

COURT OF ERRORS AND APPEALS.

IN THE LAST RESORT IN ALL CAUSES, &c.

Between

John H. Post, William H. Post, James Watson Gulick, Sarah E. Allen, and Ezekiel B. Allen, her husband and Mary F. Hoagland (late Mary F. Post),

Appellants.

On Appeal

from

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and

John Herbert and Burr Tucker, surviving Executors of John Herbert, deceased, Joseph Thompson, and Abraham Post,

Respondents.

Chancery.

Bill of Complaint.

To His Honor Theodore Runyon, Chancellor of the State of New Jersey:

Humbly complaining show unto your Honor, your orators John Herbert and Burr Tucker, surviving executors of the last will and testament of John Herbert, deceased, of the county of Somerset and State of New Jersey, that on or about the first

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day of March, 1856, John Herbert, of the county of Somerset and State of New Jersey, departed this life, having first duly made and executed his last will and testament, bearing date the 25th day of February, 1856, in the words and figures, or of the substance and effect following, that is to say :

I, John Herbert, of the township of Bridgewater, county of Somerset and State of New Jersey, do make, publish and declare this my last will and
10 testament in manner and form following :

First.—I order and direct my executors, hereinafter named, to pay all my debts and other legal claims against my estate as soon after my death as the same can be legally done.

Second.—I give and bequeath to my beloved wife, Jane, all my household and kitchen furniture, also my negro woman, named Margaret or Peg ; also the use and possession of my homestead dwelling house with the garden belonging thereto ; also the use of
20 the barn for the keeping of a horse and cow, and pasture for said cow ; also all the firewood which she may need for her comfort, to be delivered at her door, all of which privileges she is to enjoy during her life.

Third.—I order and direct my executors to invest the sum of five thousand dollars in some safe security, and the interest arising thereon pay over annually to my wife during her life, the interest to commence one day after my death. After the death
30 of my wife, I order and direct my executors to divide the said sum of five thousand dollars into three equal parts, one third part thereof to be paid to the children of my daughter, Julia Jane, to be equally divided between them, one third part to be paid to my son, John Herbert, and the remaining third part to be paid to my daughter, Sarah Ann.

Fourth.—I give and bequeath to the children of my daughter, Phebe, the sum of two thousand dol-

lars, to be divided equally between them, and to be paid to them as they respectively attain the age of twenty-one years, together with whatever interest may accrue thereon not used for their support and maintenance.

Fifth.—I give and devise to my executors all that house and lot of land and premises conveyed to me by Peter and Ephraim Merlett, by deed, bearing date the 3d day of October, 1854, and in said deed particularly described, as by reference 10
to the same recorded in Somerset Clerk's Office, in Book V., number 2, of deeds, page 39, will appear; to have and hold the same for the sole and only use and benefit of my daughter, Phebe, she, my said daughter, to have the possession and enjoy rents, issues and profits thereof during her life; she, my said daughter, keeping the same in repair, and paying all taxes and insurances on the same. After the death of my said daughter I authorize, empower and direct my said executors to sell the said house and lot at public sale, and to divide the net proceeds of said sale between the children of my said daughter when they attain the age of twenty-one years, and, in case it should be deemed advisable, at any time during the life of my said daughter, to dispose of the said house and lot of land, I do hereby authorize and empower my said executors to sell the same at public sale (the written assent of my said daughter being first had and obtained), and to invest the net proceeds of said sale in some safe security, and the interest arising thereon pay over, 20
annually, to my said daughter, during her life, and after her death divide the said principal sum between the children of my said daughter, share and share alike. 30

Sixth.—I give and bequeath to the children of my daughter, Julia Jane, wife of John Van Derveer, the sum of five hundred dollars each, to be paid to them when they attain the age of twenty-one years,

with the interest accruing thereon, not needed for their support and maintenance.

Seventh.—I give and devise to my said executors all that farm or plantation, situate in the county of Monmouth, now in the occupancy of John Van Derveer, being the same conveyed to me by one Augustus Thomas and wife, by deed dated the 8th day of November, 1847, and in said deed, particularly described as by reference to the same recorded
 10 in Monmouth County Clerk's Office, in Book E of Deeds, page 485, will appear; to have and to hold the same, in trust, for the sole use and benefit of my daughter, Julia Jane, wife of the said John Van Derveer, she, my said daughter, to have the full and free possession of said farm and the rents, issues and profits thereof, during her life, without any interference or control of her husband, and, in case it should be deemed advisable, at any time during the life of my said daughter, to dispose of the
 20 said farm, I do hereby authorize, empower and direct my said executors to sell the said farm at public sale (the written assent of my said daughter being first had and obtained), and the proceeds of said sale to invest in some safe security, and the interest arising thereon pay over, annually, to my said daughter, Julia Jane, during her life. After the death of my said daughter, I order and direct my said executors to sell the said farm at public sale (if the same has not been sold as above directed), and the net proceeds of said sale, or the principal
 30 money invested as aforesaid, as the case may be, be by them divided between the children of my said daughter, Julia Jane, share and share alike, to be paid to them as they respectively attain the age of twenty-one years.

