COURT OF ERRORS AND APPEALS, N. J.

Between
ELLEN B. FETTERS,
Appellant, and
CHARLES S. HUMPHREYS,
and WIFE and OTHERS,
Defendents.
} On Appeal.

IN CHANCERY OF NEW JERSEY.

To the Hon. HENRY W. GREEN, *Chancellor of the State of New Jersey.*

Humbly complaining shows unto your Honor your oratrix Ellen B. Fetters, of the city of Camden, in the State of New Jersey, widow of Richard Fetters, late of the said city of Camden, deceased; that the said Richard Fetters in his life-time and at the time of his death, being seized and possessed of a large real and personal estate, and among others of the real estate hereinafter particularly mentioned and referred to, did on or about the thirty-first day of March, one thousand eight hundred and sixty-three, duly make and publish his last will and testament in writing in due form of law to pass real estate, and therein and thereby among other things, did give, devise and direct in substance and effect as follows:

"I give to my dear wife, Ellen B. Fetters, 'your oratrix,' "during her natural life time, the house and lot, occupied "by me on Market street, in the City of Camden, together "with the lot adjoining the same on the east, and all the "furniture in and about my house, and also the sum of eight "hundred dollars a year so long as she shall live, to be paid "to her by my executors in quarterly payments of two hun-"dred dollars each, and I do charge my estate with the "punctual payment thereof each and every year, which said

"gift and bequest is in lieu of her right of dower at common "law:"

And further, therein and thereby, gave, devised and bequeathed all the residue and remainder of his estate, real, personal, and mixed to his three daughters, Elizabeth Smith, wife of Jesse Smith, Evaline Estell Humphreys, wife of Richard T. Humphreys and Caroline Humphreys, wife of Charles S. Humphreys; the shares however of the said Evaline and Caroline, being given and devised in trust to John K. Cowperthwaite and Jesse Smith, during the natural lives of the said Caroline and Evaline respectively, the said John K. Cowperthwaite and Jesse Smith, being in and by said last will directed to permit them, the said Caroline and Evaline respectively, to take and receive the interest monies, rents, issues and profits of all said estate so bequeathed and devised to each of them, to and for their own separate use and benefit, without any control of their said husbands, or any husband they might hereafter marry, and not to be liable for any debts or contracts of their said husbands:

And by the said last will the said testator further authorised and empowered his executors, therein named, to appoint three disinterested persons to make an equal division of his estate among his said daughters; and of said will appointed the said John K. Cowperthwaite and Jesse Smith the executors: That after making the said last will the said Richard Fetters, departed this life on or about the eighth day of August, in the year of our Lord one thousand eight hundred and sixty-three, without altering or revoking the same, and the said last will was afterwards, to wit, on or about the nineteenth day of August, one thousand eight hundred and sixty-three, proved in due form of law by the said executors before the Surrogate of the County of Camden, and the said executors thereupon took upon themselves the burthen of executing the same, as in and by said will, (a copy of which is hereto annexed) and the probate thereof, if produced may more fully appear.

And your oratrix further shows that she accepted the pro-

visions made to her in and by said last will, in lieu of her right of dower, and entered into the possession of the house, lot of land, and premises lately occupied by the said testator, and released and relinquished her right of dower at common law. That the said house and lot are situate on the south side of Market street, in the city of Camden, about one hundred and twenty feet westwardly from the west side of Third street, the lot forty feet in front extending southwardly at right angles with Market street, about one hundred and eighty feet in depth, with an increase of width on the west side at the south end; the front of said lot on Market street being occupied by the dwelling house, and a very ornamental yard. That on or near the rear of said lot is a convenient barn and stable which during the life time of the said testator and to the time of his death, was used and occupied by the said testator, with a passage thereto from the public street by an alley way or passage about ten feet in width, leading from Third street, across the land of the said testator to the barn aforesaid and stable and to the wood yard of the testator; said alley and passage having been opened by the testator in his lifetime and used by him for the purpose of going to and from his said barn and stable and the rear of his said lot: That the said testator as your oratrix is advised and believes to be true, devised to your oratrix during her natural life the said house and lot and premises, as occupied and enjoyed by himself during his own life, and immediately preceding the time of his death, including as incident thereto the said right of passage to and from the rear of said lot by said alley and passage to and from the public street; the use of said barn and stable depending upon the use of said alley and passage; to the use of which alley and passage your oratrix is entitled by virtue of said devise. That your oratrix by herself and tenants has occupied and enjoyed the said dwelling house, lot of land and premises with use of said alley and passage from the time of the death of the said testator, without obstruction or hindrance, until lately as hereinafter set forth. That a map or draft exhibiting the situation of said house and lot and of said alley and passage is hereto annexed.

And your oratrir further shows that she is informed and believes it to be true, that by virtue of the powers given by said last will, the said Jesse Smith and John K. Cowperthwaite, executors and trustees as aforesaid, appointed three disinterested persons, who your oratrix is informed were Edward H. Saunders, John S. Read and Charles S. Garrett, three respectable and competent persons, citizens of Camden, to make an equal division of the estate of the said testator (subject to the said disposition in favor of your oratrix) among the said testator's three children, according to the provisions of his said will.

