*.

In the classic case of *Torrey vs. Torrey*, 70 N.J.L. 672, Justice Dixon writing for the Court of Errors and Appeals said at page 673:

"In attempting to interpret any will the first suggestion naturally arising is that the testator intended to dispose thereby of all his property. If such intention be imputed to this testator, then the gift to his wife should include his realty, for outside of that gift and the payment of debts and funeral expenses, no disposition of property appears. Indeed, if this gift was not intended to include realty the making of the will was hardly worth the trouble of writing it, for he then had beside his real estate only a few shares of stock in a building association and his household effects, not enough to pay his creditors when he died.

The manifest purpose of the testator in disposing of his property may be and here is of much importance in arriving at his intention as to the extent of the gift. He gave "all of this world's goods of which he might be possessed at his death" to his dear wife, "confident that she will care for our dear children with the same love and devotion which she has ever shown them." These words indicate very strongly his purpose to enable his wife, so far as lay in his power, to care for their dear children as her proven love and devotion toward them would prompt her to do. Such a purpose was futile if he placed in her hands only his little personal property, which, at his death, would be wholly absorbed by complying with his preceding direction, that his debts and funeral expenses should be at once paid.

But it is argued that these considerations are not sufficient to overcome a certain legal presumption against disinheritance the heir. That presumption originated in an artificial system which does not exist among us, a system designed to avoid the division of landed estates."

There can be no certain and equivocal meaning attached to *any* word used in a will. What might appear to be strained construction of words has been placed upon such words by the court in construing wills. In the case of *Coyle vs. Donaldson* 91 N.J.E. 138, the court construed a phrase in the will involved "*the coal business now owned by me*" and held that a narrow construction was not in

order but that the phrase included in addition to the good will of the business, the lease-hold interest of the land, horse, wagons and equipment, also coal on hand, cash and checks, and cash on deposit in the bank. Justice Black quoted with approval the language of *Torrey vs. Torrey* (supra) and said at page 139,

“Whether such was the testator’s meaning and intention, to use the language of this court, as written by Mr. Justice Dixon, in the case of *Torrey vs. Torrey*, 70 N.J.L. 673, must be determined, not by fixing the attention on single words, but by considering the entire will and the surroundings of the testator, when he executed the will, and by ascribing to him, so far as his language permits the common impulses of our nature.”

Money has been held to include a devise of real estate. Vice-Chancellor Lewis so decided in the case of *Johnson vs. Bowen*, 85 N.J.E. 76, headnoted on page 77 in the following language:

“3. Testator, whose only heirs and next of kin were a sister, a brother, and several nephews and nieces, and the total value of whose real estate was \$27,095. and the proceeds of whose personal property after the payment of his debts, an annuity, and specific bequests amounted to \$25,500. who devised the “residue of my estate—all monies and incomes,” to the establishment of a free hospital as a memorial gift to his father and mother, appointed a friend as his executor, and one as his executrix who was familiar

with his plans, intended to leave the residue of both his real and personal property for such purpose, and did not limit the phrase "residue of my estate" merely to "monies and incomes," and hence did not die intestate as to his realty."

An interesting case is the case of *Tzeses vs. Tenez Construction Company* 97 N.J.E. 501. In that case the will, an extremely simple one, was as follows:

"May 26th, 1913.

I wish my niece, Miss Nellie Quinn, to be put in possession of all I have in clothes, money, jewelry, in fact, all I have.

Katherine E. Farrell.

Witness G. Herbert Allen  
M. Ina Burleigh."

The Court of Errors and Appeals affirmed the opinion of the Vice-Chancellor that it was not the intention of the testatrix to die intestate as to her real estate and most aptly discussed the use of words preceeding the general expression and passes upon the question whether or not words preceeding the general expression limits the general expression to personal property of the same kind. In the case at bar, we have a somewhat similar situation and it is submitted that the language of the court is of controlling import in the case presently under consideration of this language at page 504 follows:

"The question is whether the use of the words preceding the general expression limits the general expression to personal prop-

erty of the same kind. We think it does not. Where, as here, the enumeration of particulars seems to lead up to a sweeping general term which is added by way of embracing whatever remains unmentioned, and the whole effect is that of a residuary bequest, courts at the present day decline to be hampered by any rule which would sacrifice the testator's true meaning out of undue regard for the association of words of limited scope with broad generic terms, and the modern inclination, both in England and America, is to treat words of general description as unlimited in sense by an attempt to state particulars where the will as a whole discloses no intention to the contrary, thought not, of course, where that favorable presumption is overcome. See Schoul. Wills (5th ed.) Pages 514, 515.

