Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

*Between*

FREDERICK S. DENNIS, *et al.*, Trustees under the Will of Alfred L. Dennis, deceased, *Complainants-Respondents,*

*and*

ALFRED L. PINNEO DENNIS, *et al.*, *Defendants-Respondents,*

*and*

MARY ELIZABETH DENNIS, *et al.*, *Defendants-Appellants.*

*On Bill, Etc.*

*On Appeal from Chancery.*

## Brief in Behalf of Defendants-Appellants.

### Statement of Facts.

The complainants in the court below, as trustees under the will and codicil of Alfred L. Dennis, deceased, exhibited their bill to obtain a construction of the will and codicil of their testator. The parties defendant were all of the living descendants of the testator, including three minor great-grandchildren who appeared to the suit by Gilbert Collins as guardian *ad litem.* The testator, who died in December, 1890, (p. 17, l. 20) left five children him surviving, namely, James S. Dennis, Frederick S. Dennis, Samuel S. Dennis, Warren E. Dennis and Eliza Dennis Bell. The testator's son, James S. Dennis, died in March, 1914 (p. 17, l. 33), leaving one son, the defendant-respondent, Alfred L. P.

Dennis, and two granddaughters, children of the latter, the defendants-appellants, Mary Elizabeth Dennis and Louise Cable Dennis (p. 18, Exhibit D. 1). The precise question raised by the bill of complaint is whether or not a certain share of the testator's estate held in trust for his son, James S. Dennis, during the latter's lifetime, is now to be paid over to the testator's grandson, Alfred L. P. Dennis, or whether it must be paid over to the grandson, Alfred L. P. Dennis, and the latter's two daughters, great-grandchildren of the testator, in equal shares: in other words, whether or not the share held in trust for the testator's son, James S. Dennis, during the latter's lifetime, is now to be distributed to his issue *per stirpes* or *per capita.* The interest of all of the other defendants to the suit is potential rather than actual, since the other four children of the testator are still living.

The particular clauses of the will and codicil which give rise to the present question are as follows: (See will and codicil in appendix to printed case).

WILL.

"ELEVENTH: I hereby direct my executors to pay to each of my children, or the issue of each, if dead (the issue representing the parent) during the four years my estate is held in trust by my said executors, sums amounting yearly to three thousand dollars each."

"THIRTEENTH: At the termination of the period of four years from my death as mentioned in the second clause foregoing, I hereby give, bequeath and devise all the rest, residue and remainder of my estate of every description, personal and real, unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share

alike, the issue representing the parent, and entitled only to the share that the parent would be, if alive. The right to each of said shares to become vested at my death, subject to the trust aforesaid, and two-thirds of the share of my daughter Mary Eliza, to be subject also to the further trust following. I direct that the said two-thirds of the share of my said daughter shall continue to be held and shall be held by my executors, the survivors and survivor of them, in trust for and during her natural life, and to pay the income and proceeds thereof when received unto her during that time, for her sole and separate use, and as her separate estate exclusively, and at her death the said two-thirds to be relieved from said trust, and go to her issue, to whom I then give, bequeath and devise the same, and in default of such issue at her death, I give, bequeath and devise the same to her next of kin and heirs. Nothing in this last trust contained shall affect the absolute right of my said daughter in and to the other one-third of her share."

CODICIL.

"I do hereby ratify and confirm my said will, save so far as any part thereof shall be altered by this codicil.

"As to the disposition made in said will of my residuary estate, personal and real, in favor of my four sons, at the termination of the period of four years from my death (which disposition is contained in the thirteenth paragraph of my said will), I do hereby alter my said will in the following respects:

"Two-thirds part of the shares of the residue and remainder of my estate, personal and real, which in said will I have given, bequeathed and devised unto my four sons respectively and their issue, as mentioned in the thirteenth paragraph thereof, I give, bequeath and devise, upon a like trust as that provided

in said will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons respectively during the natural life of each, and at the death of each, the said two-thirds to be relieved from said trust and go absolutely to the issue of the son so dying. The trustees of said two-thirds for either of my said sons shall be the remaining three of my sons, their survivors and survivor, and for that purpose, the two-thirds part aforesaid of either son, shall vest in the other three sons as trustees, their survivors and survivor. In case of default of issue at the death of any of my sons I give, bequeath and devise his said two-thirds part held in trust as aforesaid, to his next of kin and heirs, according to the nature of the estate, whether personal or real.

"In regard to the two-thirds to be held in trust for my daughter as provided in my will, should there be default of issue at her death, my meaning in the said thirteenth paragraph of the will, in the use of the words 'next of kin and heirs' is the same as I have used said words in this codicil, in case of default of issue of any son.

"Nothing in this codicil shall affect the absolute right of my said sons respectively, in and to the other one-third part of their shares, as provided in said thirteenth paragraph.

"The trustees, their survivors and survivor, of the two-thirds parts aforesaid of my sons respectively, are hereby empowered, in the performance of their trusts, to sell and convey all real estate wherever situated or any interest therein, belonging to such trust, and to execute good and sufficient conveyances therefor; but nothing herein shall interfere with the power given to my executors and trustees in the fifteenth clause of my will, the survivors and survivor, to sell and convey real estate, or any share or interest therein, and to execute good and sufficient conveyances therefore, in the dis-

charge of their duties as executors and trustees under said will."

It will be observed that the two-thirds part of the share of each son of the testator held in trust during the lifetime of such son is given, by the codicil, upon the death of such son, absolutely "to the issue of the son so dying." The testator's son, James S. Dennis, having died, the question is whether or not the two-thirds part of his share so held in trust during his lifetime shall now be paid over to his only child, Alfred L. P. Dennis, or whether the latter must share this gift in remainder with his two infant children: in other words, whether the word "issue" as used by the testator in the codicil means children or whether it means descendants, and if the latter, whether it means descendants *per stirpes* or descendants *per capita*. The learned Vice Chancellor who heard the case in the court below was of the opinion that the testator used the word "issue" in the sense of children and that he meant to have his estate divided *per stirpes* and not *per capita* (p. 27, ll. 16, *et seq.*), and in accordance with his view a decree was made adjudging that the share of the testator's estate which was held in trust for the benefit of testator's son, James S. Dennis, during his life, should now be paid and distributed to the latter's son, Alfred L. P. Dennis, and that the children of Alfred L. P. Dennis have no interest therein (p. 29, ll. 34, *et seq.*). From this decree the defendants, Mary Elizabeth Dennis and Louise Cable Dennis, children of Alfred L. P. Dennis and great-grandchildren of the testator, and the defendant, Alfred D. Bell, Jr., the only other great-grandchild of testator now *in esse*, have taken this appeal.

## Specification of the Grounds of Appeal.

The sole ground upon which the appellants rest the present appeal is that the decree of the Court of Chancery should have adjudged that the share of the testator's estate which was held in trust for the benefit of testator's son, James S. Dennis, during his life, should now be paid and distributed equally between Alfred L. P. Dennis, the son of James S. Dennis, and Mary Elizabeth Dennis and Louise Cable Dennis, the two grandchildren of James S. Dennis, because the word "issue" as used by the testator in the codicil to his will denoted descendants and required a distribution to all of the issue of each of testator's sons *per capita* and not *per stirpes.*

## Argument.

I.

THE WORD "ISSUE," AS USED IN THE CODICIL, IMPORTS A DISTRIBUTION PER CAPITA TO ALL DESCENDANTS OF THE RESPECTIVE LIFE TENANTS.

Should the word "issue" in the gift in remainder of two-thirds of the shares given to testator's sons, respectively, for life, with remainder to their issue, be restricted to the child or children (and representatives of a deceased child) of a son dying, or should it be held to embrace all of the son's descendants, even those whose respective parents may be living? It is contended on behalf of the appellants that the word "issue" includes all descendants, even those of a child living at the time of the death of the life tenant, and that the distribution must be *per capita.*

It was decided by the Court of Errors and Appeals in *Weehawken Ferry Co.* v. *Sisson,* 17 N. J.

Eq., 475, that the word "issue" in a deed means descendants, unless there is some expression in the deed that would warrant limiting the grant to children; and that, because in the case then before the court there was no such expression, the word embraced the children of a living child of the grantee. Inasmuch, however, as the decision was moved by a further consideration, namely, that in deeds the word "issue" has a technical meaning, being always used as a word of purchase, and when so used invariably includes descendants of every degree, the case is not decisive of the question when it arises under a *will,* because in construing a will, which is often drawn *inops consilii,* courts will always search for the manifest intention of the testator.

The question under discussion never has been presented to this court in a case involving the construction of a will, but has been the subject of consideration and decision in the Court of Chancery. In *Inglis* v. *McCook,* 68 N. J. Eq., 27, Chancellor Magie held that the phrase "lawful issue" includes in its primary meaning not only children, but descendants; but that when used in a will a more restricted meaning may be attributed to it if from the terms of the testamentary disposition it clearly appears that the testator used the phrase in a particular meaning less general than its ordinary meaning, *e. g.,* children then living, or children then living and representatives of any deceased child. He said:

> "To properly pursue this inquiry, it is obvious that we must start with the assumption that the testator used the word in its ordinary signification. We must then examine the whole will, and we will not be able to attribute to the word a more restricted meaning unless we find in the will itself clear indication that the testator used it *in this case* in such restricted meaning."

In the case before him, Chancellor Magie found nothing in the will to warrant any other than the primary meaning of the phrase; and he therefore held that under that will children of a living child were included in the devise. His reasoning is pertinent to the present case, as will be hereinafter shown.

*Inglis* v. *McCook, supra,* was followed by Vice Chancellor Leaming in *Coyle* v. *Coyle,* 73 N. J. Eq. 528, and *Security Trust Co.* v. *Lovett,* 78 N. J. Eq. 445. In the first of the two cases the Vice Chancellor found reason to give a restricted meaning to the word "issue"; in the second he did not. The language in the first case was, "the residue of said proceeds to be divided equally share and share alike between my three children, John, James and Margaret, or such of them as shall survive my said wife, but if any of my said children shall die leaving lawful issue such issue shall take the share their *parent* would take if living." The Vice Chancellor held, on the authority of some cases in England and Massachusetts, that the word "parent" indicated that the testator had in mind only children when he used the word "issue." A similar conclusion had been reached for the same reason by Chancellor Runyon in *Ballentine* v. *De Camp,* 39 N. J. Eq. 87, not cited in the Coyle case. In *Inglis* v. *McCook, supra,* at page 39, Chancellor Magie considered that because the testator, a learned lawyer, had in one paragraph of his will, where treating of "issue," provided that division should be made *per stirpes,* and not *per capita,* while in another paragraph devising a different portion of his estate he omitted that provision, the word "issue" in the paragraph from which such a provision was omitted should be taken in its primary meaning; and he decided that the children of a living child were embraced in the unqualified term used in the latter paragraph.

Coming to the testamentary disposition now *sub judice,* the court will need to consult only paragraphs 1, 2, 11, 13 and 15 of the original will, bearing date August 6, 1883, and the codicil, bearing date April 15, 1890. Paragraph 1 appoints testator's four sons his executors. Paragraph 2 gives to the executors all of the testator's estate of every description, personal and real, to be held by them and the survivors of them in trust for the period of four years from his decease, and paragraph 15 empowers the executors and trustees to sell and convey real estate. Paragraphs 11 and 13 of the will, and the whole codicil (hereinbefore quoted in full), contain the provisions which give rise to the present controversy as to the meaning of the word "issue" as used by the testator.

It will be perceived that when dealing (in paragraph 11) with the four years during which the whole estate is to be held in trust, and (in the first clause of paragraph 13) with the contingency of the death of any one of his children before his death, the testator is careful to limit the issue of each child to those who shall represent the parent, emphasizing this in paragraph 13 by saying that they shall be "entitled only to the share that the parent would be if alive"; while in the trust created by the provision that follows of two-thirds of the share of his daughter, he makes no such limitation but devises the trust estate in remainder "to her issue" or in default of issue to her next of kin and heirs. The language in paragraph 11 "(the issue representing the parent)" is not a *definition* of the word "issue"; it is a *limitation.* That this is so is plain from the fact that when the testator came to provide for "issue," on a certain contingency, in paragraph 13 he did not content himself with merely saying that word but he repeated and emphasized his limitation. How is

it possible to escape the conclusion that when in the same paragraph creating the trust estate he dealt with "issue" generally, he intended to impose no limitation?

The codicil merely put the sons on the same footing as the daughter and created as to each a trust in two-thirds of his share, with remainder to his "issue" or in default of issue to the next of kin and heirs—defining the meaning of the latter terms both as to his sons and his daughter. That the codicil was executed seven years after the publication of the original will and is an independent testamentary disposition are facts that are helpful in interpreting both will and codicil. The provisions of the trust for the daughter and her "issue" must have been carefully considered by the testator and his legal adviser in drafting the codicil, and the court must conclude that it was the intention of the testator to adhere to the unrestricted meaning of the words he had used as to the daughter and reiterated as to the sons.

The situation is not distinguishable from that presented in *Inglis* v. *McCook, supra.* While the decision of Chancellor Magie in that case is, of course, not binding upon this court, nevertheless, it must carry with it all the weight that attaches to an exhaustive and carefully considered opinion by so learned a judge. It is submitted that the decree of the Court of Chancery in the present case cannot be affirmed without overruling the decision in *Inglis* v. *McCook, supra.*

In the court below it was contended on behalf of the defendants-respondents, (and the same contention will doubtless be relied upon in this court), that the clear intention that must appear to restrain the usual and primary meaning of the word "issue," was to be found in the general scheme of the will. It was argued that because the testator

had clearly and expressly restrained the meaning of the word in paragraph 11, and in the first part of paragraph 13 of the will, he must have meant to use it in a restricted sense in the codicil, although he failed to add the qualifying expressions which he had been so careful to employ in making the prior dispositions. It will be observed that this reasoning not only contravenes a fundamental principle of interpretation, (*Expressio unius est exclusio alterius*), but ignores the application of that principle in *Inglis* v. *McCook, supra.* In that case the omission to qualify the word "issue" in one clause of the will, and the repeated expression of qualifying words in other clauses, led Chancellor Magie to the conclusion that, in the so carefully drawn will of a distinguished lawyer, the omission must have been intentional. There is no evidence in the present case to show that the testator was a lawyer, but the will and codicil, disposing of an estate of nearly two million dollars, bear ample internal evidence of having been drawn by one learned in the law, and drawn with the most minute and particular care. Nevertheless the learned vice chancellor in the court below adopted the view thus urged in behalf of the defendants-respondents (Opinion, pp. 23-25), and apparently overlooked the decision in *Inglis* v. *McCook, supra,* although its controlling force was insisted upon by counsel for the defendants-appellants at the argument. No mention of that decision occurs in the opinion of the vice chancellor.