Seventh.—I give and devise to my said executors, all that tract of land and premises situate in the county of Genesee and State of New York, now in the occupancy of Abraham Post, being the same con-

veyed to me by the said Abraham Post, by deed dated the 6th day of November, 1838, and in said deed particularly described, as by reference to the same recorded in the Genesee County Clerk's office in Book 51 of Deeds, page 200, will appear, to have and hold the same in trust for the use of the said Abraham Post, he, the said Abraham, to have and enjoy the possession of the same and the rents, issues, and profits thereof until the youngest child of my daughter Amy Eliza, attains the age of twenty-one years; and in case it should be advisable at any time before the said child attains the age of twenty-one years, to dispose of the said farm or tract of land, I hereby authorize, empower, and direct my said executors (the written assent of the said Abraham Post being first had and obtained) to sell the said tract of land and premises at public sale, and the net proceeds of said sale to invest in some safe security, and the interest arising thereon, pay over annually to the said Abraham Post until the youngest child of my said daughter, Amy Eliza, attains the age of twenty-one years. After the said youngest child attains the age of twenty-one years, I order and direct my executors to sell the said tract of land at public sale (if the same is not already sold as above directed) and the net proceeds of said sale, or the said principal sum invested as aforesaid, as the case may be, be by them divided between the children of my said daughter, Amy Eliza, share and share alike.

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Eighth.—I give and devise to my son John Herbert, all my homestead farm, being the same conveyed to me by one Robert Lenox, Charles Wilkes, and Margaret Campbell, by deed dated the 2d day of December, 1831, and in said deed particularly described as by reference to the same recorded in Somerset Clerk's office in Book 2 of Deeds, page 108, will appear; to have and to hold the same to him, his heirs and assigns forever, the said devise

being subject to the privileges heretofore given to my wife, provided my said son John shall sell and convey to my grandson John Van Derveer, for the consideration of one dollar, the lot of land on which I have built a new house containing about ten acres, or pay to the said John Van Derveer the sum of eight hundred dollars within one year after my death.

10 *Ninth.*—I give and bequeath to my daughter Sarah Ann the sum of seventeen thousand dollars to be paid to her within one year after my death.

20 *Tenth.*—All the rest and residue of my estate, after paying and satisfying the legacies and devises above mentioned, I order and direct my executors to divide into three equal parts, one third part thereof I give and bequeath to the children of my daughter Julia Jane, one other third to my son John Herbert, and the remaining third part to my daughter Sarah Ann, the shares of the said children of my daughter Julia Jane, to be paid to them as they respectively attain the age of twenty-one years.

Eleventh.—I give and devise to my daughter Phebe, my pew in the Presbyterian Church at Bound Brook.

30 *Twelfth.*—I order and direct my executors to sell at public sale all my real and personal estate not hereinbefore disposed of, and I do hereby authorize and empower them to make and execute all necessary deeds of said real estate so sold by them and for all real estate sold by them under the directions of this my last will and testament.

Thirteenth.—My meaning is, and I do so order and direct that my daughter, Sarah Ann, be charged in my estate with the sum of one thousand eight hundred dollars, which I have heretofore advanced to her, and which is to be deducted from the legacy above given to her.

Lastly.—I constitute and appoint my son, John Herbert, and my son-in-law, Burr Tucker, and my friend, John M. Mann, executors of this my last will and testament.

In witness whereof I have hereunto set my hand and seal this twenty-fifth day of February, eighteen and fifty-six.

JOHN HERBERT. [L. s.]

Signed, sealed, published and declared by John Herbert, the testator, to be his last will and testament, in the presence of us who have hereunto subscribed our names as witnesses in the presence of each other and in the presence of the testator, and at his request. 10

DAVID TALMAGE,
JAMES THACKARA.

Proven March 24th, 1856.

JOHN M. MANN.
BURR TUCKER.
JOHN HERBERT.

Recorded in Somerset County Surrogate's office, in book G. of Wills, page 394. 20

And your orators further show unto your Honor that, after the death of said testator, and on or about the twenty-fourth day of March, 1856, your orators and the said John M. Mann proved said will before the Surrogate of the county of Somerset, who at the same time granted to your orators and the said John M. Mann letters testamentary and they became duly authorized to take upon themselves the burthen of the execution of said will. 30

And your orators further show that after such proving of said will and some time in the year 1864, the said John M. Mann departed this life leaving your orators him surviving as the executors of said last will and testament of John Herbert, deceased.

And your orators further show unto your Honor that Amy Eliza, the said daughter of said John Herbert, deceased, mentioned in said last will and testa-

ment of said John Herbert, deceased, departed this life on or about the first day of June, 1851, leaving her surviving six children, viz., John H. Post, William H. Post, Martha A. Post, Jane T., now the wife of James W. Gulick, Sarah E., now the wife of Ezekiel B. Allen, and Mary F. Post, of whom the said Mary F. Post was the youngest.

And your orators further show unto your Honor that, in pursuance of their duties as such executors of said last will and testament of said John Herbert, deceased, they filed in the office of the Surrogate of the county of Somerset their account as such executors, which said account was in the nature of a final account, and was a final settlement of the estate of said John Herbert, deceased, except as to the said farm in Genesee county, New York, which was held in trust for said Abraham Post, until the youngest child of said Amy Eliza should arrive at the age of twenty-one years, and that the only money or property in their hands belonging to the estate of said John Herbert, deceased, is that which arose from the sale of the said farm in Genesee county, New York, as hereinbefore set forth.

And your orators further show that after the said Mary F. Post attained the age of twenty-one years, and on or about the twenty-ninth day of July, A.D. 1871, your orators, by virtue of the power and authority invested in them by the provisions of said last will and testament of said John Herbert, deceased, sold the said farm in Genesee county, New York, at public auction to James W. Gulick and William H. Post, they being the highest bidders for the same, for the sum of fourteen thousand seven hundred and forty dollars; that your orators have exhibited their account of this fund before the Surrogate of the county of Somerset, from which it appears that your orators now have in their hands for distribution the sum of fifteen thousand three hundred and seventy-five dollars and thirty-seven cents, being the principal sum arising from the sale of the

farm in Genesee county, New York, with interest thereon, less the costs and expenses of your orators in making such sale, reference being had to said account filed in the office of the Surrogate of the county of Somerset, on the 20th day of March, 1873, and to which, for greater certainty, your orators beg leave to refer, will more fully and at large appear.