The application of the foregoing principles to the language of the will in question results in the conclusion that title to the testator's real estate passed to Nellis Quinn in fee-simple."

The Courts of Pennsylvania, in two interesting cases have held that indeed the word "money" includes real estate of which the testator died seized.

*Jacobs Estate 9 Pa. Co. Ct. 40. (Affirmed 140 Pa. St. 268, 21 Atl. 318, 11 L.R.A. 767.)*

*Ostrom vs. Datz 118 Atl. 313.*

If the testatrix intended to die intestate as to her real property such intention can only be imputed to her by a narrow technical construction and we respectfully urge upon the court as almost absolute

proof of her evident intent to dispose of *all* of her property the following additional phase:

The absence from the residuary devise or gift of the word "*deposits*", since if the enumeration of *particular* words is to control "*deposits*" can only be "*deposits*". Obviously she was concerned in the first instance with the "*interests on \*\*\* deposits*". A life estate in the "*deposits*" is created. What then happens to the "*interests*" upon the termination of the life estate. They become "*deposits*" and part of the "*principal*". Certainly it is not argued that the complainant-Appellant takes only the "*Interests*".

#### POINT TWO

#### THE CONTENTS OF THE PETITION BY COMPLAINANT FOR LETTERS OF ADMINIS- TRATION IN THE SURROGATE'S COURT ARE NOT PROPERLY CONSIDERED IN THIS PRO- CEEDING.

We next proceed because of the way counsel for defendants dwelt upon the subject below, to a discussion of the allegedly false representation made by complainant at the time she applied for and received letters of substitutionary administration (State of Case, page 38). It is a fact of which it is respectfully submitted this court should almost be asked to take judicial notice that an illiterate woman entering the office of the Surrogate has no knowledge of who or what constitutes next of kin. Most certainly there cannot be read into the action on her part in signing what she was told to sign an

intent to deceive any one. The sisters of the complainant and the next of kin in the same decree with the complainant are all married and living with their husbands. Complainant had lived with the testatrix and cared for her for many years prior to her death so that it is unquestionable and certain to the mind of an impartial observer that when complainant said she was the sole next of kin she meant and possibly was informed by the Surrogate that this was necessary since the property had been left to her under the will.

This point is made on behalf of complainant-appellant with anticipation of the attacks which will be made upon her integrity and character in so applying for letters of substitutionary administration.

THE COMPLAINANT APPELLANT RESPECTFULLY PRAYS, THEREFORE, THAT THE DECREE OF THE CHANCELLOR BE REVERSED AND A DECREE ENTERED ADJUDGING THAT THE WORD PRINCIPAL AS IS USED IN THE WILL OF HANORAH TIERNAY, DECEASED, INCLUDED THE REAL ESTATE OF WHICH THE HANORAH TIERNAY DIED SEIZED.

Respectfully submitted,  
HART AND VANDERWART,  
Solicitors for and of Counsel  
with Complainant-Appellant.

**New Jersey Court of Errors and Appeals**

FEBRUARY TERM—1932.

Between

DELIA BURKE MURRAY,  
Complainant-Appellant,*and*MARY DONAHUE and PATRICK  
DONAHUE, her husband, *et al.*,  
Defendants-Appellees.On Appeal  
From Chancery.**BRIEF FOR DEFENDANTS-APPELLEES.****Statement of Facts.**

Appellant filed a bill for the construction of the will of Hanora Tiernay, who died on December 24th, 1911 in the Borough of Hohokus, in Bergen County (Bill of Complaint, pp. 5-8, State of Case). The said will was probated before the Surrogate of Bergen County on January 30th, 1912 (Will, p. 25; Order for Probate, p. 31, State of Case), and Letters Testamentary were issued to Napoleon B. Barry, one of the Executors named in said will. Thereafter said Napoleon B. Barry died and appellant applied to the Surrogate of Bergen County for Letters of Substitutionary Administration with the Will annexed (Petition, pp. 33 and 34, State of Case). The said appellant stated in her verified petition that she was the only next of kin and heir-at-law of the said Testator (p. 34, lines 9 to 18, State of Case).