A further contention made on behalf of the defendants-respondents was based on the gift over, in default of "issue," to the next of kin and heirs-at-law of the respective children of the testator. It was said that such a disposition further evidenced a general scheme of stirpital distribution, because the statutes of descent and of distribution

provide for a stirpital distribution. Even if this were altogether true, it is not easy to perceive how such a gift over can be regarded as evidence of the testator's intentions as to the method of distribution of the primary gift in remainder to each child's "issue." But the statutes in question do not in fact provide for stirpital descent and distribution except in the direct line of the ancestor and of the ancestor's brothers and sisters. On the contrary, when the descent or distribution is to and among cousins, uncles, grandparents and all other degrees of relationship, the scheme of the Statute of Descents is quite arbitrary (see Comp. Stat. 1910, p. 1920, plac. 6) and that of the Statute of Distribution in effect at the time the testator made his will and codicil and at the time of his death likewise denied the principle of representation among collaterals after brothers' and sisters' children (Orphans' Court Act, Revision of 1874; Gen. Stat. 1895, p. 2390, plac. 147, Secs. II and III). *Smith* v. *McDonald,* 71 N. J. Eq. 261, at 262. In such cases neither statute provides for a stirpital division. However, the learned vice chancellor in the court below must have been impressed with this argument, for he adopted the view that the terms of the gift over to next of kin and heirs at law indicated a general testamentary intention to make a stirpital distribution, and went so far as to say (p. 25, ll. 8-12):

> "I do not see how there could be a clearer expression of an intention to divide *per stirpes.* I can think of no words which would make the provision more certain or more easily understood."

It is submitted, with great respect, that the conclusion of the learned vice chancellor is unwarranted. It is not necessary to look far to "see how there could be a clearer expression of an intention to divide *per stirpes.*" It is necessary only

to look at those clauses of the will in which the testator in clear words expressed that intention. To attribute to a deliberate omission the same effect as to a deliberate expression seems little less than fanciful.

Upon the argument in the court below it was very strongly urged by counsel for the defendants-respondents that a stirpital distribution was the natural provision that a testator would intend for his grandchildren and more remote descendants, because in expressing his affection, he would naturally give the preference to those nearest him in blood; and that therefore a presumption existed in favor of such a construction of doubtful provisions. Although the learned vice chancellor did not rest his decision upon such a theory, it may not be amiss to point out that there is little foundation in fact for any such presumption, and none in law. While the law will favor a stirpital distribution, where the facts of the case admit of it, there is certainly no presumption that such was a testator's intention. In the present case the presumption is quite the reverse, for the word "issue," meaning primarily all descendants, raises a presumption in favor of a *per capita* distribution which must be rebutted by convincing evidence of a contrary intention. The argument for the defendants-respondents reveals an ingenious attempt to evade this undoubted presumption in favor of a *per capita* distribution, by suggesting a presumption of fact that ignores the *actual* facts of this case.

The very numerous cases cited in behalf of the defendants-respondents and relied upon by the learned vice chancellor as authority for his decision are uniformly in accord with the general rule laid down in *Weehawken Ferry Co.* v. *Sisson, supra,* namely, that "when not restricted by the

context, (issue) is coextensive and synonymous with descendants, comprehending objects of every degree, and here the distribution is *per capita* and not *per stirpes.*'' The great majority of those cases (largely English) disclose a clear restriction upon the meaning of the word ''issue,'' such as the use of the word ''parent,'' which controlled the decision of Vice Chancellor Leaming in *Coyle* v. *Coyle, supra,* and the decision of Lord Eldon in *Sibley* v. *Perry,* 7 Ves. 522. Two recent cases in New York, however, appear to lend support to the theory of counsel for the defendants-respondents that a general scheme of stirpital distribution disclosed by the other parts of the will is sufficient to restrict the meaning of the word ''issue'' in a clause that is bare of any expression of intention to make a stirpital distribution. In *Re Farmers' Loan and Trust Co.,* 213 N. Y. 168, 107 N. E. 340, the will under consideration used the words ''children'' and ''issue'' in much the same juxtaposition as did the testator in the case now *sub judice,* and in one clause directed a division amongst issue without attaching restrictive words indicating that the issue were to take *per stirpes.* The Surrogate's Court held that the word ''issue'' meant descendants, that it was not limited to children and that the division must be made *per capita* amongst the descendants of every degree. The Appellate Division reversed the decree of the Surrogate and held that the word ''issue'' was used in the sense of children. The Court of Appeals then modified the decision of the Appellate Division by holding that the word ''issue'' was used in the sense of descendants taking *per stirpes.* The decision of the Court of Appeals rested wholly upon the restrictive force of the context. It is submitted that this decision is not sound in principle for the reasons already pointed out in discussing the argument for the defendants-respond-

ents on this very point. It is further submitted that the decision is not in accord with the sound reasoning of Chancellor Magie in *Inglis* v. *McCook, supra,* nor with the result reached in the latter case. It is interesting to note that the learned surrogate's view was in accord with that which is now presented in behalf of the appellants.

In *Re Union Trust Co.,* 170 App. Div. 176, 156 N. Y. Supp. 32, the New York Appellate Division felt constrained to follow *re Farmers' Loan and Trust Co., supra,* in the case of a will affording even less ground for restricting the meaning of the word "issue." The will under consideration in that case did not contain any context restricting the meaning of the word and the court in reality went so far as to substitute its own judgment of what was a proper disposition, in the place of testator's express provisions. The learned surrogate of New York County had, notwithstanding the decision *re Farmers' Loan and Trust Company, supra,* thought that the will could not possibly be construed to provide for a distribution *per stirpes.* In reversing the surrogate's decree, the Appellate Division apparently realized the sweeping and arbitrary nature of its decision, for the opinion says:

> "It may be that this construction of the will and intention to confine this distribution *per stirpes* rather than *per capita* has gone beyond any reported case, but after examination of a great many wills, I am clearly of the opinion that to give to the word "issue" a construction that would include all descendants, whether their parents were living or not, has resulted in a distribution of estates which has really been contrary to the testator's intention, and which has really worked great injustice among the testator's descendants, and so I think, in construing such a will, that equality means not equality of all descendants,

but equality in the branches into which the person's family are naturally divided."

Justice Dowling dissented from the decision of his colleagues, concurring with the surrogate, and in a short opinion admirably summed up his view as follows:

"The primary and technical meaning of the word 'issue' is equivalent to 'descendants' and this meaning does not give way to any modification or limitation in the absence of a clear intention upon the part of the testator to give it another meaning. Decedent's will was a carefully drawn document which gives every evidence of the utmost deliberation and caution in its preparation, and of a careful use of the appropriate legal terms by its draftsman. I can find in it no such expression of a clear intention by the testator to limit the meaning of the word 'issue' as would bring it outside of the ordinary rule. I therefore am in favor of the affirmance of the decree appealed from."

The case has been taken to the New York Court of Appeals, where it is now pending. Whatever the determination of that court may be, it is submitted that the decision of the Appellate Division is fundamentally unsound. It is contrary to every canon of testamentary construction that a court should do such violence to the expressed intention of a testator as to substitute for such expressed intention dispositions which the court thinks the testator must have intended, upon the mere ground that such dispositions would be more just to the testator's family. Such interpretation is not construction; it is the substitution of a judicial will for the will of the testator.

As already indicated, the courts of New Jersey have fully discussed this problem of construction and have laid down sound rules worthy to be followed by this court. To induce the court to adopt

a rule of construction which is really one of reconstruction, counsel for the defendants-respondents is obliged to resort to the decisions of other states, unsound in principle and contrary to the law of this state, so far as it has been settled heretofore. It is submitted that this court will not be moved by the consideration of such decisions, but will prefer to settle as the law of this state the more conservative rules of construction heretofore laid down and followed by the Court of Chancery. In that case, the contention of the appellants must prevail.

## II.

## SECTION 10 OF THE "ACT DIRECTING THE DESCENT OF REAL ESTATES" DOES NOT APPLY TO THE PROVISIONS OF THE CODICIL.

It was suggested upon the argument in the court below that there might be a distinction between personal and real estate; and if so, that under the well recognized rule that the proceeds of real estate sold under a power in a will remain real estate until distribution, such part of the fund in the hands of the trustees as was derived from the sale of real estate will go to the child or children (and representatives of deceased children) of the life tenant to the exclusion of the child or children of a living child. The basis for this suggestion is found in the tenth section of the "Act directing the descent of real estates" (Comp. Stat. 1910, p. 1921), which provides that in case any lands * * * shall hereafter be deviesd * * * to any person for life, and at the death of the person to whom the same shall be so devised for life to go * * * to his or her issue, * * * then in such case, after the death of such devisee for life, said land * * * shall go to, and be vested in, the

children of such devisee, equally to be divided between them as tenants in common in fee, but if there be only one child, then to that one, and if any child be dead, the part which would have come to him or her, shall go to his or her issue in like manner. This section had its origin in 1820 (Comp. of 1821, p. 774), and therefore it may not be subject to the objection that would exist under the constitution of 1844, namely, that relating as it does to *devises* it is not within the title of the act, which professes to regulate only descent; but it is plainly not applicable to the case in hand, the life estate being equitable and the estate in remainder being legal. *Shugrue* v. *Long,* 82 N. J. L. 717. Furthermore, under the will and codicil *sub judice* personal and real estate are blended and the trust is expressly created in the *proceeds* thereof.

III.

## Conclusion.

It is therefore contended in behalf of the appellants that the court should declare that the testator used the word "issue" in the codicil to his will in the sense of all descendants of each life tenant, and that such use imports a distribution *per capita.* Accordingly, the fund that became distributable upon the death of James S. Dennis should be distributed in equal third parts to and among his son, Alfred L. Pinneo Dennis, and the latter's children, Mary Elizabeth Dennis and Louise Cable Dennis.

Respectfully submitted,

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# New Jersey Court of Errors and Appeals

*Between*

FREDERICK S. DENNIS, *et al.*, Trustees Under the Will of ALFRED L. DENNIS, deceased, *Complainants-Respondents,*

*and*

ALFRED L. PINNEO DENNIS, *et al.*, *Defendants-Respondents,*

*and*

MARY ELIZABETH DENNIS, *et al.*, *Defendants-Appellants.*

*On Bill for Construction of Will.*

*On Appeal from Chancery.*

## Brief for Alfred L. Pinneo Dennis and Others, Defendants-Respondents.

Alfred L. Dennis, of Newark, the testator, died December 8, 1890, leaving four sons, James S., Frederick S., Samuel S. and Warren E., and one daughter, Mary Eliza Bell.

At testator's death, James had one son, Alfred L. P. Dennis, the defendant, who has two infant children, born since that time. Frederick had and has no children. Samuel had two children, Helen and James 2d, and a third child, Dorothy, has since been born. Samuel has no grandchildren. Warren had one son, Frederick, and since has had a son Warren and a daughter Mildred. Testator's daughter, Mary Eliza Bell, had two children, Alfred and James, and since testator's death had a third son, Samuel. Alfred Bell has a son, Alfred, Junior, now five years of age.

Testator's will, made August 6th, 1883, appointed his four sons executors, and gave them all his estate in trust for a period of four years from his death.

Paragraphs 3-10 and 12 provided gifts and trust funds not pertinent to the issues here. Paragraphs 14, 15 and 16 related to the powers of the executors and trustees. The trusts of the will are defined in the remaining paragraphs, 2, 11 and 13, and the codicil, as follows:

> "*Second.* I give, bequeath and devise unto my said executors, all my estate of every description, personal and real, to be held by them and the survivors and survivor of them, in trust, for the period of four years from my decease."
>
> "*Eleventh.* I hereby direct my executors to pay to each of my children, or the issue of each, if dead (*the issue representing the parent*) during the four years my estate is held in trust by my said executors, sums amounting yearly to three thousand dollars each."
>
> "*Thirteenth.* At the termination of the period of four years from my death as mentioned in the second clause foregoing, I hereby give, bequeath and devise all the rest, residue and remainder of my estate of every description, personal and real, unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share alike, *the issue representing the parent, and entitled only to the share that the parent would be, if alive*—the right to each of said shares to become vested at my death, subject to the trust aforesaid, and two thirds of the share of my daughter, Mary Eliza, to be subject also to the further trust following. I direct that the said

two-thirds of the share of my said daughter shall continue to be held and shall be held by my executors, the survivors and survivor of them, in trust for and during her natural life, and to pay the income and proceeds thereof when received unto her during that time, for her sole and separate use, and as her separate estate exclusively, and at her death the said two-thirds to be relieved from said trust, and go to her issue, to whom I then give, bequeath and devise the same, and in default of such issue at her death, I give, bequeath and devise the same to her next of kin and heirs. Nothing in this last trust contained shall affect the absolute right of my said daughter in and to the other one-third of her share."

CODICIL.

"Two-thirds part of the shares of the residue and remainder of my estate, personal and real, which, in said Will, I have given, *bequeathed and devised unto my four sons, respectively, and their issue, as mentioned in the thirteenth paragraph thereof,* I give, bequeath and devise, upon a like trust as that provided in said Will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons, respectively, during the natural life of each, and at the death of each, the said two-thirds to be relieved from said trust and go absolutely to the *issue of the son so dying.* * * * In case of default of issue at the death of any of my sons I give, bequeath and devise his said two-thirds part held in trust as aforesaid, to his next of kin and heirs, according to the nature of the estate, whether personal or real."

Testator's son James died March 21, 1914.

The question is whether the share that was held in trust for him shall now be paid to his only child, Alfred L. Pinneo Dennis, or shall be divided between him and his two infant children, and, if so, how.

I.

The natural and primary meaning of the word "issue" is child or children. The courts, however, (in cases referred to later) in order to avoid the hardship of disinheriting the issue of a deceased child, have given the word the broader meaning of descendants.

