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World Case Book

New Jersey Court of Errors and Appeals

BILL OF COMPLAINT.

10

(Filed May 31, 1927)

IN CHANCERY OF NEW JERSEY

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

The complainants Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma Linders who sues by Fred W. Linders, her next friend and guardian and Robert E. Linders who sues by Fred W. Linders, his next friend and guardian, respectfully shows that: 20

1. Amelia Tierney late of Jersey City, died on February 1st, 1927, leaving a last will and testament which has been duly admitted to probate on May 18th, 1927, by the Hudson County Surrogate, a copy of which is hereto annexed and made part hereof and marked Exhibit "A". 30

2. Arthur O'Toole, the executor named in said will has qualified as such executor, taken upon himself the burden of administering said estate and letters testamentary thereon have been issued to him by the Surrogate of Hudson County aforesaid. Said Arthur O'Toole is an attorney at law and solicitor in Chancery of the State of New 40

Bill of Complaint

Jersey and is practicing and has an office at 921 Bergen Avenue, Jersey City, aforesaid.

3. Complainants include all of the beneficiaries named in the fourth and fifth paragraphs of said will. 10

4. The premises referred to in the fourth paragraph of said will as 143 Manhattan Avenue, comprise a tract of land about 50 feet in width and 130 feet more or less in depth, upon which is erected a brick building known as 141-143 Manhattan Avenue which is occupied by several tenants, the rental income therefrom amounting to the sum of \$490.00 per month.

20 5. All rents accruing from said premises subsequent to February 1st, 1927, have been collected by the defendant herein, Arthur O'Toole, without any authority, permission or consent on the part of these complainants, and he, the said Arthur O'Toole, claims that by virtue of the fact that he was named as executor in the last will and testament of said Amelia Tierney, deceased, he has and has had since the death of said deceased, the 30 sole right to collect the rent, issues and profits from said real estate and to manage and control the same, notwithstanding the fact that his attention has been called to the fact that although he was named as executor in said will, he had no such right or authority either before or subsequent to the probate of said will.

6. Annexed hereto and made part hereof and marked Exhibit "B" is a copy of a letter sent 40 to the said Arthur O'Toole under date March

Bill of Complaint

18th, 1927, and annexed hereto and made part hereof and marked Exhibit "C" is the reply made by Joseph W. Henry, counsel for said Arthur O'Toole to the said letter Exhibit "B".

Annexed hereto and marked Exhibit "D" is a 10 copy of the letter sent to said Joseph W. Henry in reply to the letter marked Exhibit "C".

7. On May 16th, 1927, Fred W. Linders and Charlotte J. Linders were duly appointed as guardians of their daughter Irma E. Linders, who is now upwards of 20 years of age and they were also duly appointed as guardians of their son Robert E. Linders, who is upwards of 14 years of age, by the Surrogate of Hudson County afore- 20 said and annexed hereto and marked Exhibit "E" and "F" are copies of the letters of guardianship issued to said complainants by said Surrogate as aforesaid.

8. Complainants aver that the said Arthur O'Toole pretending to act as such executor during the period commencing on February 2nd, 1927, and ending on May 18th, 1927, and thence hitherto, claims that by reason of the fact that he 30 was nominated as executor in said will, he had the immediate right upon the death of the deceased to assume control and possession of all her real and personal property and to have the sole and exclusive possession thereof and management and control thereover; and that he also claims to have the sole right and power to determine when and on what terms he will make sale of said real estate of which said testatrix died 40 seized; that he is not obliged to consult with any

Bill of Complaint

one respecting the sale thereof and that the complainants as legatees and devisees named in the fourth and fifth paragraphs of said will do not have the right and can not take over said real estate and forego the sale thereof.

10 Complainants further aver that the said Arthur O'Toole pretending to have the power and authority as aforesaid denies that these complainants have any right to the management and control of said real estate and to the collection and distribution of the rents, issues and profits arising therefrom.

20 And they further aver that the said Arthur O'Toole claims that he has made large and numerous expenditures out of the rents, issues and profits so arising from said real estate and collected by him as aforesaid; which said expenditures are claimed by him to have been made in the nature of repairs and other charges for the upkeep and maintenance of said real estate.

30 9. Complainants aver that the said Arthur O'Toole neither individually nor as executor named in said will nor as executor, qualified as such after said will had been admitted to probate, as aforesaid, had any legal right or lawful authority to take over the management and control of said real estate or to collect the rents, issues and profits arising therefrom, and that the sole right to the management and control of said real estate is vested in these complainants.

40 10. Complainants aver that although a sale of said land and real estate is directed by the will

Bill of Complaint

of said testatrix, yet the proceeds of sale thereof are to be paid to said beneficiaries, namely these complainants, whose interest is identical whether they take the land or the proceeds of sale; that Arthur O'Toole, the executor named in said will has no duty to perform with respect to the land 10 and real estate or the proceeds of sale thereof other than to sell the land and pay over the proceeds to these complainants; and these complainants have the right to elect and do elect to take said lands instead of said proceeds of sale.

11. Complainants further aver that if it shall be ascertained that the personal estate of said testatrix is insufficient to pay the debts, legacies 20 and charges against the same, they stand ready and willing to advance the moneys necessary to pay such debts, legacies and charges and to make payment thereof, as soon as the same can be ascertained.

12. Complainants aver that they are the sole legatees and devisees of all the personal property of the testatrix and of all the proceeds of sale of the testatrix's real estate, after the debts of the testatrix, the legacies mentioned in said will and 30 the expenses of the settlement of the estate are paid; and that they are ready to pay or adequately secure the payment of these charges and desire to exercise their election to take said lands.

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

1. Arthur O'Toole, individually and as executor 40 of the estate of Amelia Tierney, deceased, who are

Bill of Complaint

the defendants in this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the rents, issues and profits arising from the premises in the bill of complaint herein described as 141-143
10 Manhattan Avenue, in Jersey City, New Jersey, and of which Amelia Tierney died seized, that have come into control or possession of the said defendants or either of them; and that the said defendants may answer and set forth by what authority they or either of them have assumed the control and management of said real estate and the collection of the rents, issues and profits arising therefrom since the death of said testatrix.
20

3. That the said defendants or one of them may be decreed to pay to these complainants the amount so found to be due to these complainants with interest and costs by a short day to be appointed by this Court.

4. That an injunction may issue out of and under the seal of this court commanding the said defendants and each of them to absolutely desist and refrain from undertaking and assuming the
30 control or management of said real estate and the collection of the rents, issues and profits arising therefrom and from interfering in any way with the right of these complainants to the sole and exclusive management and control of said real estate and collection of rents, issues and profits arising therefrom.

5. That the defendant Arthur O'Toole, executor
40 of the estate of Amelia Tierney, deceased, may

Bill of Complaint—Exhibit "A"

be restrained and enjoined from making any sale or other disposition of the real estate aforesaid, of which the said Amelia Tierney died seized, except as directed by this court; that the defendant may be directed to apprise this court of the amount of cash or security which he may require
10 to satisfy all possible needs of the estate for the payment of legatees, creditors, and expenses of administration; and that upon the payment thereof or the adequate security for the payment thereof, on such other terms as this court may direct and as may be equitable and just, the said Arthur O'Toole, executor as aforesaid, may be ordered and directed to exhaust said power of sale and convey said lands and premises to these
20 complainants.

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

MELOSH, MORTEN & MELOSH,
Solrs. for and of counsel with Complts.

30

EXHIBIT "A."

(Annexed to the Complaint)

IN THE NAME OF GOD, Amen

I, Amelia Tierney, being of sound mind and disposing memory do by these presents publish and declare this instrument, to be my last will
40 and testament.

Bill of Complaint—Exhibit "A"

First: I direct that my funeral expenses be paid as soon as conveniently can be done, after my decease.

Second: I give and bequeath to Joseph Molen
10 the sum of ten thousand dollars.

Third: I give and bequeath to Bill Barr the sum of One thousand (\$1,000.00) dollars.

Fourth: I direct that my real property located at 143 Manhattan Ave., Jersey City, N. J. be sold by my executors and the proceeds of such sale be distributed share and share alike to Mrs. Brengel, Lottie Linders, Fred Linders, Irma Linders and
20 Robert Linders, the above bequests to Joseph Molen and Billy Barr, however, to be paid before such distribution.

Fifth: All the rest, residue and remainder of my estate whether real, personal or mixed, I direct be distributed share and share alike to Mrs. Brengel, my sister aforementioned, Lottie Linders, my niece aforementioned, Fred Linders, my nephew-in-law, aforementioned, Irma Linders, my grand-niece aforementioned, Robert Linders, my
30 grand-nephew aforementioned.

Sixth: I appoint Arthur O'Toole of Jersey City, N. J. the executor of this my last will and testament.

Signed, sealed subscribed herewith by means of my marks.

(X) (L. S.)

EXHIBIT "B."

(Annexed to Complaint)

March 18th, 1927.

Arthur O'Toole,
921 Bergen Avenue,
Jersey City, N. J.

10

Dear Mr. O'Toole:

Confirming the conversation I had with you over the telephone yesterday, I would state our position so that there may be no misunderstanding hereafter.

As I view it at the present time, there is a
20 caveat against the probate of the will of Amelia Tierney. Under these circumstances, you have no right to act as executor. Neither have you the right to take charge of personal estate of the deceased or any of her personal assets.

Under the terms of the will, you are not even given the power to collect the rents of the real estate as executor and therefore you would not even have any right to collect the rents at the
30 present time were you appointed, much less only nominated in a paper writing which may hereafter be established as a will.

I therefore suggest that we have a conference at an early date and get together and arrange for authority of some kind to be given to some one to collect the rents and possibly for an appointment of an administrator *pendente lite*, if we agree that such is necessary.

40

Bill of Complaint—Exhibit "C"

I would like to have your views as soon as possible so that there may be no unnecessary delay or criticism of our act in permitting the collection of the rents and the collection of the assets of the estate under present conditions.

10 Awaiting your reply, and assuring you of my personal esteem, I am

Yours very truly,

LOUIS G. MORTEN.

20

EXHIBIT "C."

(Annexed to Complaint)

March 25th, 1927.

Messrs. Melosh, Morten & Melosh,
No. 1 Exchange Place,
Jersey City, N. J.

30 Gentlemen:

Re: Estate of Amelia Tierney

Your letter of March 18th, signed by Louis G. Morten, has been referred to me by Arthur O'Toole, Executor, whom I represent.

40 I have advised Mr. O'Toole that your suggestions to either have someone satisfactory to you

Bill of Complaint—Exhibit "D"

appointed to collect the rents, or have an *administratro pendente lite* appointed, hardly seem to be in order.

Since Mr. O'Toole's powers as executor are derived from the will itself, and not from the probate thereof, I quite fail to see how he could be criticized for collecting rents from the property that he is ordered by the terms of the will to sell. 10

Yours very truly,

JOS. W. HENRY.

JWH:M

20

EXHIBIT "D."

(Annexed to Complaint)

March 28th, 1927.

Mr. Joseph W. Henry,
Counsellor at Law,
921 Bergen Avenue,
Jersey City, N. J.

30

Dear Sir:

We have your letter of the 25th inst. in the matter of the estate of Amelia Tierney.

We must confess that we are wholly at a loss to understand the reasoning of Mr. O'Toole and 40

Bill of Complaint—Exhibit "D"

yourself. It seems so elementary that no paper writing can be recognized as a will nor the powers therein conferred, exercised, until the will is probated, that it should hardly require a statement of such fact.

10 If Mr. O'Toole is satisfied to act as an executor *de son tort*, he does so on his own responsibility and it must be distinctly understood that our clients are not to be considered in any way approving or ratifying anything that he does.

20 So far as the collection of rents is concerned, they have never given nor are they to be considered as consenting to the collection of rents by him, under any authority conferred by the alleged will or otherwise.

We are stating our position in this manner, so that there may be no misunderstanding concerning the same.

Yours very truly,

MELOSH, MORTEN & MELOSH.

AFFIDAVIT OF BERTHA BRENGEL.

State of New Jersey, }
County of Hudson. } ss:

Bertha Brengel, of full age, being duly sworn on her oath, says:

I am one of the complainants in the above 10 entitled cause and a sister of Amelia Tierney, deceased. Annexed hereto is circumstantial copy of the last will and testament of Amelia Tierney and I am one of the devisees and legatees therein mentioned.

My sister Amelia Tierney died February 1st, 1927, at the Jersey City Hospital.

Immediately after her death, the defendant 20 Arthur O'Toole, claiming to act as executor, assumed control of the premises described in the bill of complaint and known as numbers 141-143 Manhattan Avenue, Jersey City, which were owned by my sister Amelia Tierney in her lifetime and of which she died seized.

On February 7th, 1927, I saw Arthur O'Toole at his office and I told him that I would be represented in the matter of my sister's es- 30 tate by Melosh, Morten & Melosh. He told me that he was the executor named in the will and that he had the right to manage the property, sell the property whenever he wanted to and that he was not obliged to ask odds of any one.

Later, and when opportunity offered, I con- sulted my own counsel, as a result of which, a letter was sent to said Arthur O'Toole under date March 18th, 1927, a copy of which is hereto 40 annexed.

Bertha Brengel

I am informed and I believe it to be true and therefore I aver that said Arthur O'Toole has collected all rents accruing from these premises since February 1st, 1927; that without any authority from any one, he has made various expenditures and declines to recognize the authority of the owners of said property to manage and control the same.

I am advised that at the present time, the title to said lands and premises is vested in Lottie L. Linders, Frederick W. Linders, Irma Linders, Robert Linders and myself, and that said Arthur O'Toole has no right or authority to collect the rents, issues and profits arising from said premises, nor to dispose of the same and that he is acting wholly without authority in the premises.

BERTHA BRENGEL.

Subscribed and sworn to before me this
23rd day of May, A. D. 1927.

Ada Depew,
Notary Public of New Jersey.

AFFIDAVIT OF CHARLOTTE J. LINDERS.

State of New Jersey, }
County of Hudson. } ss:

Charlotte J. Linders, of full age, being duly sworn on her oath, says:

I reside at 346 Webster Avenue, Jersey City. 10

I am one of the complainants in the above entitled cause.

I am the daughter of Bertha Brengel, the wife of Fred W. Linders and the mother of Irma E. Linders and Robert E. Linders.

In the will of Amelia Tierney, who died on February 1, 1927, which has been admitted to probate in the Hudson County Orphans' Court, my mother is named as Mrs. Brengel, I am named as Lottie Linders, my husband is named as Fred Linders, my daughter is named as Irma Linders and my son is named as Robert Linders. 20

On May 16th, 1927, my husband Fred W. Linders and myself were appointed guardians of our daughter Irma E. Linders and our son Robert E. Linders, by the Surrogate of the County of Hudson in the State of New Jersey. 30

My daughter Irma Linders will be 21 years of age on February 17, 1928.

My son Robert E. Linders will be 21 years of age on April 1, 1934.

I first met Mr. Arthur O'Toole, the executor named in the will of Amelia Tierney, deceased, on February 1, 1927. 40

Charlotte J. Linders

On February 2, 1927, at the request of Mr. Arthur O'Toole, my husband, my mother and myself went to the office of said Arthur O'Toole. On this occasion we were accompanied by my sister-in-law, Mrs. Lulu Brengel. My daughter Irma
10 Linders is employed in Mr. O'Toole's office.

After we arrived at the office, he read to us the will of Amelia Tierney which he had drawn the previous day. At that time, my mother told Mr. O'Toole that she desired to have the earring out of the safe deposit box; that she had the keys of the safe deposit in her possession and she then and there gave it to him.

20 Nothing was said at this time about retaining Mr. O'Toole to represent us in the proceedings on the probate of the will.

On Monday night, February 7th, 1927, my mother, my husband and myself went to Mr. O'Toole's office and saw him there. At that time we anticipated that there would be opposition to the probate of the will of Amelia Tierney. My mother said that she was going to be represented in the matter by Melosh, Morten & Melosh.
30

I told Mr. O'Toole that I had accompanied my mother to the office of Melosh, Morten & Melosh during the morning of that day and that Mr. Morten had expressed some doubt as to whether Mr. O'Toole would feel that he could represent any of the beneficiaries named in the will of Amelia Tierney, deceased, in view of the fact that he was named as executor. He assured me however that
40 there was no reason why he could not represent

Charlotte J. Linders

my daughter, my son, my husband and myself in the probate proceedings and my husband and myself then asked him if he was going to take care of our interest in the matter and he said that he would do so.

About two weeks ago, I had a conversation with the said Arthur O'Toole about the sale of the property and he told me and also requested me to inform my mother that neither my mother nor myself had any right to place any sale price on the property; that he was the only one that had any right to sell the property and that when he got ready to sell the property, he would obtain the appraisal from three disinterested appraisers and then he would know what price to sell the property for.
10
20

At that time, my husband asked Mr. O'Toole whether he could sell the real estate of which Amelia Tierney died seized without consulting "us," meaning thereby the residuary legatees and Mr. O'Toole said that he could sell the property without consulting any of us as regards to price and he said that he could. My husband said that we wanted to be consulted before any price was fixed at which the property was to be sold.
30

I then asked Mr. O'Toole if it was not possible for us, meaning the residuary legatees to take over the property ourselves and not sell it and he said no, that we could not do it.

The rent from this property amounts to about \$490 per month and all rents that have accrued from the premises 141-143 Manhattan Avenue,
40

Charlotte J. Linders

since February 1st, 1927, have been collected by the said Arthur O'Toole, he asserting that he was the only one who had any power to collect the rents because he was named as executor in the will of Amelia Tierney, deceased.

10 He never asked my husband or myself whether we consented to have him collect the rents and we never gave him any consent to do so.

When he made the statement that he was the only one who was authorized to collect the rents because he was named as executor, we assume, he being a lawyer, knew the law and that he was telling us the truth and we relying thereon, made
20 no comment.

I am informed that he has made various expenditures from the rents which he has collected but I do not know the amount thereof.

Acting on behalf of myself and as one of the guardians of my daughter Irma and one of the guardians of my son Robert, we do not desire to have the real estate of which Amelia Tierney died seized, namely the premises 141-143 Manhattan
30 Avenue, Jersey City, sold by the executor or any one else and we desire to take over the property in conjunction with all of the residuary legatees and manage and control the same for ourselves.

CHARLOTTE J. LINDERS.

Subscribed and sworn to
before me this 25th day
of May, A. D. 1927.

40 Phil C. Lutz,
Notary Public of New Jersey.

AFFIDAVIT OF FRED W. LINDERS.