The said will provides that after the payment of all debts one Jane Schilte, a sister of Testa-

trix, shall have “*the use of my house, outbuildings, land, furniture and all appurtenances, also the interests on my deposits*” in three banks “*to use during her lifetime and after her death the said interests and principal are all to be given to my grand niece Delia Burke*”, appellant herein.

The bill *sub judice* is filed to determine if the real estate of Testatrix passed under the above quoted language of the Will to appellant. The decree of the Chancellor held that the realty did not pass under this language and that the word “principal” referred only to the several bank deposits mentioned in said last will and testament (Decree, pp. 22 and 23, State of Case).

The defendants to the Bill of Complaint are the heirs at law and next of kin of the said Testatrix (p. 7, lines 5 to 40, State of Case).

## POINT I.

### **The words of the will are to be taken in their strict and ordinary acceptance.**

Mr. Justice Minturn, speaking for the Court of Errors and Appeals in the case of *Hollinshead v. Wood*, 84 N. J. E. 492, at bottom of 493 says:

“The fundamental rule applicable to such a situation has been stated to be that courts, both of law and equity, will construe words according to their strict and primary acceptance, unless from their immediate context, or from the intention of the parties apparent on the face of the instrument, the words appear to have been used in a different sense; or unless in their strict sense they are incapable of being carried into effect. Ordinarily the Court will understand words used in their popular sense, and will interpret the language *secundum subjectum materiem*”. Citing cases.

Vice-Chancellor Van Fleet, in the case of *Marshall's Executors v. Hadley*, 50 N. J. E. 547, at top of page 552 quotes Lord Wensleydale in *Abbott v. Middleton*, 7 H. L. Cas. 68, 114, as follows:

“It is now, I believe, universally admitted that in constructing a will the rule is to read it in the ordinary and grammatical sense of the words” \* \* \*.

## POINT II.

**The word “principal” as used in this Will refers only to the money in bank accounts of testatrix, and not to real estate.**

An examination of the Will (p. 25, State of Case), discloses, first of all, that the testatrix was an illiterate woman, she having signed her Will by making her mark thereto. Keeping that fact in mind, an examination of the Will indicates that she had in mind the various kinds of property because she mentions them, first buildings, second lands, third furniture and all appurtenances, fourth interests on deposits in banks, and the Court will note that she uses the word “interests” in the plural form rather than the singular, presumably because she had more than one bank account. It thus becomes apparent that she had a very definite idea as to the different character of her estate for she specifically mentions “my house, outbuildings, land” all of which, is of course, real estate and immediately after those words “furniture and all appurtenances, also the interests on my deposits”, which is all personal, and when she came to provide for her sister Jane Schilte, she gave her a life estate in each specific kind of property, mentioned it, and immediately

thereafter in providing what should be done at the death of her sister, she gives to her grand niece "said interests and principal" and these words come immediately after the naming of the three savings institutions in which her money is deposited. Such a collocation of words coming immediately after a description of bank accounts very strongly indicate that what testatrix had in mind when she used this phraseology in that connection was "*all*" the "interests" that she had before mentioned in her Will and the principal from which such "interests" were derived, *i. e.*, the bank accounts. To say that under the word "principal" in this collocation testatrix intended to devise real estate is, I submit, doing violence to the plain words of the Will, for when she intended to devise her real estate by giving a life estate therein to her sister Jane Schilte, she took particular occasion to mention "house, outbuildings and land" and where she has done this in one portion of her Will and in the very same item omits the words "house, outbuildings and land" in making the bequest to complainant herein, I do not see how the Court can come to any other conclusion but that such words were designedly omitted.

Ordinarily and in common acceptation the word "principal" when used in connection with the word "interest" means the sum of money out of which the interest grows and where, as in the case before the Court, the plural of the word "interests" is used and the bank accounts from which it is derived are described and immediately thereafter the phraseology "the said interests and principal" are used, the conclusion would seem to be inescapable that all that was intended to pass by the latter words are "*all*" the bank accounts and the accrued interest thereon.

“The Will must furnish the basis for the construction. If the testator, through ignorance, inattention or inadvertence, fails to dispose of all of his estate, it is not within the power of the Court to supply the omission. The province of the Court is to construe, not to make, Wills.”