In *Inglis* v. *McCook,* 68 N. J. Eq. 27, at 39, Chancellor Magie says:

> "The word 'issue' in its ordinary legal meaning, embraces grandchildren and remoter descendants, as well as children. When used in deeds, it has been adjudged to have a technical sense to that effect. Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. (2 C. E. Gr.) 475. But when used in a will a more restricted meaning may be attributed if, from the terms of the testamentary disposition, it clearly appears that the testator used the word in a particular meaning less general than its ordinary meaning."

The meaning of "issue" when collocated with "their parent" will be restricted to the second generation. *Coyle* v. *Coyle,* 73 N. J. Eq. 528.

"Issue" when coupled with the provision that the issue shall represent the parent will be restricted to a devolution *"per stirpes,"* excluding any descendants whose parents are living.

A stirpital devolution of property is the usual one, and accords with the natural desires of a testator toward his descendants, so far as they are controlled by his affection. Affection is based on blood relationship. A child has half the blood of a testator, a grandchild only a quarter, and a great-grandchild only an eighth. In expressing his affection he will, therefore, give the preference to the child over the grandchild, and to the grandchild over the great-grandchild. Likewise, a testator's obligation to provide for his progeny is measured in the same way. His first obligation is to the earlier steps in the inheritance. So too, having the welfare of his progeny in mind, he will naturally wish his bounty to go to the head of each stock, rather than to the children, if the head is alive. The obligation to support the children is upon the head, and to him should be given the means. Again, the testator's bounty can be more safely bestowed on a mature than on an immature person, and the natural preference is for the head of the family rather than the remoter descendants. Furthermore, testator has in mind as objects of his bounty those whom he has seen and known, rather than those who may be born after his death.

From all these circumstances and considerations, there is a natural presumption that a testator, in dividing his estate among his descendants intends that when distributed the head of each stock shall take to the exclusion of the descendants of such head, and the circumstances would be very unusual in which it would be naturally presumed that a testator wished that a share of his estate should be divided among a child and his children, or a grandchild and his children. It is unnatural and unwise, and contrary to the policy of the common law and the statutes of this State regulating descents and distribution.

Thus, the first paragraph of the Statute of Descents, providing that real estate shall descend to children equally, without regard to sex, provides that if any child shall have died before his ancestor, "leaving lawful issue," the share the child so dying would have been entitled to "shall descend to and be inherited by such issue * * * and the same law of inheritance and descent shall be observed in the case of the death of the grandchildren and other descendants to the remotest degree," thus distinctly defining "issue" as involving a stirpital division, and excluding descendants whose parents are alive.

The second section, providing for inheritance by brothers and sisters, makes the same provision for their children and descendants *per stirpes,* using the word "children" instead of "issue," but apparently with like effect.

The fifth section, providing for the half blood, contains a similar provision for representation *per stirpes.*

The tenth section contains the same provision, using the words "children" and "issue" interchangeably.

These provisions all indicate a fixed State policy of representation, and use the word "issue" to include descendants to the remotest degree, if necessary to avoid intestacy or diversion from testator's descendants, and, yet, always treat descendants stirpitally, and never contemplate a share vesting in a child whose parent is alive; the descendant's interest is always representative only.

So, too, in the Statute of Distribution; the 168th section of the Orphans' Court Act authorizes the court to order a full and equal distribution of the personal estate "among the wife and children or children's children * * * pursuant to the laws in such cases and the rules and limitations here-

inafter set down." In the rules and limitations set down in Section 169 distribution among the children or children's children is defined as "to and among the children of such intestate, and such persons as legally represent such children, in case any of the said children be then dead."

In the third sub-division of that section it is provided that "in case there be no widow, then all the said estate to be distributed equally to and among the children." Grandchildren, who are children of a deceased child, are not mentioned, but it is always assumed that the provision of the preceding section for representation among them applies to this sub-division—that is, a stirpital conception is always assumed to be in the mind of the decedent, as well as of the legislator.

The cases of *Smith* v. *McDonald,* 69 N. J. Eq. 765, and *Fisk* v. *Fisk,* 60 N. J. Eq. 195, show that the courts apply the rule of representation *per stirpes* in all cases where the next of kin constitute a class of whom one or more have died, and apply the strict *per capita* division only when distribution is to a class of which none has died.

Legislative enactments regarding descents and distribution are presumed to be according to decedent's desire, and in no case are the words "heirs," "issue," "children," "grandchildren," or "descendants" so construed as to permit any descendant to acquire a share in real or personal property if the parent is alive. All rules of inheritance and distribution assume that no decedent could have had any such desire or intent. The courts, therefore, in construing the words "heirs," "issue," or "descendant" should assume a similar intent on the part of the testator.

In *Stoutenburgh* v. *Moore,* 37 N. J. Eq. 63, at 71, Chancellor Runyon said:

> "If it is doubtful whether he (the testator) intended the distribution among his grandchildren to be *per stirpes* or *per capita,* the court should adopt a construction in favor of the former method, not only as being most probably in accordance with his intention, but also as being in accordance with the policy of the law."

In this case there is direct evidence that the testator had in mind a division *per stirpes,* or by representation, in his provision for the issue of his children. In the second paragraph of his will he provided that all of his estate should be held in trust for "the period of four years from my decease," and in the eleventh provided:

> "I hereby direct my executors to pay to each of my children, or the issue of each, if dead (*the issue representing the parent*) during the four years my estate is held in trust by my said executors, sums amounting yearly to three thousand dollars each."

using the word "issue" in a stirpital or representative sense.

So in the thirteenth paragraph:

> "At the termination of the period of four years from my death as mentioned in the second clause foregoing, I hereby give, bequeath and devise all the rest, residue and remainder of my estate of every description, personal and real, unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share alike, *the issue representing the parent, and entitled only to the share that the parent would be, if alive.*"

This was the basic rule to control his general residuary estate after the four-year trust, and expressly shows testator's intent that his entire estate should go to his children and their descendants *per stirpes* and by representation only, and excludes the possibility that a share should go to a descendant whose parent was alive. This was the cardinal, primary and fundamental provision relating to his residuary estate.

Then he adds a qualification regarding two-thirds of the share of his only daughter, that as to that share the trust should continue during her life, and the income therefrom be paid to her, "and at her death the said two-thirds to be relieved from said trust and go to her issue," meaning the same issue that it would have gone to if she had died during the first four-year period. There is no indication of an intent that the ultimate destination of the part held in trust should be different from that part given absolutely. There is no reason to assume that testator intended his daughter's share to go to one group of her issue if she died during the four-year period, and to a different group of her issue if she died after that period. It should be presumed that the testator had the same picture in mind, and by "issue" meant issue as defined in the earlier part of the paragraph, namely, issue *per stirpes,* or by representation only. So, too, in the gift over in default of issue of his daughter, the provision is for "her next of kin and heirs," clearly revealing the familiar notion of a stirpital division according to the statutes affecting real and personal property respectively, and certainly excluding any idea that a descendant, whose parent is alive, should have a share.

The original provision for the sons was, by the thirteenth paragraph, an absolute gift after the

four-year trust, with a substitution of the issue of a child that had died; expressly limited however to a stirpital division among such issue—"the issue representing the parent and entitled only to the share that the parent would be, if alive." There can be no doubt that if the codicil had not been written and testator's son James had died during the four-year trust, leaving him surviving the son, Alfred L. P. Dennis, and the latter then had children, Alfred would have received the entire share to the exclusion of his children. The purpose of the codicil was merely to put a part of each son's share in trust during his life. There is not a word in the wills or anything in the circumstances to indicate an intention by the codicil to change the ultimate beneficiaries of their shares. In fact, in the codicil testator repeats the provision of the thirteenth section of the will, showing that it was still in his mind that he had given shares to his sons and their issue by *representation,* "mentioned in the thirteenth paragraph"; and in providing that "at the death of each son the said two-thirds to be relieved from said trust and to go absolutely to the issue of the son so dying," testator undoubtedly meant the same issue he had defined in the thirteenth paragraph and had referred to in the earlier part of the codicil, namely, "the issue representing the parent and entitled only to the share that the parent would be, if alive."

There is nothing in the will from which it can be implied that the testator contemplated that a grandchild should have to divide his share with his own children. Every expression of the will is against any such unnatural and unusual provision.

How strongly courts are inclined against a division of property between a parent and his children is shown in *Noe* v. *Miller,* 31 N. J. Eq. 234,

where Vice Chancellor Van Fleet construed a gift by testator to his daughter "to be hers and her child's or children's forever" as constituting a life estate in the mother with remainder to her children, saying:

> "I think it is much more natural and reasonable to conclude, where a father makes a bequest of a particular sum or fund to a child, and also to the children of such child, jointly, without indicating in any way when their enjoyment shall commence, that he intends the parent shall have simply the income or produce during life, and that the principal shall go to the children on the death of their parent, than that he meant that his grandchildren should share equally with their parent at once, and have a right to demand a division of the fund as soon as it is payable."

"Issue" means "heirs of the body" (*Wright* v. *Gaskill,* 74 N. J. Eq. 744). The words "heirs" carries with it the idea of representation (*Bartine* v. *Davis,* 60 N. J. Eq. 202).

In *Ballentine* v. *De Camp,* 39 N. J. Eq. 87, there was a trust to divide the income between testator's five children in equal shares "and, in the case of the death of any of said children, leaving lawful issue, then to pay over his or her share to and among said issue in equal parts or shares." One child had died during her mother's life, leaving two children and four grandchildren, children of a deceased son. It was held the division should be *per stirpes,* and that the four grandchildren took only the one-third share of their parent, and did not take by *per capita* division with the two surviving children.

An intention to divide *per stirpes* was also presumed in *Roome* v. *Counter,* 6 N. J. L. 113, and in *Hayes* v. *King,* 37 N. J. Eq. 1.

If in this case "issue" is construed to be descendants *per capita* and not *per stirpes,* and a grandchild is to share his inheritance with his own children, the results may be fantastic. Thus, if Alfred L. P. Dennis shares with his two minor children, any other children hereafter born would have no share in the inheritance. If Mrs. Bell had died before her grandchild was born her children would each have had a third of her share. If she lives until her oldest son has nine children and her other two children have none, their portions of her share would be reduced from a third to a twelfth. If certainly cannot be presumed testator contemplated any such unnatural, unusual and unfortunate results.

II.

In many similar cases courts have given effect to the slightest indications of intent to restrict the meaning of "issue" in wills to "descendants *per stirpes,*" excluding descendants with living parents, and to this end frequently hold that a specific qualification of "issue" in one provision shall control its meaning in other parts where used without qualification.

In *Ralph* v. *Carrick,* 11 Ch. Div. 873; 40 L. T. 505; 48 L. J. Ch. 801, JAMES, *L. J.,* said:

> "Now the word 'issue' is an ambiguous word. In the ordinary parlance of laymen it means children, and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children, not grandchildren or great-grandchildren. But in the language of lawyers, and only in that language, it means descendants; and on the particular will in the case of Sibley *v.* Perry (*ubi supra*), Lord Eldon found ground

for coming to the conclusion that the word 'issue' had the layman's meaning of 'children,' and not the lawyer's meaning of 'descendants.'

"I have no doubt that when the testator said 'descendants' he meant 'descendants,' and that the descendants were to take. It appears to me that the effect of the word 'parent' would be that they will take *per stirpes,* not *per capita,* so that children will not take concurrently with their parents. This gives full effect to the words, so that there is no incongruity or inconsistency in that part of the will."

In *Re Birks* v. *Kenyon,* 69 L. J. Ch. 124; L. R. 1 Ch. (1900) 417, LINDLEY, *M. R.,* said:

"Although it is true that among lawyers 'issue' is generally taken to mean descendants, we must not allow ourselves to be misled by that. We must not start with any predisposition to read it in that way, but we must look at the will and try and see whether the testator has shown what he meant when he used the word.

"The word 'issue' is said to have a flexible meaning—it may mean 'children,' and it may mean descendants of any degree. There is no hard-and-fast rule, and what we have to discover is the sense in which this testator has used the word in this will. He has used the word so often that we cannot help seeing his meaning. In eleven cases out of twelve we can see that he means by 'issue' simply children, and if we find that wherever it is clear what the testator means by the word he intends it to express children, what is the natural inference to be drawn in the case where he has thrown no light upon the meaning of the word? The natural conclusion is that he used the

word in the same sense in which he used it before. That is good sense. I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed, or will, or other document, you find that a word has some particular meaning when you can understand it, then the presumption is that it means the same thing when its meaning is not clear."

Sir F. H. Jeune:

"I am of the same opinion. It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when a testator has made a dictionary for himself we must look at that to see in what sense he has used words in his will; and it would be doing less than justice to one's common sense to say that where a testator has qualified the meaning of a word in one part of the will it must not be assumed that in some place where he has not qualified it he did not mean to do so. That phraseology, as to a man making a dictionary for himself in his will, means what it says. If we find from a will, as we do here, that a testator has used a word in a particular sense, we must give it that meaning wherever it occurs in the will."

In *Re Coulden* v. *Coulden,* 77 L. J. Ch. 209; 1908, 1 Ch. 320. A testator directed his real and personal estate to be sold at a certain period and equally divided amongst his then surviving children and their respective issue: *Held,* that "issue" was not a word of limitation; that the gift to the issue, though original, was alternative; and that the property was divisible *per stirpes* among the children of the testator who survived the

period of distribution and the surviving issue of children who pre-deceased it.

PARKER, *J.*, said:

> "Lastly, do the children and issue of children surviving at the period of distribution take *per capita,* the issue competing with their parents, or can I read the words 'and their respective issue' as an alternative gift to the issue only of children who predecease the period of distribution? * * *. But I think that I shall be giving effect to the intentions of the testator as disclosed by his will by holding, and I accordingly hold, that the gift to the issue is alternative, though original, and that the issue of children living at the period of distribution do not take concurrently with such children."

*Union Safe Deposit & Trust Co.* v. *Dudley,* 104 Me. 297; 72 Atl. Rep. 166, held that the word "issue," as used in wills, is an ambiguous term. It may be restricted to children only, or include descendants generally, or descendants taking by right of representation. Whether it shall be construed to have one or the other meaning depends entirely upon the intention of the testator as gathered from the context of the whole will, interpreted according to the established rules of construction.