State of New Jersey, }
County of Hudson. } ss:

Fred W. Linders, of full age, being duly sworn on his oath, says:

I reside at 346 Webster Avenue, Jersey City. 10

I am one of the residuary legatees named in the will of Amelia Tierney, deceased. She died February 1st, 1927, and her will has been admitted to probate by the Hudson County Orphans' Court. A copy of said will is hereto annexed and made a part hereof and marked Exhibit "A".

The first time I met Mr. Arthur O'Toole, the executor named in said will, was February 2nd, 20 1927, at his office when he read the will in the presence of Mrs. Bertha Brengel, my wife Charlotte J. Linders, my sister-in-law Mrs. Lulu Brengel and my daughter Irma E. Linders and myself.

On that occasion, said Arthur O'Toole stated that because he was named as executor in the will of Amelia Tierney, he had the sole right to the control and management of her estate.

The next time we consulted said Arthur O'Toole about the estate was on the evening of February 30 7th, 1927. At that time Mrs. Bertha Brengel, my wife and myself were present.

We told him, the said Arthur O'Toole, that we anticipated trouble over the will and Mrs. Brengel said that she had retained Melosh, Morten & Melosh to represent her.

My wife said that she had spoken to Mr. Morten of that law firm and that Mr. Morten had 40

Fred W. Linders

expressed doubt as to whether or not Mr. O'Toole would feel that he could represent us in the probate proceedings in as much as he was named as executor in the will.

10 Mr. O'Toole said that he could represent us in the probate proceedings and that he would take care of our interests.

I was also present at a conversation which took place about two weeks ago at which my wife and myself were present. At that time said Arthur O'Toole said that he would not need to consult us regarding the price at which he would sell the said real estate on Manhattan Avenue and that it
20 was not necessary that he should let us know at what price it was to be sold for before it was sold.

My wife asked him then whether it was not possible for the parties in interest to take over the property instead of having it sold and he said that they could not do so, and that the property had to be sold.

Ever since February 1st, 1927, said Arthur O'Toole has been collecting the rents from said
30 premises which amount to about \$490 per month and I am informed that he has made large disbursements therefrom although I do not know the exact nature thereof.

On May 16, 1927, my wife and myself were appointed as guardians of our daughter Irma E. and as guardians of our son Robert E., by the Hudson County Surrogate. Attached hereto is a copy of the letters of guardianship, issued to us
40 as such guardians.

Answer and Counterclaim

On behalf of myself and as guardian of my daughter Irma E. and as guardian of my son Robert E., I am desirous that the real estate of which Amelia Tierney died seized shall not be sold by said executor and I am desirous of acting in conjunction with the other parties in interest in taking over the real estate as it is and retaining the management and control thereof, with the other parties in interest. 10

FRED W. LINDERS.

Subscribed and sworn to
before me this 24th day
of May, A. D. 1927.
Ada Depew,
Notary Public of New Jersey. 20

ANSWER AND COUNTERCLAIM OF ARTHUR O'TOOLE, AS EXECUTOR OF THE ESTATE OF AMELIA TIERNEY, DECEASED.

(Filed Aug. 10, 1927)

The answer of Arthur O'Toole, as executor of the estate of Amelia Tierney, deceased, to the bill of complaint of complainant: 30

1. He admits paragraphs 1, 2, 3 and 4.

2. He denies the allegations of Paragraph 5 so far as they allege that this defendant has acted without authority of law in the conduct and management of the estate of Amelia Tierney, and he denies that he is without authority to take charge of the property described in the bill of complaint. 40

Answer and Counterclaim

3. He admits the allegations of paragraph 6.

4. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 7, and leaves the complaint to make proof thereof.

10 5. Defendant admits the allegations of paragraph 8, so far as they allege that he is the executor of the estate of Amelia Tierney and as executor has taken possession of the property of said estate, but denies that the complainants have any right to the management and control of real and personal property of the estate of Amelia Tierney.

20 6. He denies the allegations of paragraphs 9, 10, 11, and 12.

FOR COUNTERCLAIM:

1. Amelia Tierney late of Jersey City, County of Hudson County, State of New Jersey, died on the first day of February, 1927, leaving a last will and testament, a copy of which is annexed to the bill of complaint, marked Exhibit A, which will was duly admitted to probate by the Surrogate of
30 the County of Hudson and letters testamentary thereon issued to the defendant who has taken upon himself the burden of administering the said estate.

2. In and by her said will the said Amelia Tierney directed that all her funeral expenses be paid as soon as might conveniently be done after her demise, and gave and bequeathed to Joseph Molen the sum of \$10,000 and to one Billy Barr the sum
40 of \$1000.

Answer and Counterclaim

3. That after making the above mentioned bequests the said testatrix provided:

“Fourth: I direct that my real property located at 143 Manhattan Avenue, Jersey City, N. J. be sold by my executor and the proceeds of such sale
10 be distributed share and share alike to Mrs. Bren- gel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders, the above bequests to Joseph Molen and Billy Barr however, to be paid before such distribution.

“Fifth: All the rest, residue & remainder of my estate whether real, personal or mixed, I direct be distributed share and share alike to Mrs. Bren- gel, my sister aforementioned, Lottie Lin-
20 ders, my niece, aforementioned, Fred Linders, my nephew-in-law aforementioned, Irma Linders, my grand niece aforementioned, Robert Linders, my grand nephew aforementioned.

4. This defendant further alleges that the complainants Bertha Bren- gel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders claim that under the 4th paragraph of said will are the sole devisees of the premises described in
30 the bill as 143 Manhattan Avenue, Jersey City, New Jersey.

5. Defendant further shows that at the death of the said Amelia Tierney she left the following heirs at law who may have an interest in the real property left by the said Amelia Tierney: Clara Tullio and Ida Soper, who are daughters of a deceased sister of the said testatrix, Amelia Tier-
40 ney.

Answer and Counterclaim

6. That a question has arisen on the construction of said will whether the complainants herein take the real estate No. 143 Manhattan Avenue, Jersey City, under the residuary clause or whether said real estate goes to this defendant as trustee of the estate of Amelia Tierney, or whether the title to said real estate descends to the heirs at law of said Amelia Tierney subject to be divested by sale by this defendant as executor of the estate of Amelia Tierney.

This defendant is without adequate remedy in the courts of law and therefore prays:

1. That the complainants Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma Linders an infant, and Robert E. Linders an infant may answer this counterclaim without oath and statement therein made.

2. That said Clara Tullio and Ida Soper may be made parties to this suit.

3. That this court may construe said last will and testament of said Amelia Tierney and declare the respective rights of the parties to this suit thereunder.

PERKINS & DREWEN,
Solicitors for Defendants.

REPLICATION AND ANSWER OF COMPLAINANTS TO COUNTERCLAIM.

(Filed Sept. 13, 1927)

These complainants join issue on the answer interposed herein by the defendant Arthur O'Toole.

As to the counterclaim contained in said answer, complainants say:

1. They admit the allegations contained in paragraph 1 of said counterclaim and that letters testamentary were issued to the defendant as executor of the said estate.

2. Reserving for greater certainty the right to refer to the will mentioned in paragraph 2 of said counterclaim, these complainants admit the allegations contained in said paragraph.

3. Reserving for greater certainty the right to refer to the will mentioned in paragraph 3 of said counterclaim, these complainants admit the allegations contained in said paragraph.

4. These complainants admit the allegations contained in paragraph 4 of said counterclaim.

5. These complainants deny that Clara Tullio and Ida Soper have any interest in the estate of which the said Amelia Tierney, died seized.

6. These complainants deny that any question has arisen on the construction of the said will, as alleged in paragraph 6 of said counterclaim, and aver that the alleged question is purely academic and has no bearing on the issues involved herein or the merits of this cause.

MELOSH, MORTEN & MELOSH,
Solrs. for Complainants.

**ANSWER OF DEFENDANTS CLARA TULLIO AND
IDA SOPER TO COUNTERCLAIM.**

(Filed Oct. 22, 1927)

The defendants, Clara Tullio and Ida Soper, answering the counterclaim of Arthur O'Toole filed herein, say that:

10 1. They admit the allegations and charges contained in paragraphs 1, 2 and 3 of the counterclaim.

2. These defendants admit so much of paragraph 4 as alleges the claim made by the complainants in this action, but they deny the validity of such claim.

20 3. They admit paragraph 5, except that they charge that they do have an interest in the real property left by the said Amelia Tierney.

4. They admit paragraph 6 of the counterclaim.

SEPARATE DEFENSE:

30 1. The fourth and fifth clauses of the will of Amelia Tierney, deceased, as set forth verbatim in paragraph 3 of the counterclaim, do not provide for the vesting of the title to the premises at 143 Manhattan Avenue, Jersey City, and therefore the said Amelia Tierney died intestate as to this property.

40 2. These defendants are the daughters of a deceased sister of the said Amelia Tierney and as such are tenant in common of the fee in this property aforesaid. These defendants further allege that as such heirs-at-law of the decedent, they have an immediate vested interest in this property.

PAUL J. DUFFY,
Solr. for Defts. Clara Tullio and
Ida Soper.

**REPLICATION OF DEFENDANT ARTHUR
O'TOOLE, EXECUTOR OF THE ESTATE OF
AMELIA TIERNEY, DECEASED.**

This defendant joins issue on the answer filed on behalf of Clara Tullio and Ida Soper.

PERKINS & DREWEN,
Solrs. of Arthur O'Toole, 10
executor, etc.

CONCLUSIONS.

(Filed January 17, 1928)

1. When a testator directs his executor to sell 20 land and to pay the proceeds to beneficiaries and the executor has no other duty to perform with respect to said land, or the proceeds of sale, the beneficiaries may elect to take the land instead of the proceeds but to make such election effective, all persons interested in the proceeds of sale must join therein.

2. A general guardian of a minor has no authority to make such election for his ward. This 30 court may elect for the minor if it appears to the minor's advantage to do so.

3. When the land is not devised to the executor or to anyone else and the executor has but a bare authority to sell and distribute the proceeds, the land descends to the testator's heirs at law, subject to the power of sale is exercised, the heirs at law are entitled to possession of the land and to the rent therefrom. 40

Conclusions

Messrs. Melosh, Morten & Melosh for complainants

Messrs. Perkins & Drewen for defendant O'Toole.

Mr. Paul J. Duffy for defendants Tullio, *et al.*

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FIELDER, V. C.:

Amelia Tierney died February 1, 1927, leaving a will duly admitted to probate. By the first clause she directed the payment of her funeral expenses; by the second and third clauses she bequeathed \$10,000 to Joseph Molen and \$1,000 to Billy Blair; by the fourth clause she provided as follows:

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"I direct that my real property located at 143 Manhattan Avenue, Jersey City, N. J., be sold by my executors and the proceeds of such sale be distributed share and share alike to Mrs. Bren- gel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders, the above bequests to Joseph Molen and Billy Blair however, to be paid before such distribution.

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By the fifth clause she directed that all the rest, residue and remainder of her estate be distributed share and share alike among the same persons named in the fourth clause and by the sixth (and last) clause she appointed Arthur O'Toole sole executor.

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The persons named in the fourth clause filed their bill herein against the executor; alleging that he has taken management and control of the Manhattan Avenue property since the death of Amelia Tierney and has collected the rent

Conclusions

therefrom, all without authority under the will; that they have the sole right to such control and rents; that being entitled to the proceeds of sale of said property, they have the right to elect and do elect to take the lands instead of the proceeds of sale thereof; that if the personal estate of the testatrix is insufficient to pay her debts, legacies and charges against the estate, they stand ready and willing to advance the money necessary therefor and to pay the same or to secure the payment thereof. They pray that the executor account to them for rent collected and that he be enjoined from interfering with complainant's control of the property and the collection of rent therefrom; that he be directed to apprise this court of the cash or security required for the payment of debts, legacies and administration expenses and that upon payment, or security for payment, by them, the executor be directed to exhaust his power of sale by a conveyance of said land to complainants. The executor answered the bill denying complainants' right to control and managements of, or rents from, said property and he filed a counterclaim alleging that two strangers to the suit, namely Clara Tullio and Ida Soper, are heirs at law of the testatrix and as such may have an interest in said real property and that questions have arisen on the construction of the will as to which he desires the advice and direction of this court. The complainants answered the counterclaim, denying any interest in Clara Tullio and Ida Soper and also denying that construction of the will is required. Clara Tullio and Ida Soper answered the counterclaim alleging that since the will does not vest title to the Manhattan Avenue

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Conclusions

property in anyone, the testatrix died intestate as to such property; that they are heirs at law of the testatrix and that upon the death of the testatrix, title to said property vested in them immediately, as tenants in common with other heirs at law. The issues were submitted on the pleadings and on a stipulation admitting that two of the complainants are minors, appearing by their guardians appointed by the Surrogate of Hudson County and that Clara Tullio and Ida Soper are heirs at law of the testatrix.

It is settled in this state that when a testator directs his executor to sell land and to pay the proceeds to beneficiaries and the executor has no other duty to perform with respect to said land or the proceeds of sale, the beneficiaries have the right to elect to take the land instead of the proceeds and that this court will not permit the executor to sell against the wishes of the beneficiaries. But all of the beneficiaries of the proceeds of sale must join in such election; otherwise the executor will not be enjoined from exercising his power of sale as directed by the will (*Fluke v. Fluke*, 16 N. J. Equity, 478; *Bolton v. Stretch*, 30 N. J. Equity, 536; *Morse v. Hackensack Savings Bank*, 47 N. J. Equity, 279; *Hatt v. Rich*, 59 N. J. Equity, 492; *Cronan v. Coll*, 69 N. J. Equity, 694; *Condict v. Condict*, 73 N. J. Equity, 301; *Cranstoun v. Westerdorf*, 91 N. J. Equity, 34). The complainants are not the only persons interested in the proceeds of sale of the Manhattan Avenue property. The direction of the will is that out of the proceeds of the sale thereof the bequests to

Conclusions

Joseph Molen and Billy Blair be paid before the complainants take the proceeds, which direction, in effect, charges these legacies on the property and gives the legatees an equitable lien on the proceeds of the sale thereof. It is true that the complainants say they are willing to pay, or to secure the payment of such legacies, but the legatees have a right to their lien on the land and to require the payment of their legacies in the manner directed by the testatrix. They are not parties to this suit and without their consent, or hearing accorded them, this court should not substitute security for that given them by the will for the payment of their legacies. Further, for the two complainants who are minors, an election to take the lands instead of the proceeds of sale is attempted to be made for them by their guardian appointed by the Surrogate. The minors cannot make the election themselves and a general guardian is without authority to elect for them (*Fluke v. Fluke*, *supra*; *Condict v. Condict*, *supra*; *Cranstoun v. Westerdorf*, *supra*). Should it appear that it would be to the advantage of the minors, this court might make the election for them, but there is nothing in the pleadings from which the court can determine that such an election would be for their benefit. It is not perceived how the conveyance, which the complainants desire the executor to make to them, can vest good title in the minors and if it can and it should in the future and during their minority, prove advisable to turn their interests into money, it could only be done at considerable expense to them through partition or proceedings to sell infants' lands. It is there-

Conclusions

fore apparent that all persons interested in the sale which the testatrix directed and in the proceeds thereof, do not consent to take the property in lieu of the proceeds and the complainants' prayer that the executor be directed to make conveyance to the complainants will be denied. The court is without information as to the amount of residuary estate—whether it is sufficient to pay debts and administrations expenses. Perhaps some portion of the proceeds of sale of the Manhattan Avenue property may be required for such purpose. The executor is advised to make sale of the Manhattan Avenue property with all due diligence and from the proceeds to pay the legacies, and if there are sufficient assets in the residue of the estate to pay funeral charges, debts and administration expenses, to pay the balance to the persons named in the fourth clause of the will. If there is not sufficient property in the residue of the estate to pay the charges aforesaid the executor should withhold from such proceeds sufficient for that purpose and pay the balance to the persons named in the fourth clause of the will.

The will contains no devise of the Manhattan Avenue property to the complainants or to the executor and it does not pass under the residuary clause; hence, the testatrix died intestate as to this land and it descended to her heirs at law, subject to the power of sale in the executor and to the trusts declared thereon. Until the power of sale is exercised the heirs at law are entitled to possession thereof and to the rents and income therefrom. (*Herbert v. Tuthill*, 1 N. J. Equity,

Conclusions

141; *Gest v. Flock*, 2 N. J. Equity, 108; *Fluke v. Fluke*, *supra*; *Todd v. Wortman*, 45 N. J. Equity, 723; *Morse v. Hackensack Savings Bank*, *supra*; *Bonnell v. Bonnell*, 47 N. J. Equity, 540; *Hopping v. Gray*, 82 N. J. Equity, 502; *Triplett v. Ivins*, 93 N. J. Equity, 202). The pleadings do not disclose who the heirs at law of the testatrix are, but from the briefs filed by counsel I gather that Bertha Brengel is the only complainant who is an heir at law and that Clara Tullio and Ida Soper are the only other heirs at law. The complainants assert their rights jointly and they base their prayer for a restraint against the executor from exercising control over and the collection of rent from the property in question, upon what they assert to be their rights under the fourth clause of the will. It is obvious that upon such ground the restraint cannot be granted and it will therefore be denied. In their answer the defendants Tullio and Soper express their willingness that the executor should continue to collect the rent and manage the property, but the executor is advised that he has no such right under the will. He is advised that the Manhattan Avenue property was not devised to the complainants by either the fourth or the residuary clauses of the will and that the testatrix died intestate as to said property and that the right to the possession thereof and to the rents and income therefrom is in the heirs at law of the testatrix, subject to the power of sale in the executor. No opinion is intended to be expressed as to who are the heirs at law of the testatrix.

FINAL DECREE.

(Filed Jan. 23, 1928)

This matter coming on to be heard in the presence of Melosh, Morten & Melosh, solicitors for and of counsel with complainants, and of Perkins & Drewen, solicitors for and of counsel with defendant, Arthur O'Toole, executor, etc., and of Paul J. Duffy, solicitor for defendants, Clara Tullio and Ida Soper; and this cause having, by stipulation of the respective counsel, been submitted to the court on the pleadings; and the court having examined the pleadings and the stipulation entered into by counsel for the respective parties, and having heard the argument of the said respective counsel and considered the same:

It is, on this 23rd day of January, 1928,

ORDERED, ADJUDGED and DECREED that the complainants' bill be and the same hereby is dismissed, with costs.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to the prayer for interpretation of the will of Amelia Tierney, deceased, under the counter-claim of the defendant, Arthur O'Toole, executor, etc., that the said will contains no devise of the lands and premises described in the bill of complaint to the complainants or to the executor; and that the said lands and premises do not pass under the residuary clause of the will; and that said Amelia Tierney died intestate as to the said lands and premises, the same descending to the heirs at law of said Amelia Tierney, subject to the power of sale in the said Arthur

Final Decree

O'Toole as executor named in the said will, and to the trusts declared thereon; and that until the exercise of the power of sale, the heirs at law of the said Amelia Tierney are entitled to possession of the lands and premises, and to the rents and income therefrom.