And that said persons have, as your oratrix is informed, made such division which has been accepted by said three children, respectively, that the lots and premises over and through which said alley and passage way passes, being a part of the real estate of the said testator, have been assigned and set off to the said Caroline Humphreys, wife of the said Charles S. Humphreys, and to the said Jesse Smith and John K. Cowperthwaite in trust for the said Caroline Humphreys, as part of her share of the said real estate of the said testator: That your oratrix is unable to state more particularly the said partition and division of the said estate, the same not being of record and your oratrix not having access thereto; That the said Caroline Humphreys with Charles S. Humphreys, her husband, by the consent and permission of the said trustees, and according to the direction of the said last will, has entered upon the said lots and premises, and the houses thereon, so assigned and set off for the use of the said Caroline, over and through which lots the said alley passes, and the said Caroline is now in the possession thereof and receiving the rents and issues and profits thereof. That as your oratrix is advised and believes to be true, the said persons so appointed to make such partition and division among said heirs, had no authority and did not attempt to affect or restrict your oratrix's right to said alley, your oratrix's right thereto being paramount, and any assignment of said alley was necessarily subject to the rights of your oratrix.

And your oratrix further shows, that the said Caroline Humphreys and Charles S. Humphreys, her husband, claiming that the said assignment of the said commissioners and the setting off of the said lots and premises over and through which the said alley and way has been opened to her use and benefit, has also given her and her trustees who held the title to her share of the real estate of the said testator, the exclusive title to said alley and way, or upon some other pretence, the said Caroline and Charles, her husband, have lately forbidden to your oratrix and your oratrix's tenants, the use of said alley and passage way to and from said barn, and to and from the rear of your oratrix's said lot and the public street, and on or about the fifth day of January, instant, or shortly before, the said Caroline and Charles placed a fence across said alley and passage way and have since nailed up or fastened the same, so as absolutely to debar your oratrix and your oratrix's tenant, occupying said barn and stable, under your oratrix, from the use of said alley and passage way, and depriving your oratrix of the use and benefit thereof; the said Caroline and Charles alleging that they have closed said passage and alley by the permission and assent of the said trustees, and under the title derived from the said will and devise, and said division and partition alleged to have been made in pursuance of said last will. That Thomas Newall and Timothy P. Newall, now occupy said barn and stable as tenants of your oratrix and that they with their horse and carriage by the action of said defendants are prevented from passing to and from said barn and stable to the great injury of your oratrix. And your oratrix expressly alleges that as she is informed and believes to be true, the said pretence of authority on the part of the said Caroline and Charles and of the said trustees, under said division or any other authority, pretended to be derived under said will, is contrary to the truth of the case and without foundation in law.

And your oratrix further says by herself and counsel she has applied to the said Caroline and Charles, and to the other defendants, and requested them to remove said obstructions

placed in said alley and passage-way, and to permit her and her said tenant to have the use of said alley and passage in going to and from said barn and stable, and to and from the rear of her said lot, and your oratrix well hoped that they would have complied with such reasonable request as in equity and justice they ought to have done.

But now so it is, &c.

In tender consideration, &c.

That the rights of your oratrix to said alley and passage way be ascertained and established, and that the said defendants may be restrained from obstructing and closing said alley and passage-way, and from obstructing your oratrix, and her tenant and tenants, from passing over and along the same with her and their carriages and horses, and otherwise at all reasonable and proper times to and from the rear of said lot of your oratrix, and to and from her said barn and stable; and may be required to remove any obstructions they may have placed there, and that your oratrix may have such further and other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered to grant unto your oratrix, not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said Charles S. Humphreys and Caroline his wife, Jesse Smith and John K. Cowperthwaite, restraining them and each of them, and all persons acting under them or either of them, from obstructing your oratrix and your oratrix's tenant and tenants, from passing over and along said alley and passage-way to and from the rear of said lot of your oratrix, and to and from said barn and stable with their horses and carriages. And also the State's writ of subpœna to be directed to the said Charles S. Humphreys and Caroline Humphreys his wife, Jesse Smith and John K. Cowperthwaite, &c.

T. P. CARPENTER,
Solicitor and of Counsel with Complainant.

SCHEDULE.

COPY OF THE WILL OF RICHARD FETTERS.

I, Richard Fetters, of the City and County of Camden, in the State of New Jersey, being of sound and disposing mind and memory, do on this thirty-first day of March, in the year of our Lord one thousand eight hundred and sixty-three, make, ordain and publish, my last will and testament as follows:

I hereby constitute and appoint, John K. Cowperthwaite and Jesse Smith, executors of this my last will and testament.

After payment of my just debts and charges, I dispose of my estate as follows:

1. I give and bequeath to my grandson, Richard Fetters Smith, my gold watch now carried by me, to be delivered to him immediately after my decease, and also at the same time, my double-barrel shot gun.

2. I give to my dear wife, Ellen B. Fetters, during her natural life time, the house and lot occupied by me, on Market street in the said City of Camden, together with the lot adjoining the same on the east; and all the furniture in and about my house, and also the sum of eight hundred dollars a year so long as she shall live, to be paid to her by my executors in quarterly payments of two hundred dollars each; and I do charge my estate with the punctual payment thereof, each and every year, which said gift and bequest is in lieu of her right of dower at common law.

3. I give, bequeath and devise all the residue and remainder of my estate, real, personal and mixed, to my three daughters, Elizabeth Smith, wife of Jesse Smith, Evaline Estell Humphreys, wife of Richard Humphreys, and Caroline Humphreys, wife of Charles S. Humphreys: Provided always, that the share of my said daughter, Evaline Estell Humphreys, and the share of my said daughter, Caroline Humphreys, are upon the trust and condition following to each. I hereby give and devise the said share of my daughters, Caroline and Evaline, to the said John K Cowperthwaite and

Jesse Smith, in trust that they will during the life of my said daughters, Caroline and Evaline, permit them to take and receive the interest monies, rents, issues and profits of all said estate so bequeathed and devised to each of them, to and for their own separate use and benefit, without any control of their husbands or any husband they may hereafter marry, and not be liable for any debts or contracts of their said husbands in anywise whatever, and the separate receipt of the said Caroline and Evaline, only shall be a discharge for the interest, rent, issues and profits of their respective estates.