KING, *J.*, said:

> "It is contended that, if 'issue' is extended to mean descendants, then all lineal descendants are included, taking *per capita.* * * * We think such is not the correct construction. The words 'the aforesaid issue taking only the deceased parent's share' discloses the testator's intention that the issue should take by right of representation.
>
> "It is claimed, however, that these limiting words do not qualify the word 'issue' as first

used in the paragraph because separated from that by the semicolon * * * no reason can be gathered from the will, or attending circumstances, why the testator should intend that the language used in this paragraph should have any different meaning than it does as used in the others. It follows as a necessary conclusion that the true interpretation of the words 'the lawful issue, if any of the body,' as used in this will, means lineal descendants taking by right of representation, *per stirpes* and not *per capita.*''

In *Jackson* v. *Jackson,* 153 Mass. 374; 26 N. E. 1112, FIELD, *C. J.,* said:

''There may be some doubt whether, grammatically, the last clause, namely, 'such issue to take as by right of representation the shares of their respective parents,' qualifies only the clause which gives the property to the issue of the deceased children of the testator, or qualifies that and the clause which gives it to the issue of Susan C. Jackson; but we do not think it necessary to determine this.

''The tendency of our decisions has been more and more to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants, and importing representation; and certainly when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors.

''We are of opinion that when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal

sum to his issue then living, it is to be presumed that the intention was that the issue should include all lineal descendants, and that they should take *per stripes,* unless from some other language of the will a contrary intention appears."

In *Coates* v. *Burton,* 191 Mass. 180; 77 N. E. 311, KNOWLTON, *C. J.,* said:

"In two paragraphs it is expressly said that the issue are to take by representation, while in two others, without any apparent reason for making a distinction these words do not appear. We think these provisions and the scheme of the will indicate that the testator did not intend, if his daughter should leave several children, and also grandchildren who were the children of one of these living children, that they should take *per capita,* so that one of the children and his descendants might receive as much as all of his brothers and sisters together. We think the case should follow the decision in Jackson *v.* Jackson."

In *Ridgeway* v. *Munkittrick,* 1 Dr. & War. 84, LORD ST. LEONARDS said:

"It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appears a clear intention to the contrary."

In *Edwards* v. *Edwards,* 12 Beav. 97, LORD LANGDALE, *M. R.,* said:

"The expression 'issue' may either mean all the descendants in every degree, or it may be used in a more limited sense. * * *

"But if, in the first part of a will, you have this word used equivocally, and nothing in the immediate context, to enable you to construe its meaning; but, in another part of the same will, you have the ambiguity corrected, and find it used in a particular sense, the presumption is, that the testator has always used it in that sense in which you find it, where he himself has corrected the ambiguity."

*In Re Tenny; In Re Foster's Will,* 93 N. Y. Supp. 811. In the second clause of his will, testator made a bequest to children of a deceased sister and the issue then living of any deceased child; the issue of such deceased child to take by representation the share that the parent would have taken if living. By the fourth and seventh clauses the word "issue" was used in the same connection. By the sixth clause testator created a trust in favor of a niece, and provided that on her death the fund should be transferred to her issue, and in default of issue to her next of kin. *Held,* that in view of the use of the word "issue" in other clauses, and in the absence of evidence that the niece's grandchildren were alive when the will was made, or of any facts from which an intent to benefit her grandchildren at the expense of her children could be inferred, the word "issue" would be construed to include only her children.

INGRAHAM, *J.,* said:

"The distribution which would follow from the construction given by the court below would be extremely unequal. Mrs. Beeckman has four children. Two of them have no issue, while the other two have eight issue living. If all of these descendants of Mrs. Beeckman are to share equally, Mrs. Lorillard and her children would have four-twelfths

of the fund, Mrs. Steward and her children would have six-twelfths of the fund, while the two other children would have one-twelfth each—a distribution which would be contrary to the intention of the testator, as I gather it from the will. In each case he provides that, in default of issue of a beneficiary for life, the property should go to the next of kin of the life beneficiary, where it would be distributed upon a principal of representation; and I think, therefore, taking this will as a whole we can see running through it an intention of the testator to distribute these shares upon the death of his nephews and nieces who have a life interest equally among those who succeed them. Thus we have the indication that the testator did not intend to give to the word 'issue' that primary significance that it received at common law; that is descendants generally.

"In Chwatal *v.* Schreiner, 148 N. Y. 683, 43 N. E. 166, the word 'issue' was held to mean children, rather than remote descendants, because the testator in one clause of the will had given a definition of the word as meaning that the issue were to take by way of representation the estate of the respective parents, and that, the testator having thus disclosed his intention, the word 'issue' in the other part of the will would be given a similar meaning. Here in the second clause of the will the testator expressly provides that the issue of a child of his deceased sister was to take by way of representation the shares which their parents would have taken if living. Here he had in mind the idea of issue taking by way of representation, and I think that in repeating this clause, where provision

is made for the issue of his niece Margaret, he uses the word 'issue' in the same sense; intending that Margaret's children should take, if alive, or, if one of them had died, leaving issue that such issue should take by way of representation."

III.

In construing wills, the courts readily incline to infer an intent to limit "issue" to "descendants by representation," as will appear from some quite similar recent cases in other jurisdictions.

In *Dexter* v. *Inches,* 147 Mass. 324; 17 N. E. 551, a testator left property to his son for life, with a remainder, after a life-estate to the son's wife, "equally to and among the issue." The son left children and their descendants. The property given by the will to other children of the testator was given outright, and the will provided that if any of the testator's children, including this son, should die before the testator, the child's issue should take their parent's share by right of representation. *Held* that, upon considering the whole will, the property should be divided among the son's issue by right of representation.

Holmes, *J.,* said:

"Charles died, leaving no widow, but leaving three children, and also grandchildren and great-grandchildren, descendants of two of these three children; and the question is whether the grandchildren and great-grandchildren are entitled to share with the children from whom they are descended. The testator gave the residue of his property to his eight children in equal shares, seven of them taking their shares outright, but Charles' share being put in

trust for him by a subsequent clause, with the above-recited limitation over, which we have to construe. The will further provides that 'in case of the decease of either or any of my children before the receipt of his or her share, leaving issue him or her surviving, such issue shall represent and take the parent's share.' The general scheme of the will, then was one of equal division, in which the issue of any of the other seven children who died intestate would have taken by way of representation, and the issue of any child, including Charles, would have taken by way of representation, if that child had died 'before the receipt of his share.' However the English courts would construe the word 'issue' in the clause before us, occurring in such a will, we cannot bring our minds to doubt that the testator intended issue to take in a representative or *quasi* representative way, and we think that the intention fairly appears from the will itself, in the circumstances to which we have adverted. The difficulty which was felt by Lord Loughborough, in Freeman *v.* Parsley, 3 Ves. 421, in finding a medium between total exclusion of grandchildren and the admission of them to share with their parents, does not strike us as insuperable, supposing that he would have felt it in such a case as this. Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant. * * *."

In *Re Farmers' Loan and Trust Company,* 213 N. Y. 168; 107 N. E. 340, the testator gave his residuary estate to his wife for life and directed

that on her death it be sold and divided into nine parts. By the fourth sub-division of his will he gave one-ninth to each of his seven surviving children absolutely, and one of the remaining ninths he gave in trust for the daughter of a deceased son, the other in trust for a son of a deceased daughter, with the provision that the share of any of his surviving children who died before the division of the estate should go "to his or her issue, if any, such issue to take equally what would have been the parent's share." And further provided as to the shares held in trust for the grandchildren that "upon the death of either, I give, devise and bequeath his or her share to his or her issue, if any."

The grand-daughter, Mrs. Campbell, died before the division of the estate, leaving two daughters, one of whom had one child living, the other of whom had three children living. The surrogate held that "issue" meant descendants and that the division must be made *per capita* among Mrs. Campbell's descendants of every degree, so that her two children and four grandchildren were each entitled to one-sixth of the share in question.

The Appellate Division held that "issue" was synonymous with children, and the grandchildren were excluded.

The Court of Appeals, by CARDOZO, *J.*, said:

> "We are thus brought to a consideration of the question whether the gift to the issue of Mrs. Campbell was one *per capita* or *per stirpes*. If it was *per capita*, children and grandchildren take concurrently. If it was *per stirpes*, they take by representation. * * * We think that it may fairly be gathered from the context that the gift was to be *per stirpes*. The presumption in this state favors a *per capita* distribution. * * * But

the presumption yields to 'a very faint glimpse of a different intention.' * * * To determine the meaning of the word 'issue' in the fifth subdivision of the will, we must read the latter subdivision in connection with the fourth. The first use of the word 'issue' we find in the provision:

'In case of the death of either of my children before the division of my estates, I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share.'

"The fair meaning of this provision is that the issue are to take by right of representation. * * * Having in view the rule that favors the keeping of the gift within the primary line of descent, we think that by the gift to issue, in the fourth subdivision of the will, there was intended a gift to descendants *per stirpes.*

"If that is the meaning of the word 'issue' as used in that subdivision, we may fairly hold that it did not lose that meaning and take on another one in the next subdivision. * * * We must keep in mind the unity of scheme that binds these subdivisions together. The fifth subdivision merely amplifies and develops a gift which takes its origin in the fourth. The trusts affecting two-ninths of the estate are established in one clause; the description of them is resumed, and they are made precise and definite, in another. This cohesion of plan must have tended to impress the testator with the belief that, after defining his use of the word 'issue' in one paragraph, it was needless to repeat the definition in the next. In all likelihood it never occurred to him that the need of such repeti-

tion would ever suggest itself to any one. * * * It is incredible that he contemplated a stirpital division among issue of children who died before him, but after the making of the will, and a *per capita* division among the issues of those children who died before him and before the making of the will. A rule which yields so readily as the one that presumes a *per capita* division must give way where adherence to it involves a discrimination so unreasonable."

In *Re Union Trust Company—Detmold's Will,* 156 N. Y. S., 32; 170 App. Div. 176, testator provided trusts for life for each of his daughters, the fund on the death of each to be paid to her surviving issue, if any, and if not then to be added to the trust for the other daughter "if she shall then survive; or, if not, then I give, devise and bequeath the same in equal portions to her issue, if any then surviving." His surviving daughter died without issue. Her sister had left eight children, one of whom had a daughter. The question was whether "issue" included this grand-daughter of the daughter that first died.

The Appellate Division, applying the Farmers' Loan and Trust Company case, *supra,* held that the equality contemplated in the quoted clause sufficiently indicated a division *per stirpes* and not *per capita.*

The court, speaking by INGRAHAM, *J.,* said:

"The controlling intention all through this will is equality. And this equality is not taking all the descendants of the daughter as a class, no matter what their degree of relationship should be to the testator, but equality among the children of his daughter, leaving their descendants to take the share of the parent dying before the death of the life bene-

ficiary. It certainly would not be equality to give seven shares to one grand-daughter having six children and one share to a grand-daughter having no children, and and such a construtcion would seem to defeat what is to me the controlling intention as expressed in this will. It may be that in this construction of the will an intention to confine this distribution *per stirpes* rather than *per capita* has gone beyond any reported case, but after examination of a great many wills I am clearly of the opinion that to give to the word 'issue' a construction that would include all descendants, whether their parents were living or not, has resulted in a distribution of estates which has really been contrary to the testator's intention, and which has really worked great injustice among a testator's descendants; and so, I think, in construing such a will, that equality means, not equality of all descendants, but equality in the branches into which the person's family are naturally divided. The testator leaves his estate to his grandchildren, subject to a life estate in a child. The natural division is among the grandchildren who survive the life beneficiary. It is not to the descendants of those grandchildren while the grandchildren are alive. And while he contemplates the possibility of the death of a grandchild leaving descendants, and desires that such descendants shall also be included, it seems to me, where equality is provided and is the predominating intent, that it is only in the case of the death of the grandchildren that the grandchildren's issue should be included. And thus in the study of this will I cannot avoid a feeling that this was what the testator intended by equality, and

not such inequality as would result from a division of this share among all the descendants of a grandchild where the grandchild was still alive. The extension of this rule that 'issue' is synonymous with descendants creates no hardship, where all of the descendants are of the same degree of relationship to the testator; it creates a great inequality where all descendants take equally, irrespective of their relationship to the testator; and it is this inequality, which would result from the affirmance of the decree of the learned surrogate, which I think we should prevent."

The New Jersey cases are not inconsistent with the foregoing decisions. In *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. Eq. 476, this Court construing a deed strictly held that "issue" meant descendants of all degree. Following the same English authorities that are the basis for the decisions above referred to, the Court said: "*In deeds* the word invariably has a technical meaning, being always used as a word of purchase, and when so used universally including descendants of every degree," and found nothing in the other parts of the deed to give the word a more restricted meaning. The Court refused to consider evidence of a contrary intention in the pleadings of the suit leading up to the decree upon which the deed was based.

In *Inglis* v. *McCook,* 68 N. J. Eq. 27, Chancellor Magie construed the will of Henry Day, in his time a leading lawyer of New York City. By the fifth clause of his will he gave one-half of his estate to trustees for his wife for life, "and upon her death to divide the same among my lawful issue, or to trustees for their use," as his wife should by will direct, and in default of such

will then the share was to be distributed as in the sixth clause provided. The sixth clause directed that the other half of his estate "be divided into as many shares as I may leave children me surviving, and children who may then be deceased leaving issue me surviving; one of these shares I give to be divided equally among the issue of each of my then deceased children *per stirpes* and not *per capita.*" The other shares he placed in trust for each of his surviving children **for life** with power of appointment, and under three different circumstances directed that issue take *per stirpes* and not *per capita.*

The Chancellor very properly determined that the testator used the word "issue" in different senses in the two paragraphs, and that in the fifth paragraph it meant all the descendants, including grandchildren whose parents were living, while in the sixth it meant issue by representation only, which he conceded "excluded from any benefit thereunder the descendants of any living *stirps,*" (page 39) and, as testator's widow had not made provision for all of such descendants her appointment was invalid.

The contrast is evident. In the fifth paragraph he used "issue" in its broader sense to include all of a class among whom his wife might appoint the estate. The addition of the words "*per stirpes* and not *per capita*" would have been inappropriate, and might have limited her discretion in a manner not intended. A different meaning was assigned to the word in the fifth clause, because it appeared in a different clause of the will for a different purpose, and disposed of a different share of the estate.