And your orators further show, that Martha A. Post, one of the children of said Amy Eliza, daughter of said John Herbert, deceased, was born June 12th, A. D. 1841, and departed this life February 26th, A. D. 1861 (which was before the said Mary F. Post, the youngest child of said Amy Eliza had attained the age of twenty-one years), without leaving lawful issue, and without having made a last will and testament. 10

And your orators further show that Joseph Thompson, of the county of Somerset, and State of New Jersey, hath been granted by the Surrogate of the county of Somerset letters of administration upon the estate of said Martha A. Post, and, as such administrator, claims of your orators that he is entitled to receive the one-sixth part of said sum of fifteen thousand three hundred and seventy-five dollars and thirty-seven cents, being the portion to which the said Martha A. Post would have been entitled to receive had she been living at the time the said Mary F. Post attained the age of twenty-one years. 20

And your orators further show that said Abraham Post, father of said Martha A. Post, claims and demands of your orators that he is entitled to receive the one-sixth part of said funds, the share to which said Martha A. Post would have been entitled to receive had she been living at the time said Mary F. Post attained the age of twenty-one years, upon the grounds that the interest of said Martha A. Post in the farm in Genesee County, New York, or in the proceeds arising from its sale, vested at the death of said John Herbert, deceased, and said Abraham 30

Post claims said share or interest as the next of kin of said Martha A. Post.

10 And your orators further show that John H. Post, one of the children of said Amy Eliza, was born January 30th, 1835, and that on the 26th day of August, 1857, by his deed of conveyance under his hand and seal, conveyed to said Abraham Post all the right, title and interest which he then had or might thereafter acquire to the undivided one-sixth part of the said farm or tract of land in Genesee county, New York, so as aforesaid sold by your orators, from the proceeds of which sale the said fifteen thousand three hundred and seventy-five dollars and thirty-seven cents arose. The consideration of which said deed of conveyance was the sum of _____ dollars, and in and by which deed the said farm in Genesee county, New York, was described by metes and bounds at full length, and after being duly executed and acknowledged according to law, was recorded on the 26th day of August, 20 A.D. 1857, in the office of the Clerk of the County of Genesee, in the State of New York, in Liber No. 97 of Deeds, page 242. Reference being thereunto had, will more fully and at large appear.

And your orators further show that said Abraham Post claims and insists that by virtue of said conveyance of said John H. Post, he is entitled to receive of your orators the share or proportion of the aforesaid sum of money to which the said John H. Post would have been entitled to receive under the provisions of said will of said John Herbert, deceased, had said deed never been given.

30 And your orators further show that said John H. Post claims and insists to your orators that said deed of conveyance did not pass to the said Abraham Post his (the said John H. Post's) interest in said farm, or in the proceeds arising from the sale of said farm in Genesee county, in New York, but that he the said John H. Post is entitled to receive the same in accordance with the provisions of said last will and testament of John Herbert, deceased.

And your orators further show that Jane T. Gulick, wife of James W. Gulick, Sarah E. Allen, wife of Ezekiel B. Allen, Mary F. Post, all of the county of Somerset and State of New Jersey, William H. Post, of Batavia, and John H. Post, of the city of New York, both of the State of New York, the surviving children of the said Amy Eliza, daughter of said John Herbert deceased, claim to be entitled by the will of John Herbert, deceased, to have the whole proceeds of the sale of the farm in Genesee county, New York, ordered to be sold by the sixth clause of the aforesaid will of said John Herbert, deceased, divided among them equally, share and share alike, upon the ground that the said Martha A. Post departed this life without leaving lawful issue, and before the said Mary F. Post, the youngest child of the said Amy Eliza, had attained the age of twenty-one years, and before the interest of the said Martha A. Post in the share or proceeds of sale of the said lands and real estate, ordered to be sold by said sixth clause of said will had become vested in the said Martha A. Post.

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And your orators further show that they are advised by counsel and verily believe that by reason of the conflicting claims to the distributive shares of said sum of fifteen thousand three hundred and seventy-five dollars and thirty-seven cents, it is unsafe for them to distribute said sum of money without the advice, protection and decree of this Honorable Court.

In tender consideration whereof, and for as much as your orators are remediless by the strict rules of the common law and can only have relief in this Court, where matters of this nature are properly cognizable and relievable:

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To the end, therefore, that the said Abraham Post, Joseph Thompson, Jane T. Gulick, James W. Gulick, Sarah E. Allen and Ezekiel B. Allen, John H. Post, Wm. H. Post and Mary F. Post may discover upon their several and corporal oaths full, true, perfect and direct answer made to all and singular the

matters and things herein set forth, as fully and particularly as if the same were herein repeated paragraph by paragraph ; and that the said last will and testament of said John Herbert, deceased, may be established, construed and determined ; and that the said defendants may, by their answer, or by bill of interpleader, or otherwise, bring at a short day the question in dispute distinctly before this Honorable Court, so that your orators may have the matters in doubt and difference touching the

10 the aforesaid claims of the said Abraham Post, to the one-sixth part of said sum of money, as the next of kin of said Martha A. Post, deceased, and touching the claim and demand of said Abraham Post to another one-sixth part of said sum of money by virtue of the said deed of conveyance so as aforesaid made and executed by said John H. Post and delivered to said Abraham Post, and touching the claim and demand of said surviving children of said Amy Eliza, deceased to have the whole of said fund divided among

20 them, share and share alike, determined, and that each of said defendants may appear and answer this bill of complaint and set forth their various claims and rights in the matter, and that this Court will by its judgment and decree declare and determine the true construction of said last will and testament of said John Herbert, deceased, and whether the said sum of fifteen thousand three hundred and seventy-five dollars and thirty-seven cents is to be divided among the five surviving children of said Amy Eliza, share and share alike, or whether

30 the interest of Martha A. Post in said land in Genesee county, New York, or in the money arising from the sale of said farm vested in said Martha A. Post upon the death of John Herbert, deceased, or whether said Abraham Post is entitled to be paid and receive out of said sum of money, the distributive share of said John H. Post, by reason of said deed of conveyance so as aforesaid made by said John H. Post, and delivered to said Abraham Post, so that your orators may be able to

settle up the estate of the said John Herbert, deceased, and that your orators may have such further and other relief in the premises as to your Honor shall seem equitable and just according to the principles and practice of this Honorable Court.