And I do hereby authorize and empower my executors, herein before named, or the survivor to appoint three disinterested persons to make an equal division of my said estate, according to the provisions of this my will.

In witness whereof, I have hereunto set my hand and seal, the day and year first above written.

Signed, sealed, published, and declared as his last will and testament, by the testator, in our presence at the same time, and we at his request and in his presence have hereunto set our hands as witness.
JAMES B. DAYTON.
MARMADUKE B. TAYLOR.

RICHARD FETTERS.

ANSWER.

IN CHANCERY OF NEW JERSEY.

To the Honorable HENRY W. GREEN, *Chancellor of the State of New Jersey*:

The joint and several answers of Charles S. Humphreys and Caroline his wife, Jesse Smith and John K. Cowperthwaite, defendants, to the bill of complaint of Ellen B. Fetters, complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint, contained for answer thereunto, or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say, they admit that Richard Fetters in the complainant's bill named, did duly make and execute his last will and testament, in writing, of such date and in such words as in the complainant's said bill is mentioned and set forth, and did thereby give and devise to said complainant, during her natural life, the house and lot occupied by said testator, in Market street, in the city of Camden, together with the lot adjoining on the east, with the furniture and moneys mentioned in said bill of complainant's, in lieu of her right of dower at common law, and all the rest and residue and remainder of his estate, real, personal, and mixed, he gave, and devised therein and thereby to his three daughters, Elizabeth, Evaline and Caroline, the shares of the said Evaline, and of one of the defendants, the said Caroline, wife of Charles S. Humphreys, however being given and devised in trust to two of said defendants, John K. Cowperthwaite and Jesse Smith, as is alleged in said bill of complaint: and did further therein and thereby authorize and empower said last named defendants, his executors, to appoint three persons to make an equal division of his estate among his said daughters, and on the third day of July, eighteen hundred and sixty-three, without altering or revoking said will, died; and on about the nineteenth day of August of said year, the said executors proved the same in due form of law, and took upon themselves the burthen of the execution thereof, as is alleged in said bill of complaint. And these defendants in further answering admit, that the said complainant accepted the provision made for her in said will, in lieu of her right of dower, and took possession of the house and lot lately occupied by said testator, on Market street, which said house and lot adjoining on the east, as in said will mentioned, has a front of forty feet on Market street, in the City of Camden, the

building occupying twenty feet and the lot adjoining, on the east a front of twenty feet, and used by the testator as an ornamental yard for the display of flowers and plants: The said testator being for many years, and unto the time of his death, engaged in the business of cultivating and selling flowers and plants; his green houses and hot houses being in the rear of said house and lot in which he raised and cultivated in connection with said vacant lot, flowers and plants for sale.

And these defendants in further answering, admit that near the rear of said lot, the said testator had in use during his life time, a barn and stable, the entrance to which was through an alley from Third street, as complainant alleges, but these defendants charge that the said barn and stable was a mere temporary structure, an old frame, of but little value, and moved on said lot by said testator for his own personal convenience, during his life time, in carrying on his business as florist, as aforesaid, and that said alley way was used and laid out, not for the purposes of said stable, but for the benefit of his Third street property, and as an entrance to his green houses to which it led directly; said green houses being in the rear of said Market street house and lot, as aforesaid.

And these defendants further answering say, that said alley was opened and laid out solely and in reference to the use and advantage of said Third street property, on or about the year eighteen hundred and thirty-three, and long before he was the owner of the said Market street property, devised as aforesaid to the said complainant; said testator having become seized of the said Market street property by two deeds; one bearing date the eighth day of September, eighteen hundred and forty-six, from William Burrough, and one bearing date the seventh day of September, eighteen hundred and forty-seven, from James Burrough, as will appear by reference to the same in the custody of these defendants.

And these defendants in further answering say, that said alley or passage way from Third street is not incident to the house and lot aforesaid, and does not pass under said devise,

and that it is not true, the use of said barn and stable depends upon the use of said alley way, the said complainant having the vacant lot of twenty feet, part of said forty feet devised to her, as aforesaid, over and through which she or her tenants might pass to and from said barn to the public street: And that under said will said complainant is only entitled to a life estate in said lot of land having a front of forty feet on Market street, with a depth of one hundred and eighty feet, of which said testator become seized, as aforesaid, under said conveyances from said William and James Burrough, and where the temporary use of way laid out for other purposes and for benefit of other property of testator, as aforesaid, did not pass an interest in the same to said complainant under said will. And these defendants in further answering, admit that the said executors and trustees, as aforesaid, by virtue of the power given by said last will, did appoint three persons, Mr. Edward H. Saunders, John S. Read and Charles S. Garrett, to make an equal division of the estate of the said testator to his children, according to the provisions of his said will; which said division was made on or about the twenty-fourth day of August, eighteen hundred and sixty-four, and was accepted by said children, respectively; and that the lots and premises over and through which said alley way runs, were together with the houses on each side of the same assigned and set off to the said defendant, Caroline wife of the said Charles S. Humphreys, and to the said trustees in trust for the said Caroline, as part of her share of the real estate of said testator; and the said Caroline is now in the possession and receiving the rents and profits thereof; and these defendants in further answering say that said persons so appointed, as aforesaid, to make said division, assigned and set off to the said defendant, Caroline Humphreys, said alley, together with the houses and lots, on each side of the same, as part of her share of said estate, the same being a part of the testator's real estate to be divided, as aforesaid, among his children; no interest or rights to the same having passed to said complainant under and by virtue of the will of said testator. And the said Caroline,

together with said trustees, claim to have the exclusive title to said alley by and under said will and division as aforesaid.