Here the word "issue," when it appears unqualified by immediate context, is used in reference to the same share of the estate affected by

its use when qualified, and the words are tied together by cross-references, so that they evidently mean the same thing in every instance. Our testator seems to have precisely defined what he meant by "issue" and afterwards used it without qualification, assuming it conveyed the same idea. There is no contrast in this will by which a distinction can be made in the meaning of the word in one place as compared with another.

Here there seems nothing in the context to show that testator intended a different meaning for "issue" when he used it without qualification, and when he used it with. A construction of this will that would hold "issue" without qualification meant all descendants, including those whose parents were still alive, and that the same word when used with a stirpital qualification excluded descendants whose parents were alive, would give a different devolution to the share of a child who died *before* the four-year period, from that of a child who died *after* the four-year period. There is nothing to show testator intended any such distinction.

In *Coyle* v. *Coyle,* 73 N. J. Eq. 528, the Court construed a will providing a trust for testator's wife for life, with remainder to his children "or such of them as shall survive my said wife, but if any of my said children shall have died, leaving issue, such issue shall take the share their parent would have taken if living." Vice Chancellor Leaming felt constrained by the line of English authorities, starting with *Sibley* v. *Perry,* 7 Ves., Jr., 523, to conclude that testator, on account of the collocation of "parent" with "issue" intended to restrain that word to children, and excluded the grandchildren of a deceased child.

He protested, however, that it was against his judgment of what the testator really intended.

If that case controls this, it solves the present problem in favor of the defendant, Alfred L. Pinneo Dennis, but, if it becomes the law of this will, it may have unfortunate consequences when other shares come to be distributed in other circumstances. I, therefore, deem it my duty to point out what seem to me to be distinctions between the words in that case and in this.

There, by strict grammar, "such issue" and "their parent" limited the prior word "issue" to descendants of the second generation only, excluding those of the third.

Here, "such" and "their" are lacking, and the words seem to indicate a general plan of representation that would extend to all generations—"*the* issue representing *the* parent," and, further, they were "entitled only to *the* share that *the* parent would be if alive," repeating the provision for representation, and distinctly excluding descendants of a living parent. The stirpital idea is further expressed in the provision to take share and share alike, thus securing equality between the stocks. All these iterated provisions strongly evidence a stirpital scheme of devolution. In fact, these three clauses defining the issue intended seem to be equivalent to the idea expressed by the technical words *per stirpes*. If those words had been added to the provision in *Coyle* v. *Coyle* the decision surely would have been different.

Furthermore in this case, the gift over in default of issue indicates the testator did not intend to limit issue to children, and thus possibly, in some contingency, forfeit the share of the remote descendants of one stock and transfer it to another stock, especially in view of his provision for equality between the stocks.

In *Security Trust Co.* v. *Lovett,* 78 N. J. Eq. 445, testator gave his residuary estate to his wife for life, and at her death directed that it be divided between eleven children and the four children of a deceased child, and added: "should either of my above-named children die leaving issue, it is my will that the portion herein devised or bequeathed to such child or children shall be equally divided between their issue."

The Vice Chancellor found nothing in the will to limit the word "issue" to any other than its ordinary meaning of descendants, and so held that it included children of a living child. He did not apply the rule of *Coyle* v. *Coyle,* because there was no collocation of "parent" with "issue." There being no words providing for representation (as there are here) he directed a *per capita* and not a *per stirpes* division. If there had been any expression of an intent that deceased issue should take by representation, the result would, of course, have been different.

IV.

On casual reading, the 10th section of the Statute of Descents might seem to control the decision of the questions here, so far as they relate to real estate, the provision being that if lands are devised to a person for life and at the death of such person to go "to his or her issue," in such case the land after the death of the devisee for life "shall go to and be vested in the children of such devisee, equally to be divided between them as tenants in common in fee, but if there be only one child then to that one in fee, and if any child be dead the share which would have come to him or her shall go to his or her issue in like manner."

This court, however, in *Shugrue* v. *Long,* 82 N. J. L., 717, has held that this statute does not apply where the freehold estate is equitable and the remainder is legal.

Likewise *Martling* v. *Martling,* 55 N. J. Eq. 771, seems to make it plain that the 11th section of the Statute of Descents does not apply in this case.

## V.

Our views and contentions, briefly summarized, are:

(1) "Issue" naturally means "children."

(2) By legal definition "issue" means descendants of all degrees, and will be given that strict construction in deeds. *(Weehawken* v. *Sisson).*

(3) In wills, however, this wide meaning will be restricted, if apparently so intended by testator. (*Inglis* v. *McCook*).

(4) "Issue" may be so collocated with "parent" as to indicate by clear intent that it means children, but this construction is not favored. (*Coyle* v. *Coyle*).

(5) An intent to restrict "issue" to descendants *per stirpes* is favored, and will be presumed on slight evidence of such intention. (*In re Farmers' Loan & Trust Co.*)

(6) "Issue," once defined, will have the same meaning throughout the will, in the absence of a plain intent to the contrary.

(7) Here testator, in the basic provisions of his will, repeatedly restricts "issue" to descendants *per stirpes.* There is no reason to assume he had any other intention when he used it without qualification, and, therefore, the same meaning should be given it there.

(8) Sec. 10 and 11 of Statute of Descents do not apply. (*Shugrue* v. *Long; Martling* v. *Martling).*

VI.

The appellant's brief in this court assumes that this case is identical with *Inglis* v. *McCook* and urges this court to reverse the decision below in this case in order that it may not impliedly reverse the decision in *Inglis* v. *McCook.*

This assumption and plea entirely overlook the distinctions between the two cases suggested above, namely, that in the Inglis case, when testator in the fifth paragraph of his will used the unqualified word "issue" to define a class among whom his wife had power to appoint one share of his estate, the fact that in the sixth paragraph, in defining a direct gift of another share of the estate, he qualified the word "issue" by the words "*per stirpes,*" did not evidence an intent to similarly qualify the word in the fifth paragraph. There was no similarity between the two provisions from which the inference could be drawn. The two provisions dealt with different shares of the estate and by different methods—one by power of appointment to a limited class, the other by a direct gift. Inserting "*per stirpes*" in the fifth paragraph would have been inappropriate and would have put a limitation on the power of appointment which evidently the testator did not intend.

In the present case the word "issue" when used without qualification refers to the same share, destined for the same ultimate beneficiaries, as when previously used with the requisite qualification; and the two provisions are tied together by cross reference, showing testator had the same thought and purpose in mind in each provision.

Appellant's brief (pp. 14 and 16) criticizes the decisions in the recent similar New York cases as being unsound in principle and in violation of recognized canons of construction. These criticisms are unjustifiable. The judges in those cases, as well as the Vice Chancellor in this case, and the judges in the other cases cited in this brief, found an expression of intent in words and circumstances which they deemed sufficient. In doing so they violated no principle of law or canon of construction, notwithstanding appellant's counsel does not agree with them.

It is respectfully submitted that the decree below should be affirmed.

JOHN O. H. PITNEY,

*Of Counsel With Alfred L. P. Dennis and Others, Defendants-Respondents.*

# INDEX.

**Bill of Complaint**

(Filed August 13, 1915.)

# In Chancery of New Jersey.

*To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:*

Humbly complaining, show unto your Honor, your orators, Frederick S. Dennis, Samuel S. Dennis and Warren E. Dennis, surviving executors of and trustees under the will and codicil of Alfred L. Dennis, deceased, late of the City of Newark, in the County of Essex and State of New Jersey.

1. That on the eighth day of December, 1890, said Alfred L. Dennis departed this life, leaving a last will and testament, dated August 6th, 1883, and a codicil thereto, dated April 15, 1890, which will and codicil were on the 20th day of December, 1890, duly admitted to probate by the Prerogative Court of the State of New Jersey. A copy of said will and codicil thereto is hereto annexed and made a part hereof. Thereafter the executors and trustees named in the said will and codicil qualified, and entered upon the performance of their duties as such.

2. That by said will, as by reference thereto will appear, testator gave all the estate to his executors in trust for a period of four years after his decease, and at the termination of said four years gave all his estate unto his children living at his death and the issue of any pre-deceased children, such children and issue to take share and share alike, the issue representing the parents and being entitled only to the share the parent would

be if alive, the right of each of said shares to become vested at testator's death, subject to the trust aforesaid and two-thirds of the share of testator's daughter, Mary Eliza (the wife of James Christy Bell) to be subject also to the further trust following:

"I direct that the said two-thirds of the share of my said daughter shall continue to be held and shall be held by my executors, the survivors and survivor of the, in trust for and during her natural life, and to pay the income and proceeds thereof when received unto her during that time, for her sole and separate use, and as her separate estate exclusively, and at her death the said two-thirds to be relieved from said trust and go to her issue, to whom I then give, bequeath and devise the same, and in default of such issue at her death, I give, bequeath and devise the same to her next of kin and heirs. Nothing in this last trust contained shall affect the absolute right of my said daughter in and to the other one-third of her share."

3. That in the codicil to said will testator provided.

"As to the disposition made in said will of my residuary estate, personal and real, in favor of my four sons, at the termination of the period of four years from my death (which disposition is contained in the thirteenth paragraph of my said will), I do hereby alter my said will in the following respects:

"Two-thirds part of the shares of the residue and remainder of my estate, personal and real, which in said will I have given, bequeathed and devised unto my four sons respectively and their issue, as mentioned in the

thirteenth paragraph thereof, I give, bequeath and devise, upon a like trust as that provided in said will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons respectively during the natural life of each, and at the death of each, the said two-thirds to be relieved from said trust and go absolutely to the issue of the son so dying. The trustees of said two-thirds for either of my said sons shall be the remaining three of my sons, their survivors and survivor, and for that purpose, the two-thirds part aforesaid of either son, shall vest in the other three sons as trustees, their survivors and survivor. In case of default of issue at the death of any of my sons, I give, bequeath and devise his said two-thirds part held in trust, as aforesaid, to his next of kin and heirs, according to the nature of the estate, whether personal or real."

4. That testator left him surviving his four sons, viz., James S. Dennis and your orators, Frederick S. Dennis, Samuel S. Dennis and Warren E. Dennis, and one daughter, Mary Eliza (the wife of James Christy Bell aforesaid).

5. That after the settlement of testator's estate, and after the expiration of the four years' trust above referred to, the executors divided one-third of testator's estate between his five children, and the remaining two-thirds have since held under the trusts provided in the said will and codicil, and have, from time to time, presented to the Prerogative Court of New Jersey full accounts of their trusteeship, which accounts have been duly allowed by said Court.

6. That on the 21st day of March, 1914, James S. Dennis, one of the children of testator, and one

of the executors and trustees under his will, departed this life, leaving him surviving an only child, Alfred L. Pinneo Dennis, and no issue of any other child. Said Alfred L. Pinneo Dennis had at the date of his father's death, and still has, only two children, viz., Mary Elizabeth Dennis, an infant of the age of fifteen years, and Louise Cable Dennis, an infant of the age of eleven years, both granddaughters of said James S. Dennis, deceased, and great-granddaughters of said testator.

7. That after the death of said James S. Dennis the surviving executors and trustees under said testator's will filed in the Prerogative Court of this State an account, designated as their ninth accounting, and thereafter, on the 23d day of June, 1914, said Court entered its decree, allowing said account, and directed that the share that had been held in trust for the said James S. Dennis be distributed and paid over unto his son, said Alfred L. Pinneo Dennis, and, in pursuance thereof your orators thereupon delivered to said Alfred L. Pinneo Dennis security and assets of the value of $218,272.80, as the amount of the corpus of the estate so held in trust during the life of the said James S. Dennis; that of said amount the sum of $87,481.03 represented the portion thereof which had been received from the proceeds of the sale of real estate of which testator was seized.

8. That thereafter your orators were advised that there was a question as to whether, under the terms of said will and codicil, said Alfred L. Pinneo Dennis was entitled to all of said assets so distributed and paid over to him, or whether his children, being issue of the testator, were entitled to some share or portion thereof, and it has been claimed on behalf of said children that they were and are so entitled. On the other hand, said Alfred

L. Pinneo Dennis claims that he was and is entitled to the whole of said share, and that his children have no interest therein.

9. That your orators being in doubt whether the payment to said Alfred L. Pinneo Dennis was in accordance with the provisions of said will, as properly construed, and if not, being also in doubt as to how the same should be distributed and paid over, requested the said Alfred L. Pinneo Dennis to return to them two-thirds of the corpus so paid to him, in order that they might have it under their control, in case this Court should decree that he was only entitled to one-third thereof, and that his children were entitled to the remaining two-thirds, or some part thereof, and so that they might be able to ask the aid and direction of this Court in the premises; and thereupon the said Alfred L. Pinneo Dennis, in a spirit of fairness, but claiming that he was entitled to the whole of said share, and desiring to co-operate with your orators in the settlement of the questions so raised, subjected to your orators' control two-thirds of the assets so received by him as aforesaid, and the same are now under the control of your orators, so that the same may be applied according to the intent of the will and codicil of said testator as they may be construed by this Court.

10. Your orators further show that none of the other trusts for testator's other children have as yet been terminated, but that there are living other grandchildren and one other great-grandchild of testator, who have an interest in said estate and in the questions so raised. Your orator, Samuel S. Dennis, has three children—Helen Eliza Dennis, James S. Dennis, 2d, and Dorothy Dennis, all of age. Your orator, Warren E. Dennis, has three children—Frederick James Dennis, Warren Eger-

ton Dennis, Jr., both of whom are of age, and Mildred Dennis, an infant about the age of fourteen years. Said Eliza Dennis Bell has three children—Alfred Dennis Bell, James Christy Bell, Jr., and Samuel Dennis Bell, all of age. Said Alfred Dennis Bell is married and has a son, Alfred Dennis Bell, Jr., an infant of the age of five years.

To the end, therefore, that your orators may have the aid and direction of this Court in the premises, and that it may be determined whether, by the true construction of testator's will and codicil, the shares so held in trust for his children are upon the death of each child respectively payable to his issue per stirpes or per capita, and particularly whether the share of said James S. Dennis was and is properly payable to his only son, said Alfred L. Pinneo Dennis, or is to be divided between the said Alfred L. Pinneo Dennis and his two children, the said Mary Elizabeth Dennis and Louise Cable Dennis, and, if so, in what shares and proportion, and that the said Alfred L. Pinneo Dennis, Mary Elizabeth Dennis, Louise Cable Dennis, Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Alfred Dennis Bell, Jr., Helen Eliza Dennis, James Shepard Dennis, 2d, Dorothy Dennis, Frederick James Dennis, Warren Egerton Dennis, Jr., and Mildred Dennis, may answer the premises, but without oath, answer under oath being waived, and may set forth and assert their respective claims as to the true meaning of the will and codicil of testator in the particulars aforesaid, and that your orators may have the protection of the order of this Court in the premises, and may have such other relief as the nature of the case may require and to your Honor shall seem meet and be agreeable to equity and good conscience.