May it please your Honor, the premises considered, to grant unto your orators a writ or writs of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said John H. Post, Abraham Post, Joseph Thompson, Jane T. Gulick, James W. Gulick, Sarah E. Allen and Ezekiel B. Allen, William H. Post and Mary F. Post, thereby commanding them and each of them, on a certain day and under a certain penalty therein to be inserted, personally, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the premises and to stand to and abide such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience, and your orators will ever pray, &c.

GASTON & BERGEN,

Solicitors for and of Counsel with Complainants.

ANSWER OF DEFENDANT, JOSEPH THOMPSON.

The several answer of Joseph Thompson, as administrator of Martha A. Post, deceased, to the bill of complaint of John Herbert and Burr Tucker, surviving executors of the last will and testament of John Herbert, deceased, complainants.

This defendant now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, says :

That he admits that John Herbert, late of the county of Somerset, departed this life at about the time stated in the bill of complaint, leaving a last will and testament bearing the same date stated in said bill of complaint, which was afterwards admitted to probate by the Surrogate of the said county of Somerset, and letters testamentary granted thereon to the said complainants and one John M. Mann, who has since departed this life, but whether the said last will and testament is truly and accurately set out and copied in said bill of complaint, this defendant neither admits nor denies, but leaves the said complainants to make such proof of the language and contents of said will as is necessary and proper.

10 And this defendant, further answering, admits that Amy Eliza Post, the daughter of said testator and the wife of the defendant, Abraham Post, departed this life intestate on the first day of June, 1851, in the lifetime of the testator and nearly five years before his death, leaving surviving her her
20 husband, the defendant Abraham Post, and six children, whose names this defendant believes are correctly given in the said bill of complaint.

And this defendant further answering says, he believes it is true, although he has no personal knowledge on the subject, that the said complainants sold and also conveyed the farm, lands, and premises situated in the county of Genesee, and State of New York the proceeds of the sale, of which were given in and by said will, to the children of testator's daughter, Amy Eliza Post, at the
30 time, to the persons and for the price stated in the said bill of complaint, and this defendant admits that said complainants have accounted to the Orphan's Court of the county of Somerset in the State of New Jersey for the proceeds of the sale of said farm, lands, and premises, and the interest which had accrued thereon up to the time of filing said account, and that the balance remaining in the hands of said complainants, as shown by said ac-

count, for distribution among the children of the said Amy Eliza Post, and those who represent them, is \$15,375,37, but this defendant shows that part of said sum so remaining in the hands of said complainants was, at the time said account was filed, and still is invested and drawing interest, and this defendant insists that on the distribution and payment of said fund the said complainants must account for and pay all interest which shall accrue since the filing of said account.

And this defendant, further answering, says, that his intestate, Martha A. Post, was a daughter of the said Amy Eliza Post, and a granddaughter of the said testator, and he admits that the said Martha A. Post was born on the 12th day of June, 1841, that she died intestate, unmarried, and without issue, on the 26th day of February, 1861, and before the youngest child of the said Amy Eliza Post attained the age of twenty-one years; and this defendant also shows that the death of the said Martha A. Post occurred while she was residing with this defendant in the said county of Somerset, and that letters of administration to administer her estate were duly granted to this defendant by the surrogate of the said county of Somerset on the 14th day of June, 1873, and that as such administrator this defendant is lawfully entitled to the one-sixth part of the fund with which said complainants are chargeable for the proceeds of the sale of the said farm, lands, and premises situated in Genesee county, and State of New York, and the interest which has and shall accrue thereon.

And this defendant, further answering, says, that he is not aware that Abraham Post, the father of this defendant's intestate, ever made any claim to that one-sixth part of said fund to which this defendant is lawfully entitled as administrator as aforesaid, except such right as he may have there to under statute of distribution; but if he did this defendant submits that such claim is unfounded in law.

And this defendant, further answering, says, that the said testator, John Herbert, deceased, having directed the said farm, lands and premises, situate in Genesee County and State of New York, to be converted into money and given and bequeathed the proceeds of sale as money; that in legal contemplation the conversion took place on the death of the testator, and that the gift to this defendant's intestate, as well as to the other children of the said Amy Eliza Post, was a gift of money; that by
 10 the true, proper and legal construction of the will of the said John Herbert, deceased, the gift or legacy to the said Martha A. Post took effect and vested in this defendant's intestate immediately on the death of the said John Herbert, and that this defendant, as administrator of the said Martha A. Post, deceased, is the only person who can lawfully demand and receive the said one-sixth part of said fund, so given to the said Martha A. Post.

20 And this defendant submits the questions raised by said bill of complaint and his answer thereto, upon the proofs which may be offered to the judgment of this honorable Court, averring that all the matters and things in this answer contained, he is ready to aver, maintain and prove, as this honorable Court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

VAN FLEET & BIRD,

30 *Solicitors for, and of counsel with, the defendant Joseph Thompson, administrator.*

State of New Jersey, ss:

JOSEPH THOMPSON, of full age, being duly sworn according to law, on his oath, says, that he is the the defendant named in the foregoing answer; that the matters and things set forth in said answer so far as relate to his own acts, are true, and so far as

they relate to the acts of others, he believes them to be true.

