

## I N D E X .

|  | PAGE |
|--|------|
| Notice of Appeal.....  | 1    |
| Petition of Appeal.....  | 2    |
| Answer of Respondent to Petition of Appeal.  | 5    |
| Answer of Respondents to Petition of Appeal.   | 7    |
| Bill of Complaint including copy of Will.....  | 8    |
| Answer of Defendants Ida Dowdney, Stella<br>Fox and Herbert Straut to Bill of Com-<br>plaint.....      | 14   |
| Answer of Defendants Edith Sholl, Lillian<br>Rothrock and Sidney Straut to Bill of Com-<br>plaint..... | 16   |
| Order Appointing Guardian ad Litem for De-<br>fendant Eva Mackay.....                                  | 18   |
| Answer of Defendant Eva Mackay to Bill of<br>Complaint.....  | 19   |
| Replication to Answers.....  | 21   |
| Order of Reference to Vice-Chancellor.....   | 22   |
| Stipulation and Depositions of Witnesses....   | 23   |
| Conclusions of Vice-Chancellor.....  | 29   |
| Final Decree.....  | 33   |
| Order Amending Final Decree.....   | 36   |

**Notice of Appeal.**

(Filed March 17, 1928.)

**In Chancery of New Jersey** 10

Between

PERCIVAL FORSHEE, Executor of  
the Last Will and Testament of  
Matilda McLaurin, deceased,  
Complainant,

and

IDA DOWDNEY, STELLA FOX, HER-  
BERT STRAUT, EVA MACKAY,  
LILLIAN ROTHROCK, EDITH  
SHOLL and SIDNEY STRAUT,  
Defendants.

On Bill, etc.

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The defendants Lillian Rothrock, Edith Sholl, Eva Mackay and Sidney Straut hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Fielder in this Court, in the above-stated cause, and from the whole and every part thereof, except such part as provides for the payment of counsel fees and costs, to the Court of Errors and Appeals in the last resort in all causes. 30

Dated, March 12, 1928.

KELSEY & LUDWIG,  
Solicitors for and of Counsel with the  
Defendants Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay. 40

*Notice of Appeal.*

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

CLARENCE KELSEY,  
Of Counsel with Defendants Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay.

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**Petition of Appeal.**

(Filed April 5, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between  
PERCIVAL FORSHEE, Executor of the Last Will and Testament of Matilda McLaurin, deceased,  
Complainant-Respondent,

20

and

IDA DOWDNEY, STELLA FOX and HERBERT STRAUT,  
Defendants-Respondents,

30

and

LILLIAN ROTHROCK, EDITH SHOLL, SIDNEY STRAUT and EVA MACKAY,  
Defendants-Appellants.

On Bill, etc.

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

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The petition of Eva Mackay, by John M. Mackay, her guardian, Lillian Rothrock, Edith Sholl and

*Petition of Appeal.*

Sidney Straut, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the fifth day of December, in the year A. D. nineteen hundred and twenty-seven—as said final decree was amended by an order of said Chancellor made on the thirtieth day of January, in the year A. D. nineteen hundred and twenty-eight—wherein the said Percival Forshee, Executor of the last will and testament of Matilda McLaurin, deceased, was complainant, and the said Ida Dowdney, Stella Fox, Herbert Straut, Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay were defendants, in this respect, to wit: that the said decree adjudges that the said complainant, as executor under the last will and testament of Matilda McLaurin, deceased, pay over to the said Ida Dowdney the share bequeathed in and by said will unto the children of Peter F. Straut, a deceased brother of the testatrix, and pay over to said Stella Fox and Herbert Straut the share bequeathed in and by said will to the children of Jacob E. Straut, a deceased brother of the testatrix.

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And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that under the terms of said will and the true construction to be placed thereon and the evidence your petitioners, Lillian Rothrock, Edith Sholl and Sidney Straut, grandchildren of said Peter F. Straut, are each entitled to a one-thirtieth share or part of the residuary estate of said Matilda McLaurin, deceased, and your petitioner, said Ida Dowdney, to a one-tenth share thereof, and your petitioner, Eva Mackay, a grandchild of said

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*Petition of Appeal.*

Jacob E. Straut, is entitled to a one-fifteenth share or part thereof, and said Stella Fox and Herbert Straut each to a one-fifteenth share, and said decree should have so adjudged and should have adjudged that the said executor pay over to your  
10 petitioners respectively the said parts or shares to which they, as aforesaid, are entitled.

Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

20 **KELSEY & LUDWIG,**  
Solicitors for and of Counsel with  
the Appellants.

Service of a copy of the petition of appeal in the above-entitled cause is hereby acknowledged this seventh day of April, nineteen hundred and twenty-eight.

30 **MELOSH, MORTEN & MELOSH,**  
Solicitors for Ida Dowdney, Stella  
Fox and Herbert Straut, Re-  
spondents.

**PH. F. SAUER,**  
Solicitor for Percival Forshee, Ex-  
ecutor, etc., Respondent.

**Answer to Petition of Appeal.**

(Filed April 9, 1928.)