And complainants having applied, upon the settlement of this decree, for an order vacating the restraint imposed upon them and enjoining them from proceeding with a certain action in the Supreme Court of New Jersey, upon their judgment in ejectment, and the Court being of the opinion that such restraint should be continued, it is accordingly ORDERED that said application be denied.

It is further Ordered, adjudged and decreed that a counsel fee of \$500.00 be allowed to Perkins & Drewen, counsel of Arthur O'Toole, executor, and a counsel fee of \$150.00 be allowed to Paul J. Duffy, counsel of Clara Tullio and Ida Soper, and that said counsel fee be paid out of the estate of said Amelia Tierney, deceased.

Respectfully advised,

JAMES F. FIELDER.
V. C.

ORDER TO SHOW CAUSE.

Upon reading and filing the bill of complaint herein and the affidavits and exhibits thereto annexed and due consideration thereof;

10 It is on this 31st day of May, 1927, on motion of Melosh, Morten & Melosh, of counsel with complainants, ORDERED:

20 That the defendants Arthur O'Toole, individually and as executor of the estate of Amelia Tierney, deceased, show cause before this court on June 13th, 1927, at the Chancery Chambers in Jersey City, at ten o'clock in the forenoon, Daylight Saving Time, or as soon thereafter as counsel can be heard, why an order should not be made commanding said defendants to desist and refrain from undertaking and assuming the management and control of the premises #141-143 Manhattan Avenue, Jersey City, New Jersey, and the collection of rents, issues and profits arising therefrom and from interfering with the complainants' right to undertake and assume the management and control of the said real estate and the collection of the rents, issues and profits thereof, until the further Order of this Court in
30 the premises.

And it is further ORDERED;

40 That service of this order to show cause and of the bill of complaint and affidavits and exhibits thereto annexed, be made upon the defendants by giving one copy thereof to said Arthur O'Toole, personally, or by leaving said copy at his office with the clerk in charge thereof, within two days from the date hereof, between the hours of 10

Arthur O'Toole

a. m. and 4 p. m., which said copy of said order to show cause and of said bill of complaint, affidavits and exhibits thereto annexed may be certified as true copies by said solicitors for said complainants.

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And it is further ORDERED:

That said defendants serve upon the solicitors for the complainants on or before June 8th, 1927, a copy of their affidavits and other papers intended to be submitted by said defendants upon the argument of this order to show cause.

Respectfully advised,

20

JOHN BENTLEY.
V. C.

AFFIDAVIT OF ARTHUR O'TOOLE.

(Filed June 27, 1927)

State of New Jersey, }
County of Hudson. }ss:

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I, Arthur O'Toole, of full age being duly sworn upon my oath depose and say that I am the defendant in the above entitled matter, and that I am an Attorney at Law and solicitor in Chancery of the State of New Jersey.

On February 1st, 1927, I was called to the bedside of Amelia Tierney, deceased, at the Jersey 40

Arthur O'Toole

City Hospital, Jersey City, New Jersey, and was requested by said Amelia Tierney, deceased, to make her last will and testament.

Pursuant to her request, I made her last will
10 and testament, which will and testament was admitted to Probate on May 18, 1927, by the Hudson County Surrogate, Hudson County, New Jersey. Amelia Tierney in such last will and testament designated me, as her executor, and instructed me to sell her real property which was located at 143 Manhattan Avenue, Jersey City, New Jersey, and to distribute the proceeds from such sale to the beneficiaries named in the will.

20 Since the death of Amelia, deceased, I have been acting as executor of her estate and have been in control of all her personalty including the premises 143 Manhattan Avenue, Jersey City, I have collected the monthly rentals accruing from the tenancies therein amount collected to date \$2200.00 I have, in the course of my management of such property, ordered necessary repairs, such as: the installation of a water heater at a cost of \$102.00; have purchased about 15 tons for \$225.00;
30 paid the superintendent \$30.00 for three months service; paid first half 1927 taxes amounting to \$502.26; recompensed my agent for collections of monthly rentals, 3% per month, in the sum of \$53.10; paid \$153.00 for fire insurance; paid \$9.38 for landlord—tenants liability insurance; paid \$4.04 for gas and electric; paid \$18.75 for plumbing; paid \$18.90 for water rent; paid \$1.08 for advertising vacant apartments; paid \$22.00 for
40 dining room fixtures; paid \$2.00 for electrical

Arthur O'Toole

services. I have also ordered the painting of two apartments the exact cost of which I am unfamiliar at this time.

I have not made any excessive expenditures, all amounts outlayed being in keeping with preservation of the estate. 10

At the time of the making of the last will and testament of Amelia Tierney, deceased, the testator told me that she did not want either one or all of the beneficiaries to receive the property at 143 Manhattan Avenue, Jersey City, in lieu or in exchange for the bequests which she provided for them in such will and testament, but that she wanted the property sold to the highest
20 bidder and the proceeds of the sale to be distributed according to the directions of such last will and testament.

I am cognizant of the interest which the residuary legatees in the last will and testament of Amelia Tierney, deceased, have in the proceeds of the sale of the premises at 143 Manhattan Avenue, and I have repeatedly told them that I would welcome their cooperation in obtaining the highest
30 purchase price for such premises.

ARTHUR O'TOOLE.

Sworn and subscribed to
before me this 8th day
of June, 1927.
Matthew J. Snodder,
Notary Public of N. J.

ORDER DISMISSING ORDER TO SHOW CAUSE.

(Filed June 27th, 1927)

This matter being opened to the Court by Messrs. Melosh, Morten & Melosh, solicitors for the complainants, in the presence of Messrs. Perkins & Drewen, solicitors for the defendant, upon the Order to show cause made herein, on the 31st day of May, 1927, requiring the defendant to show cause why an order should not be made commanding him to desist and refrain from undertaking and assuming the management and control of the premises 141-143 Manhattan Avenue, Jersey City, New Jersey, and upon reading the affidavit and hearing the argument of counsel thereon.

It is on this 27th day of June, 1927, on motion of Perkins & Drewen, solicitors for defendant, ORDERED that the Order to show cause made herein on the 31st day of May, 1927, be and the same hereby is dismissed.

Respectfully advised,

JAMES F. FIELDER.
V. C.

PETITION OF ARTHUR O'TOOLE.

(Filed Oct. 28, 1927)

1. Your petitioner is the defendant in the above entitled cause.

2. On the first day of February, 1927, Amelia Tierney, late of the City of Jersey City, died leaving a last will and testament wherein your petitioner was named executor of the estate of the said decedent. The said last will and testament was duly admitted to probate by the Surrogate of the County of Hudson on the 18th day of May, 1927. Your petitioner has duly qualified as executor of the said estate and has since the death of the said decedent, and since the probate of her last will and testament discharged the duties of his office under the said will.

3. On the 31st day of May, 1927, the above named complainants did file their bill of complaint herein. By reason of the matters and things in the said bill alleged, they did pray that this defendant, among other things, be enjoined and restrained from undertaking and assuming the control or management of the real estate mentioned in the 4th paragraph of the said last will and testament, and from collecting the rents, issues and profits arising therefrom, and from interfering in any way with the sole and exclusive management and control by the complainants of the said real estate and the collection by them of the rents, issues and profits arising therefrom.

4. At the time of the filing of the said bill of complaint, an order to show cause was issued by this court requiring your petitioner, individually

Petition of Arthur O'Toole

and as such executor aforesaid, to show cause why the prayer of the bill as hereinabove set forth should not be granted and your petitioner accordingly be enjoined and restrained until the further order of this court in the premises.

10 5. Upon the return of said Order to Show Cause, the merits thereof and the law and facts involved were argued before this Honorable Court by the solicitors of the complainants and by the solicitors of your petitioner. Upon such argu-
ment first heard and considered, an Order was made and entered on the 27th day of June, 1927, wherein and whereby it was ordered that the
20 above mentioned Order to Show Cause made on the 31st day of May 1927, be dismissed.

6. Thereafter, and on or about the 10th day of August, 1927, your petitioner, as defendant in the said cause, did file therein an answer and counter claim; and in the counter claim did allege among other things, that certain questions had arisen on the construction of the will of the said decedent whether the complainants took the real estate in said paragraph 4 of the will mentioned, under
30 the residuary clause or whether said real estate goes to this defendant as trustee of the estate of Amelia Tierney, or whether the title to said real estate descends to the heirs at law of the said Amelia Tierney subject to be divested by sale by this defendant as executor of the estate aforesaid. And, in his said counter claim your petitioner did further allege that in addition to the complainants, the deceased left the following
40 heirs at law who may have an interest in the said

Petition of Arthur O'Toole

real estate, that is to say, Clara Tullio and Ida Soper, daughters of a deceased sister of the said decedent. And, in the prayer of the said counter claim your petitioner does pray that the said Clara Tullio and the said Ida Soper be made parties to this suit, and that this court construe the said last will and testament of Amelia Tierney and declare the respective rights of the parties to this suit therein. 10

7. After the filing of the said answer and counter claim and on the 6th day of September, 1927, the solicitors of the complainants did serve on the solicitors of your petitioner notice of a motion to strike out the counter claim. The said motion was duly argued and as a result thereof, there was made and entered in this court under date of the 12th day of September 1927, an Order denying the said motion to strike out your petitioner's counter claim. This court did also direct that the said Clara Tullio and Ida Soper, heirs as aforesaid, be served with the process of this court and be brought in as parties defendant in this cause. 20

8. Pursuant to this Court's direction as aforesaid process of *subpoena ad respondendum* was duly served upon the said Clara Tullio and Ida Soper on the 14th day of September, 1927, and thereafter the said Clara Tullio and Ida Soper did duly file an answer to the counterclaim of your petitioner herein, wherein it is alleged, among other things, that the said Amelia Tierney died intestate as to the said real estate; that the said Clara Tullio and Ida Soper, are the daugh- 30
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Petition of Arthur O'Toole

ters of a deceased sister of the said decedent, and that as such they are tenants in common of the fee in the said real estate; that they are heirs-at-law of the said decedent and that they have a vested interest in the said property. After the
 10 making of the said Order dismissing the motion to strike out petitioner's counterclaim, the complainants caused to be filed their replication to petitioner's answer and an answer to petitioner's counterclaim wherein it is, among other things, denied that the said Clara Tullio and Ida Soper have any interest in the estate of which the said Amelia Tierney died seized, and wherein it is
 20 denied that any question has arisen on the construction of said will as alleged in your petitioner's counterclaim.

9. And your petitioner does further show that by reason of all the matters and things in this petition above set forth there is now pending and undetermined in this Court a cause for the construction and determination of the meaning, intent and import of the said will, and for the adjudication and settlement of all the rights and in-
 30 terests of your petitioner as executor, of the complainants and of the said Clara Tullio and Ida Soper under the said will and in the said real estate by virtue of the terms and provisions of the said will.

10. And your petitioner further shows that notwithstanding the pendency of the said cause in this Court in manner aforesaid, the complainants did on the 25th day of August, 1927, institute suit
 40 in the New Jersey Supreme Court, Hudson

Petition of Arthur O'Toole

County, against your petitioner as such executor aforesaid to eject your petitioner as such executor from the said real estate and to compel the surrender by him to the complainants of his possession thereof. The said action of ejectment did
 10 present for determination to the New Jersey Supreme Court, your petitioner respectfully submits, the same question that is now pending and undetermined, as aforesaid, in this Court. In the said action of ejectment, as appears more fully by reference to the complaint filed therein, the claim of the plaintiffs is that they are entitled to the possession aforesaid by reason of the terms and provisions of the said last will and testament,
 20 a copy of which is annexed to the said complaint in the action of ejectment and made a part thereof; and that your petitioner as defendant in the said action of ejectment is not, by reason of his executorship or anything in the said last will and testament contained, entitled to the possession of the said real estate or to the collection of the rents, issues and profits arising therefrom, or to the management and control thereof. All of the questions thus submitted by the complainants to
 30 the New Jersey Supreme Court were at the time of such submission pending and undetermined, in the manner aforesaid, in this Court.

11. Your petitioner filed his answer to the said action in ejectment wherein he denied the several allegations of the plaintiffs in said action and did further aver that the plaintiffs therein (the complainants in the present cause) had previously filed their bill of complaint in this Court which
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Petition of Arthur O'Toole

had assumed jurisdiction of all matters and things set up in the said complaint in ejectment.

10 12. And your petitioner further shows that such proceedings were taken by the complainants, as plaintiffs in the said action of ejectment, that an order was entered in the said Supreme Court striking out the answer of your petitioner and his several defenses to the said action of ejectment.

20 13. And your petitioner further shows that the complainants do intend without delay to cause to be issued out of the New Jersey Supreme Court such writ or process as may be necessary to eject your petitioner from the said lands and premises and to take over unto themselves full possession and control thereof and that the complainants do intend to accomplish this notwithstanding the fact that the questions submitted by them and by your petitioner to this Court touching and concerning all rights in the premises are still pending and undetermined herein.

30 14. And your petitioner does further show that the said Clara Tullio and Ida Soper, who were added by this Court as parties defendant to this cause so that their interest, if any, in the said real estate and under the said last will and testament might be determined, were not parties to the said action of ejectment. And your petitioner does therefore also respectfully submit that the prosecution by the complainants of their said action of ejectment is in violation of the rights not only of your petitioner as a suitor in this Court, but
40 also of the said Clara Tullio and Ida Soper; and

Petition of Arthur O'Toole

is in violation of the jurisdiction of this Court first had in the premises.

Wherefore, your petitioner prays that this Honorable Court make an order requiring the complainants to show cause before it on a day 10 to be fixed by the Court why they and each of them and their solicitors, agents and representatives should not be forthwith restrained and enjoined from in any wise further pursuing or instituting any action, suit, cause or proceeding for the purpose of, or calculated to result in the ejecting of your petitioner as such executor aforesaid, from the said lands and premises and depriving him of the management and control of the said 20 real estate and the collection of the rents, issues and profits arising therefrom; and why they should not be forthwith enjoined and restrained from so doing until the further order or decree of this Court in the premises.

And your petitioner will ever pray, etc.

PERKINS & DREWEN,
Solicitors of Petitioner.

AFFIDAVIT OF ARTHUR O'TOOLE.

State of New Jersey, }
 County of Hudson. }ss:

Arthur O'Toole of full age being duly sworn according to law, on his oath deposes and says:

10 I am the petitioner in the foregoing petition named; I have read the said petition and all matters and things therein contained are true to the best of my knowledge, understanding and belief.

ARTHUR O'TOOLE.

Subscribed and sworn to
 before me this 28th
 day of October, 1927.

20 John P. Nugent,
 Attorney-at-Law
 of New Jersey.

ORDER TO SHOW CAUSE.

(Filed Oct. 28, 1927)

30 Upon reading and filing the duly verified petition of Arthur O'Toole, the defendant in the above entitled cause, it is on this 28th day of October, 1927;

ORDERED that Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma Linders, Fred W. Linders as next friend of Robert E. Linders, and Irma Linders, show cause before this Court at Chancery Chambers, No. 1 Exchange Place,
 40 Jersey City, New Jersey, on the 14th day of No-

Order to Show Cause

vember, 1927, at ten o'clock in the forenoon, or as soon thereafter as the Court can attend to the same, why the prayer of the said petition should not be granted;

And it is hereby further ORDERED that in the 10
 meantime and until the further order of this Court, they, the said Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma Linders, Fred W. Linders as next friend of Robert E. Linders and Irma Linders, and each of them, their attorneys, solicitors, agents, and representatives are restrained and enjoined from in any wise further pursuing or taking any step in any suit or proceeding for the purpose of, or calculated to 20
 result in, ejecting of the defendant herein as executor under the last will and testament of Amelia Tierney, deceased, from the lands and premises referred to in the said petition, and from depriving said defendant as such executor of the management and control of the said real estate and the collection of the rents, issues and profits arising therefrom;

And it is further ORDERED that a copy of this order and of the said petition, certified by the 30
 solicitors of the petitioner, be served on Melosh, Morten & Melosh, solicitors of the complainants within 3 days from the date hereof.

E. R. WALKER,
 C.

Respectfully advised
 John Bentley,
 Vice-Chancellor.

**ANSWER OF COMPLAINANTS TO PETITION OF
ARTHUR O'TOOLE.**

(Filed Nov. 14, 1927)

The answer of Bertha Brengel, *et als.*, complainants to the petition of Arthur O'Toole.

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1. Complainants deny that the petitioner is the defendant in the above entitled cause.

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2. Complainants admit the death of Amelia Tierney; that she left a last will and testament in which she named Arthur O'Toole as executor; that said last will and testament was admitted to probate by the Surrogate of the County of Hudson and that the said Arthur O'Toole qualified as executor of said estate.

30

3. They have no knowledge or information sufficient to form a belief as to whether or not the said Arthur O'Toole has discharged his duties as executor since the probate of the said will, but they aver that without warrant or authority, he has assumed the management and control of the real estate of which the testatrix died seized; and has unlawfully excluded and still does unlawfully exclude the complainants from their right to the possession and control of said real estate and rents, issues and profits thereof.

3. Complainants admit the statements contained in paragraph 3 of the petition of Arthur O'Toole.

4. Complainants admit the statements contained in paragraph 4 of the said petition.

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5. Complainants admit the statements contained in paragraph 5 of the said petition.

*Answer of Complainants to Petition of Arthur
O'Toole*

6. Complainants admit the statements contained in paragraph 6 of the said petition.

7. Complainants admit the statements contained in paragraph 7 of the said petition.

10

8. Complainants admit the statements contained in paragraph 8 of the said petition.

9. Complainants aver that there is no merit in the cause brought by Arthur O'Toole as executor of the estate of Amelia Tierney for the construction of the will of said deceased; and that it is only filed for the purpose of embarrassing and preventing complainants from obtaining the possession and control of the real estate of said deceased, to which they are lawfully entitled.

20

10. Complainants admit the statements contained in paragraph 10 of said petition, excepting the statements contained in the last sentence thereof. These complainants deny that the questions submitted to and decided by the Supreme Court are or ever were pending or undetermined in this Court.

30

11. Complainants admit the statements contained in paragraph 11 of the said petition.

12. Complainants admit the statements contained in paragraph 12.

13. Complainants admit the statements contained in paragraph 13.

14. These complainants deny the statements contained in paragraph 14, excepting that they

40

*Answer of Complainants to Petition of Arthur
O'Toole*

admit that Clara Tullio and Ida Soper were not parties to said ejectment action.