JOSEPH THOMPSON.

Sworn and subscribed this 29th day of }
December, A. D. 1873, before me. }

PETER G. SCHAMP,

Master in Chancery of New Jersey.

Answer of Defendant Abraham Post. 10

The several answer of Abraham Post, of Genesee county, in the State of New York, to the bill of complaint of John Herbert and Burr Tucker, surviving executors of the last will and testament of John Herbert, deceased, complainants.

This defendant now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, says: 20

That he admits that John Herbert, late of the county of Somerset, departed this life at about the time stated in the bill of complaint, leaving a last will and testament, bearing the same date stated in the said bill of complaint, which was afterwards admitted to probate by the Surrogate of the said county of Somerset, and letters testamentary granted thereon to the said complainants, and one John M. Mann, who has since departed this life; but whether the said last will and testament is truly and accurately set out and copied in said bill of complaint, this defendant neither admits nor denies, but leaves the said complainants to make such proof of the language and contents of said will as is necessary and proper. 30

And this defendant, further answering, says, he was the husband of the testator's daughter, Amy Eliza Post, mentioned and referred to in said will; and he admits that his wife, Amy Eliza, departed this life, intestate, on the first day of June, in the year of our Lord one thousand eight hundred and fifty-one, in the lifetime of the testator, and nearly five years before his death, leaving this defendant surviving her, and also six children, whose names are correctly given in said bill of complaint.

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And this defendant, further answering, admits that after the youngest child of the said Amy Eliza Post attained the age of twenty-one years, the said complainants sold and also conveyed the farm, lands, and premises situate in the county of Genesee, and State of New York; the proceeds of the sale of which were given in and by said will to the children of testator's daughter, Amy Eliza Post, at the time, to the persons and for the price stated in the said bill of complaint; and this

20 defendant further says, he believes it to be true, though he has no personal knowledge on the subject, that the said complainants have accounted to the Orphan's Court of the county of Somerset, in the State of New Jersey, for the proceeds of the sale of said farm, lands and premises, and the interest which had accrued thereon up to the time of filing said account, and that the balance remaining in the hands of said complainants, for distribution among the

30 children of the said Amy Eliza Post, and those who represent them by assignment or administration, as shown by said account, is the sum of fifteen thousand three hundred and seventy-five dollars and thirty-seven cents; but this defendant shows, that part of said sum so remaining in the hands of said complainants, was, at the time said account was filed, and still is, invested and drawing interest; and this defendant insists, that on the distribution and payment of said fund the

said complainants must account for and pay all interest which shall have accrued since the filing of said account.

And this defendant, further answering, says, that his daughter, Martha A. Post, who was also a daughter of the said Amy Eliza Post, was born on the 12th day of June, in the year of our Lord one thousand eight hundred and forty-one, and departed this life, in the county of Somerset, and state of New Jersey, intestate, unmarried and without issue, on the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and sixty-one, and before the youngest child of the said Amy Eliza Post attained the age of twenty-one years, and that this defendant has been informed, and believes the fact to be, that administration of the estate of the said Martha A. Post, deceased, has been granted by the Surrogate of said county of Somerset, to Joseph Thompson, who has accepted the trust, and claims to be entitled to the one-sixth part of the fund arising from the sale of said farm, land and premises.

And this defendant, further answering, says he denies that he claims that he is entitled to the legacy or gift made to the said Martha A. Post, except such right as he may have thereto as next of kin, under the statute of distribution.

And this defendant, further answering, admits that John H. Post, one of the children of the said Amy Eliza Post and this defendant, was born on the thirtieth day of January, in the year of our Lord one thousand eight hundred and thirty-five, and this defendant shows, that on the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and fifty-seven, the said John H. Post made and executed, in due form of law, and delivered to this defendant an indenture in the following words and figures, to wit:

"This indenture made this 26th day of August, in the year of our Lord one thousand eight hundred and fifty-seven, between John H. Post, of the town of Alexander, in Genesee county, State of New York, of the first part, and Abraham Post, of the same place, of the second part, witnesseth that the said party of the first part, in consideration of the sum of fifteen hundred dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged,

10 has bargained, sold, remised, and quit-claimed, and by these presents does bargain, sell, remise and quit-claim unto the said party of the second part, and to his heirs and assigns forever. All the interest which he now has, and all the right, title and interest which he may hereafter acquire to the one-sixth undivided part of all that certain piece or parcel of land, situate, lying and being in the town of Alexander, Genesee county, and State of New York, which, on a map or survey of divers tracts or townships of land made for the Holland Land Company,

20 by Joseph Ellicott, surveyor, is distinguished by township number eleven, in the second range of said townships, and which said tract of land on a certain other map or survey of said township into lots, made for the said Holland Land Company, by the said Joseph Ellicott, surveyor, is distinguished by lot 3, in the eighth section, and part of lot 4 in the eighth section. Said lot three is bounded as follows: north, by lots 4, 7, 8 and 9, one hundred and ten chains and forty-seven links; south, by a line

30 parallel with the north line of said lot three; on lot two, sixty-seven chains and sixty links; west, by part of lot eleven, twenty chains; east, by the Tonawanda Creek, containing (246) two hundred and forty-six acres; part of lot (4) four is bounded south by part of lot (3) three, fifty chains and forty-seven links; west, by part of lot seven (7) ten chains and eight links; north, by a line parallel with the south bounds of said lot four (4) fifty-nine chains and fifty-four links; and east by the Tonawanda Creek, containing

fifty-eight (58) acres, this conveyance including all the lands above described, amounting in the whole to three hundred and four (304) acres. Together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the perversion and perversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the one-sixth undivided part, the above bargained premises, with the said hereditaments and appurtenances. To have and to hold the said right, title and interest to the one-sixth undivided part of the above described premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

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*JOHN H. POST. [L. s.]