And by virtue thereof did on or about the day mentioned in said bill of complaint, close up said alley, by putting a fence across the same at such a distance from the street as was requisite for the use of her own property; the passage of horses and wagons from said stable-tenants of said complainant, being an injury to said defendant's property, and dangerous for the persons passing up the alley way to said doors of said Caroline's houses, opening out on said alley, said alley way being the sole entrance to said doors fronting on the same; and these defendants in further answering say, that the said Edward H. Saunders, John S. Read and Charles S. Garrett, in allotting to the said defendant, Caroline Humphreys, the one-third of the real estate of said testator as provided for in said will, allotted said real estate including said alley or passage way as follows: "We have allotted unto Caroline "Humphreys, wife of Charles S. Humphreys, as one-third of "said real estate, the following described land and premises, "situate in the North Ward of the City of Camden, in the "State of New Jersey, to wit:

"1. That lot of land and premises situate on the west side "of Third street, between Market and Plum streets, compris- "ing the two frame messuages respectively numbered thirty- "seven and thirty-nine, and the brick messuage, number "forty-one, and ten feet wide passage way between said "messuages, numbers thirty-nine and forty-one, respectively."

Which said allotment bears date the twenty-sixth day of August, Anno Domini eighteen hundred and sixty-four, and now in the custody of these defendants, and ready to be produced as this honorable court shall direct. And these defendants deny, &c.

And humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES B. DAYTON.
Solicitor and of Counsel with defendants.

IN CHANCERY OF NEW JERSEY.

Between Ellen B. Fetters, compl't
and
Charles S. Humphreys and
Caroline Humphreys, ET AL, Deft's.
} On bill, &c.

Testimony taken June 5, 1865, before Charles P. Stratton, Master in Chancery, at his office in the City of Camden, at the hour of 10 o'clock in the forenoon. Taken by agreement between solicitors of the parties, and in the presence of said solicitors, Thomas P. Carpenter, Esq., and James B. Dayton, Esq.

JESSE SMITH: a witness produced on the part of the defendants.

I am one of the executors and a trustee under the will of the late Richard Fetters, dec'd, a copy of which will is annexed to the complainant's bill in this cause. Under and by virtue of that will, the other executor and myself appointed three persons as commissioners to make division of the real estate of Richard Fetters. We appointed Charles S. Garrett, John S. Read and Edward H. Saunders, as such commissioners. They accepted the appointment and made the division. Being shown paper marked X, on the part of the defendants, says: This is the report of said commissioners. I am acquainted with the alley-way in dispute in this suit. I recollect it as far back as 1835. Richard Fetters at that time owned the property, adjoining, as well as the alley-way. The property in Market street, Camden, which he left to his wife, he bought I think by two deeds, about 1847 or 8. These are the deeds for that property which I hold here. (Deed dated September 7, 1847, from James Burrough to Richard Fetters offered in evidence, marked by me Ex. B of defendants; also, deed from same to same, dated September 8, 1846, marked by me Ex. C, on the part of defendants).

The alley was there when Mr. Fetters bought the property, but he widened it. As I recollect it in 1835, it was of the same width as it is now. He had a stable back there. (Being shown deed from Jacob Evaul, to Richard Fetters, dated April 16, 1833, marked by me Ex. D, on the part of the defendants. Also deed from Lambert Tice and wife, to Richard Fetters, dated March 29, 1831, marked by me Ex. E, on the part of defendants). These are the deeds for the Third street property. The alley-way led back to a stable and the green house of Mr. Fetters. In fact the green house at one time ran along the north side of the alley all the way out to Third street. Mr. Fetters was engaged in the horticultural business. He sold flowers, plants, trees, &c., &c.

Q. Did he keep a horse in connection with that business?

A. He did.

Q. What did he do in connection with that business personally?

A. He bought plants, sold them again and did a great deal of work in the early part of the time personally himself.

Q. Did he load his own plants and deliver them himself, personally, with that horse and wagon?

A. Yes he did, with such help as he sometimes employed.

Q. Where was the stable of which you have spoken?

A. It was on the back end of the alley, on the south side. After he bought the property on Market street he moved the stable away. The stable was frame, worth about $250 at the outside.

Q. What is the value of the real estate which Mr. Fetters left to his wife?

A. About $9000.

Q. Did he continue the use of that stable after he moved it?

A. He did. He kept his horse and wagon in it. He used these in connection with his business. He never kept but one horse and wagon for his business. He had another wagon. The green houses were in the rear of the Market street property, that is part of it, they did not run the whole length.

Q. Are the side entrances to the Third street houses on the alley or part of it?

A. They are.

(Being shown a map marked by me Ex. F. on the part of defendants, being the same attached to the bill the witness says): This map is not correct. There is no alley where that is laid down between the two bricks.

The said lot to the Market street house where Mr. Fetters lived, he always kept as I understood, for a sort of display, to show off his plants, that he might sell his plants and flowers. He fitted it up for that purpose, in the first place, as I understood him. The fence of the lot was an open iron railing on Market street.

JOHN S. READ, being duly sworn for defendants, saith:

I was one of the persons appointed to make division of the real estate of Richard Fetters, dec'd, a commissioner (with the other commissioners). This alley in dispute was set off to Mrs. Caroline Humphreys, as part of the property left to the children.

Being cross-examined.

Q. What was the proximate value of the real estate of Richard Fetters.

A. I suppose in the neighborhood of $100,000. I don't know that the commissioners made any estimate of it. I have known Mr. Fetters for 15 years, to the best of my knowledge, perhaps more. During that time he has been very actively engaged in dealing in, and in the improvement of real estate. I think Mr. Fetters was in the habit of doing his own work, repairing his own fences, carting the materials and working upon the fences and his houses. I mean that he carted the materials. I don't thiuk he did the work of repairs himself. He owned largely of lot property and houses in the vicinity of Camden. I do not recollect that the right of passage was a question with the commissioners, in setting off that alley-way. I don't remember about that subject.