**NEW JERSEY COURT OF ERRORS AND  
APPEALS.**

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Between

PERCIVAL FORSHEE, Executor of  
the Last Will and Testament of  
Matilda McLaurin, deceased,  
Complainant-Respondent,

and

IDA DOWDNEY, STELLA FOX and  
HERBERT STRAUT,  
Defendants-Respondents,

and

LILLIAN ROTHROCK, EDITH SHOLL,  
SIDNEY STRAUT and EVA  
MACKAY,  
Defendants-Appellants.

On Appeal  
from Court  
of Chancery.

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The answer of Percival Forshee, executor of the last will and testament of Matilda McLaurin, deceased, the above-named complainant-respondent, to the petition of appeal of Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay, defendants-appellants.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admits that a decree was on the 5th day of December,

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*Answer to Petition of Appeal.*

A. D. 1927, 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 decree this respondent begs leave to refer thereto when the same shall be produced.

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

PH. F. SAUER,  
Solicitor for and of Counsel with Percival Forshee, Executor, etc., Complainant-Respondent.

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**Answer to Petition of Appeal.**

(Filed April 9, 1928.)

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

Between

10

PERCIVAL FORSHEE, Executor of the Last Will and Testament of Matilda McLaurin, deceased, Complainant-Respondent,

and

IDA DOWDNEY, STELLA FOX and HERBERT STRAUT, Defendants-Respondents,

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LILLIAN ROTHROCK, EDITH SHOLL, SIDNEY STRAUT and EVA MACKAY, Defendants-Appellants.

On Appeal from Court of Chancery.

The answers of Ida Dowdney, Stella Fox and Herbert Straut, the above-named defendants-respondents, to the petition of appeal of Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay, defendants-appellants.

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These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admit that a decree was on the 5th day of December, A. D. 1927, 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 decree, these respondents beg leave to refer thereto when the same shall be produced.

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*Answer to Petition of Appeal.*

These respondents 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 respondents.

10                   MELOSH, MORTEN & MELOSH,  
Solicitors for and of Counsel with Ida  
Dowdney, Stella Fox and Herbert  
Straut, Defendants-Respondents.

**Bill of Complaint.**

20                   (Filed April 28, 1927.)

## IN CHANCERY OF NEW JERSEY.

*To the Honorable Edwin Robert Walker, Chan-  
cellor of the State of New Jersey:*

30                   The complainant, Percival Forshee, of the City  
of Jersey City, County of Hudson, and State of  
New Jersey, the executor under the last will and  
testament of Matilda McLaurin, deceased, late of  
said County of Hudson, respectfully shows that:

1—The said Matilda McLaurin, late of said  
County of Hudson, died on December 20th, 1926,  
leaving a last will and testament which was there-  
after and on the 5th day of January, 1927, duly  
admitted to probate by the Surrogate of said Coun-  
ty of Hudson and letters testamentary thereon is-  
sued to complainant, the executor therein named.

40                   A true copy of said last will and testament is  
annexed hereto and made a part hereof.

*Bill of Complaint.*

2—Paragraph three of said will is as follows:  
“After paying my just debts and funeral expensis  
of my

*i* direct the balance  $\wedge$  estate remaining—be divided  
into five (5) equal parts or shares; one part or  
share *i* give, devise and bequeath unto my Sister  
Jane Maria Forshee, if living: if not living, then  
to her children in equal parts among them, one

10                   unto  
part or share *i* give, devise and bequath  $\wedge$  to my  
Sister Mary Amealine Palmer if living: if not liv-  
ing, then to her children in equal parts among them,

and  
one part or share *i* give, devise  $\wedge$  bequeath unto  
the children of my deceased brother, Peter F.

20                   and  
Straut one part or share *i* give, devise  $\wedge$  bequeath  
unto the *the* children of my deceased brother Jacob  
E. Straut one part or share *i* give, devise and be-  
queath unto my brother, George Straut, if living:  
if not living then *i* direct that his part or share be  
paid to my Sister Jane Maria Forshee, my Sister  
Mary Amaline Palmer. and the children of my  
deceased brother Peter F. Straut and the children  
of my deceased brother Jacob E. Straut.”

30                   3—Jane Maria Forshee, Mary Amealine Palmer  
and George Straut, sisters and brother mentioned  
in paragraph three of said will who are each en-  
titled to an undivided one-fifth part or share of the  
residuary estate, are still living.

40                   4—At the time of the execution of the will, name-  
ly April 8th, 1925, as well as the time of the death  
of the testatrix, namely, December 20th, 1926, and  
a long time prior thereto, Peter F. Straut, a brother

*Bill of Complaint.*

of the testatrix, was dead and he left him surviving the following:

10     Ida Dowdney, a daughter  
        (Lillian Rothrock,  
        (Edith Sholl  
        (Sidney Straut, grandchildren, children of  
        Charles Straut, a deceased son of Peter F. Straut.

5—At the time of the execution of the will, namely, April 8th, 1925, as well as the time of the death of the testatrix, namely, December 20th, 1926, and a long time prior thereto, Jacob E. Straut, a brother of the testatrix, was dead and he left him surviving the following:

20     Stella Fox, a daughter  
        Herbert Straut, a son  
        Eva Mackay, a grandchild, who was a daughter  
        of Eva Mackay, a deceased daughter of Jacob E.  
        Straut.