15. Complainants aver that annexed hereto, made part hereof and marked Exhibit 1, is the copy of the complaint filed by these complainants as plaintiffs in the New Jersey Supreme Court, in the action in ejectment, brought by them against the defendant.

16. Complainants aver that annexed hereto, made part hereof and marked Exhibit 2, is the copy of the answer filed by the defendant in the action in ejectment, instituted by these complainants in the New Jersey Supreme Court, as aforesaid.

17. Complainants aver that annexed hereto, made part hereof and marked Exhibit 3, is the copy of the notice of motion to strike out the answer of said defendant so filed by him in the action brought by these complainants in the New Jersey Supreme Court, aforesaid.

18. Complainants aver that annexed hereto, made part hereof and marked Exhibit 4 is the copy of the opinion of the Court, determining the motion so made by these complainants in said ejectment action so brought by them against the defendant in the New Jersey Supreme Court, as aforesaid.

19. Complainants aver that annexed hereto, made part hereof and marked Exhibit 5, is the copy of the order entered in the New Jersey Supreme Court in said ejectment action so brought

*Answer of Complainants to Petition of Arthur
O'Toole*

by these complainants against the defendant, as aforesaid.

20. Complainants aver that the defendant herein and in said judgment so entered in the New Jersey Supreme Court in said ejectment action, was not ignorant of the facts in question pending said ejectment suit; that the facts averred as a defense by said defendant in said ejectment action could have been received as a defense; that the defendant in said ejectment action was not prevented from availing himself of the defenses alleged in his answer by any fraud or accident or by any act of these complainants who were plaintiffs in said ejectment suit.

21. Complainants aver that on the hearing of said motion to strike out the answer of said defendant in said ejectment action, so brought by these complainants against the defendant, in the New Jersey Supreme Court, as aforesaid, these complaints were compelled to admit the truth of all the facts alleged and pleaded by the defendant in his answer in said ejectment action in said Supreme Court;

That they did admit the facts therein alleged and pleaded and that the said Court, after due consideration, determined the questions involved, in favor of these plaintiffs and against the said defendant and that this Court under the law and circumstances of this case, must recognize the questions determined by said Supreme Court in said action as *res judicata*.

Answer of Complainants to Petition of Arthur O'Toole

Wherefore, these complainants submit that the petition of said Arthur O'Toole filed herein shall be dismissed with costs to these complainants to be taxed.

10 MELOSH, MORTEN & MELOSH,
Solrs. for Complainants.

State of New Jersey, }
County of Hudson. }ss:

Louis G. Morten, of full age, being duly sworn on his oath, says:

20 Annexed hereto and marked Exhibits 1, 2, 3, 4 and 5 are copies of the complaint in the suit brought by Bertha Brengel, *et als.*, in the New Jersey Supreme Court, against Arthur O'Toole, executor of the estate of Amelia Tierney, the answer filed by the defendant, the notice of motion to strike out answer, the conclusions of the Court and the order striking out the answer of the defendant, all of which are referred to in the foregoing petition.

LOUIS G. MORTEN.

30 Subscribed and sworn to
before me this 14th day
of November, A. D. 1927.
Ada Depew,
Notary Public,
of New Jersey.

EXHIBIT 1.

Complaint

NEW JERSEY SUPREME COURT

HUDSON COUNTY

10

BERTHA BRENGEL, CHARLOTTE J.
LINDERS, FRED W. LINDERS,
IRMA LINDERS, who sues by
FRED W. LINDERS, her next
friend and ROBERT E. LINDERS,
who sues by FRED W. LINDERS,
his next friend and in the al-
ternative BERTHA BRENGEL,

Plaintiffs,

20

vs.

ARTHUR O'TOOLE, executor of
the estate of Amelia Tierney,
deceased,

Defendant.

FIRST COUNT

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Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma Linders who sues by Fred W. Linders her next friend and Robert E. Linders, who sues by Fred W. Linders, his next friend, and in the alternative, Bertha Brengel, demand of Arthur O'Toole, executor of the estate of Amelia Tierney, deceased, the defendant herein, the possession of a certain tract of land with the appurtenances situated in Jersey City, Hudson County, 40

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 1*

New Jersey, of which Amelia Tierney died seized and known as street number 143 Manhattan Avenue, lots 15 and 16 in block 851, county block 1254, Jersey City, New Jersey, with the building
10 thereon erected and plaintiffs say their right, and in the alternative, Bertha Brengel, says that her right to the possession of the same accrued on May 18th, 1927, and that the defendant wrongfully deprives them and in the alternative, her, said Bertha Brengel, of the possession thereof to their damage Five thousand (\$5,000.00) Dollars.

SECOND COUNT

20 1. Amelia Tierney, late of Jersey City, died on February 1st, 1927, leaving a last will and testament which was duly admitted to probate on May 18th, 1927, by the Hudson County Orphans' Court, a copy of which is hereto annexed, made part hereof and marked Exhibit A.

2. At the time of her death, Amelia Tierney was seized of title to the premises described in said will as 143 Manhattan Avenue.

30 3. The premises of which Amelia Tierney died seized and designated by her as 143 Manhattan Avenue, Jersey City, New Jersey, are also known as lots No. 15 and No. 16 in block 851, county block 1254.

They have a total width of about fifty feet on Manhattan Avenue and run through from Manhattan Avenue to Sanford Place and erected on
40 said lands is one, double brick building, used for dwelling house purposes.

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 1*

4. Plaintiffs are the beneficiaries named in the fourth and fifth paragraphs of the will of said Amelia Tierney, deceased.

5. The defendant Arthur O'Toole, executor of
10 the estate of Amelia Tierney, deceased, claims that by virtue of his being named as executor in the will of Amelia Tierney, deceased, his qualification as such executor and the powers given him under said will he is entitled to all of the rents, issues and profits arising from said lands and premises.

6. Defendant Arthur O'Toole as executor of the estate of Amelia Tierney, deceased, claims that he
20 is entitled to the possession of said lands and to all of the rents, issues and profits therefrom, and to the management and control thereof and he has taken such possession, management and control and he has received and is receiving all of the rents, issues and profits therefrom.

7. Plaintiffs aver that the said defendant is not entitled to the possession of said premises or to the rent, issues and profits arising therefrom or
30 to the management and control thereof and that these plaintiffs are entitled thereto.

8. Plaintiffs aver that Bertha Brengel, the plaintiff, is one of the heirs-at-law of the said Amelia Tierney, deceased; that the said Amelia Tierney died a widow, leaving no issue her surviving and leaving as her only heirs-at-law, Bertha Brengel, a sister, one of the plaintiffs herein and Clara Tullio and Ida Soper, daughters of a
40 deceased sister.

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 1*

9. Plaintiffs aver that the whole beneficial interest in the land aforesaid directed to be conveyed as in said will provided, belongs to these plaintiffs for whose use it is given; that they have notified the said defendant that it is against their wishes that he should execute the trust named in said will, namely selling said lands and premises; and that they have elected to take said lands rather than have same sold by said defendant; and they further aver that they have instituted an action in the Court of Chancery of New Jersey to compel the defendant herein to permit these plaintiffs to take said lands.

10. Plaintiffs say that their right to the possession of said premises accrued on May 18th, 1927, and that the defendant Arthur O'Toole, executor of the estate of Amelia Tierney, deceased wrongfully deprives them thereof, to their damage Five Thousand (\$5,000.00) Dollars.

THIRD COUNT

1. Plaintiff Bertha Brengel, repeats the allegations contained in paragraphs 1, 2, 3, 5, 6 and 8 of the second count of this complaint.

2. Plaintiff, Bertha Brengel, avers that, as one of the heirs-at-law of the said Amelia Tierney, deceased, she is entitled to all of the rents, issues and profits of said lands and premises and to the possession thereof and to the management and control thereof, as against the defendant Arthur O'Toole, executor as aforesaid, and that as against the said plaintiff Bertha Brengel, the said

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 1*

defendant Arthur O'Toole, as executor aforesaid, has no right to the possession of said lands and premises or to the rents, issues and profits arising therefrom or the management and control thereof.

3. Plaintiff, Bertha Brengel, says that her right to the possession of said premises accrued on May 18th, 1927, and that the defendant Arthur O'Toole, executor of the estate of Amelia Tierney, deceased, wrongfully deprives her thereof to her damage Five thousand (\$5,000.00) Dollars.

MELOSH, MORTEN & MELOSH,
Attorneys for Plaintiffs.

EXHIBIT "A."

IN THE NAME OF GOD, AMEN.

I, Amelia Tierney, being of sound mind and disposing memory do by these presents publish and declare this instrument to be my last will and testament.

FIRST: I direct that my funeral expenses be paid as soon as conveniently can be done, after my decease.

SECOND: I give and bequeath to Joseph Molen the sum of ten thousand dollars.

THIRD: I give and bequeath to Billy Bair the sum of One thousand (\$1,000.00) Dollars.

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 1*

FOURTH: I direct that my real property located at 143 Manhattan Avenue, Jersey City, N. J. be sold by my executor and the proceeds of such sale be distributed share and share alike to Mrs. Bren-
10 gel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders, the above bequests to Joseph Molen and Billy Barr however, to be paid before such distribution.

FIFTH: All the rest, residue and remainder of my estate, whether real, personal or mixed, I direct be distributed share and share alike to Mrs. Bren-
20 gel, my sister aforementioned, Lottie Linders, my niece aforementioned, Fred Linders my nephew-in-law aforementioned, Irma Linders, my grand-niece aforementioned and Robert Linders, my grand-nephew aforementioned.

SIXTH: I appoint Arthur O'Toole of Jersey City, N. J. the executor of this my last will and testament.

Signed, sealed and subscribed herewith by means of my marks.

(X) (L. S.)

EXHIBIT 2.

Answer and Notice

Defendant Arthur O'Toole, executor of Amelia Tierney, deceased, says that:

FIRST DEFENSE 10

Defendant denies that Plaintiffs are entitled to the possession of the premises described in the complaint.

SECOND DEFENSE

Defendant is the executor of the estate of Amelia Tierney, deceased, and as such executor, is given a power of sale under the will of Amelia
20 Tierney, deceased, and is entitled to possession of the said premises.

THIRD DEFENSE

1. Plaintiffs on the 31st of May, 1927, filed their bill of complaint in the Court of Chancery of New Jersey, praying among other things, for the same relief sought in this action.

2. Defendant filed his answer to said bill and a
30 counterclaim thereto.

3. The Court of Chancery of New Jersey has assumed jurisdiction of all the matters and things set up in the complaint in this suit.

PERKINS & DREWEN,
Attorneys for Defendant.

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 3*

To: Melosh, Morten & Melosh,
Attorneys for Plaintiffs.

Gentlemen:

10 Take notice that upon the trial of the above en-
titled cause, the defendant will move to strike out
the complaint on the following grounds:

1. The complaint shows no cause of action in
the plaintiffs.

2. The complaint shows no rights of possession
in the plaintiffs.

20 3. The complaint shows that the defendant is
entitled to possession of the premises.

4. The Court of Chancery of New Jersey at the
instance of the plaintiff has assumed complete
jurisdiction over all matters set forth in the com-
plaint herein.

PERKINS & DREWEN.

EXHIBIT 3.

30

Notice

SIRS:

40 Take notice that on Saturday, October 1st, 1927,
we shall apply to the Honorable James F. Min-
turn, Justice of the Supreme Court, at the Court
House, Jersey City, at ten o'clock in the fore-
noon, or as soon thereafter as counsel can be
heard, for an order as follows:

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 3*

1. Striking out the first defense interposed by
the defendant herein, on the ground that it is
sham.

2. Striking out the second defense interposed 10
by the defendant herein because it is frivolous
and because it discloses no defense to the action
instituted by the plaintiffs.

3. Striking out the third defense interposed by
the defendant herein because it is frivolous and
because it discloses no defense to the action insti-
tuted by the plaintiffs herein.

4. Striking out paragraph 1 of the third de- 20
fense on the ground that it does not contain a
plain and concise statement of the issuable facts
on which the defendant relies and because it is a
pleading of a conclusion and not of a fact.

5. Striking out paragraph 3 of the third de-
fense on the ground that it does not contain a
plain and concise statement of the issuable facts
on which the defendant relies and because it is a
pleading of a conclusion and not of a fact.

6. And that upon the hearing of said motion, 30
we shall rely upon the complaint and exhibit
thereto annexed, and the answer filed by the de-
fendant.

Dated, September 19th, 1927.

Yours respectfully,
MELOSH, MORTEN & MELOSH,
Attys. for Plaintiffs.

To:

Perkins & Drewen,
Attys. for Defendant.

40

EXHIBIT 4.*Conclusion*

ACKERSON, S. C. C.

This is an action in ejectment.

10 Amelia Tierney died February 1st, 1927, testate, seized in fee simple of title to the premises in question. Her will was admitted to probate in Hudson County and the provisions thereof concerned in this suit, are found in the second, third, fourth, fifth and sixth paragraphs which read as follows:

20 "Second: I give, and bequeath to Joseph Molen the sum of ten thousand dollars.

Third: I give and bequeath to Billy Barr the sum of one thousand (\$1,000) Dollars.

30 Fourth: I direct that my real property located at 143 Manhattan Avenue, Jersey City, N. J., be sold by my executor and the proceeds of such sale be distributed share and share alike to Mrs. Brengel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders, the above bequests to Joseph Molen and Billy Barr however, to be paid before such distribution.

40 Fifth: All the rest, residue and remainder of my estate, whether real, personal or mixed, I direct be distributed share and share alike to Mrs. Brengel, my sister aforementioned, Lottie Linders, my niece aforementioned, Irma Linders, my grandniece aforementioned, Robert Linders, my grandnephew aforementioned.

Answer of Complainants to Petition of Arthur O'Toole—Exhibit 4

Sixth: I appoint Arthur O'Toole, of Jersey City, N. J. the executor of this my last will and testament."

The complaint in this ejectment suit contains 10 three counts. The first is the statutory count in ejectment, claiming right of possession in the plaintiffs in the alternative, either in the residuary beneficiaries named in the fifth item of the will or in Bertha Brengel, one of the heirs at law of the testatrix.

The second count avers that the plaintiffs are the beneficiaries, specific and residuary, named in the will and the defendant claims to be entitled 20 to possession under the terms of the will; that Bertha Brengel is one of the heirs at law of the testatrix and that the plaintiffs are entitled to the whole beneficial interest in the land. The third count is similar to the second count, except that it avers that Bertha Brengel as one of the heirs-at-law of the testatrix is entitled to possession of the premises as against the defendant executor.

The defendant's answer sets up as a first de- 30 fense, a general denial that the plaintiffs are entitled to possession of the premises. As a second defense, that the power of sale under the will gives him the right of possession and that as a third defense, he claims the pendency of Chancery proceedings and that the Court of Chancery has assumed jurisdiction of the controversy.

In his answer, the defendant sets forth a bill 40 of particulars, in which he claims that his title or

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 4*

right of possession in the premises, arises out of the fact that he is the executor named in the above mentioned will, with power of sale, and this appears to be the only title under which he claims.

10 Under this situation, the matter comes before me upon a motion to strike out the first defense as sham and the second defense as frivolous and disclosing no defense, and the third defense as frivolous and disclosing no defense, and to strike out the first paragraph of the third defense on the ground that it does not contain a plain and concise statement of the issuable facts and if the
20 pleading of a conclusion and not a fact and to strike out the third paragraph of the third defense on the same grounds.

No affidavits are filed by either side and the motion is to be decided upon the pleadings and the exhibits annexed thereto.

So far as the first and second defenses are concerned, it is sufficient to say that the defendant as the executor under the will in question, has only
30 a naked power of sale, not coupled with any interest and therefore does not have the right to possession. So far as the property involved in this suit is concerned, it passed upon the death of the testatrix, either to the residuary legatees or to the heirs-at-law of the testatrix.

Don v. Creveling, 25 N. J. L., 449.

40 The defendant, although given the power of sale of the premises in question, is not charged with the duty of collecting the rents, issues and

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 4*

profits thereof, nor given the management thereof, and hence has no interestt in the property whatever.

Boylan v. Meeker, 28 N. J. L., 274.

and of course, having no interest, is not entitled to possession. 10

For the purposes of this motion, it seems unnecessary to determine whether or not the plaintiffs as residuary legatees under the will, or Bertha Brengel, individually, as one of the heirs-at-law is entitled to possession. Since the title cannot "hang in the air" it is either vested in the residuary legatees or the heirs-at-law and since
20 the complaint is broad enough to cover either situation, it is sufficient as against the defendant who has no title.

It would seem, however, that the plain intent of the residuary clause of the will is to best title to all residuary real estate in the legatees therein named, even though the word "heirs" is not used and the residuary estate is "directed to be distributed, share and share alike," to the legatees
30 therein named.

For the reasons above mentioned, the first and second defenses will be struck out.

The third defense merely set up a claim that the same issues are involved in a suit in the Court of Chancery, between the same parties. This is clearly not a good defense to the action. It might be the proper subject of a plea in abatement under the old practice, but since the matter
40

*Answer of Complainants to Petition of Arthur
O'Toole—Exhibit 5*

is urged as a complete defense, and not for the purpose of staying the action in this Court, the third defense must be struck out as insufficient in law. It might also be noted that the first and
10 third paragraphs of this third defense, set forth more conclusions of law.

An Order may be presented in accordance with the conclusions here reached.

HENRY E. ACKERSON, Jr.,
Supreme Court Commissioner.

20

EXHIBIT 5.

Order Striking Out Answer.

Plaintiff having moved to strike out answer interposed by the defendant herein and the court having heard the argument of respective counsel and duly considering the same and being of the opinion that plaintiff's motion should be granted:

30 It is ORDERED:

That the answer interposed by the defendant herein be stricken out with costs to be taxed.

Dated October 24th, 1927.

HENRY E. ACKERSON, Jr.,
S. C. C.

Entered on motion of
40 Melosh, Morten & Melosh,
Attys. for Plaintiffs.

CONCLUSIONS.

A complainant who filed his bill in this court seeking relief in a cause of action within the jurisdiction of this court, may be restrained from prosecuting a subsequent suit brought by him in another court for practically the same relief.

On petition and order to show cause for re-
straint of proceedings at law. 10

Messrs. Perkins & Drewen, for petitioner O'Toole.

Messrs. Melosh, Morten & Melosh, for complainants-respondents.