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Sealed and delivered }
in the presence of }

RICHARD SMITH,

A Justice of said County.

STATE OF NEW YORK, } ss. :
Genesee County,

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On this twenty-sixth day of August, in the year one thousand eight hundred and fifty-seven, before me, the subscriber, personally appeared John H. Post, to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

That said indenture was, on the day of the date thereof, deposited for record, and recorded in the

office of the Register of Deeds for Genesee county, in the State of New York, in volume 97 of Deeds, page 242 ; that the land and premises described in said indenture are the same ordered and directed in and by the will of the said John Herbert, deceased, to be sold by the said complainants and their co-executor John M. Mann, and the proceeds of the sale of which are given and bequeathed in and by said will to the six children of the said Amy Eliza Post, share and share alike ; that the

10 said indenture was made by the said John H. Post to this defendant for the consideration of fifteen hundred dollars actually paid by this defendant to the said John H. Post ; that the said John H. Post contracted to sell, and did sell, to this defendant, on or about the date of said indenture, for the sum of fifteen hundred dollars, all his rights and interests in the gift or legacy made and given to him in and by said will of, in and to the moneys arising from the sale of the said

20 farm, lands and premises, situate in Genesee county and State of New York ; and this defendant paid to the said John H. Post the sum of fifteen hundred dollars as and for the price of said purchase ; and that said indenture was made, executed and delivered by the said John H. Post to this defendant, as a transfer and assignment of the gift or legacy made and given to him in and by said will ; and this defendant claims and insists that the legal effect and operation of said indenture was and is to transfer and assign to this defendant all the rights and

30 interests which the said John H. Post had at the date of said indenture, or at any time afterwards of, in and to the gift or legacy made and given to him, in and by said will, of the one-sixth part of the moneys arising from the sale of said farm, lands and premises.

And this defendant, further answering, says that on or about the twenty-sixth day of August in the year of our Lord one thousand eight hundred and

fifty-seven, the said John H. Post, one of the children of the said Amy Eliza Post, for the sum of fifteen hundred dollars, then paid by this defendant to the said John H. Post, sold and assigned to this defendant, the share and portion of the moneys arising from the sale of the said farm, lands and premises situate in Genesee county and State of New York, given and bequeathed to him, the said John H. Post, in and by the last will and testament of the said John Herbert, deceased, and that by virtue of such sale, assignment and payment, this defendant is entitled to demand and receive the one-sixth part of moneys or fund now in the hands of said complainants. 10

And the defendant, in further answering says, that the said testator, John Herbert, deceased, having directed the said farm, lands and premises, situate in Genesee county and State of New York, to be converted into money, and given and bequeathed the proceeds of sale as money; that, in legal contemplation, the conversion took place on the death of the testator, and that the gift or legacy to the six children of his daughter, Amy Eliza Post, was a gift or legacy of money, and that by the true legal and proper construction of said will, the gift or legacy to the six children of the said Amy Eliza Post, took effect and vested in the children of the said Amy Eliza Post immediately on the death of the said testator. 20

All which matters and things this defendant is ready to aver, maintain and prove as this honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. 30

VAN FLEET & BIRD,
Solicitors for and of Counsel with
Abraham Post.

STATE OF NEW YORK, }
County of Genessee. } ss.

ABRAHAM POST, of full age, being duly sworn according to law, on his oath, says, that he is the defendant named in the foregoing answer; that the matter and things set forth in said answer, so far as relate to his own acts, are true, and so far as they relate to the acts of others he believes them to be true.

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ABRAHAM POST,

Sworn and subscribed, this twenty-fourth day of December, A. D. 1873, before me, MARCUS LANDON BABCOCK, a Notary Public, of the State of New York, duly authorized to act, and by the law of the State of New York to administer oaths. In testimony whereof I have hereto set my hand and official seal this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-three.

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[SEAL.]

M. L. BABCOCK,
Notary Public.

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The answers of the other defendants admit the allegations of fact set up in the bill, and merely raise the questions of law involved in this appeal, to wit, that the children of the testator's daughter, Amy Eliza, took as a class, under the descriptive words of the will, and that the five children living at the commencement of this action, were entitled to the fund in equal proportions.

No proofs were taken.

*Decree.**(Filed November 3d, 1875.)*

This cause coming on to be heard in the presence of counsel, it is, on this nineteenth day of October, 1875, ordered, adjudged and decreed that the legacy bequeathed by the testator to the children of Amy Eliza Post vested in the said children immediately on the death of the testator, and the said surviving executors of John Herbert, deceased, are hereby directed to pay to the administrator of Martha A. Post the one-sixth part of the fund bequeathed to the children of Amy Eliza Post, of the testator, John Herbert, deceased, after deducting and paying thereout to the complainants' solicitor a counsel fee of \$50, with the taxed costs of said complainants. 10

THEODORE RUNYON, C.

Opinion.