*Order appointing Guardian ad litem.*

May it please your Honor, the premises considered, to grant unto your orators the State's writ or writs of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Alfred L. Pinneo Dennis, Mary Elizabeth Dennis, Louise Cable Dennis, Elizabeth Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Alfred Dennis Bell, Jr., Helen Eliza Dennis, James Shepard Dennis, 2d, Dorothy Dennis, Frederick James Dennis, Warren Egerton Dennis, Jr., and Mildred Dennis, commanding them and each of them by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

BEDLE & KELLOGG,
*Solicitors for and of Counsel with Complainants.*

(Proceedings were thereupon had for the appointment of a guardian *ad litem* for the infant defendants, and resulted in the making of the following order.)

## Order Appointing Guardian Ad Litem for Infant Defendants.

(Filed September 24, 1915.)

Upon reading the petitions filed in this cause by Gilbert Collins, setting forth that the said Gilbert Collins is next friend of Alfred Dennis Bell, Jr.,

and Louise Cable Dennis, two of the defendants in this cause, and that the said Alfred Dennis Bell, Jr., and the said Louise Cable Dennis are minors under the age of fourteen years, and praying that the said Gilbert Collins may be appointed guardian *ad litem* of the said minors, and upon reading the written assents of the said Gilbert Collins to the said appointments and the affidavits of R. Robinson Chance that the said petitions and assents were duly signed and the adffiavits of the said Gilbert Collins verifying the ages of the said Alfred Dennis Bell, Jr., and the said Louise Cable Dennis; and upon reading the petition filed in this cause by Mary Elizabeth Dennis, one of the defendants in this cause, setting forth that she, the said Mary Elizabeth Dennis, is a minor over the age of fourteen years, and praying that Gilbert Collins, Esq., may be appointed her guardian *ad litem,* for her and in her behalf, to make answer and defense to the complainants' bill of complaint, and upon reading the written assent of the said Gilbert Collins annexed to the said petition that the said appointment be made, and also the affidavit of R. Robinson Chance verifying the age of the said petitioner and setting forth that the said petition and assent were signed in his presence;

It is on this 24th day of September, 1915, ordered that the said Gilbert Collins be, and he hereby is, appointed guardian *ad litem* of the said Alfred Dennis Bell, Jr., Louise Cable Dennis and Mary Elizabeth Dennis, by whom each and all of the said minor defendants may appear and answer and defend this suit.

E. R. WALKER,
*C.*

## Answer of Defendant, Alfred L. Pinneo Dennis.

(Filed September 25, 1915.)

The answer of the defendant, Alfred L. Pinneo Dennis, to the bill of complaint of Frederick S. Dennis and others, executors and trustees under the will of Alfred L. Dennis, deceased.

This defendant admits the allegations of the bill of complaint, and claims that by the true construction of the will of said Alfred L. Dennis, deceased, this defendant is entitled to the entire share of the estate of said testator, which, under his will, was held in trust for defendant's father, James S. Dennis, for life; that the Prerogative Court properly ordered the same to be paid to this defendant, and that this defendant's children, named in said bill, have no interest in said share or any part thereof. This defendant therefore prays that this Court may make decree accordingly.

PITNEY, HARDIN & SKINNER,
*Solicitors and Counsel for Defendant,*
*Alfred L. Pinneo Dennis.*

Endorsed:

We acknowledge service of a copy of the within answer and we consent that within answer may be filed as of time September 23, 1915.

BEDLE & KELLOGG.

## Answer of Defendants, Mary Elizabeth Dennis and Louise Cable Dennis.

(Filed September 29, 1915.)

The answer of the defendants, Mary Elizabeth Dennis and Louise Cable Dennis, by Gilbert Collins, their guardian *ad litem* to the bill of complaint in the above entitled cause.

These defendants, answering, say:

1. They admit the allegations of paragraph 1 of the bill of complaint.

2. They admit the allegations of paragraph 2 of the bill of complaint.

3. They admit the allegations of paragraph 3 of the bill of complaint.

4. They admit the allegations of paragraph 4 of the bill of complaint.

5. They admit the allegations of paragraph 5 of the bill of complaint.

6. They admit the allegations of paragraph 6 of the bill of complaint.

7. As to the allegations of paragraph 7 of the bill of complaint, these defendants have no knowledge or information sufficient to form a belief.

8. These defendants admit that the complainants were advised that there was a question as to whether, under the terms of the will and codicil of Alfred L. Dennis, deceased, the defendant, Alfred L. Pinneo Dennis, was entitled to the whole share held in trust for the benefit of James S. Dennis, deceased, during his lifetime. These defendants admit that they claim to be entitled to a portion of such share and they set forth their claim to be as follows: That upon the death of said James S. Dennis, grandfather of these defendants, the

share held in trust during the lifetime of said James S. Dennis for his benefit under the will and codicil of Alfred L. Dennis, deceased, was distributable under the terms of the said will and codicil of Alfred L. Dennis, deceased, amongst the issue of said James S. Dennis living at his death, equally per capita; that such issue were the said Alfred L. Pinneo Dennis, father of these defendants, and these defendants; that each of these defendants accordingly claims the one equal third part of the share so held in trust during the lifetime of their grandfather, James S. Dennis, for his benefit and for the benefit of his issue.

9. As to the allegations of paragraph 9 of the bill of complaint, these defendants have no knowledge or information sufficient to form a belief.

10. As to the allegations of paragraph 10 of the bill of complaint, these defendants have no knowledge or information sufficient to form a belief.

11. These defendants therefore pray that this Honorable Court may make a decree ordering and directing the complainants, as executors and trustees under the will and codicil of Alfred L. Dennis, deceased, to transfer and pay over unto these defendants a just and lawful portion of the share so held in trust for the benefit of James S. Dennis and his issue under the said will and codicil, in accordance with the claim hereinbefore set forth; and these defendants submit themselves to the jurisdiction of this Honorable Court in the premises.

WHEREFORE these defendants pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

COLLINS & CORBIN,
*Solicitors of Gilbert Collins, Guardian ad litem of the Defendants, Mary Elizabeth Dennis and Louise Cable Dennis.*

## Answer of Defendant, Alfred Dennis Bell, Jr.

(Filed September 29, 1915.)

The answer of the defendant, Alfred Dennis Bell, Jr., by Gilbert Collins, his guardian *ad litem*, to the bill of complaint in the above entitled cause:

This defendant, answering by his said guardian, says that he is a stranger to all and singular the matters and things in the said bill of complaint contained, otherwise than that this defendant is informed that under the will and codicil of Alfred L. Dennis, deceased, he is interested in the subject matter of this suit, and, being an infant of tender years, this defendant submits himself to the judgment of this Honorable Court, and prays that his interests may be protected and saved to him.

COLLINS & CORBIN,
*Solicitors of Gilbert Collins, Guardian ad litem of Alfred Dennis Bell, Jr., Defendant.*

## Answer of Defendant, Mildred Dennis.

(Filed October 30, 1915.)

The answer of the defendant, Mildred Dennis, to the bill of complaint of Frederick S. Dennis and others, executors and trustees under the will of Alfred L. Dennis, deceased.

This defendant admits all of the allegations of the bill of complaint except so much thereof as alleged her to be an infant, which she denies, and this defendant submits herself to the judgment of this Honorable Court, and prays that her interests may be protected and saved to her.

COLLINS & CORBIN,
*Solicitors of Mildred Dennis, Defendant.*

## Interlocutory Decree and Reference

(Filed November 4 ,1915.)

This matter being opened to the court by Bedle & Kellogg, solicitors of the complainants, and it appearing that process of subpoenas to appear and answer have been duly issued and returned served on Alfred L. Pinneo Dennis, Mary Elizabeth Dennis, Louise Cable Dennis, Helen Eliza Dennis, James Shepard Dennis, 2d, and Dorothy Dennis, and that process of subpoena for Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Alfred Dennis Bell, Jr., Frederick James Dennis, Warren Egerton Dennis, Jr., and Mildred Dennis has been duly issued and returned not found;

*Interlocutory Decree and Reference.*

And it appearing that, in pursuance of an order of this Court, made on the 26th day of August, 1915, the notice to appear and answer required by law and the rules of this Court was, within ten days after the making of the said order, given to the absent defendants, Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Alfred Dennis Bell, Jr., Frederick James Dennis, Warren Egerton Dennis, Jr., and Mildred Dennis, and it appearing that the defendants, Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Helen Eliza Dennis, James Shepard Dennis, 2d, Dorothy Dennis, Frederick James Dennis and Warren Egerton Dennis, Jr., have not appeared, answered or taken any other steps in respect of the complainants' bill within the time limited by law, or at any time, but have wholly failed and neglected so to do;

And it appearing that answer has been filed by the said Alfred L. Pinneo Dennis and the said Mildred Dennis, and that Gilbert Collins, Esquire, has been appointed guardian *ad litem* of the said Alfred Dennis Bell, Jr., Louise Cable Dennis and Mary Elizabeth Dennis, and, as such guardian *ad litem,* has filed answer in their behalf;

It is on this 3d day of November, 1915, on motion of Bedle & Kellogg, solicitors for the complainants, ordered that the said complainants' bill be, and the same hereby is, taken as confessed against the said defendants, Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Jr., Samuel Dennis Bell, Helen Eliza Dennis, James Shepard Dennis, 2d, Dorothy Dennis, Frederick James Dennis and Warren Egerton Dennis, Jr., and that it be referred to the Honorable James E. Howell, one of the Vice-Chancel-

lors of this court, to hear the same for the Chancellor and to report thereon to him, and advise what order or decree should be made therein.

E. R. WALKER,
*C.*

Endorsed:

We consent to the making of the within order.

COLLINS & CORBIN,
*Solicitors of Gilbert Collins,*
*Guardian, ad litem.*

## Order of Substitution

(Filed December 7, 1915).

By consent of Collins & Corbin, solicitors for the defendant, Mildred Dennis, it is on this second day of December, nineteen hundred and fifteen, ORDERED that Pitney, Hardin & Skinner be, and they hereby are, substituted as solicitors for said defendant in place of Collins & Corbin, her present solicitors.

E. R. WALKER,
*C.*

Respectfully advised,

J. E. HOWELL,
*V. C.*

We consent to the foregoing order.

COLLINS & CORBIN,
*Solicitors of Mildred Dennis.*

## Testimony.

(Taken December 2, 1915.)

IN CHANCERY OF NEW JERSEY.

*Between*

FREDERICK S. DENNIS, *et als.*,
*Complainants,*

*and*

ALFRED L. PINNEO DENNIS, *et als.*,
*Defendants.*

Transcript of shorthand notes of testimony taken in the above entitled cause on December 2, 1915, at Chancery Chambers, Newark, New Jersey, before Hon. James E. Howell, Vice-Chancellor.

Appearances:

Judge Gilbert Collins for all the infant defendants.

Mr. John O. H. Pitney for defendant Alfred L. Pinneo Dennis.

JAMES S. DENNIS, sworn.

*Direct examination* by Mr. Pitney.

Q Where do you live, Mr. Dennis? A In Short Hills.

Q How old are you? A Twenty-eight.

Q What relation are you to Alfred L. Dennis, the testator, whose will is under construction in this suit? A Grandson.

Q Do you know the family history? A Yes.

*Testimony.*

Q How many children did your grandfather have? A Five.

Q And have all of those grandchildren also defended? A Four of them have.

Q Does this table that you have prepared correctly set forth the descendants of Alfred L. Dennis, all of the descendants of Alfred S. Dennis, and dates of birth? A Yes, all the descendants now alive.

Q With their dates of birth? A Yes.

Q Were all of the testator's children alive at his death? A Yes.

Q Was the grandchild of Alfred L. P. Dennis alive at Mr. Dennis' death? A Yes.

Q What was the date of the death of the testator? A In 1890.

Q December, 1890? A Yes.

Q Then from this statement he had no great grandchildren living at his death? A No, sir.

Q But he had some grandchildren at his death, and others were born afterwards? A Yes.

*Mr. Pitney.* I will have this marked for convenience as being the proof.

Marked Exhibit D. 1.

Q Which of the descendants of the testator have died since his death? A Since the death of the testator?

Q Yes. A James S. Dennis.

Q His son? A Yes.

Q And when did he die? A He died in March, 1914; I am not certain of the date of the death of James S. Dennis, but I know it was in March, 1914.

Q (*By Judge Collins*) A year ago last March? A Yes.

*Exhibit D. 1.*

# EXHIBIT D. 1.

## DATES OF BIRTH OF DESCENDANTS OF A. L. DENNIS.

| Children<br>James S. Dennis | Grandchildren<br>Alfred L. P. Dennis<br>May 21, 1874 | Great-Grandchildren<br>Mary Elizabeth Dennis<br>Apr. 13, 1900<br>and Louise Cable Dennis<br>Aug. 25, 1903 |
|---|---|---|
| Frederick S. Dennis | none | none |
| Samuel S. Dennis | Helen E. Dennis<br>June 27, 1885<br>James S. Dennis, 2d<br>Oct. 26, 1887<br>Dorothy Dennis<br>Sept. 8, 1891 | none |
| Warren E. Dennis | Frederick J. Dennis<br>Dec. 12, 1888<br>Warren E. Dennis, Jr.<br>June 15, 1892<br>Mildred Dennis<br>Aug. 30, 1894 | none |
| Eliza Dennis Bell | Alfred D. Bell<br>Aug. 7, 1886<br>James C. Bell, Jr.<br>Feb. 4, 1889<br>Samuel D. Bell<br>Jan. 19, 1892 | Alfred D. Bell, Jr.<br>Sept. 3, 1909 |

## Opinion.

(Filed January 13, 1916.)

On Bill for Construction of Will.

Bedle & Kellogg for the complainants.

John O. H. Pitney for defendant Alfred L. P. Dennis.

Gilbert Collins for Mildred Dennis and Louise and Elizabeth Dennis, infants.