FIELDER, V. C.:

20

The complainants filed their bill in the above entitled cause, setting forth the probate of the will of Amelia Tierney and the grant of letters testamentary thereon to Arthur O'Toole. The bill alleges that Amelia Tierney died seized of the premises 143 Manhattan Avenue, Jersey City, and that O'Toole, as executor, has assumed the management and control thereof and claims the right to sell the same and that he denies the complainants' claim to such management and control. 30
The bill further alleges that said premises were devised by the will to complainants and that under the terms of the will they are entitled to the possession thereof and the prayer is that O'Toole account for the rent collected and be enjoined from assuming control and management over the premises and from interfering with complainants' management and control.

40

Conclusions

O'Toole answered the bill asserting his right as executor and denying the complainants' claim to management and control and by counterclaim he set up the provisions of the will relating to said real estate and alleged that a question had arisen
 10 on the construction of the will, whether the complainants take the real estate thereunder, or whether the real estate goes to O'Toole as trustee, or whether the title descended to the heirs at law of Amelia Tierney, subject to be divested by sale thereof by O'Toole as executor. The answer and counterclaim allege that certain other persons, namely, Clara Tullio and Ida Soper, as heirs at law of Amelia Tierney, may have an interest in
 20 the real estate in question and the counterclaim prays that they and the complainants may answer the counterclaim and that this court will construe the will and declare the rights of the parties. The complainants did not answer the counterclaim within time but took an order extending their time to answer and within a few days after the date of that order they instituted a suit in ejectment in the New Jersey Supreme Court against O'Toole as executor, wherein they
 30 claimed the right to possession of said premises 143 Manhattan Avenue under the terms of the will of Amelia Tierney and alleged that O'Toole as such executor, wrongfully deprives them of such possession. O'Toole answered the complaint in ejectment denying the complainants' claim and alleging that the complainants (plaintiffs in ejectment) had previously filed their bill in this court and that this court had assumed jurisdiction of all the matters set up in the ejectment complaint. On motion of the plaintiffs in
 40

Conclusions

ejectment (complainants here) O'Toole's answer was stricken out.

While the ejectment suit was pending and before the answer was stricken out, the complainants herein filed a replication to O'Toole's answer
 10 in this cause and an answer to the counterclaim, denying that Clara Tullio and Ida Soper have any interest in said real estate and denying that any question has arisen on the construction of the will. Clara Tullio and Ida Soper also filed an answer to the counterclaim denying the claim set up in the complainants' bill herein and asserting that they (Tullio and Soper) have a vested interest in the property.
 20

Immediately after the order striking out his answer was entered in the ejectment suit, O'Toole filed his petition in this cause setting out the above facts and praying that the complainants herein be enjoined from further prosecuting any action or proceeding calculated to result in ejecting him from the premises in question, until the further order of this court.

The complainants came into this court by filing
 30 a bill which presented their controversy with O'Toole and they prayed this court's decree thereon. The defendant O'Toole answered the bill and by counterclaim prayed for construction of the will which is the basis of complainants' claim and he brought in other parties who claim an interest adverse to the complainants. All parties to the controversy are before this court and the question presented by the pleadings, is:
 40 who, under the terms of the will of Amelia

Conclusions

Tierney, is entitled to the possession of the premises in question? This court had and has full power to hear and determine the subject matter thus in controversy and to settle the rights of the parties before it. The ejectment suit instituted
 10 by the complainants presented the same question then before this court on bill, answer and counterclaim and there was and is before this court the additional question whether Clara Tullio and Ida Soper are entitled to any interest in said lands, which additional question was not before the law court because Tullio and Soper were not parties to the ejectment suit.

This court having been first requested by the
 20 complainants to take cognizance of the controversy and having first obtained jurisdiction by the filing of complainants' bill, the complainants had no right to institute a proceeding presenting practically the same cause of action, to another court and they may be compelled to desist from further proceeding their ejectment suit, either by a restraining order or by attachment for contempt of this court (*Home Insurance Co. v. Howell*, 24 N. J. Equity, 238; *Force v. City of Elizabeth*, 27
 30 N. J. Equity 408; *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Equity, 422; *Sweeney v. Williams*, 36 N. J. Equity, 627; *Bigelow v. Old Dominion Copper Co.*, 74 N. J. Equity, 457-473; *Von Bernuth v. Von Bernuth*, 76 N. J. Equity, 177; *Grover v. Woodward*, 91 N. J. Equity, 250). The defendant (O'Toole) by pleading in the ejectment suit did not forfeit his right to relief here (*Simon v. Townsend*, 27 N. J. Equity, 302).
 40

The defendant, by his petition herein, having prayed that complainants be restrained, such restraint will be granted.

PETITION FOR RE-ARGUMENT.

(Filed Dec. 2, 1927)

The petition of Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma E. Linders, by Fred W. Linders, her next friend and Robert E. Linders by Fred W. Linders his next friend, respectfully shows that: 10

1. On October 28th, 1927, Arthur O'Toole, presented his petition praying that these complainants be restrained and enjoined from instituting any action, suit, cause or proceeding for the purpose or calculated to result in the ejectment of said Arthur O'Toole, as executor, from the lands and premises described in the bill of complaint.

2. On that date, an order to show cause was
 20 made by this Court, requesting these complainants to show cause before this court on November 14th, 1927, why they should not be enjoined, pursuant to the prayer of said petition.

3. At about five o'clock on October 28th, 1927, a copy of said petition and order to show cause were served upon the solicitors for these complainants.

4. Complainants filed their answer to said petition on the return date of said order to show cause which was November 14th, 1927, in which they denied that the petitioner Arthur O'Toole was the defendant in this cause and in which they averred among other things that the defendant in this action, to wit, Arthur O'Toole, executor of the estate of Amelia Tierney, deceased, who was the defendant in the judgment entered in the New Jersey Supreme Court in the ejectment action re- 40

Petition for Re-argument

ferred to in said petition, was not ignorant of the facts in question pending said ejectment suit; that the facts averred as a defense by the said defendant in said ejectment action could have been received as a defense and that the defendant
 10 in said ejectment action was not prevented from availing himself of the defenses alleged in said action by any fraud or any accident or by any act of these complainants, who were the plaintiffs in said ejectment suit.

5. These complainants also averred that the determination of said Supreme Court in said action was *res judicata*.

20 6. While the answer of these petitioners does not state the date on which the judgment was entered in said Supreme Court in said ejectment action, brought by these complainants against the defendant herein, Arthur O'Toole, executor as aforesaid, yet at the argument on said rule to show cause, it was conceded by counsel and we stated to the Court that judgment had been entered in said Supreme Court action prior to the hearing on said order to show cause.

30 7. As a matter of fact and as appears from the copy of the order made in the Supreme Court, the answer interposed by the defendant herein in said ejectment action, was stricken out by order made October 24th, 1927. On that same date, this order was mailed to the Clerk of the New Jersey Supreme Court who presumably received it on the morning of October 25th, 1927.

40 8. Under dated October 27th, 1927, the Clerk acknowledged that he had received the order with

Petition for Re-argument

the request that judgment be entered in said ejectment action and attached hereto and marked Exhibit 1, is a copy of the letter of the Clerk of New Jersey Supreme Court with reference to said judgment.

9. On the morning of October 28th, 1927, Louis
 10 G. Morten one of the complainants' solicitors, called the Clerk of the New Jersey Supreme Court on the telephone and advised that office that inasmuch as this was an action in ejectment, no assessment of damages were necessary and upon the attention of the Clerk being called to that fact, said solicitor was informed that judgment would be entered immediately and as a matter of
 20 fact, the record shows that the judgment was entered on October 28th, 1927, and annexed hereto and marked Exhibit 2, is a copy of the statement received from the New Jersey Supreme Court showing the entry of such judgment.

10. Petitioners are advised that conclusions have been filed by the Court herein and that from such conclusions it would appear that this court was under the impression that no judgment has as yet been entered by the New Jersey Supreme
 30 Court in the action in ejectment whereas as a matter of fact such judgment was entered on October 28th, 1927, as hereinbefore set forth.

11. Petitioners further show that no order has as yet been made by this court upon said petition and order to show cause, and in conformity with the conclusions filed by this court herein on November 30th, 1927, and they therefore pray that
 40 this court grant a re-argument upon said order to show cause and petitioners will ever pray etc.

MELOSH, MORTEN & MELOSH,
 Solrs. for Petitioners.

AFFIDAVIT OF LOUIS G. MORTEN.

State of New Jersey, }
 County of Hudson. }ss:

Louis G. Morten, of full age, being duly sworn on his oath, says:

10 1. I am a member of the firm of Melosh, Morten & Melosh, solicitors for the above named complainants and petitioners herein.

2. I am familiar with all of the facts and statements contained in said petition and the same are true.

20 3. The order striking out the answer of the defendant, Arthur O'Toole, executor of the estate of Amelia Tierney, deceased, in the action in ejectment in the New Jersey Supreme Court was made on October 24th, 1927, and mailed by me on that day to the Clerk of said court with a request that judgment be entered.

30 4. On the morning of October 28th, 1927, I received a reply, a copy of which is hereto annexed and marked Exhibit 1. I thereupon sometime during the forenoon, called the said Clerk's office on the telephone and informed them that in as much as the action in which said order was made in ejectment, no assessment of damages was necessary and I asked them to enter the judgment and they informed me that it would be done at once, and annexed hereto and marked Exhibit 2, is a copy of the statement I subsequently received from said Supreme Court showing that said judgment was entered on October 28th, 1927.

40 5. I was not served with the petition and order to show cause filed herein on October 28th,

Louis G. Morten—Exhibit 1

1927, until late in the afternoon, at or about five o'clock.

6. When said order to show cause came on for hearing on November 14th, 1927, I stated to the Court that judgment had been entered in the New Jersey Supreme Court action although I did not state the date of the entry of the judgment, and counsel for the defendant Arthur O'Toole, executor as aforesaid, assented to the truthfulness of the statement so made by me when I made such statement to the Court. 10

LOUIS G. MORTEN.

Subscribed and sworn to before me,
 this 1st day of December, A. D. 1927. 20
 Ada Depew,
 Notary Public of New Jersey.

EXHIBIT 1.

October 27, 1927

Melosh, Morten & Melosh, Esqs., 30
 1 Exchange Place,
 Jersey City, N. J.

Gentlemen:

I have received order striking out answer in the case of Brengel *et als.* vs. O'Toole. I know of no ruling by the Court in regard to the commissioner making a maximum statutory allowance on the motion. 40

Louis G. Morten—Exhibit 2

Before I can enter judgment in this case, it will be necessary for you to send in an Assessment of Damages with interest calculations to date of judgment, as the order striking out answer does not provide for damages. Also let me know to
 10 what county you wish execution issues and oblige

Very truly yours,

EDWARD J. KELLEHER,
 Clerk.

EXHIBIT 2.

20 NEW JERSEY SUPREME COURT

STATEMENT

BERTHA BRENGEL, Impld., &c.

vs.

ARTHUR O'TOOLE, Exec., &c.

Action at Law.

30 Judg't entered Oct. 28, 1927.

Costs

Attorney	\$48.00
Disbursements	15.78

\$63.78

Judgt. for Poss.

Clerk.

EDWARD J. KELLEHER,

40

ORDER DISMISSING PETITION.

(Filed Dec. 2, 1927)

Complainants having presented their verified petition to the Court praying for an order requiring the defendant Arthur O'Toole, individually and as executor, etc., to show cause why a
 10 re-argument should not be granted on the order to show cause made herein on October 28th, 1927, and the Court having considered the same;

It is on this 2nd day of December, 1927, Ordered:

That said application for said order to show cause be denied and that said petition be dismissed.

20

ORDER.

This matter being opened to the Court by Perkins & Drewen, solicitors for and of counsel with Arthur O'Toole, the above named defendant, on return of order to show cause made herein under date of the 28th day of October, 1927, in the presence of Lewis G. Morten of Melosh, Morten &
 30 Melosh, solicitors for and of counsel with the complainants, and of John Drewen of Perkins & Drewen, solicitors for and of counsel with defendant, and the Court having read the duly verified petition upon which the said order to show cause was made and also the affidavit submitted in answer thereto on behalf of the complainants, and having heard and considered the argument of respective counsel, it is on this sixth day of
 40 December, 1927:

Petition of Bertha Brengel for Modification of Decree

Ordered and Decreed that the complainant, their attorneys and solicitors, agents and representatives, and each of them, be enjoined and restrained from proceeding with a certain action
 10 in the Supreme Court of New Jersey, the purpose of which said action being to eject the defendant, Arthur O'Toole, from the premises set forth in the bill of complaint, until the further order of this court.

E. R. WALKER
 C

Respectfully advised

James F. Fielder

20 V. C.

PETITION OF BERTHA BRENGEL FOR MODIFICATION OF DECREE.

(Filed Feb. 6th, 1928)

To his Honor Edwin Robert Walker,
 Chancellor of the State of New Jersey

30

The petition of Bertha Brengel, one of the complainants in the above entitled cause, respectfully shows that:

1. By an order made herein on December 6th, 1927, the complainants are restrained from proceeding in a certain action in the New Jersey Supreme Court, the purpose of which action is to eject the defendant Arthur O'Toole from the
 40 premises set forth in the bill of complaint herein;

Petition of Bertha Brengel for Modification of Decree

2. By the final decree made in this cause on January 23rd, 1928, it is ordered, adjudged and decreed that the lands and premises described in the bill of complaint, descend to the heirs at law of Amelia Tierney, deceased, subject to power
 10 of sale of the executor named in her will.

3. Complainant Bertha Brengel is one of the heirs at law of Amelia Tierney, deceased, the said deceased having left her surviving as her only heirs at law your petitioner, a sister and Ida Soper and Clara Tullio, nieces of Amelia Tierney, dec'd., they being sisters, and children of a deceased sister of Amelia Tierney, deceased.

20

Your petitioner therefore prays that the Final Decree herein may be modified and vacated in so far as it denies the application of this complainant for an order vacating the restraint imposed upon the complainants from proceeding with a certain action in the Supreme Court of New Jersey, upon the judgment in ejectment hereinbefore mentioned; and that the restraint imposed upon this complainant in the order made by this court on December 6th, 1927, may be vacated, in so far
 30 as it affect this complainant, your petitioner.

MELOSH, MORTEN & MELOSH,
 Solrs. for Petitioner.

State of New Jersey, }
 County of Hudson. }ss:

Bertha Brengel, of full age, being duly sworn according to law on her oath deposes and says:

40

I am the petitioner named in the foregoing petition.

Petition of Bertha Brengel for Modification of Decree

Amelia Tierney, deceased, therein named, was my sister. She died on February 1st, 1927, at Jersey City, New Jersey, leaving her surviving as her only heirs at law, the following, to wit:

10 Your petitioner, a sister;

Ida Soper and Clara Tullio, nieces of Amelia Tierney, dec'd.; and daughters of her deceased sister, Hannah Kaminski.

On January 23, 1928, this court, by a final decree in this cause denied the application of the complainants to be relieved from the restraint imposed upon them by this court, enjoining them
20 from proceeding upon a certain judgment recovered by them in the New Jersey Supreme Court in ejectment against Arthur O'Toole, executor of the estate of Amelia Tierney, deceased.

In and by said final decree, it is adjudged that the heirs at law of Amelia Tierney are entitled to possession of the lands and premises and the rents and income therefrom.

I am one of the heirs at law of the said Amelia
30 Tierney and as such am entitled to possession of said lands and premises under the terms of said final decree.

BERTHA BRENGEL.

Sworn to and subscribed before me
this 30th day of January, A. D. 1928.

Ada Depew,
Notary Public of New Jersey.

MEMORANDUM.

FIELDER, V. C. (orally)—

The main and I think a sufficient reason for denying Mr. Morten's motion to discharge or modify the restraint heretofore granted against Bertha Brengel from proceeding in the ejectment suit
10 brought by her and others against O'Toole, Executor, is that the ejectment suit was improperly brought for the reasons stated in my conclusions filed in this cause and that the commencement of that suit was in contempt of this court. I know perfectly well that the institution of that suit upon the advice of and by Mr. Morten as attorney, was not an intentional act of disrespect to the court,
20 but it amounted to a contempt and having determined that the ejectment suit should never have been brought and having granted a restraint against Mrs. Brengel and her co-plaintiffs from proceeding under the judgment entered therein, I do not think that I should discharge or modify that restraint as to Mrs. Brengel and permit her to enjoy the fruits of a judgment entered in a suit which would have been stayed immediately upon the filing of the complaint, had application for a stay then been made. Mrs. Brengel is technically
30 in contempt of this court and I am not willing to permit her to profit from such contempt.

ORDER DENYING PETITION.

(Filed Feby. 7, 1928)

Complainant Bertha Brengel having presented her petition herein, alleging that she is one of the heirs-at-law of Amelia Tierney, deceased, and praying that the final decree herein may be modified and vacated and that the restraint imposed upon this complainant in the order made by this court on December 6th, 1927, herein, may be vacated in so far as it affect said complainant, and the Court having heard the argument of Melosh, Morten & Melosh, of counsel with petitioner and Perkins & Drewen of counsel with defendant executor and Paul J. Duffy of counsel with Clara Tullio and Ida Soper, and being of the opinion that said motion should not be granted;

It is on this 7th day of February, A. D. 1928,
Ordered:

That the prayer of said petition be denied and that said petition be dismissed.

Respectfully advised,

JAMES F. FIELDER,
V. C.

PETITION OF APPEAL.

(Filed February 10th, 1928)

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

The petition of Bertha Brengel, Charlotte J. Linders, Fred W. Linders, Irma E. Linders, who sues by Fred W. Linders her next friend and guardian, and Robert E. Linders, who sues by Fred W. Linders, his next friend and guardian, respectfully shows that:

1. Petitioners find themselves aggrieved by an interlocutory order made in Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 6th, 1927, in a certain cause in said Court of Chancery wherein the said appellants were complainants and the said respondent was defendant, in this respect, to wit, that the said Order enjoins and restrains these appellants from proceeding with a certain action in the Supreme Court of New Jersey, the purpose of which said action being to eject the defendant Arthur O'Toole, from the premises set forth in their bill of complaint, until the further Order of the Court.

The petitioners appeal from the said Order of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that these appellants should not have been restrained or enjoined from proceeding in their said action in the Supreme Court of New Jersey.

Petitioners therefore pray that the said Order of the said Chancellor may be wholly reversed and set aside and for nothing holden, and that peti-

Amended Petition of Appeal

as executor named in the said will and to the trusts declared thereon;

That until the exercise of the power of sale, the heirs at law of Amelia Tierney are entitled to possession of the lands and premises and to the rents and income therefrom;

That the said decree orders that the application of the complainant for an order vacating the restraint imposed upon them and enjoining them from proceeding with a certain action in the Supreme Court of New Jersey, upon their judgment in ejectment, be denied;

That said decree orders, adjudges and decrees that a counsel fee of \$500.00 be allowed to counsel of Arthur O'Toole, executor, and a counsel fee of \$150.00 be allowed to counsel for Clara Tullio and Ida Soper, and that said counsel fees be paid out of the estate of Amelia Tierney, deceased.