Examined in chief:

I often saw Mr. Fetters carting about plants and flowers. He was a nurseryman, I believe.

Re-cross-examined:

I do not think Mr. Fetters carried on the nursery business so largely at the latter end of his life. He was not so vigorous in it. He had a nursery I believe at his home and elsewhere. He had nurseries in different places.

JOHN S. READ.

Adjourned to Saturday, September 2d, 1865.

SATURDAY, September 2d, 1865, at the hour of 10 A M. examination continued in the presence of the solicitors of the parties.

EDWARD H. SAUNDERS, a witness produced on the part of the defendants, being duly sworn, deposeth and saith:

I am the City Surveyor of the City of Camden, have held that office for more than 18 years. I was one of the three persons appointed by the executors of Richard Fetters, dec'd, to make division of his real estate. I, together with the two other persons named, accepted the appointment and made the division. (Being shown paper heretofore marked Exhibit B. on the part of the defendants). This paper is the report made by us of such division, together with the map accompanying. The map was drawn by me. Said map represents the Third and Market street properties only.

Q. Will you examine this map annexed to the bill and say whether there is any such an alley as is laid down upon said map?

A. This is a mistake. The alley as laid down in the map is one line too far south. The only passage way out or back entrance to No. 41, is the passage way represented on the map annexed to the report.

Q. In the allotment to Caroline Humphreys, is this passage way set off to her?

A. It is included in the boundaries set off to her. The report will show for itself. Whether for her sole use I am unable to say.

Q. Did you not as one of the commissioners decide that that passage way belonged to the Third street property.

A. We made no such decision. We did not consider that we had a right to do so. I will add that in my judgment and also in the judgment of the other commissioners, so far as I talked with them and heard their opinions, the passage way ought to belong to the Third street property.

Being X examined:

The map annexed to the commissioners report was drawn by me. The main object of that map was to show the lines of division as we established them, and is not intended to show previous internal arrangement. (Being shown map annexed to bill of complaint.)

Q. Do you recognize the map from which this map was copied?

A. I strongly suspect upon looking at it, that it was drawn from my original draft; the same that the map annexed to the report was taken from. Upon further examination I say positively it is a copy except the portion of the alley referred to.

The alley is placed too far south as I stated before.

Q. In allotting the passage way to Mrs. Caroline Humphreys, did you undertake to settle any of the rights of the widow to pass through it or over it?

A. As for myself I considered we had no such right to settle, and the opinions of the other commissioner coincided with my own, I believe.

There was a barn on the premises occupied by Mr. Fetters in his lifetime, situated near the rear of the lot as represented on the map, (the premises occupied by the widow) and occupied by Mr. Fetters in his lifetime. Mr. Fetters kept a horse, and always used the barn, so far as I know. Mr. Fetters built the house on Market street, I think, about 1850 or 1851, and occupied it till the time of his death.

Q. During that time had he had any other access to his barn, except through the passage way allotted to Mrs. Humphreys?

A. Not so far as I know. That passage way was his method of access to and from the stable. The lot represented on the map annexed to the bill, as in the rear of the Market street property, and in the rear of a portion of the Third street property, was used by Mr. Fetters for his green house, and as a kind of store yard, for sash and other material connected with his green house operations.

Mr. Fetters was a large owner of real estate in the City of Camden. He was chiefly employed in the management of that real estate. I cannot give the dimensions of the barn spoken of. The side yard of the Market street property, was occupied by Mr. Fetters as an ornamental flower garden, during his life time.

Q. Do you know of any other side yard or garden of the same size in the City of Camden, so handsomely gotten up and maintained.

A. I know of one that will very favorably compare with it, Mr. John Morgan's. In my judgment, Mr. Morgan's is a good yard, got up in good taste and well kept. Mr. Fetter's yard, was too crowded with plants. I refer to the garden as it appeared during the life of Mr. Fetters. He was a man who had a great fondness for flowers.

In chief.

Mr. Fetters made the cultivation and sale of plants and flowers a business, he pursued it as a business.

In fixing upon the value of the respective shares of the children, I for one did not take into consideration the value of the alley in allotting to Mrs. Caroline Humphreys her share: I mean not as separate from its use for a back outlet for lots Nos. 39 and 41. Both of those lots have back outlets upon this passage.

EDWARD H. SAUNDERS.

Adjourned to Friday morning, September 8th, at 10 o'clock A. M.

Examination closed on the part of the defendants.

Friday Sept., 8th, 10 o'clock, A. M. examination continued pursuant to adjournment on the part of complainant, in the presence of T. P. Carpenter and Jas. B. Dayton, Esqs., solicitors of parties.

JOHN GUTHRIDGE, a witness produced on the part of the complainant, being duly sworn, saith?

I was in the employ of Richard Fetters, before his death, for about eight years, as gardener and in taking care of his horse. Mr. Fetters had a barn, on the rear of this lot, upon which he resided at the time of his death. It was a frame building intended for a stable and carriage house; it contained three stalls and a hay loft upon which a carriage might be run. It had a large leanto adjoining it. Mr. Fetters had a handsome riding carriage and a lumber wagon. He owned considerable property about Camden, and rode about frequently looking after it, generally going twice a day. When his houses and fences needed repairs he generally looked after it himself, going in his wagon. He got in and from his stable by the passage way leading from Third street, which was intended for the stable. He always took in his loads of straw or hay or anything by that way, in addition to his best riding carriage, in which he rode about. Mr. Fetters was very fond of the cultivation of flowers. He had a large green house, and raised flowers, and sold a good many small plants.