*Tyndale v. McLaughlin*, 84 N. J. Eq. 652,  
at pp. 657 and 658;  
*In re Roger's Estate*, 91 N. J. Eq. 294,  
at p. 297;  
*McDonald v. Clermont, et al.*, 107 N. J.  
Eq. 585;  
*People's Nat. Bk. of Elizabeth v. Tipper*,  
100 N. J. Eq. 431.

### POINT III.

#### **Complainant-appellant does not come into Court with clean hands.**

The fact that complainant-appellant has been in undisturbed possession of the real estate referred to in the Will *sub judice* was urged by the complainant below as a reason why the Court should construe the said Will so that it would devise the realty of the testatrix to the complainant. While complainant-appellant does not urge that point on appeal it nevertheless remains an unexplained challenge to defendants' rights and for that reason will be dealt with by the appellees.

If the Court should decide against the contention of the defendants-appellees because they have not heretofore laid claim to any interest in the realty, it would be allowing complainant-appellant to profit by her own wrong. If the Court will examine the petition for Substitutionary Administration C. T. A., dated December 19th, 1912, and

attached to the bill of complaint in this matter, which petition was signed by the complainant-appellant herein, it will appear that complainant-appellant made the following statement to the Court:

“Your petitioner further shows that the next of kin and heirs at law of said Testatrix, with their respective residences or post-office addresses and the manner and degree in which they severally stand related to said testator so far as the same are known to your petitioner are as follows, to wit:

Your petitioner, Delia Burke Murray, residing in Hohokus, N. J. of full age.

Your petitioner therefore prays that letters of substitutionary administration with the will of the said Hanorah Tiernay deceased annexed may be granted to her”.

(Signed DELIA BURKE MURRAY.)

(P 34, ll. 8 to 20, State of Case.)

This representation that was made to the Court was untrue and known to Delia Burke Murray to be untrue at the time that she made it, for all of the defendants named in the amended bill of complaint were then alive, to wit: Mary Donahue, a sister of complainant; Elizabeth Flanagan, another sister of complainant; Nellie Kearns, another sister of complainant; John Murphy, a nephew of complainant; Rose Kessler, a niece of complainant; John Burke, a brother of complainant, and Patrick Burke, another brother of complainant. None of these parties were given any notice whatever by appellant that they had any right in the matter and appellant deceived the Orphans' Court of Bergen County into believing that no one was interested in the matter except herself. Can it be said that a Court of equity is going to allow her to profit by this deceit through which she obtained possession of this

real estate and to say that because she has had possession without any contest by these defendants, for the very good reason that they did not know that they had any interest therein, is the Court, I say, going to decide this matter in her favor because of that fact? Such a thing would be unthinkable. Delia Burke Murray, the complainant-appellant in this action, fraudulently withheld from the Bergen County Orphans Court the names and addresses of the heirs-at-law of Hanora Tiernay and if she could have disposed of this real estate without their knowledge, the inference is plain from such acts that she would have done so, but in order to clear her title she was compelled to give notice to all of such heirs-at-law and even then she was not frank with her own counsel for an examination of the original bill of Complaint filed in this cause will show that she did not mention the names of her two brothers, John Burke and Patrick Burke, in setting out who the heirs-at-law of Hanora Tiernay were and it was only after answer was filed to the original bill of complaint in this cause setting up such omission that an amended bill was then filed setting out the names of all of the parties interested. The complainant-appellant therefore does not come into Court with clean hands.

**It is respectfully submitted that the Decree of the Chancellor should be affirmed.**

MARK A. SULLIVAN,  
Solicitor for and of Counsel with  
Defendants-Appellees.



## INDEX.

|  | Page |
|--|------|
| Notice of Appeal and Ground.....   | 1    |
| Complaint.....   | 2    |
| Answer, Annexed to Complaint.....  | 3    |
| Reply.....   | 4    |
| Verdict for Admission of Facts and Admissions.....                         | 5    |
| Reply, Annexed to Demand for Admission of Facts and Admissions.....        | 11   |
| Agreed State of Facts and Stipulation to Submit.....                       | 13   |
| Verdict A, Annexed to Agreed State of Facts and Stipulation to Submit..... | 15   |
| Verdict B, Annexed to Agreed State of Facts and Stipulation to Submit..... | 16   |
| .....  | 19   |
| .....  | 20   |
| .....  | 22   |