Submitted December 2, 1915.

Decided January 12, 1916.

Howell, *V. C.*

The bill in this case was filed to obtain a construction of the will of Alfred L. Dennis, late of Newark, who died December 8, 1890. He left four sons and one daughter, whose names are, respectively: James S. Dennis, Frederick S. Dennis, Samuel S. Dennis, Warren E. Dennis and Mary Eliza Bell. At the time of the testator's death his son James S. had one son, Alfred L. P. Dennis, the defendant, a grandson of the testator, and he in turn now has two infant daughters, born since the death of the testator. Frederick has no children. At the time of the testator's death Samuel had two children, Helen and James, and the third child, Dorothy, has since been born. Samuel has no grandchildren, neither has Warren. Mildred is not married. Mrs. Bell has three children, Alfred D., James C. and Samuel D. Her son Alfred D. has a son, Alfred D. Bell, Jr. All of them are parties to the suit.

The controversy which is raised by the bill is between Alfred L. P. Dennis, a grandchild of the testator, and his own two infant children, Eliza-

beth and Louise, who are great-grandchildren of the testator. Their ancestor, James S. Dennis, who was a son of the testator, died March 21, 1914, and the share of which he had the income for life is available for distribution, and the question is under the terms of the will whether the share of the testator's estate which was enjoyed by James S. Dennis in his lifetime shall go to James S. Dennis' son, Alfred L. P. Dennis, or whether Alfred L. P. Dennis' two infant children take equally with their parent, so that each receives an undivided one-third of the James S. Dennis share. The portions of the will out of which this controversy arises are paragraphs 11 and 13, and the codicil dated April 15, 1890. They are as follows:

"11. I hereby direct my executors to pay to each of my children, or the issue of each, if dead (the issue representing the parent) during the four years my estate is held in trust by my said executors, sums amounting yearly to three thousand dollars each."

"13. At the termination of the period of four years from my death, as mentioned in the second clause foregoing, I hereby give, bequeath and devise all the rest, residue and remainder of my estate of every description, personal and real, unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share alike, the issue representing the parent, and entitled only to the share that the parent would be, if alive—the right to each of said shares to become vested at my death, subject to the trust aforesaid, and two-thirds of the share of my daughter, Mary Eliza, to be subject also to the further trust following. I direct that the said two-thirds of the share of my said daughter shall continue to be held and

shall be held by my executors, the survivors and survivor of them, in trust for and during her natural life, and to pay the income and proceeds thereof when received unto her during that time, for her sole and separate use, and as her separate estate exclusively, and at her death the said two-thirds to be relieved from said trust, and go to her issue, to whom I then give, bequeath and devise the same, and in default of such issue at her death, I give, bequeath and devise the same to her next of kin and heirs. Nothing in this last trust contained shall affect the absolute right of my said daughter in and to the other one-third of her share."

CODICIL.

"Two-thirds part of the shares of the residue and remainder of my estate, personal and real, which in said will I have given, bequeathed and devised unto my four sons respectively and their issue, as mentioned in the thirteenth paragraph thereof, I give, bequeath and devise, upon a like trust as that provided in said will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons respectively during the natural life of each, and at the death of each, the said two-thirds to be relieved from said trust and go absolutely to the issue of the son so dying. The trustees of said two-thirds for either of my said sons shall be the remaining three of my sons, their survivors and survivor, and for that purpose, the two-thirds part aforesaid of either son, shall vest in the other three sons as trustees, their survivors and survivor. In case of default of issue at the death of any of my sons, I give, bequeath and devise his said two-thirds part held in trust as aforesaid, to his next of kin and heirs, according to the nature of the estate, whether personal or real."

*Opinion.*

The dispute arises out of the interpretation which should be given to the word 'issue'' in the codicil. This instrument provides that "at the death of each, the said two-thirds to be relieved from trust and go absolutely to the issue of the son so dying.". Does the word "issue" as used by the testator mean children, or does it mean descendants to the remotest degree? Is it to be divided *per capita* or *per stirpes?*

It seems to be well settled in this State that the word "issue," which is so indefinite and capable of so many interpretations, in its first and primary sense, means descendants and comprises objects of every degree. The Court of Errors and Appeals in *Weehawken Ferry Company* vs. *Sisson,* 2 C. E. Gr., 486, adopts the definition given by Jarman, as follows: "When not restrained by the context (issue) is co-extensive and synonymous with descendants, comprehending objects of every degree, and here the distribution is *per capita* and not *per stirpes.*" And "Where the description 'issue' is employed in a will as a word of purchase, it will, in its ordinary import, comprise all those who claim as descendants from or through the person to whose issue the bequest is made, i. e. grandchildren and great-grandchildren, as well as children; and in order to restrain this usual sense of the word, a clear intention must appear upon the will." 2 Will. on Exrs. See also *Ballantine* vs. *DeCamp,* 12 Stew. 87; *Coyle* vs. *Coyle,* 3 Buch. 528. This appears to be the universal interpretation. The matter of *Farmer's Loan & Trust Company,* 213 N. Y. 168; *Jackson* vs. *Jackson,* 153 Mass., 374; *Ralph* vs. *Carrick,* L. R. 11 C. D. 873; 48 L. J. Ch. 801, and in this interpretation all the text books coincide. Theobald, Wills, 267. 2 Jarman, Wills, sixth English edition, 1590. See also *Davenport* vs.

*Hanberry,* 3 Vesey, 257. Garner, Wills, 435. Applying the broad, general rule laid down by these authorities to the case in hand, we would have Alfred L. P. Dennis sharing with his two infant children in the final distribution of the portion of the testator's estate which has hitherto been enjoyed by James S. Dennis, their ancestor, as life tenant. Such will have to be the interpretation of the will in question unless we can find some expression in the document which indicates that the testator intended no such result, but that on the contrary thereof he meant to make a stirpital distribution of his estate, and if such intention can be found within the four corners of the instrument, then it is quite clear that James S. Dennis' share would be distributed to Alfred L. P. Dennis alone and that his children would be entitled to nothing as devisees under the will. In my opinion such an expression is found in the codicil and in the very sentence which provides for a distribution of the fund. By the original scheme of the will the whole of the estate of the testator was trusteed for a period of four years, at the termination of which period there was to be an equal distribution of the estate, the four male children taking their shares outright and the daughter being made a life tenant of two-thirds of another share, with remainder to her children. The first indication of the desire of the testator for a stirpital division of his estate appears in the eleventh paragraph, where he gives the sum of three thousand dollars each to his five children annually during the four years that the estate is held in trust, and in making this division the executors are to distribute to each of the children, or to the issue of each, if any are dead "the issue representing parent," and this same intention is evidenced by a similar expression in the thir-

teenth paragraph, which provides the original scheme for the division of the estate; there, at the end of four years there was to be a division "unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share alike, the issue representing the parent, and entitled only to the share that the parent would be, if alive." Thus it appears that under the original scheme of the will there was a clearly expressed intention on the part of the testator to treat the word "issue" as if it were "children" and to provide for a division *per stirpes.* The codicil, made several years after the making of the will, to my mind, gives forth the same intention. By it the testator abandoned his original idea of dividing his estate among his five children, trusteeing the daughter's share, and he made instead thereof a provision for trusteeing two-thirds of the whole estate, or each of the shares, during the lifetime of his several children, treating them all in the same manner in which he had treated his daughter under his first scheme of distribution. By the codicil he gives, bequeaths and devises two-thirds part of the shares of the residue and remainder of the estate "upon a like trust as that provided in said will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons respectively during the natural life of each." And, in order that there might be no doubt about his intention, he provides "at the death of each (of his children) the said two-thirds to be relieved from said trust and go absolutely to the issue of the son so dying." And finally in the same codicil he provides for a default of issue at the death of any of his sons. In such case he gave his said two-thirds part, held in trust as aforesaid, to his next

of kin and heirs, according to the nature of the estate, whether personal or real, indicating conclusively, to my mind, that he had in contemplation a stirpital distribution of his estate, of the same stirpital character as that provided for by our statutes of descents and distributions. I do not see how there could be a clearer expression of an intention to divide *per stirpes.* I can think of no words which would make the provision more certain or more easily understood.

Up to this point I have endeavored to reach a conclusion from an examination of the will itself without resort to any of the many authorities which might be cited in favor of the view that I have taken. It appears to have been frequently held that where a "parent" of issue is spoken of the word is *prima facie,* restricted to children of the parent. It was so held in *Coyle* vs. *Coyle,* 3 Buch. 528, where the rule is stated and the authorities collected. See *Pruen vs. Osborn,* 11 Sim. 132. There the testator bequeathed the residue of his estate to the children then living of B. and C. and the lawful issue then living of such of their children as were dead, as tenants in common, so, nevertheless, that such issue should, as amongst themselves, take as tenants in common, and *per stirpes* and not *per capita;* it being his intention that such issue should have only the shares which their respective parents would have been entitled to if living. It was held that the word "issue" must be taken in the restricted sense of "children." Vice-Chancellor Shadwell says: "Moreover, I am of the opinion that, if there be nothing more in a will, or other written instrument, whereby to construe the term 'issue' than a direction that the issue are to take the shares of their parents, that is enough to confine the general meaning of the word 'issue' to

the particular meaning of children of that parent." And it was so held in *Leigh* vs. *Norbury*, 13 Ves. 340. In *Sibley* vs. *Perry*, 7 Ves. 522, Lord Eldon put the same construction on the word "issue" because he found that in a particular clause the use of the word "parent" restricted the meaning of the word "issue," and the same construction was adopted in a case which came before Sir William Grant at the Rolls on the second of March, 1814 (*Harrington* vs. *Lawrence,* not reported). There, by an indenture, a fund was declared to be in trust for the children of a marriage, living at the death of the husband and wife, and the deed then provided that if any should die in the lifetime of the husband and wife, leaving issue, such issue should take such share as their parent would have been entitled to in case he or she had survived the husband and wife. A grandchild of a child of the marriage was excluded. It may be said that the case of *Sibley* vs. *Perry* has been much criticised (*Coyle* vs. *Coyle,* 3 Buch. 528), but it has been followed with very little, if any, diminution of its force as a precedent. In *Maynard* vs. *Wright,* 26 Bev. 285, Sir John Romilly, M. R., says: "It is clear that the word 'issue' is *nomen generalissimum* and that it includes the latest descendants unless its meaning be restricted and cut down by words to be found in the will. On the other hand, it is also clear that where issue are substituted for parent the word 'issue' is restricted to the children of the parent spoken of. But this rule of construction may again be controlled by the general nature and scope of the whole will and by the use of the word 'issue' in other parts of the will which may enlarge this construction and restore the word to its original comprehensive meaning."

*Opinion.*

It was strongly argued on principle and authority that when the testator used the word "issue" in any particular sense in one part of the will he must be held to have used the same word in the same sense in all other parts of the will. Unless there is something to indicate a contrary intention, I have no doubt of the proposition and agree entirely with the argument made on behalf of Alfred L. P. Dennis on this point. And I find, as a matter of fact, that in this case the testator did use the word "issue" in the same sense in every part of the will.

I am therefore of the opinion that the testator used the word "issue" in the sense of "children," and that he meant to have his estate divided *per stirpes* and not *per capita.* This will result in a decree giving the share in question to Alfred L. P. Dennis and excluding his two children from participation therein.

## Order for Amendment of Bill.

(Filed May 4, 1916.)

This matter having come on for final hearing, and it appearing on the proofs submitted that the $218,272.80 turned over to Alfred L. Pinneo Dennis the sum of $111,006.03 thereof represented the portion thereof which had been received from the proceeds of the sale of real estate of which the testator, Alfred L. Dennis, died seized, instead of $87,481.03, as is alleged in paragraph "8" of the bill herein filed, and application having been made on behalf of the complainants for leave to amend the bill so that the same may conform to the proofs in this regard, and the solicitors and counsel for the respective parties consenting, and it appearing that such amendment will further the ends of justice and will not in any wise abridge rights of defense,

It is on this 3d day of May, 1916, on motion of Bedle & Kellogg, solicitors for the complainants, ordered that the complainants' bill be amended by striking from paragraph "8" thereof the figures "$87,481.03" and inserting in place thereof the figures "$111,006.03."

E. R. WALKER,
*C.*

Respectfully advised,

JAMES E. HOWELL,
*V. C.*

We consent to the making and entry of the above order.

COLLINS & CORBIN,
*Solicitors for Gilbert Collins, Guardian ad litem of infant defendants,*

PITNEY, HARDIN & SKINNER,
*Solicitors of Defendants.*

## Final Decree.

(Filed May 4, 1916.)

This cause coming on to be heard upon the pleadings and proofs taken in open court, in the presence of Bedle & Kellogg, counsel for the complainants, Gilbert Collins, Esquire, guardian *ad litem* for the infant defendants, Mary Elizabeth Dennis, Louise Cable Dennis and Alfred Dennis Bell, Junior, and John O. H. Pitney, of counsel for the defendants, Alfred L. P. Dennis and Mildred Dennis, and the Court, having read, heard and considered the pleadings, proofs and arguments of counsel thereon, being of the opinion that by the true construction of the will and codicil of said Alfred L. Dennis, deceased, in the clause of the codicil:—"go absolutely to the issue of the son so dying," testator used the word "issue" in the sense of children with representation *per stirpes,* and intended that upon the death of each son the share upon which he had received the income should be divided among his issue *per stirpes* and not *per capita,* and that upon the death of testator's son, James, the share upon which he had received the income for life should be paid and distributed to his only son, Alfred L. P. Dennis, and that Elizabeth Dennis and Louise Dennis, children of the said Alfred L. P. Dennis, should be excluded from participation therein;

It is, thereupon, on this third day of May, nineteen hundred and sixteen, ORDERED, ADJUDGED, DECREED AND DECLARED that the share of said testator's estate, which was held in trust for the benefit of testator's son, James S. Dennis, during his life, should now be paid and distributed to his son, Alfred L. P. Dennis, and

that the children of said Alfred L. P. Dennis have no interest therein.

It is Further Ordered and Decreed that the complainants be authorized to pay out of the principal of the entire trust estate held by them prior to the death of the said James S. Dennis, as an expense of administration, the taxed costs of the solicitors of the various parties hereto, and an allowance of seven hundred and fifty dollars to Gilbert Collins, Esquire, guardian *ad litem* of the infant defendants, and a counsel fee of five hundred dollars to Bedle & Kellogg, counsel for the complainants, and a counsel fee of fifteen hundred dollars to John O. H. Pitney, counsel for the defendants, Alfred L. P. Dennis and Mildred Dennis.