Q. To what extent did Mr. Fetters carry the business of gardening, and to what extent was it a matter of profit to him in the latter years of his life?

A. He told me for the last three years before he died, that he would not have kept a man at all, except to see to his horse; and said that on account of being obliged to keep a man for the horse, he would keep the hot house going on a while yet. He was satisfied if, what we sold would pay my wages, and for the pots and coal. So far as I could judge the business did not pay for my wages, the pots and coal. I believe he was money out of pocket, besides it. He had an ornamental yard at the side of his house, orange trees, lemon trees, rose bushes and other ornamental plants.

Q. Did he maintain that yard at very considerable expense?

A. I think it cost him in the neighborhood of from one to two hundred dollars a year to keep up that yard, counting labor and all.

Q. What amount of tulips have you known him to place there in a single year?

A. I have known him to plant as many as two cases in the fall of the year, I think he told me the tulips cost $40 a case. I know Mr. Morgan and Mr. Bingham's yards in Cooper street. I think Mr. Morgan's yard does not cost him more than fifteen dollars to put it in order in the spring of the year, and that is the chief expense. What flowers Mr. Fetters did not sell out of his green house he generally planted in his own yard, usually keeping the best for his own yard. He sold a few, he once sent some flowers to auction out of the hot house but they did not bring the price of the pots. The roses were raised in nurseries in other parts of the town; they were all grown in South Camden. In the winter, the roses were fetched into a house built expressly for them, called the Rose House; a fire was kept in the Rose House, the roses were generally taken to auction at Wolbert's, in Philada. He would replace any that were missing in his own yard out of them. A fire was kept in the Rose house, only for a short period; this was a distinct house from the green house.

Being X examined.

Mr. Fetters was in the habit of carting his plants to town with the horse I kept; sometimes he drove to town himself, sometimes I drove, sometimes people would come and order a hundred plants or so, and these I would take over or he would; these were such plants as we did not take to auction.

The best or handsomest carriage I spoke of, Mr. Fetters bought after he married his third and last wife. He paid eighty-five dollars for it, as he told me, I think he lived between two and three years after he married the last time.

JOHN GUTHRIDGE.

Tuesday, Sept., 12th, 10 A. M., continued the examination pursuant to the above adjournment in the presence of the solicitors of the parties.

Benjamin H. Browning, a witness produced on the part of the complainant, alleging himself conscientiously scrupulous of taking an oath and being duly affirmed, saith:

I am a resident of the city of Camden, I was intimately acquainted with Richard Fetters during his lifetime, for many years, more particularly so, during the last five or six years of his life. He was a large property holder acquired by his own industry. I do not know that he had any special occupation, he was in the hot house business; I had several conversations with him in reference to that business; he took me out riding with him one day, more particularly to show me some of his South Camden property. After he had shown me for what purpose he was using his nurseries, principally to decorate his property, setting out trees on the side-walks, &c. I had suggested to him to let it go, that it was more of a plague to him than a profit; he said no, it was a relaxation to him. We talked for a long time, he said his business was a pleasure to him, but no profit; at another time he had sold me some vines, he then told me the same thing; that he carried on his business for pleasure, that he had to keep up the trees on his own sidewalks, and that so he kept up his nurseries.

He took very great pleasure in his flowers, it seemed to be very gratifying to him, he took great pleasure in his side yard, I have seen him frequently watching his rose bushes and cleaning them off. Mr. Fetters owned large real estate in the city of Camden, he attended personally to the management of it.

Being X examined, the witness says:

I think Mr. Fetters' side yard has lost its ornamental character in a measure, since the house passed into the hands of a tenant. I understand from Mrs. Fetters that the tenant, agreed to keep up the side yard in the same condition that it had been. The ride I took with Mr. Fetters referred to when we had the long conversation, was five or six months previous

to his marriage to his last wife; the second conversation referred to at the time I purchased the vines, was in the fall, four years last fall.

B. H. BROWNING.

NOTE. It is here admitted by the Solicitor of the defendants, that the barn of Mr. Fetters, referred to in the bill, has been rented by Mr. Timothy Newall, since within a short time after the death of Mr. Fetters, up to the present time, at a rent of fifty dollars per annum, (exclusive of the leanto.)

EDWARD H. SAUNDERS, being recalled (by consent,) and examined on the part of the defendants, says

Q. After the division of Mr. Fetters' property did you have any conversation with Mrs. Caroline Humphreys in reference to her rights in relation to the passage-way leading into Third street, and if so, what was it?

A. I did converse with Mrs. Caroline Humphreys upon that subject, I said to her that one of the objects of the commissioners had been to place that passage way entirely under the control of one share, that share fell to her; my impression was, the passage way should be closed and not remain as an appurtenant to the Market street property.

This question objected to as incompetent.

Without waving the objection made to the competency of the above testimony, the witness X examined.

In setting off the share of Mrs. Caroline Humphreys, the commissioners did not mean to settle her rights against the claims of the widow. What I said was merely an expression of my private judgment.

EDWARD H. SAUNDERS.

The testimony in this case is hereby closed.

Dated September 12th. A. D. 1865.

CHARLES P. STRATTON.

FINAL DECREE.

This cause coming on to be heard before the Chancellor upon bill, answer, and proofs, in the presence of Thomas P. Carpenter, of counsel with the complainant, and of James B. Dayton, of counsel with the defendant, and the pleadings and proofs having been read, and the arguments of counsel heard and the Chancellor having taken time to consider the same, and being now of the opinion that the said complainant is not entitled to the relief prayed in her said bill.

It is thereupon, on this thirteenth day of February, A. D. eighteen hundred and sixty-seven, by his Honor, Abraham O. Zabriskie, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the said complainant is not entitled to the relief prayed in her said bill of complaint; and that the said bill of complaint do stand dismissed out of this Court.