2. The petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that the said decree should have ordered, adjudged and decreed;

That an injunction issue out of the said Court of Chancery commanding the said defendants and each of them to desist and refrain from undertaking and assuming the control or management of said real estate and the collection of the rents, issues and profits arising therefrom and from interfering in any way with the right of the complainants to the sole and exclusive management and control of said real estate and collection of

Amended Petition of Appeal

the rents, issues and profits arising therefrom, until the exercise of the power of sale by said executor;

That said decree should have adjudged that until the exercise of the power of sale mentioned in said will, these complainants are entitled to the possession of the lands and premises described in the bill of complaint and to the rents and income therefrom;

That said decree should have dismissed the counterclaim filed by said executor praying for a construction of the will of the said deceased;

That said decree should have adjudged and decreed that the application of the complainants for an order vacating the restraint imposed upon them and enjoining them from proceeding with the certain action in the Supreme Court of New Jersey, upon their judgment in ejectment be granted;

That said decree should have adjudged and decreed that no counsel fee be allowed to counsel of the said Arthur O'Toole, aforesaid, and that no counsel fee be allowed to counsel of Clara Tullio and Ida Soper;

And that counsel fees be allowed to these complainants as against Clara Tullio and Ida Soper, defendants, in said counterclaim.

Petitioners therefore pray that the decree of the said Chancellor may be reversed, set aside and for nothing holden in respect to those matters concerning which the petitioners find themselves

ANSWER TO PETITION OF APPEAL.

The answer of Clara Tullio and Ida Soper, two
of the above named appellees to the petition of ap-
peal of Bertha Brengel, Charlotte J. Linders,
Fred W. Linders, Irma E. Linders, and Robert
E. Linders, by his next friend, the above named
10 appellants,

These appellees, not admitting the truth of all
or any of the matters in the said petition of ap-
peal contained, for answer thereto nevertheless
admit that a decree was on the 23d day of Janu-
ary, 1928, made and entered in the Court of Chan-
cery of New Jersey in the above entitled cause,
for the purpose in said petition mentioned and
as therein set forth, but as to the substance and
20 form of said decree, these appellees beg leave to
refer thereto when the same shall be produced.

These appellees are advised and believe that
the said decree is agreeable to equity and they
pray that the same may be affirmed, with costs to
be taxed, in favor of these appellees.

30 PAUL J. DUFFY,
Solicitor for appellees,
Clara Tullio and Ida Soper.

Thomas J. Stanton
Of Counsel.

40

PETITION OF APPEAL.

(Filed March 13th, 1928)

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

The petition of Bertha Brengel, the appellant in 10
the above entitled cause, respectfully shows that:

The petitioner finds herself aggrieved by an or-
der made in the Court of Chancery by his Honor
Edwin Robert Walker, Chancellor of the State of
New Jersey, bearing date February 7th, 1928, in
a certain cause in said Court of Chancery, wherein
the said Bertha Brengel and others were com-
plainants and said Arthur O'Toole, individually 20
and as executor of the estate of Amelia Tierney,
deceased, was defendant, and Clara Tullio and
Ida Soper were defendants named in counter-
claim, in this respect, to wit:

That the said order directs that the prayer of
the petition filed by this appellant in said Court
of Chancery on February 6th, 1928, be denied and
that said petition be dismissed, which said peti-
tion prayed that the final decree herein be modi-
fied and vacated in so far as it denied the applica- 30
tion of complainant for an order vacating the
restraint imposed upon the complainants from
proceeding with a certain action in the Supreme
Court of New Jersey, upon the judgment in eject-
ment therein entered.

And further prayed that the restraint imposed
upon this appellant in the order made by said
Court on December 6th, 1927, be vacated in so far
as it affected this appellant. 40

Petition of Appeal

And petitioner appeals from the order of the Court of Chancery which orders as aforesaid, upon the ground that the same is erroneous in that the said order should have directed that the prayer of this appellant, as contained in said petition, should be granted

And that the final decree be modified as prayed for in said petition.

And that the order of December 6th, 1927, aforesaid, be vacated in so far as it affected this appellant.

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

MELOSH, MORTEN & MELOSH,
Of counsel with appellant.

ANSWER OF ARTHUR O'TOOLE, RESPONDENT, TO PETITION OF APPEAL OF BERTHA BRENGEL.

(Filed Mar. 13th, 1928)

The answer of Arthur O'Toole, individually and as executor of the estate of Amelia Tierney, deceased, the above named respondent, to the petition of appeal of Bertha Brengel, the above named appellant.

This respondent, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that an order was, on the 7th day of February, 1928, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this respondent.

PERKINS & DREWEN,
Solicitors for and of counsel with
respondent, Arthur O'Toole.

ANSWER TO PETITION OF APPEAL.

The answer of Clara Tullio and Ida Soper, two of the above named appellees to the petition of appeal of Bertha Brengel, the above named appellant,

10 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that an order was on the 7th day of February, 1928, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said order, these appellees beg leave to refer thereto when the same shall be produced.

20 These appellees are advised and believe that the said order is agreeable to equity and they pray that the same may be affirmed, with costs to be taxed in favor of these appellees.

PAUL J. DUFFY,
Solicitor for Appellees, Clara Tullio
and Ida Soper.

08 Thomas J. Stanton
Of Counsel.

47 MAY.T.1928

76 MAY.T.1928

77 MAY.T.1928

New Jersey
Court of Errors and Appeals

BERTHA BRENGEL, *et als.*,

Complainants-Appellants,

and

ARTHUR O'TOOLE, individually
and as executor of the estate
of Amelia Tierney, dec'd.,

Defendant-Respondent,

and

CLARA TULLIO and IDA SOPER,
defendants named in counter-
claim of original defendant,

Respondents.

On appeal
from Court
of Chancery

BRIEF FOR APPELLANTS.**STATEMENT OF FACTS.**

Amelia Tierney died February 1st, 1927, seized of the title to the premises 141-143 Manhattan Avenue, Jersey City. She left a last will and testament which was duly admitted to probate in which she directed that these lands should

be sold by her executor Arthur O'Toole and the proceeds divided among the complainants, as specific legatees (8).

She also named the complainants as residuary legatees and devisees (8).

Immediately upon the death of the testatrix, the defendant Arthur O'Toole, assumed possession and control of said real estate and the collection of the rents, issues and profits and continued so to do until May 18th, 1927, claiming that he had a right so to do because he was named as executor in the will of the deceased (par. 8, p. 3).

On May 18th, 1927, the will was admitted to probate and the defendant Arthur O'Toole, then claimed that he had a right to the absolute control and management of the real estate as executor, because of the provisions contained in said will (par. 5, p. 22).

On May 31st, 1927, the complainants filed their bill of complaint, having for its purpose a two-fold purpose, namely:

FIRST: To restrain the defendant, Arthur O'Toole, individually and as executor, from interfering with the right of the complainants to the management and control of the real estate and

SECONDLY: To compel him, as executor, to turn over the real estate to the complainants rather than the proceeds of any sale thereof which might be made by him as such executor.

The bill of complaint had annexed to it, a copy of the will and various exhibits and affidavits verifying the allegations contained in the bill of complaint, and upon the filing of the bill of com-

plaint, an order was made requiring the defendant, Arthur O'Toole to show cause why he should not desist and refrain from undertaking and assuming the management and control of said real estate.

There was no dispute as to the facts and after argument, the Court denied the complainants any relief and dismissed the order to show cause on June 27th, 1927 (40).

Thereafter the complainants instituted an action in the New Jersey Supreme Court in ejectment against the defendant, Arthur O'Toole. Defendant filed his answer admitting the charges contained in the complaint and thereupon the plaintiffs in the Supreme Court action moved to strike out the defendant's answer, which was done, and judgment in ejectment was entered in favor of the plaintiffs in the Supreme Court action on October 28th, 1927 (55-78).

On this same date, the defendant presented his petition in the Court of Chancery and obtained an order requiring the plaintiffs in the ejectment suit, who are the complainants in the Chancery case, to show cause why they should not be restrained from ejecting the defendant from the real estate in question (48).

The complainants filed their answer to this petition on November 14th, setting up the proceedings in the Supreme Court and that the judgment of the Supreme Court was *res adjudicata* (50).

After hearing argument of counsel upon said order to show cause, the Court made an order on December 6th, 1927, restraining the complainants from proceeding upon their judgment which they

had recovered in ejectment in the Supreme Court (79).

From this order so made on December 6th, 1927, the complainants have appealed and this is one of the appeals presented herein (80).

II.

The defendant, Arthur O'Toole filed an answer to the bill of complaint in which the statement of facts alleged in the bill of complaint, is practically admitted.

To this answer, the defendant added a counterclaim setting up the fourth and fifth clauses of the will and averring that a question had arisen on the construction of the will as to whether or not the complainants took the real estate under the residuary clause or whether the real estate went to the defendant as trustee or whether the title descended to the heirs-at-law subject to be divested by sale, and prayed for a construction of the will and a declaration of the respective rights of the parties (23).

To this counterclaim, the complainants filed an answer denying that any question had arisen on the construction of the will and averring that the questions alleged by the defendant-executor were purely academic and had no bearing on the issues involved in the Chancery proceeding (25).

Under the counterclaim, the executor brought in the two remaining heirs-at-law as parties and they filed an answer alleging that they had an immediate vested interest in the real estate as such heirs-at-law (26).

The Court of Chancery found that the complainants were not entitled to elect to take the real estate instead of the proceeds of sale and from this finding no appeal has been taken.

The Court of Chancery also found that under the terms of this will, the executor had no right to collect the rent or manage the real estate in question.

The Court of Chancery also found that the complainants were not entitled to the rents and income from the real estate under the fourth or under the residuary clause of the will and that such income belonged to the heirs-at-law and a decree was accordingly made, dismissing the complainants' bill, construing the will, with the usual allowance of costs and counsel fees.

Upon the making of the final decree, the complainants applied for an order vacating the restraint imposed upon them and enjoining them from proceeding under their judgment in ejectment, and this application was likewise denied.

The complainants have appealed from the decree dismissing their bill of complaint claiming that they were entitled to restraint against the defendant as executor from assuming the management and control of the real estate in question; that said decree should have dismissed the counterclaim of the executor praying for a construction of the will; that the decree should have provided that the restraint imposed upon the complainant from proceeding upon their judgment in ejectment, should have been vacated; that no counsel fees should have been allowed to the executor or to the answering heirs-at-law and that counsel fees should have been allowed to the complainants as against the heirs-at-law (87).

III.

Subsequent to the making of the final decree and after the Court had found that the executor was not entitled to the management and control of the real estate, the complainant Bertha Bren- gel filed her petition averring the restraint im- posed upon her by the order of the Court of Chan- cery on December 6th, 1927; that she was one of the heirs-at-law of Amelia Tierney, deceased and praying that the final decree be modified and va- cated in so far as it denied her application for an order vacating the restraint imposed upon her as one of the complainants from proceeding upon the judgment in ejectment which had been entered in the Supreme Court, as aforesaid, and that the order of December 6th, 1927, be vacated in so far as it affected her (80).

This application was likewise denied by the Court of Chancery by an order made on Febru- ary 7th, 1927, the Vice Chancellor holding that it was contempt on her part to have been party to the proceedings in the Supreme Court and that therefore he would not discharge or modify the restraint (83). From the order (84) an appeal has likewise been taken (93).

L A W.

I.

The order made on December 6th, 1927, restraining the complainants from proceeding on their judgment in ejectment was erroneous.

Complainants in their bill of complaint sought as part of their relief, an injunction restraining the defendant Arthur O'Toole, individually and as executor from assuming the control and man- agement of the real estate, of which Amelia Tier- ney died seized (6). Attached to the bill of com- plaint were exhibits and affidavits upon which the complainants moved for an order restraining said defendant from assuming control and man- agement of said real estate and from interfering with the rights of the complainants to collect the rents and manage the real estate (7-21). This motion on behalf of the complainants was denied (40).

Thereupon, the complainants instituted an ac- tion in ejectment in the Supreme Court of New Jersey against Arthur O'Toole, as executor of the estate of Amelia Tierney, deceased, to which the defendant filed his answer, claiming that he had the right as such executor to the possession of the premises (55-62).

This defense was stricken out by the Supreme Court and judgment was entered in favor of the complainants, who were the plaintiffs in ejectment (68).

The judgment was entered in Supreme Court on October 28th, 1927 (78) and on the same day, the defendant applied to the Court of Chancery

and obtained a restraining order enjoining the complainants from enforcing their judgment which they had recovered in the Supreme Court (48).

To the petition for the restraining order, the complainants filed an answer setting up the recovery of the judgment in the Supreme Court and that such judgment was *res adjudicata* (53).

Upon the hearing on the petition, the Court of Chancery made an order enjoining the complainants from proceeding upon their judgment in ejectment (79).

It appears from the conclusions of the Supreme Court in the ejectment action, a copy of which was annexed to the answer of the complainants to the petition of the defendant for the restraining order, that that Court found that the defendant in the ejectment action had no interest in the real estate whatever and therefore was not entitled to possession (67).

The Vice Chancellor refused to accept this decision of the Supreme Court, although he should have done so, and this Court has so held.

Raimondi v. Bianchi, 140 Atlantic,
584.

When the case came on for final hearing, as appears from the conclusions of the Vice Chancellor, he agreed with the finding of the Supreme Court and held that the executor had no right to collect the rents or manage the real estate in question (33).

It would therefore seem to necessarily follow that the executor had no right to restrain the com-

plainants from proceeding on their judgment in ejectment and that the order of December 6th, 1927, imposing such restraint, was erroneous, because if the executor had no right to the possession of the premises or to collect the rent or manage the same, he had no right to interfere with the rights of the complainants thereto and even if it may be argued that there is a possibility that the Court of Chancery was right in refusing the motion of the complainants upon their bill of complaint and affidavits, yet after the complainants had obtained their judgment in ejectment in the Supreme Court, that judgment was final and the Court of Chancery should not have interfered therewith.

We therefore respectfully submit that the order of December 6th, 1927, is erroneous and should be reversed.

II.

The final decree dismissing the complainants' bill of complaint should be reversed and a decree should be made dismissing the counterclaim of the executor and answer of the defendants, Clara Tullio and Ida Soper.

(1)

The complainants' bill should not have been dismissed.

By their bill of complaint the complainants sought an injunction against the defendant, Arthur O'Toole, individually and as executor from assuming the management and control of the real estate in question and an accounting (6). Although both the Supreme Court and the Court

of Chancery by its final decree found that the executor was not entitled to the possession or management or control of the real estate in question, yet the Court of Chancery dismissed the complainants' bill.

It was conceded by the defendant, Arthur O'Toolé, that he was collecting rents from the premises in question and had assumed the management and control (2 & 21), thereby interfering with the rights of the complainants to the premises in question. This being so and the complainants having established their right to possession by an action in ejectment, it would seem to necessarily follow that the complainants were entitled to the injunction and accounting for which they had prayed, and being so entitled, it was error on the part of the Court of Chancery to deny them that relief.

The complainants do not rely upon the fourth clause of the will as stated by the Court in his conclusions (33) but upon both the fourth and fifth clauses and each of them.

The bill of complaint should have been sustained and this relief should have been granted to the complainants.

(2)

There was no occasion for the executor to file his counterclaim and his counterclaim should have been dismissed.

The only duty and power given to the executor respecting the premises in question, is found in the fourth clause of the will of the deceased (8). The Vice Chancellor found that the executor had

but a bare authority to sell the lands and distribute the proceeds (3d syllabus).

He was to sell the lands and divide the proceeds. He was in no doubt or uncertainty whatever. The language was plain; and both the Court of Chancery and Supreme Court so rules (34 & 67).

In the counterclaim, the executor avers that a question has arisen on the construction of the will.

1. Whether the complainants take the real estate in question under the residuary clause, or
2. Whether the real estate goes to the defendant, Arthur O'Toole, as trustee of the estate of Amelia Tierney, or
3. Whether the title to said real estate descends to the heirs-at-law of said deceased.

The complainants answered this counterclaim and among other things, denied that any question had arisen on the construction of the will, as alleged in the counterclaim; that the alleged question was purely academic and had no bearing on the issues involved or the merits of the cause.

We submit that the executor was not justified in raising the alleged questions as he was in no wise concerned therewith.

The sole duty of the executor was to sell the real estate and divide the proceeds. He was not concerned as to where the fee lie and it made no difference to him. Up to that time, no question had been raised by any one as to who was seized of the fee to the lands in question or by the heirs-at-law, as between themselves, as to who was en-

titled to the rents therefrom and it was this wholly unnecessary action on the part of the executor that caused wholly unnecessary litigation.

Up to this time, the two remaining heirs-at-law, Clara Tullio and Ida Soper, had made no claim whatever to the lands or rents accruing therefrom.

What possible difference could it have made to the executor as to whether the complainants took the real estate under the residuary clause or not, or whether the title descended to the heirs-at-law. It made absolutely no difference to him and he was not entitled to raise that question.

Upon what possible theory it could have been held that the lands in question went to the defendant executor as trustee, seems beyond conception. The will was too plain to admit of any such theory and the sole purpose of the executor in raising this question was to promote litigation.

We therefore respectfully submit that there was no occasion for any construction of the will of the deceased upon the application of the executor and that his counterclaim praying for a construction of this will should have been dismissed.

(3)

The application of the complainants to vacate the restraint imposed upon them from proceeding upon their judgment in the ejectment proceedings should have been granted.

In the final decree, the Court of Chancery ordered that the restraint enjoining the complainants from proceeding upon their judgment in the ejectment proceedings should be continued; and

this, notwithstanding that the Supreme Court and the Court of Chancery itself, had found that the defendant Arthur O'Toole, had no right to the control or management of the real estate in question, either individually or as executor.

The Court of Chancery held that the ejectment proceeding presented to the Supreme Court the same question that was then pending before the Court of Chancery (72).

We respectfully submit that this conclusion on the part of the Court of Chancery is clearly erroneous.

The bill of complaint had two objects in view.

First, to restrain the executor from selling the premises and to compel him to turn it over to the complainants in lieu of the proceeds of sale and

Secondly, to enjoin the defendant from interfering with the complainants' right to possession, and for an accounting.