E. R. WALKER,
*C.*

Respectfully advised,

J. E. Howell,
*V. C.*

## Notice of Appeal.

(Filed May 17, 1916; Served May 18 and 19, 1916.)

The defendants, Mary Elizabeth Dennis, Louise Cable Dennis and Alfred Dennis Bell, Junior, by Gilbert Collins, their guardian *ad litem,* hereby appeal from so much of the final decree made in this Court in the above stated cause as orders, adjudges, decrees and declares that the share of the estate of Alfred L. Dennis, deceased, which was held in trust for the benefit of testator's son, James S. Dennis, during his life, should now be paid and distributed to his son, Alfred L. P. Dennis, and that the children of said Alfred L. P. Dennis have no interest therein; to the Court of Errors and Appeals in the last resort in all causes.

COLLINS & CORBIN,
*Solicitors of Gilbert Collins,*
*Guardian ad litem.*

GILBERT COLLINS,
*Guardian ad litem counsel pro se.*

Dated, May 15, 1916.

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

GILBERT COLLINS,
*Guardian ad litem counsel pro se.*

## Petition of Appeal.

(Filed May 17, 1916; Served May 18 and 19, 1916).

*To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:*

The petition of Mary Elizabeth Dennis, Louise Cable Dennis and Alfred Dennis Bell, Junior, by Gilbert Collins, their guardian ad litem, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the third day of May in the year 1916, in a certain cause wherein the said Frederick S. Dennis, Samuel S. Dennis and Warren E. Dennis, surviving executors of and trustees under the will and codicil of Alfred L. Dennis, deceased, were complainants, and the said Alfred L. Pinneo Dennis, Mary Elizabeth Dennis, Louise Cable Dennis, Eliza Dennis Bell, Alfred Dennis Bell, James Christy Bell, Junior, Samuel Dennis Bell, Alfred Dennis Bell, Junior, Helen Eliza Dennis, James Shepard Dennis 2d, Dorothy Dennis, Frederick James Dennis, Warren Egerton Dennis, Junior, and Mildred Dennis, were defendants, in this respect, to wit: that the said decree adjudges that the share of the estate of Alfred L. Dennis which was held in trust for the benefit of the said Alfred L. Dennis' son, James S. Dennis, during his life, should now be paid and distributed to his son Alfred L. P. Dennis and that the children of said Alfred L. P. Dennis have no interest therein. And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same

is erroneous for that the said decree should have adjudged that the share of the said testator's estate which was held in trust for the benefit of testator's son, James S. Dennis, during his life, should now be paid and distributed equally *per capita* between the said Alfred L. P. Dennis and the latter's children, namely, two of your petitioners, Mary Elizabeth Dennis and Louise Cable Dennis. Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this honorable Court shall seem meet.

COLLINS & CORBIN,
*Solicitors of Gilbert Collins,*
*Guardian ad litem for Appellants.*

GILBERT COLLINS,
*Guardian ad litem Counsel pro se.*

## Answer of Alfred L. P. Dennis to Petition of Appeal.

(Filed May 22, 1916).

The answer of Alfred L. Pinneo Dennis, defendant-respondent, to the petition of appeal of Mary Elizabeth Dennis, *et als.*, defendants-appellants:

This defendant-respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was on the 3rd day of May, 1916, made in the Court of Chancery in a cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said order is agreeable to equity and it prays that the same may be affirmed with costs to be adjudged to this respondent.

PITNEY, HARDIN & SKINNER,
*Solicitors for and of Counsel with Defendant-Respondents.*

## Answer of Frederick S. Dennis, et als, to the Petition of Appeal.

(Filed May 26, 1916).

The answer of Frederick S. Dennis, Samuel S. Dennis and Warren E. Dennis, surviving executors of and trustees under the will and codicil of Alfred L. Dennis, deceased, complainants-respondents, to the petition of appeal of Mary Elizabeth Dennis et al., defendants-appellants:

These complainants-respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that an order was on the 3rd day of May, 1916, made in the Court of Chancery in a cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced, and they pray that such order may be made in affirmance, reversal or modification of the aforesaid order as is agreeable to equity, and they pray that costs be adjudged to them.

BEDLE & KELLOGG,
*Solicitors for and of Counsel with Complainants-Respondents.*

## ADDENDA

### Copy of Will and Codicil Thereto of Alfred L. Dennis, Deceased.

WILL.

IN THE NAME OF GOD, AMEN:

I, Alfred L. Dennis, of the City of Newark, Essex County, New Jersey, being of sound mind, memory and understanding, for which blessing, I thank God, do make and publish this my last Will and Testament in manner following, that is to say

*First.* I do hereby nominate, constitute and appoint my four sons, James S. Dennis, Frederick S. Dennis, Samuel S. Dennis and Warren E. Dennis, Executors of this my last will and Testament, and no security to be required of either of them: I direct that each of my said executors shall receive the sum of Five hundred dollars as full compensation for their services. I also appoint as advisory counsel to my said executors, on the wisdom and policy and security of investments or re-investments, or changes in investments of the monies of my estate, Joseph D. Bedle of Jersey City, New Jersey, and Alfred L. Dennis, Junior, son of my deceased brother, Martin R. Dennis, and direct my executors to pay them each One thousand dollars out of my estate as a compensation therefor.

*Second.* I give, bequeath and devise unto my said executors, all my estate of every description, personal and real, to be held by them and the survivors and survivor of them. in trust, for the period of four years from my decease.

*Third.* I hereby direct my executors to pay my funeral expenses as soon as conveniently can be after my decease.

*Fourth.* Having given to each of my own sisters a house and lot, I give and bequeath unto my half sister Malvina Lewis, wife of Edward A. Lewis, in case she survives me, the sum of Twenty-five hundred dollars, for her sole and separate use, estate and benefit.

*Fifth.* I give and bequeath to each of my servants, who shall at the time of my decease, have been in my service, for the period of five years the sum of One hundred dollars.

*Sixth.* I direct my executors to set apart, of my estate and hold in interest, securities amounting to Five thousand dollars, or as much more as may be necessary to raise an annuity of three hundred dollars, which annuity, I give and bequeath to my sister Mary I. Shepard (widow of Samuel Shepard), the same to be paid to her during her lifetime, semi-annually from my death, and if her daughter Isabella shall survive her mother, the said annuity to be continued to the said Isabella during her lifetime from the death of her mother, such annuity not to exceed three hundred dollars, nor in any event to be less.

*Seventh.* I direct my executors to set apart, of my estate and hold in trust, securities amounting to Five thousand dollars, or as much more as may be necessary to raise an annuity of Three hundred dollars, which annuity I give and bequeath to my sister, Mrs. Frances H. Camp (wife of James H. Camp), the same to be paid to her during her lifetime, semi-annually from my death, and if her daughter, Anna Josephine, shall survive her mother, the said annuity to be continued to the said

Anna Josephine, during her lifetime, from the death of her mother, such annuity not to exceed Three hundred dollars, nor in any event to be less.

*Eighth.* In token of the devotion of Mrs. Josephine R. Dennis to her husband, my only brother, Martin R. Dennis deceased, and of my high regard for her, I give and bequeath to her an annuity of Three hundred dollars, during her lifetime, payable semi-annually from my death.

*Ninth.* All the monies held or controlled by me for my sister-in-law, Laura Shepard, having been largely overpaid by me, to or for her, and the same being exhausted, I give and bequeath to her an annuity of three hundred dollars during her lifetime, payable semi-anually from my death, in order thereby to secure her support and maintenance.

*Tenth.* I direct my executors to set apart and hold in trust sufficient of my estate, to produce the annuities not hereinbefore provided for. The executors shall take the individual receipts of the annuitants for all the annuities given in this Will.

*Eleventh.* I hereby direct my executors to pay to each of my children, or the issue of each, if dead (the issue representing the parent) during the four years my estate is held in trust by my said executors, sums amounting yearly to three thousand dollars each.

*Twelfth.* I hereby empower my executors to appropriate as much as may be necessary of the balance of the income of my estate to the payment and cancellation of all my debts, if any, and of all mortgages, if any, upon my real estate.

*Thirteenth.* At the termination of the period of four years from my death, as mentioned in the second clause foregoing, I hereby give, bequeath and devise all the rest, residue and remainder of

my estate of every description, personal and real, unto all my children, living at my death, and the issue of any of my children who may have died before me, said children and issue to take share and share alike, the issue representing the parent, and entitled only to the share that the parent would be, if alive,—The right to each of said shares to become vested at my death, subject to the trust aforesaid, and two-thirds of the share of my daughter, Mary Eliza, to be subject to the further trust following—I direct that the said two-thirds of the share of my said daughter shall continue to be held and shall be held by my executors, the survivors and survivor of them, in trust for and during her natural life, and to pay the income and proceeds thereof when received unto her during that time, for her sole and separate use, and as her separate estate exclusively, and at her death the said two-thirds to be relieved from said trust, and go to her issue, to whom I then give, bequeath and devise the same, and in default of such issue at her death, I give, bequeath and devise the same to her next of kin and heirs. Nothing in this last trust contained shall affect the absolute right of my said daughter in and to the other one-third of her share.

*Fourteenth.* I hereby authorize and empower my executors and trustees to continue my present investments, unless there be in their opinion good reason for a change. All investments of my estate made by my executors and trustees, whether of principal or accumulations or from whatever source derived, I direct shall only be made in first bonds and mortgages on improved real estate in the State of New Jersey worth three times at least the amount invested, and which bonds and mortgages, by law or agreement according to law, shall

be free from taxation, or the tax agreed to be paid by the borrower according to law. Also in registered bonds of the State of New Jersey exempt from taxation. Also in registered bonds of the United States, alike exempt, and also in registered bonds of any of the New England or Middle States, that may be approved of by the advisory counsel aforesaid and my executors. And also in first mortgage bonds of any Rail Road Company which has been operated a sufficient number of years to prove its ability to earn and promptly pay more than its interest on its bonds, and which company has regularly earned and paid all its interest on its bonds.

*Fifteenth.* I hereby empower my executors and trustees, the survivors and survivor, to sell and convey in their judgment, all my real estate or any share or interest therein, wherever situated, and to execute good and sufficient conveyances therefor.

*Sixteenth.* If either of my sons shall reside in foreign lands, his executorship and trusteeship herein may be suspended during that time, and all the powers and duties under this will be exercised by the others, by residence, I mean absence in foreign lands.

*In Witness Whereof,* I have hereunto set my hand and seal this sixth day of August, in the year of our Lord, one thousand eight hundred and eighty-three.

[L. S.] ALFRED L. DENNIS.

*Codicil.*

Signed, sealed, published and declared by the said Alfred L. Dennis to be his last Will and Testament in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of each other, and of the testator, and at his request. (This Will consists of four (4) pages besides this part of a page.)

W. Muirheid, Jersey City, N. J.
Flavel McGee, Jersey City, N. J.
John Griffin, Jr., Jersey City, N. J.

CODICIL

This is a Codicil to the last Will and Testament of Alfred L. Dennis, of Newark, New Jersey, which Will bears date the sixth day of August, eighteen hundred and eighty-three.

I do hereby ratify and confirm my said Will, save so far as any part thereof shall be altered by this codicil.

As to the disposition made in said Will of my residuary estate, personal and real, in favor of my four sons, at the termination of the period of four years from my death (which disposition is contained in the Thirteenth paragraph of my said Will), I do hereby alter my said Will in the following respects:

Two-thirds part of the shares of the residue and remainder of my estate, personal and real, which in said Will I have given, bequeathed and devised unto my four sons respectively and their issue, as mentioned in the thirteenth paragraph thereof, I give, bequeath and devise, upon a like trust as that provided in said Will for my daughter, the income and proceeds thereof when received, to be paid unto my said sons respectively during the

natural life of each, and at the death of each, the said two-thirds to be relieved from said trust and go absolutely to the issue of the son so dying. The trustees of said two-thirds for either of my said sons shall be the remaining three of my sons, their survivors or survivor, and for that purpose, the two-thirds part aforesaid of either son, shall vest in the other three sons as trustees, their survivors and survivor. In case of default of issue at the death of any of my sons I give, bequeath and devise his said two-thirds part held in trust, as aforesaid, to his next of kin and heirs, according to the nature of the estate, whether personal or real.

In regard to the two-thirds to be held in trust for my daughter, as provided in my Will, should there be default of issue at her death, my meaning in the said Thirteenth paragraph of the Will, in the use of the words "next of kin and heirs" is the same as I have used said words in this codicil, in case of default of issue of any son.

Nothing in this codicil shall affect the absolute right of my said sons respectively, in and to the other one-third part of their shares, as provided in said Thirteenth paragraph.

The Trustees, their survivors and survivor, of the two-thirds parts aforesaid of my sons respectively, are hereby empowered, in the performance of their trusts, to sell and convey all real estate wherever situated, or any interest therein, belonging to such trust, and to execute good and sufficient conveyances therefor; but nothing herein shall interfere with the power given to my Executors and Trustees in the Fifteenth clause of my Will, the survivors and survivor, to sell and convey real estate, or any share or interest therein, and to execute good and sufficient conveyances

therefore, in the discharge of their duties as Executors and Trustees under said Will.

The Sixteenth paragraph of my Will in regard to the absence of either of my sons in foreign lands, shall be applicable not only to said Will, but to this Codicil.

In Witness Whereof, to this present writing, which I hereby declare to be a codicil to my last Will and Testament, and which I direct to be added thereto, and to be taken as a part thereof, I have set my hand and seal this Fifteenth day of April, Eighteen hundred and ninety.

ALFRED L. DENNIS, [L. S.]

Signed, sealed, published and declared by the said Alfred L. Dennis as and for a codicil to his last Will and Testament, and to be taken as a part thereof, in the presence of us, who were present at the same time, and we then subscribed our names as witnesses, at the request of the said Alfred L. Dennis, in his presence, and in the presence of each other.

FLAVEL MCGEE, 282 Barrow St., Jersey City, N. J.

J. D. BEDLE, JR., 260 Montgomery St., Jersey City, N. J.

THOS. F. BEDLE, 473 Jersey Avenue, Jersey City, N. J.