THE CHANCELLOR: The question presented for decision arises under the will of John Herbert, late of the county of Somerset. The will is dated February 25th, 1856, and the testator died in March of that year. The sixth section is as follows: 20

"I give and devise to my said executors all that tract of land and premises situated in the county of Genesee and State of New York, now in the occupancy of Abraham Post, being the same conveyed to me by the said Abraham Post by deed dated the 6th day of November, 1838, and in said deed par-

ticularly described, as by reference to the same recorded in the Genesee County Clerk's office, in Book 51 of Deeds, page 200, will appear, to have and hold the same in trust for the use of the said Abraham Post, he, the said Abraham, to have and enjoy the possession of the same and the rents, issues and profits thereof until the youngest child of my daughter, Amy Eliza, attains the age of twenty-one years; and in case it should be advisable at any time before the said child attains the age of twenty-
 10 one years to dispose of the said farm or tract of land, I hereby authorize, empower and direct my said executors (the written assent of the said Abraham Post being first had and obtained) to sell the said tract of land and premises at public sale, and the net proceeds of said sale to invest in some safe security, and the interest arising thereon pay over annually to the said Abraham Post until the youngest child of my said daughter, Amy Eliza, attains the age of twenty-one years. After the said youngest child attains the age of twenty-one years, I order
 20 and direct my executors to sell the said tract of land at public sale (if the same is not already sold as above directed), and the net proceeds of said sale, or the said principal sum invested as aforesaid, as the case may be, be by them divided between the children of my said daughter, Amy Eliza, share and share alike."

The testator's daughter, Amy Eliza, was the wife of Abraham Post. She was dead at the time when the will was made. She left six children, all
 30 of whom were living at the testator's death. The youngest then was under six years of age and the oldest over twenty-one. The executors proved the will on the 24th of March, 1856. Abraham Post, who is still living, received the rents, issues and profits of the farm up to the time when the youngest of Amy Eliza's children attained to the age of twenty-one. After that, and in the year 1871, the executors sold the property. One of the children, Martha A., died under the age of twenty-one, on

the 26th of February, 1861, having never been married. Her administrator claims one-sixth of the proceeds of the sale of the farm. Her brothers and sisters, on the other hand, claim the whole. The executors, by the bill, ask for directions as to the payment. The question presented is, whether the legacies given to Amy Eliza's children were vested at the testator's death, or whether they were contingent upon the legatees attaining to the age of twenty-one years. If they were vested at the death of the testator, Martha's administrator is entitled to the one-sixth in question; if contingent, her brothers and sisters are entitled to the entire fund. The intention of the testator was to give the use of the farm in question to Abraham Post, until all the children of the latter's late wife—the testator's daughter Amy Eliza—should have attained to their majority, when presumably he would no longer be charged with their support or maintenance, and they would be no longer dependent on him. Accordingly, he gave to Abraham Post, out of that property (which, judging from the plan of the will, was the share which he would have given to his daughter, Amy Eliza, had she been living, for her life and after her death to her children), the use thereof until the majority of the youngest child, and directed that at that time the principal should be, by his executors, divided between Amy Eliza's children in equal shares. The case presents the features of a gift to the children contained only in the direction to divide; of a postponement of the distribution to let in another interest, and of fractional interests in the fund bequeathed absolutely to different persons in succession at periods which must arrive. The gift to the children, in my judgment, vested immediately on the death of the testator. "Where," says Jarman, "a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other person, the children, if any, living at the death of the testator take an immediately vested

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interest in their shares, subject to the diminution of those shares (*i. e.*, to their being divested *pro tanto*), as the number of objects is augmented by future births during the life of the tenant for life, and consequently on the death of any of the children during the life of the tenant for life, their shares (if their interest is transmissible) devolve to their respective representatives." 2 Jarman on Wills, 75. When the absolute property in a fund is bequeathed in fractional interests in succession,

10 at periods which must arrive, the interest of the first and subsequent takers vests together. Roper on Leg., 586. A bequest in the form of a direction to pay or to pay and divide vests immediately, if the payment be postponed for the convenience of the estate or to let in some other interest. Hawkins on Wills, 232. 1 Jarman on Wills, 763. *Howell vs. Green*, 2 Vr., 570. *Wintermute vs. Snyder*, 2 Green's C. R., 490. *Van Dyke vs. Vanderpoel*, 1 McCart, 207. *Thomas vs. Anderson*, 6 C. E. G.,

20 22. *Packham vs. Gregory*, 4 Hare., 396, 398. In the case under consideration, the time of payment is not annexed to the substance of the legacy, though there is no gift of the legacy distinct from the direction to the executors for its payment. The event on which the division was to take place was in no wise uncertain. The gift is not to such of the children as should be living when the youngest should attain to the age of twenty-one years, nor is there any language used from which the conclusion can be deduced that it was the intention of the testator that

30 the legatees should not be entitled to their legacies in case they should not live to that period. He provides for no survivorship, nor is there any gift over. Had he not desired to give an interest in the property to Abraham Post, the testator would probably have given the legacies to the children by words expressive of a present gift. The postponement of the time of distribution is a necessary consequence of the bequest to Abraham Post with which it is coupled. By the construction insisted upon in behalf of the

surviving children, it is necessary to impute to the testator an intention that the children of any of Amy Eliza's children who should die before the period of distribution, should not participate in the fund. Martha A., had she lived, would have been over thirty years of age when the youngest child attained her majority, and the oldest child would have been thirty-six years old. Indeed, at the time when the will was made, the oldest child was over twenty-one years of age. The contingency of the death of some of these children leaving issue before the period of distribution should have arrived, may well have been in the contemplation of the testator. The will contains no evidence of his intention to confine participation in the fund to such of the children as should live to the period fixed for the distribution. On the other hand, the bequests to the children of his other daughters show that he intended that the shares given to his grandchildren, should vest at his death. To each of his daughters, Julia Jane and Phebe, he gave the use of a farm for life, vesting the title in the executors, with like power of sale and distribution as in the case of the farm in Genesee county, except that the distribution was to take place at the death of the life-tenant, and in those cases he provided that, at the death of the life-tenant, the proceeds of sale, or the principal money derived from sale made before the death of the life-tenant, should be "divided between the children" of the life-tenant, "share and share alike," to be paid to them as they "should respectively attain to the age of twenty-one years." By the third section of the will he directed the executors to invest \$5,000 and pay the interest to his widow for life, and "after the death" of his widow to "divide the principal sum into three equal parts, one-third part thereof to be paid to the children of his daughter Julia Jane, "to be equally divided between them."