And it is further ordered, adjudged and decreed, that the said complainant do pay to the said defendants, or to their solicitor, their cost of this suit to be taxed, within ten days after service upon their solicitor of a certified copy of this decree, and of the taxed bill of costs.

A. O. ZABRISKIE, C.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between Ellen B. Fetters, appellant, and Charles S. Humphreys and wife and others, appellees. } Petition of appeal.

To the Honorable Court of Errors and Appeals:

The humble petition of Ellen B. Fetters, the appellant in the above stated cause, respectfully shows, that your petitioner finds herself aggrieved by a final decree, made in the Court

of Chancery by the Honorable Abraham O. Zabriskie, Chancellor of New Jersey, bearing date the thirteenth day of February, in the year one thousand eight hundred and sixty-seven, wherein the said Ellen B. Fetters was complainant and the said Charles S. Humphreys and Caroline his wife, Jesse Smith and John K. Cowperthwaite, were defendants in this respect, to wit: That the said decree adjudges and decrees that this petitioner, appellant, is not entitled to the writ prayed for in her said bill of complaint, and that the injunction in the said cause be dissolved and the bill of complainant dismissed; and your petitioner humbly appeals from that part of the said decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, for that your petitioner is entitled to the writ prayed for in the said bill of complainant, and to the use of the alley and passage-way, as set forth in her bill of complaint. Your petitioner therefore prays that the said decree of the Chancellor may in the particulars aforesaid be set aside, reversed and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet

T. P. CARPENTER,

Solicitor, and of Counsel with appellant.

Dated, February 20th, 1867.

OPINION OF THE CHANCELLOR.

Richard Fetters, the husband of the complainant and the father of the defendant, Caroline Humphreys, died in August 1863, seized of considerable real property in the City of Camden. He occupied as his dwelling, a house on the south side of Market street, built on a lot forty feet wide, and one hundred and eighty feet deep. The west side of this lot was one hundred and twenty feet, east of and parallel to the east side of Third street. The dwelling house was built on the west half of the lot, twenty feet wide and the other half was occupied by an ornamental flower garden which the deceased, who was a florist by occupation, had for years kept up with great care and expense. The front along the street, was enclosed by an open iron fence.

On the rear of this lot there was a frame stable worth about three hundred dollars, which had been placed there by the deceased, and which he used for his horse and carriage and his florists wagon.

The only egress from this stable was through a lane or alley running from the south-east corner of the lot eastwardly across other lands owned by him to Third street. This alley was ten feet wide and ran between and adjoined two brick houses owned by him, standing on Third street, with side-doors opening on the alley. On both sides of this alley he formerly had kept green-houses to which it gave access. These, after he had discontinued active business, had been removed.

In this situation of the premises, Richard Fetters by his will dated March 31, 1863, devised the house and lot to his wife the complainant for her life; and the residue of his property to his children. By a division, made according to the provisions of his will, the part of his property between the rear of the homestead lot and Third street, which included the alley, and the two brick houses on each side of it, fronting on Third street, was allotted to, and became the property of the defendant, Caroline Humphreys. The defendants being

advised that this property was held by her under the devise in the will, free from any easement of passing over it from the homestead lot, shut up the rear of the alley and prevented the complainant, and her tenant of the stable, from passing through it to Third street. There is no access from the complainant's stable to any public street, except through this alley or by cutting a way through the ornamental garden along side the house and the iron fence that separates it from the street.

It is clear that a man can have no easement in his own property, and that in the life of the testator there was no easement belonging to the homestead lot to pass out to Third street, over this alley. An easement by its definition is a right in the lands of another. His right to pass out this way was perfect as owner of the land over which he passed; it was not a right appurtenant to the homestead lot. He bought the lots from different owners, and no such right existed at his purchase, if it had, the unity of title would have extinguished it.

A privilege or right attached to one tenement or parcel of land to enjoy some benefit in or over another tenement or parcel, is called an easement of the dominant tenement, to which it belongs and a servitude upon the servient tenement or that in which it exists. These easements are either apparent and continuous or not so. Apparent or continuous easements are those depending upon some artificial structure upon or natural formation of the servient tenement obvious and permanent, which constitutes the easement or is the means of enjoying it, as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain or a sewer. Non-apparent or non-continuous easements are such that have no means specially constructed or appropriated to their enjoyment and that are enjoyed at intervals leaving between these intervals no visible sign of their existence: such as a right of way, or right of drawing a seine upon the shore.

In some cases, easements are created by implication, where lands held by the same owner are sold or devised in different parcels or where lands held in common are partitioned. If until the time of severance of title, there has been a way or drain or other matter in the nature of an easement from one of the parcels through the other established and kept up by the common owner of both, and necessary for the beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise or partition.

This principle was approved and adopted by this Court in the judgments of Chancellor Williamson, in the case of Brakely vs. Sharp, reported in 1 Stock. 9 and 2 Stock. 206, and his opinion is sustained by the authorities cited by him and other cases in England and this country decided both before and since. The result arrived at on the final hearing of the cause, was different from that on the motion to dissolve the injunction, but this arose from the different application of another rule. The opinion of the Chancellor on the point now in question was the same on both arguments.