The Court of Chancery refused injunctive relief to the complainants on their motion and left the parties in *status quo*. The complainants then sought relief by ejectment which is purely a possessory action.

Courts of law are the proper tribunals in which the right to possession should be determined.

The Court of Chancery would not and could not determine, and was not asked to determine, whether or not the complainants were entitled to the possession of the premises in question.

All it was asked to do was to restrain the executor from interfering with the complainants' rights and to order an accounting. It could not determine the title but it could restrain the executor from collecting rents and interfering with complainants' rights until the right to possession had been determined in an action at law.

It would therefore seem that the Court of Chancery fell into error when it held that the proceedings in ejectment presented the same question as was then pending before the Court of Chancery on bill and answer.

Just why the Court of Chancery should have been of the opinion that the complainants were not entitled to have the restraint removed which prevented them from proceeding upon their action in ejectment, we do not know. Certainly, if the executor was not entitled to the possession of the premises in question or to the control and management thereof, he was not entitled to restrain the complainants from asserting the rights under their judgment in the Supreme Court and that restraint should have been vacated.

(4)

The allowance of counsel fees to the executor and heirs at law out of the estate was erroneous.

If the complainants were entitled to succeed upon their bill of complaint restraining the defendant, Arthur O'Toole, individually and as executor from interfering with their rights to the possession of the lands in question and the rents therefrom and an accounting for rents collected, it would seem to necessarily follow that counsel fees and costs should not have been awarded against the complainants or out of the estate.

As appears from the bill of complaint and the exhibits, the defendant was warned that he had no right to the lands in question or to the rents (9, 11) and he was a trespasser and it does not seem equitable that the complainants should be compelled to pay costs and counsel fees in a litigation in which they were partially successful.

It is true that part of the relief prayed for in their bill of complaint, namely, a decree for conveyance of the lands, was denied, but at the very best, it was a case in which both sides were partially successful and costs and counsel fees should not have been awarded to either party as against the other.

(5)

The heirs at law of the deceased are not entitled to either the lands in question or the rents arising therefrom.

In the final decree, the Court of Chancery held that Amelia Tierney, deceased, died intestate as to the lands in question and that until the exercise of the power of sale, the heirs at law were entitled to the possession of the lands in question and the rents therefrom.

We respectfully submit that the decree is erroneous in this respect.

Under the residuary clause, the entire estate of the deceased not theretofore disposed of, was directed to be "distributed" among complainants. As appears by the affidavit of Charlotte J. Linders, annexed to the bill of complaint; this will in question was drawn by the defendant, Arthur O'Toole (16), who is an attorney at law and solicitor in Chancery of New Jersey (1, 21). If

there is any uncertainty about this will, the responsibility therefor lies wholly and solely with him, in not having used proper language to express the desire of the testatrix.

If the Court shall hold that, notwithstanding the fact that the executor has no right to raise any question regarding the construction of this will because he is not interested therein, yet, in as much as the contention has been made by the defendants Tullio and Soper that they are entitled to the rents pending the sale of the real estate, it has now become necessary to construe the will of the deceased, then the complainants argue on their behalf that when the testatrix disposed of her residuary estate, in her will, it included not only the real and personal estate as it existed at the time of the death of the testatrix, but also all rents, issues and profits arising from the real estate and all income and profit from the personal estate, accruing during the interim between the death of the testatrix and the final distribution of the estate.

If the testatrix had said, "All the rest, residue and remainder of my estate, whether real, personal or mixed, I direct be *divided* share and share alike to" the residuary legatees, there would have been no doubt as to the meaning of the will.

We respectfully submit that when the language used in the will which directs that the real estate of the testatrix be *distributed* share and share alike to the residuary legatees, the intention of the testatrix is plain, although there may have been an unhappy choice of words by the scrivener to express it.

The whole responsibility for any uncertainty that may have arisen or may exist because of the language used in this will, rests upon the defendant Arthur O'Toole. As a lawyer, he should have known that it was not proper to direct that real estate be "distributed" among the devisees, as was done in this will.

Strictly speaking, real estate cannot be "distributed." This word, as a general rule, is applicable to personal property only, but in this case, we respectfully submit that the word "distributed" is to be construed as if it were the word "divided," and this contention is supported by the finding of the Supreme Court (67).

We submit that it was not the intention of the testatrix that any one should share in her estate or any of the income or profits arising therefrom, excepting those persons mentioned in her will and that the defendants in the counterclaim, namely Clara Tullio and Ida Soper are not entitled to share in any of the rents arising from the real estate in question between the date of the death of the testatrix and the date of the sale of the lands by the executor, and if this be true, then the final decree should be reversed in this respect and no allowances of counsel fees or costs should be made to the defendants Clara Tullio and Ida Soper as against the complainants but on the other hand, counsel fees should be allowed to the complainants as against them.

III.

The Court of Chancery should have granted the application of the complainant Bertha Brengel for modification of restraint.

When the Court of Chancery made its final decree, it held entitled to share in any of the rents arising from the real estate in question between the date of the death of the testatrix and the date of the sale of the lands by the executor, and if this be true, then the final decree should be reversed in this respect and no allowances of counsel fees or costs should be made to the defendants Clara Tullio and Ida Soper as against the complainants but on the other hand, counsel fees should be allowed to the complainants as against them.

III.

THE COURT OF CHANCERY SHOULD HAVE GRANTED THE APPLICATION OF THE COMPLAINANT BERTHA BRENGEL FOR MODIFICATION OF RESTRAINT.

When the Court of Chancery made its final decree, it held that the lands in question descended to the heirs-at-law of Amelia Tierney, deceased (32).

The complainant, Bertha Brengel, is not only one of the heirs-at-law (82) but also one of the specific and residuary legatees of Amelia Tierney deceased.

After the making of the final decree, she presented her petition setting up the order of December 6th, 1927, the terms of the final decree;

that she was one of the heirs-at-law; she named the remaining heirs-at-law and asked that the restraint theretofore imposed upon her be removed or vacated as against her, because the Court had already found and decreed that the heirs-at-law, of which she was one, were entitled to the possession of the lands and premises in question (80).

The Court of Chancery held that the institution of the ejectment suit was a contempt of the Court of Chancery and therefore, although she, as one of the heirs-at-law, was entitled to the premises that the lands in question descended to the heirs-at-law of Amelia Tierney, deceased (32).

The complainant, Bertha Brengel, is not only one of the heirs-at-law (82), but also one of the specific and residuary legatees of Amelia Tierney, deceased.

After the making of the final decree, she presented her petition setting up the order of December 6th, 1927, the terms of the final decree; that she was one of the heirs-at-law; she named the remaining heirs-at-law and asked that the restraint theretofore imposed upon her, be removed or vacated as against her, because the Court had already found and decreed that the heirs-at-law, of which she was one, were entitled to the possession of the lands and premises in question (80).

The Court of Chancery held that the institution of the ejectment suit was a contempt of the Court of Chancery and therefore, although she, as one of the heirs-at-law, was entitled to the premises in question and the possession thereof, yet the Court of Chancery did not permit her to oust the executor from the control, management and

possession of the real estate in question (83, 84).

We respectfully submit that the refusal of the Court of Chancery to grant the motion of the complainants on their bill and affidavit to restrain the executor from assuming possession and control of the lands and premises in question, was not equivalent to a final decree that the complainants were not entitled to that relief.

It was merely a denial of that relief pending further action by the Court.

We further submit that it is not contempt for a complainant in equity to seek relief at law where there is perfect remedy at law and the Court of Chancery has refused to interfere, let the reason for that refusal be what it may.

A complainant or plaintiff may institute any number of actions and it is the right of a defendant to compel a complainant or plaintiff to elect upon which one, further proceedings will be taken.

Had the defendant so elected, he could have refrained from filing any answer in the ejectment proceedings and possibly could have restrained the complainants from proceedings to judgment in their ejectment suit.

However, the defendant did not so elect but on the contrary, filed an answer and experimented with the Supreme Court and after he was unsuccessful in the Supreme Court, he then returned to the Court of Chancery for further relief.

Having submitted to the jurisdiction of the Supreme Court, how can the Court of Chancery say that it was contempt on the part of the complainant to institute their action? If it was, then it was just as much contempt for the defendant to

come in and permit that tribunal to pass upon the question.

We submit that after the entry of the judgment in the Supreme Court, that judgment became *res adjudicata* and it was error for the Court of Chancery to ignore or to presume to make any decree which amounted to a nullification of that judgment.

Where both a court of law and a court of equity have jurisdiction and a litigant submits his action either as plaintiff or a defendant to the determination of a law court, he is bound thereby. In such cases this Court has held:

“Having thus by acts of omission and commission, lead to the result of which they complain, they ought not to be allowed to set it aside. To permit that would amount to permitting suitors to experiment with the Courts and if defeated in one Court, to resort to another.”

Commercial etc. v. Hamilton, *et al.*, 133 Atlantic, 704.

Woolsey v. Woolsey, 72 Equity, 898, 903.

In both of these cases, we find the same situation as in the case now under consideration.

In neither of these cases was it argued or intimated that there was any contempt because resort had been had to both a Court of Equity and a Court of Law, and we know of no case where there has been any finding of contempt under such circumstances.

We therefore submit that the order of February 7th, 1927, should be reversed, because Bertha Brengel was entitled to proceed upon her judgment in ejectment which she had obtained, both as residuary legatee and devisee and as an heir-at-law, and that she had been guilty of no contempt by becoming party to the proceedings in ejectment in the Supreme Court.

For all of these reasons, we respectfully submit that the orders and final decree in Chancery appealed from, should be reversed in the particulars complained of.

Respectfully submitted,

MELOSH, MORTEN & MELOSH,
Of Counsel with Appellants.

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77 MAY.T.1928

**New Jersey
Court of Errors and Appeals**

BERTHA BRENGEL, et als,
Complainants-Appellants,

AND

ARTHUR O'TOOLE, individually
and as executor of the estate
of Amelia Tierney, deceased. ,
Defendant-Respondent,

On Appeal
from Court
of Chancery

AND

CLARA TULLIO and IDA SOPER,
defendants named in counter-
claim of original defendant,
Respondents.

**BRIEF FOR RESPONDENTS, CLARA
TULLIO AND IDA SOPER**

Statement of Facts

Amelia Tierney died on February 1st, 1927. She left a will (7-8) wherein, after providing for the payment of her funeral expenses, she made two specific pecuniary bequests of \$10,000.00 and \$1,000.00, respectively. In paragraph 4, she directed her executor to sell a certain parcel of real estate and distribute the proceeds equally among Bertha Brengel, Lottie, Fred, Irma and Robert Linders, after deducting sufficient therefrom to

pay the two specific bequests. Finally, the testatrix directed that the residue of her estate be distributed among Mrs. Brengel and the Four Linders above mentioned.

Mrs. Brengel and the Linders filed their bill to compel the executor (O'Toole) to account for the rents and profits and to convey to them, and for other equitable relief. The executor answered and counterclaimed, and among other things prayed the addition of Clara Tullio and Ida Soper as defendants. These defendants therefore have come in in answer to the counterclaim of the executor. They were not parties to the ejectment action in the Supreme Court.

Law

Clara Tullio and Ida Soper as tenants in common with Bertha Brengel are entitled to the rents, issues and profits of the Manhattan Avenue property until sold.

When a will gives an executor a naked power of sale, it is merely a power and not a trust. The land is not devised to the executor and therefore, in the meantime and until the sale is effected by the executor, the title is in the heirs at law. They may even transfer this interest. (*Romaine vs. Hendrickson's Executors*, 24 N. J. Equity, 231, at page 237.)

Mrs. Brengel and the Linders, the distributees named in the will, are not entitled to the real estate. The specific direction to sell imposed upon the executor immediately converted the realty into personalty, so far as the distributees are concerned. In New Jersey, there is a long line of well considered cases on the doctrine of

equitable or notional conversion. They seem to be unanimous on the point that when a direction to sell is given an executor and no specific devise of real property is made, the testator dies intestate as to such realty, at least until the executor exercises his power of sale, and until he does so exercise this power and since the fee must vest in some one, the heirs at law are immediately entitled to possession and to the benefits of the property. (*Herbert vs. Tuthill*, 1 N. J. Equity, 141; *Gest vs. Flock*, 2 N. J. Equity, 108; *Todd vs. Wortman*, 45 N. J. Equity, 723; *Bonnell vs. Bonnell*, 47 N. J. Equity, 540; *Hopping vs. Gray*, 82 N. J. Equity, 502; *Triplett vs. Ivins*, 93 N. J. Equity, 202.)

In *Triplett vs. Ivins*, 112 Atlantic, 510, Vice Chancellor Leaming lays down the rule as follows:

Where land is directed to be converted into money by the executors and the proceeds distributed in the manner designated by the testator, such proceeds are to be regarded as gifts of money to the distributees and not as devises of real estate, and until the power of sale is exercised the legal estate descends to and vests in the heirs at law of the testator as tenants in common, they taking the legal title charged with the trust created by the will.

These defendants, Tullio and Soper, had no knowledge of the Supreme Court ejectment action. Further, they were unaware of the Chancery action whereon this appeal has been taken, until they were brought in as parties by the counterclaim of the defendant O'Toole. We respectfully urge that these defendants, together with Bertha

Brengel, are the sole heirs at law of Amelia Tierney, and as such heirs at law they are entitled as tenants in common to the rents, issues and profits derived from the real estate of the testatrix, until such time as the executor exercises his power of sale.

The argument of counsel for the appellants is in itself significant of the fact that a construction of the will was and is necessary. Further, the question of possession being in issue, these defendants, Tullio and Soper, were therefore necessary parties to this cause. As to the question of counsel fee allowed to the solicitor of Tullio and Soper, it seems to us that the only question in this regard is as to whether such counsel fee should have been paid out of the estate or by the complainants individually.

Respectfully submitted,

PAUL J. DUFFY and
THOMAS J. STANTON,
Of Counsel with Respondents.
CLARA TULLIO and IDA SOPER.

76 MAY.T.1928

77 MAY.T.1928

New Jersey Court of Errors and Appeals

Between

BERTHA BRENGEL, CHARLOTTE J.
LINDERS, FRED W. LINDERS,
IRMA LINDERS, by next friend,
and ROBERT E. LINDERS, by next
friend,
Complainants-Appellants,

ON APPEAL
FROM
CHANCERY.

and

ARTHUR O'TOOLE, Executor of
the Estate of Amelia Tierney,
Defendant-Appellee.

BRIEF FOR APPELLEE.

This is an appeal by complainants from a decree of the Court of Chancery. The appeal involves several propositions, set forth in three separate petitions of appeal. After a statement of the facts, the scope of these separate petitions of appeal will be defined.

Facts.

Amelia Tierney, late of Jersey City, died on February 1st, 1927, leaving a last will and testament which was admitted to probate by the Surrogate of Hudson County on May 18th, 1927.

The will was short, containing six paragraphs.

First, it directs that the funeral expenses be paid.

Second, it gives to Joseph Molen the sum of ten thousand dollars.

Third, it gives to Billy Bair the sum of one thousand dollars.

The fourth clause is as follows:

“I direct that my real property located at 143 Manhattan Ave., Jersey City, N. J., be sold by my executors and the proceeds of such sale be distributed share and share alike to Mrs. Brengel, Lottie Linders, Fred Linders, Irma Linders and Robert Linders, the above bequests to Joseph Molen and Billy Bair, however, to be paid before such distribution.”

The fifth clause reads as follows:

“All the rest, residue and remainder of my estate whether real, personal or mixed, I direct to be distributed share and share alike to Mrs. Brengel, my sister aforementioned, Lottie Linders, my niece aforementioned, Fred Linders, my nephew-in-law, aforementioned, Irma Linders, my grand-niece aforementioned, Robert Linders, my grand-nephew aforementioned.”

The sixth clause appoints the defendant, Arthur O'Toole, executor.

The complainants are the persons mentioned in the fourth and fifth paragraphs of the will.

The bill sets forth the death and testacy of Amelia Tierney, annexing a copy of the will, and alleging that the defendant qualified as executor, received letters testamentary, and took upon himself the burden of administering the estate.

It describes the premises 143 Manhattan Avenue, occupied by several tenants paying a monthly rental of about \$490.00; that the rents are collected by defendant O'Toole; that on May 16th Fred W. Linders and Lottie Linders were ap-

pointed guardians of their daughter, Irma Linders, and of their son, Robert Linders; that the executor claims the right to exercise dominion over the real estate of the decedent, and “that he also claims to have the sole right and power to determine when and on what terms he will make sale of said real estate”; that the executor has no right or lawful authority to take over the management and control of the real estate, but that that right exists in the complainants.

In paragraph 10 of the bill it is alleged that:

“Although a sale of said lands and real estate is directed by the will of the testatrix, yet the proceeds thereof are to be paid to the said beneficiaries, namely, these complainants, whose interests are identical whether they take the land or the proceeds of sale; that Arthur O'Toole, the executor named in said will, has no duty to perform with respect to the land and real estate, or the proceeds of the sale thereof, other than to sell the land and pay over the proceeds to these complainants; and these complainants have the right to elect, and do elect, to take said lands instead of said proceeds of sale.”

By paragraph 11 the complainants offer to advance the moneys necessary to pay the debts, legacies and charges; and by paragraph 12 claim that they are the sole legatees and devisees of all the personalty of the testatrix, and all the proceeds of the real estate, after the debts of the testatrix and the legacies mentioned in the will and the expenses in the settlement of the estate are paid; that they are ready to pay or secure payment of the charges and “*desire to exercise their election to take said lands*”.

The prayer is for answer, that an accounting may be taken of the rents, and that the defendant may be decreed to pay to complainants what is found to be due, and an injunction against the

executor assuming control and management of the real estate.

The defendant executor filed an answer and counter-claim. By the answer he denies generally the equity attempted to be set up in the bill, sets forth that he is the executor of the estate of Amelia Tierney, and denies generally that he acted without authority in the conduct and management of the estate of Amelia Tierney.

By way of counter-claim, the executor sets up that Amelia Tierney died February 1st, 1927, leaving at the time of her death, as her heirs, Clara Tullio and Ida Soper, daughters of the deceased sister of the testatrix, and Bertha Brengel, one of the complainants; that Clara Tullio and Ida Soper (not named in the will) may have an interest in the real property of the testatrix.

The counter-claim further sets up:

“That a question has arisen on the construction of said will, whether the complainants take the real estate, 143 Manhattan Avenue, Jersey City, under the residuary clause, or whether said real estate goes to this defendant as trustee of the estate of Amelia Tierney, or whether the title to said real estate descends to the heirs at law of said Amelia Tierney, subject to being divested by sale by this defendant as executor of the estate of Amelia Tierney.”