By the fourth section he gave to "the children" of his daughter Phebe, "the sum of \$2,000 to be

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equally divided between them, and to be paid to them as they should respectively attain the age of twenty-one years, together with whatever interest might accrue thereon not used for their support and maintenance." By the fifth section he gave "to the children" of Julia Jane \$500 each, "to be paid to them when they should attain to the age of twenty-one years, with interest accruing thereon not needed for their support or maintenance." So, too, in disposing of the residue of his estate, he directed his
 10 executors to divide it into three equal parts and gave one part to "the children" of Julia Jane, another to his son, and the remaining one to his daughter Sarah Ann, and provided that the shares of the children of Julia Jane "be paid to them" as they "should respectively attain the age of twenty-one years."

These gifts all vested in the legatees on the death of the testator. The reason for the peculiar provision in the bequest to the children of Amy Eliza, that the distribution should not be made until the
 20 youngest child should have attained to the age of twenty-one years has been before suggested. Had she been alive at the time of making the will there is no reason to doubt that he would have made the like provision for her and her children, in respect to the Genesee farm which he had made for two of his other daughters and their children in respect to the farms, the use whereof he gave for life to those daughters. But she, being dead, he gave to her husband, to enable him to bring up her children,
 30 the use of the Genesee farm, for a period covering the minority of the youngest child, intending that, after that purpose should have been served, the proceeds of the property should go to Amy Eliza's children, in like manner, as provided for the children of his other two daughters in respect to the farms given to them; and, inasmuch as the use of the property was given to Amy Eliza's husband up to the time when the youngest of her children should have attained to the age of twenty-one

years, there was, of course, no occasion, as there was in the other cases, for a provision limiting the time of payment in reference to their age.

The executors will be directed to pay one-sixth of the fund to Martha's administrator.

Appeal.

(Filed November 16, 1875.)

The defendants, John H. Post, William H. Post, James Watson Gulick, Sarah E. Allen and Ezekiel B. Allen, her husband, and Mary F. Hoagland (late Mary F. Post), hereby appeal from so much of the final decree made in this Court in the above stated cause, as declares that the legacy bequeathed by the testator to the children of Amy Eliza Post, vested in the said children immediately on the death of the testator, and also that part by which the said surviving executors of John Herbert, deceased, were directed to pay to the administrator of Martha A. Post the one-sixth part of the fund bequeathed to the children of Amy Eliza Post by the testator John Herbert, deceased, after deducting and paying therefrom, to the complainants' solicitors, a counsel fee of \$50, with the costs of the complainants, to the Court of Appeals, in the last resort, in all cases of law.

JOHN SCHOMP,
Solicitor of defendants appealing.

A. A. CLARK,
Of counsel.

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

A. A. CLARK.

*Petition of Appeal.**(Filed December 18, 1875.)**To the Honorable the Court of Errors and Appeals, in the last resort in all cases.*

The humble petition of John H. Post, William H. Post, Sarah E. Allen, and Ezekiel B. Allen, her husband; James Watson Gulick, and Mary F. Hoagland, (late Mary F. Post,) the appellants in the above cause, respectfully shows that they find themselves
 10 aggrieved by an order or final decree made in the Court of Chancery of New Jersey, by his Honor Theodore Runyon, Chancellor, bearing date on the third day of November, in the year of our Lord, one thousand eight hundred and seventy-five, wherein the said John Herbert and Burr Tucker, surviving executors of the last will and testament of John Herbert, deceased, were complainants, and your petitioners and others were defendants, in this respect, to wit: That by the said order or final
 20 decree of the Chancellor, it was decreed and adjudged that the legacy bequeathed by the testator, John Herbert, to the children of Amy Eliza Post, vested in said children at the testator's death, and directs that the one-sixth part of the fund given by said will to said children be paid to the administrator of Martha A. Post, deceased.

And your petitioners humbly appeal from that part of said decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, for that the said legacies did not vest
 30 at the testator's death, but at the majority of the youngest child of the said Amy Eliza, or if they vested, they vested in all the children as a class, and the whole fund rightfully belongs to those children who were alive at the majority of the said youngest child, and the whole fund should be paid in equal one-fifth parts to the surviving children of said Amy Eliza. Your petitioners therefore pray

that the said decree may be in the particulars afore-
said reversed, set aside and for nothing holden.

And that your petitioners may have such relief 10
in the premises as to this Honorable Court shall
seem meet and proper.

JNO. SCHOMP,
Solicitor for Appellants,
A. A. CLARK,
Of Counsel, with Appellants.

I conceive there is good and sufficient ground of
appeal in above stated cause.

A. A. CLARK,
Of Counsel &c.

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Answer to Petition of Appeal.

(Filed January 14 1876.)

The answer of Joseph Thompson, administrator
of Martha A. Post, deceased to the petition of ap-
peal of the above-named appellants.

These respondents, not admitting all or any of
the matters or things to be true as in and by the
said petition of appeal are mentioned and set forth,
for answer thereunto says that he believes it to be 30
true that such decree as is complained of was made
by the Court of Chancery, as in the said petition of
appeal is mentioned and set forth; but as to the date,
substance and extent thereof, this respondent
humbly craves leave to refer thereunto when the
same shall be produced. And this respondent
humbly conceives and is advised that the decree in
the matters complained of in said petition of appeal
is correct and just, and according to law and the
proofs in said matter;

And therefore humbly prays that said decree may
be affirmed, and the said appeal may be dismissed, 40
with costs.

JOHN T. BIRD
Solicitor for and of Counsel with Appellee.

Like answers to the said petition of appeal were duly filed by the respondents, John Herbert and Burr Tucker, and the respondent, Abraham Post.





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