The exception to the rule which the Chancellor attempted to apply on the argument of the injunction is this: that if the common owner convey the servient tenement retaining the dominant, he is held to convey all his right in it, including the right to enjoy the privileges before enjoyed upon it, for benefit of the dominant tenement, and it is conveyed free of any servitude. But the exception is too broadly stated and is not sustained by the authority cited for it, and by most of the authorities it is confined only to non-apparent easements such as rights of way: and it is held that apparent or continuous easements such as the use of water pipes and sewers in existence will be created by implication upon the conveyance of the servient tenement by the common owner, he retaining the dominant tenement. This is the doctrine in Nicholas, v. Chamberlain Cro-Jac. 150, cited as the leading case on the whole subject; and in 1 Hurls. and Norm. 916, Pyer v., Carter. Judge Denio in delivering the opinion of the Court of Appeals in New York in Lampman, v. Milks, 21 New

York, Rep. 506. expressly holds it. He says by a sale "easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence if instead of a benefit conferred a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it;" and on page 516, he says, "those easements which are discontinuous, pass upon severance of tenements by the owner, only when they are absolutely necessary to the enjoyment of the property conveyed." Gale and Whately in their treatise on easements p 40. lay down the rule with the same qualification.

The reasoning of the Supreme Court in Massachsetts in Johnson v. Jordan, 2 Metc. 240. takes the other view of the case, but it is not supported by the authorities cited and had no bearing upon the decision of the case, which turned upon the fact that the easement claimed, was not necessary to the enjoyment of the tenement conveyed which was the dominant and not the servient tenement.

In the case of Stuyvesant v. Woodruff, 1 Zab. 133, the parcels were conveyed out of the original owners of both, by commissioners for partition, and therefore are to be considered as conveyed at the same time. The easement claimed, was a right of way at the south-west corner of Stuyvesant's land over the north-west corner of Woodruff's lot, because the former owner of the whole, before the severance of the title, had been accustomed to drive out upon the public road in that direction. This was not an apparent or continuous easement, nor was it necessary to the enjoyment of the lot of Stuyvesant because he could drive out upon the public road over the part of his own premises, next adjoining to that part of Woodruff's lot over which the easement was claimed, and it was held that no easement was retained upon severance of title. The ruling in that case is perfectly consistent with that in Brakely v. Sharp, and the decision upon which it is founded.

In the cases of Pyer v. Carter and Lampman v. Milks, Supra, it was held that the easement was created by grant, although not necessary to the enjoyment of the property, and although another could be created on the land granted at a small expense; and that the grantee was entitled to the property as it was enjoyed at the time of the grant.

The contrary doctrine is held by the Massachusetts cases. 24 Pick. 102. Nichols v. Luer. 2 Metc. 234. Johnson v. Jordan. 2 Cush. 327. Thayer v. Payne.

These all hold that no easement is created by implication except in case of necessity.

And in New Jersey, the decision of the Supreme Court in Stuyvesant v. Woodruff, and the opinion of the Chancellor in Brakely v. Sharp, hold that no easement will arise by such implication unless necessary to the beneficial enjoyment of the property. And this rule is founded on reason and good sense, as well as upon these authorities, which I am not at liberty to disregard while sitting here.

The complainant then is not entitled to the use of this way unless necessary to the beneficial enjoyment of the property, devised to her for life. It is not absolutely necessary, for she can open a way to Market street, over the land devised to her, and thus have access to the barn. It will materially injure the property to open this way, and probably the opening would be attended with some expense. In the case of drains and water pipes, and apparent and continuous easements of that nature, the fact that others may be substituted for them on the premises conveyed at a reasonable cost, has been held in some cases not to affect the right. 1 Hurlst. and Nor. 919 Pyer v. Carter. Although the contrary doctrine is laid down in 2 Metc. 234. Johnson v. Jordan.

But discontinuous easements not constantly apparent, are only continued, or created by a severance when they are necessary and that necessity cannot be obviated by a substitute constructed on or over the dominant premises. 21 N. Y. Rep. 516. Lampman v. Milks. 2 Cush. 332. Thayer v. Payne. 16 M. & W. 484. Pheysey v. Vicary.

The case of the United States v. Appleton, 1 Sum. 492 is the only authority that I find against this rule. But Justice Story in his opinion was evidently guided by the cases on continuous and apparent easements, to which alone he refers, and upon which he relies. His attention was not called to the well established distinction between the two kinds of easements.

This difference in the rule as applied to the two classes of easements is founded upon reason and the nature of easement itself. A continuous or apparent easement is either a fixture, or it is enjoyed by means of a fixture upon the land itself. There is something visible by which it may be known to a purchaser, as an overhanging roof, open windows, a sewer or a water pipe actually engaged in fulfilling their duties. A right of way or discontinuous easement of any kind is only exercised at intervals and is a latent incumbrance or claim the very existence of which may depend on uncertain and doubtful testimony. In other respects to establish the creation of a right of way by implication, on a conveyance of property because a former occupier was in the habit of passing out in a certain direction, would be productive of great inconvenience, and would work injustice especially in city property. If A, should purchase of B, a city lot adjoining the house lot of B, and it should turn out that the servants of B, had been in the habit, by B's direction, of crossing over B's lot diagonally to the street, from a gate in the side of the house lot retained, B, could not build on the front of the lot. Such use until and at the time of sale would create an easement over the lot sold, by implication. The same result would follow in case of partition or a sale in partition. The rule as established in the case of permanent apparent easements is I think of very doubtful expediency. But this is the law as I find it, I do not feel inclined to extend it.

The doubts, difficulties, confusion and indecision in the minds of the Barons of Exchequer, as exhibited in their attempt to apply the rule to a right of way, almost a way of necessity in Pheysey v. Vicary 16 M. & W. 484, shew the

inexpediency and impracticability of the rule in case of other than apparent and continuous easements, except when required by absolute necessity.

The property of the complainant could be better and more beneficially enjoyed by the use of this alley, as it was used by the testator in his life time, but it is not necessary to the beneficial enjoyment of it. The right of way, therefore cannot arise by implication from the devise to her. The bill must be dismissed.