The counter-claim concludes with the prayer:

“That Clara Tullio and Ida Soper may be *made parties to this suit*, and that the court may construe the will and declare the respective rights of the parties.”

Clara Tullio and Ida Soper, the two heirs at law of Margaret Tierney, not mentioned in the will, appeared and filed an answer to the counter-claim, admitting generally paragraphs 1, 2 and 3 of the

counter-claim, and denying the validity of the claim of the complainants to the property, and alleging that they have an interest in the real property left by Amelia Tierney.

As a separate defense, their answer sets up that the fourth and fifth clauses of the will of Amelia Tierney do not provide for the vesting of the title of the real estate mentioned, and that Amelia Tierney died intestate with respect thereto, and that Tullio and Soper are daughters of a deceased sister of the testatrix, and as such are tenants in common of the fee, and have an immediate vested interest in the real estate.

After the filing of the bill, answer, counter-claim, and answer thereto, *and before this cause came on for hearing*, the complainants instituted an action of ejectment against the executor-defendant in the New Jersey Supreme Court. The executor filed an answer in the ejectment suit. The answer was stricken out on motion, and judgment entered therein, in favor of the plaintiffs there, who are the present complainants.

Thereupon the defendant O'Toole filed his petition in this cause (Case, p. 41), setting up the death of Amelia Tierney, her will, the institution of this suit, various proceedings therein, the filing in this cause of a petition on behalf of the complainants on May 31st, 1927, praying for an injunction against defendant's control of the real estate and collecting the rents thereof, and restraining him from interfering in any way with the sole and exclusive management and control by the complainants of the said real estate; the order to show cause issued on said petition; the disposition of the order to show cause upon the hearing; and an order made on June 27th, 1927, by which the order to show cause was dismissed; the institution of the ejectment suit; the entry of judg-

ment therein; and showing that all of the questions submitted by the complainants to the Supreme Court in the ejectment suit were, at the time of such submission, *pending and undetermined in this court*, and praying for an order requiring complainants to show cause why they should not be restrained and enjoined from in anywise further pursuing the ejectment suit and instituting any further proceedings on the judgment there. After the argument of this order to show cause, conclusions were filed by Vice-Chancellor Fielder, which, after stating a brief history of the entire proceedings, holds:

“This court, having been first requested by the complainants to take cognizance of the controversy, and having first obtained jurisdiction by the filing of the complainant’s bill, the complainants have no right to institute proceedings presenting practically the same cause to another court, and they may be compelled to desist from further prosecuting their suit, either by a restraining order, or by attachment for contempt of this court” (Case, p. 69, etc.).

An order pursuant to these conclusions was made under date of December 6th, 1927 (Case, p. 79). The order restrained complainants from in any wise proceeding with the ejectment suit.

Thereupon the main cause was proceeded with. The issues were submitted on the pleadings and on a stipulation admitting that two of the complainants are minors appearing by their guardians, appointed by the Surrogate of Hudson County, and that Clara Tullio and Ida Soper are heirs at law of the testatrix.

The conclusions of the court on the case in chief are found in the printed record (pp. 27-33), and the final decree (p. 34) decrees:

1. The bill be dismissed with costs.

Under the counter-claim of the defendant O’Toole it further decrees:

1. That the will contains no devise of the lands to the complainants or to the executor.

2. That the lands do not pass under the residuary clause.

3. That Amelia Tierney died intestate as to the lands, the same descending to her heirs at law, subject to the power of sale in the executor, and to the trusts declared thereon.

4. That until the exercise of the power of sale the heirs at law of Amelia Tierney are entitled to possession of the lands and premises, and to the income therefrom.

5. That complainants’ application upon the settling of decree for an order vacating the restraint of any action on the judgment in ejectment be denied.

6. That counsel fees be allowed to defendants in the sums stated.

About two weeks after the entry of the final decree, one of the complainants, Bertha Brengel, petitioned the court that the final decree “may be modified and vacated so far as it denies the application of this complainant for an order vacating the restraint imposed upon the complainants from proceeding” with the judgment obtained in the ejectment suit in the Supreme Court (Case, pp. 80-81).

After the argument of this petition the Vice-Chancellor stated his conclusions orally (Case, p. 83); and an order was made under date of February 7th, 1928, denying the application and dismissing the petition for the reasons expressed by the Court (Case, p. 84).

The several petitions of appeal, in the order of their filing, are:

1. Appeal from the interlocutory order of December 6th, 1927, restraining action upon the judgment in ejectment.

2. Appeal from final decree in the case *in certain particulars*.

3. Appeal from the order of February 7th, 1928, denying Bertha Brengel's petition for the vacation of the restraint in the final decree.

POINT I.

The order of December 6th, 1927, restraining the action at law, is proper and valid. And likewise the order of February 7th, 1928, denying the petition of Bertha Brengel to vacate the restraint in the decree.

These two orders are considered together under this head, as the same principle is common to both.

First of all, it is important to point out that this case has no parallel to the ordinary cases where injunctive relief is prayed against a judgment obtained at law. The questions and the principles involved in those cases have no application. The question in such cases is, in one way or another, invariably centered around the inquiry as to whether or not the party seeking injunctive relief against the judgment has a right under an equitable principle, of which, without fault of his own, the judgment at law would deprive him. On the other hand, the propositions involved in the present case are readily distinguishable from that just stated; the question here is two-fold:

a. The Court's duty to itself to protect its jurisdiction over a cause properly before it, and to vindicate its own dignity.

b. The defendant's right to have the issue confined to one forum.

It must be remembered that the Court of Chancery had acquired jurisdiction of this case *in its entirety*, and that such jurisdiction attached as the result of the bringing of the suit in that Court *by the complainants*. The jurisdiction of the Court of Chancery had been a fact long before the *complainants took it upon themselves to leave the Court of Chancery and pursue their relief in another forum*. The power and duty of the Court to maintain its own jurisdiction and to vindicate its own dignity is inherent in the very nature of tribunals. It is the genius and the power of courts to protect, under all the rights which the law gives, *all the parties before it*. If suitors can by invoking the court's process bring respondents into court and make them subject to its jurisdiction, and having done so, can *without leave* make the same respondents *at the same time* subject to the jurisdiction of *another court* and for the affording of the *same relief*, then we shall have to admit that no court can defend its own jurisdiction, and that tribunals are available to serve the varying policies of moving parties rather than to accomplish the administration of justice.

Under the head of "confining litigation to one forum" we find the following in *Corpus Juris*, Volume 32 page 87 (Sec. 77) citing *Logan vs. Flattau*, 73 N. J. Equity, 222:

"Where a court whose power is adequate to the administration of complete justice in the premises has acquired jurisdiction of a case, the litigation should be confined to that forum, and any attempt by either party to divert the litigation to another court will be restrained by injunction."

Any attempt of counsel to show that the relief sought in the law action is not the same as that sought by the bill filed in equity will not avail against the universal principle of confining litiga-

tion to one forum. For it cannot be denied that the court of equity, whose power was first invoked by the complainants, "is adequate to the administration of complete justice in the premises". In the face of this, attempted distinctions between the action in ejectment as being one for possession and the suit in equity as being one for the property itself, are mere quibbling. Everything that ejectment can give *they had first asked this court to give, but did not wait for the answer.*

The next point to be considered is this: The fact that the ejectment suit had gone to judgment does not in any way prejudice the right of the defendant to have the litigation confined to one forum, the forum in which the complainants instituted it. Our authority under this head is *Simon vs. Townsend et als.*, 27 N. J. Equity, 302. The authority of this case is still unmodified by any subsequent holding. In *Simon vs. Townsend*, *supra*, the complainant Simon was sued in an action at law. He appeared and answered. Actual trial of the case was had. It resulted in a judgment of non-suit in favor of Simon. Subsequently the non-suit was set aside by the Supreme Court and a new trial ordered. *After the setting aside of the judgment of non-suit and the ordering of the new trial*, Simon filed his bill in the Court of Chancery praying for an injunction against the suit at law. The defendant Townsend moved to dissolve the injunction upon the ground, among others, that before Simon came into the court of equity for injunctive relief, he had submitted himself to the jurisdiction of a common law tribunal in respect to the subject of the action and that he should, therefore, be compelled to abide the result of the litigation at law. THE COURT HELD THAT ALL THIS DID NOT FURNISH SUFFICIENT GROUND FOR DENYING INJUNCTIVE RELIEF TO SIMON AND THAT THE APPEARANCE AND THE FILING OF AN ANSWER IN THE

LAW ACTION AND THE ACTUAL ATTENDANCE AT THE TRIAL AS A DEFENDANT DID NOT FORFEIT HIS CLAIM TO RELIEF IN EQUITY.

Now, it seems to us that a comment on the relation between the holding of the court in the Simon case, *supra*, and the present situation is fitting: Simon did very much more to "forfeit" his right to injunctive relief than the defendant in the present case has done. All that the present defendant did was to file an answer to the complainants' suit in ejectment; and in that answer he *expressly set up and relied upon the fact that jurisdiction of the whole question had been taken over by the Court of Chancery where the cause was still pending.* Whatever was done after the filing of the answer in the present case, and resulting in the entry of judgment was done by the complainants entirely. For after the answer was filed, the complainants moved to strike it out and pressed their cause to summary judgment. It was as the result of such procedure at law that the judgment in the ejectment suit was obtained against us. The only active thing that the present defendant did was to file his answer, the answer being of the character above stated. The remainder of defendant's part in the proceedings was entirely passive.

While *Simon vs. Townsend* is, we submit, a controlling precedent in favor of injunctive relief in this case, it must be apparent to the Court that its facts are not so strong for that relief as are the facts *sub judice*. Supposing, for example, that before suing Simon in the law court, Townsend had submitted the question to the Court of Chancery and that it was *while the jurisdiction of Chancery was in force* that Townsend started his action at law against Simon. Since, on the facts before it, the Court of Chancery held that Simon had done nothing to forfeit his right to injunctive

relief, certainly there can be no doubt of what the court would have done if the facts before it had been aggravated by the presence of the additional circumstances that are met with in the present cause.

There is one more thought to be submitted to the Court's consideration. As a result of the bill in equity that was filed by the complainants in this case and the pendency of the cause thus instituted, the defendant, as executor, had abstained from any exercise of his power of sale under the will. He did this, as it was necessary to do it, in order to preserve the status quo of the matters and things submitted to court for adjudication and adjustment. While the pendency of the complainants' suit in equity created a necessity which thus restrained the conduct of the defendant O'Toole, we say that the complainant had no right to seek a separate and independent advantage over him by *breaking away from the judicial posture of things which they had created in this Court and seeking relief in another forum.*

Whenever counsel for complainants argue in their brief concerning the injunctive order of December 6th, 1927, and the order of February 7th, 1928, the burden of the argument is that these orders must be held erroneous in view of the ultimate finding in the case that the *heirs at law* were entitled to the possession of the property and the collection of the income until the sale by the executor under his power. There are a number of things to be said in answer to this. And all of them, we think, are conclusive.

To begin with, only one of the complainants is an "heir at law" of the decedent. The heirs at law of the decedent are the complainant Brengel in this cause, and the added defendants, Tullio and Soper, who were brought in under the prayer of this defendant's counter-claim. And while the

court held that *all* the heirs at law were entitled to possession and income pending sale, it was only the complainants as such who were restrained from pursuing a course which had been adjudged contemptuous of the court below. The defendants Tullio and Soper had never been adjudged in contempt, and there was never anything in the case restraining them in their right to possession and receipt of income should they see fit to exercise it pending the sale.

It was in the sound discretion of the court to determine the effect of complainants' conduct in bringing the suit at law against the defendant executor when and as they did. And having so determined, it was also within the sound discretion of the court to measure its discipline unto the complainants. Counsel lose sight of the fact that what we are now considering is not a matter of consistency or parallel, as between what complainants wrongfully went to law to get, and what the Court of Chancery finally held they were entitled to. The matter is one of the Court's inherent power to vindicate its jurisdiction and *to protect all parties who are before it.* How under all the circumstances the court is to do this, it is for the court to say. That the court's power has been abused in the present instance not even counsel for complainants would upon reflection maintain.

The court simply imposed its discipline pending the sale of the real estate "with all due diligence" by the executor under the power given by the will. That power has now been exercised; a sale of the property has been had. (See cases cited in conclusions of court below, Case, p. 72.)

The case of *Raimondi v. Bianchi*, 140 Atlantic 584, cited on page 8 of complainants' brief, has no semblance of bearing on this question.

When counsel speak of the court's having "interfered" with the judgment below; and of the court's making a decree which "amounts to a nullification of that judgment"; and of the judgment in ejectment as being *res judicata*, they seem to miss the point entirely. And the language makes strange reading in the brief of experienced attorneys who have long been observing a system of jurisprudence that operates strictly in personam.

POINT II.

There is no error in the final decree. And the dismissal of the bill is in keeping with the findings of the Court as set forth in the decree.

Under point 2 of complainants' brief there are five contentions. One of these—the refusal of the court to vacate the restraint—has already been considered under our point 1. The remaining contentions are:

(a) That the bill should have been dismissed.

(b) That the counterclaim should have been dismissed because there was no need of construction of the will, and therefore no occasion for the counter-claim.

(c) That the allowance of counsel fees to the executor and to the heirs at law, Tullio and Soper, was erroneous.

(d) That the heirs at law of decedent are not entitled to any interest in the land or the income therefrom.

Under the first of these, complainants argue that the decree does allow in part the prayer of the bill, and therefore should not have decreed the dismissal of the bill. What counsel says in

this connection is altogether misleading. The decree, it will be seen, allows *nothing* of what the bill prays.

An examination of the prayer of the bill will at once show that its several items are in no sense independent of one another, but that they are all devised to accomplish the one ultimate object of complainants, viz.: a decree that the right to the real estate came to them upon the death of testatrix and as beneficiaries under her will, *and to the exclusion of any heirs at law as such*, and that simply as a necessary incident to this the defendant O'Toole account to *them* for all income accruing in the meantime; and that said defendant be decreed to sell and convey the land to *them* upon their giving to him cash or security wherewith to be assured of sufficient to carry out those provisions of the will which are dependent for effect upon the proceeds of the executor's sale of the property.

The decree allows *nothing* that this prayer asks for. It decrees—

That the will contains no devise of the lands to complainants or to the executor;

That the lands do not pass under the residuary clause;

That testatrix died intestate as to the lands;

That the lands descended to *the heirs at law* (not to the complainants as beneficiaries under the will), subject to the executor's power of sale and the trusts declared thereon;

That until the exercise of the executor's power, the *heirs at law* (not complainants as beneficiaries under the will) are entitled to possession of the land and to the income.

When we say that counsel's argument under this point is misleading, we mean that it conceals all distinction between the decree which gives management and control to *the heirs at law* and

the prayer of the bill which asks that "*these complainants be given the sole and exclusive management and control of the said real estate and the collection of the rents, issues and profits arising therefrom*" (Case, p. 6, l. 35). The fallacy shown by this instance runs through the whole argument.

Furthermore, the bill was properly dismissed because the end and object of the prayer is denied by the final decree in the finding of the court that there is no right of election in the complainants, and that this defendant, as executor, is required to make sale of the property. The conveyance of the land to them was one thing complainants really wanted; and the court denied it.

It may be well to add that from this part of the final decree no appeal has been taken (Complainants' brief, p. 5, 1st par.).

Construction of the Will.

A careful reading of the will discloses that it required construction by the Court below. It certainly is sufficiently ambiguous in a number of its provisions to justify the executor to ask the Court to protect him and all the interests in the estate by placing its construction on the will. Practically the whole estate of Amelia Tierney consists in the real estate at 143 Manhattan Avenue. There is no other real estate and the personal property is so insignificant that it would not cover the funeral expenses and the expenses of administration. Down to paragraph 4 of the will there is no difficulty, but when we reach paragraph 4, we find that there is a direction by the testatrix to her executor to sell the real estate and distribute the proceeds share and share alike among the complainants, "the above bequest to Joseph Molen and Billy Bair, however, to be paid

before such distribution". It will be observed that the testatrix does not devise the property to the complainants, nor does she constitute the executor her trustee and vest him with title. All that the executor has is the naked power of sale, and under this clause the complainants get absolutely nothing in the real estate. Apparently, under many well-considered cases in New Jersey, the title to the real estate descended to the heirs at law of Amelia Tierney.

If the will had ended at paragraph 4, there would probably be no question but that the title would have descended to the heirs at law subject to be divested by sale by the executor, and that there was a conversion, and that so far as the real estate was concerned there was a conversion of real estate into personal estate.

But in paragraph 5 a further distribution is apparently intended. It is not the ordinary residuary clause bequeathing and devising the residuum. It provides "that all the rest, residue, and remainder of my estate whether real, personal or mixed, I direct be distributed share and share alike" to the complainants. The residuary clause apparently does not affect the title to the real estate. Apparently when testatrix reached this paragraph she was under the impression *that she had wholly disposed of her real estate when as a matter of fact, she had merely created a power of sale in the executor.*

It may be argued that under the residuary clause the complainants took the fee, that having been undisposed of in the will by paragraph 4.

But on the other hand, the residuary clause does not give or bequeath anything directly to the complainants. It contemplates a distribution—apparently by the executor. There certainly was some confusion in the mind of the testatrix or some misapprehension. She apparently thought she disposed absolutely of the real estate,

whereas she had merely provided for its sale and the distribution of the proceeds. The residuary clause was probably taken up, not with the view of vesting the complainants with title to the real estate, but merely for the purpose of disposing of any personalty that by any chance was left after the previous provisions of the will had been followed out. In any event, whatever was to be done under the residuary clause was to be done by the executor in the form of a distribution.

With these ambiguities in the will, it was entirely a proper thing for the executor to ask the Court to construe the will, and point out the meaning thereof so that he could perform his functions as executor with certainty and in accordance with the direction of the court.

We suggest also that the fact that two complainants are infants is another difficulty fairly calling for construction of the will and the exercise of judicial authority over the matter. Probably the executor would have had no right to convey the property to these defendants. This would mean that the infants, upon arrival at their majority, could disaffirm the transactions. In any event, the guardians would have no right to bind the infants.

As to the allowance of counsel fees, it must follow that if the foregoing contentions are sound, the allowance to the defendant executor O'Toole, we submit, is in no way improper.

As to the interest of the defendants, Tullio and Soper, as heirs at law of the testatrix, we are content to rest upon the authorities set forth in the opinion below (Case, p. 32, at bottom, etc.).

The decree of the Court of Chancery should be affirmed.

PERKINS & DREWEN,
Solicitors for and of counsel with
defendant, Arthur O'Toole, ex-
ecutor, etc.