6—The said Lillian Rothrock, Edith Sholl and Sidney Straut, who are grandchildren of Peter Straut, a deceased brother of the testatrix, claim  
 30 to be entitled to a part or share of the undivided one-fifth part or share of the residuary estate bequeathed to the children of my deceased brother, Peter F. Straut.

7—Complainant is prepared to distribute the residuary estate of the said decedent, but is in doubt as to the persons who are entitled thereto, and cannot safely proceed to distribute the said residuary estate without the directions of this  
 40 court.

*Bill of Complaint.*

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

1—That said Ida Dowdney, Lillian Rothrock, Edith Sholl, Sidney Straut, Stella Fox, Herbert Straut and Eva Mackay, who are the defendants to this suit, may answer this bill of complaint and each statement therein made. 10

2—That this court may direct the complainant to whom he is to distribute the said undivided one-fifth part or share given and bequeathed to the children of the deceased brother, Peter F. Straut, and to whom he is to distribute the said undivided one-fifth part or share given and bequeathed to the children of the deceased brother, Jacob E. Straut; as bequeathed under provisions of paragraph three of the said last will and testament of said Matilda McLaurin, deceased. 20

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

PHILIP F. SAUER, 30  
 Solicitor for and of Counsel with  
 Complainant.

Will of Matilda McLaurin.

In the Name of God, Amen.

I, Matilda McLaurin of the Jersey City of . . . . .  
County of Hudson County State of New Jersey  
being of sound and disposing mind and memory,  
and considering the uncertainty of this life, do  
make, publish and declare this to be my last Will  
and Testament as follows, hereby revoking all  
other and former Wills by me at any time made.

First, after my lawful debts are paid, I give  
devise and bequeath West New Hempstead Re-  
formed Church—the Town of Ramapo, Rockland  
County State of New York, *tw* (2) Hundred dollars  
to take care—Plot in West *new* Hempstead Ceme-  
tery.

and  
Second *i devse*  $\wedge$  bequeath unto my Nephew  
Percival Forshee *Tw* (2) thousand dollars

Third After paying my just debts and funeral  
of my  
expenses *i direct* the balance  $\wedge$  estate remaining—  
be divided into five (5) equal parts or shares; one  
part or share *i give*. devise and bequeath unto my  
Sister Jane Maria Forshee, if living: if not living,  
then to her children in equal parts among them, one

unto  
part or share *i give*, devise and bequath  $\wedge$  to my  
Sister Mary Amealine Palmer, if living; if not liv-  
ing, then to her children in equal parts among

and  
them, one part or share *i give*, devise  $\wedge$  bequeath  
unto the children of my deceased brother, Peter F.

and  
Straut one part or share *i give*, devise  $\wedge$  bequeath  
unto the *the* children of my deceased brother Jacob  
E. Straut one part or share *i give*, devise and be-  
queath unto my brother, George Straut, if living:

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Will of Matilda McLaurin.

if not living then *i direct* that his part or share be  
paid to my Sister Jane Maria Forshee, my Sister  
Mary Amaline Palmer. and the children of my  
deceased brother Peter F. Straut and the children  
of my deceased brother Jacob E. Straut

Fourth I give, the 2 parlor chairs with green  
bottoms to my *neice* Ida Doudney, My Piano *i*  
give to my *neice* Nellie Palmer, My Watch and  
chain *i give* to Claria Bassinger, My Breastpins to  
Jane Maria Forshee, the violins to Eugene Forshee,  
the rest of my furniture *i leave* to my sister Jane  
Maria Forshee and my Sister Mary Amealine Pal-  
mer *i desire* that my Executor shall take charge  
of my estate whatsoever kind wheresoever situated  
*i desire* that *that* my nephew. Percival Forshee shall

Bond  
not be required to give as  $\wedge$ . Executor.

Likewise, I make, constitute and appoint My  
Nephew Percival Forshee to be the executor of this,  
my last Will and Testament,

In Witness Whereof, I have hereunto subscribed  
my name and affixed my seal, the Eight-day of  
April, in the year of our Lord one *one* thousand  
nine hundred and *twenty* five.

Matilda McLaurin (SEAL)

We, whose names are hereto subscribed, do cer-  
tify that. . . . .the testator, subscribed her name  
to this instrument in our presence, and in the  
presence of each of us, and at the same time she  
declared in our presence and hearing that the same  
was her last Will and Testament, and requested  
us, and each of us, to sign our names thereto as  
witnesses to the execution thereof, and which we  
hereby do in the presence of the testatrix and of  
each other, this Eight-day of April 1925, the day

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*Answer of Ida Dowdney et al.*

of the date of the said Will, and write opposite our names our respective places of residence.

Philip McGovern, residing at 159 Newkirk St. J. City....

10 William I Law residing at Rutherford, N. J.

**Answer to Bill of Complaint.**

(FILED MAY 23, 1927)

IN CHANCERY OF NEW JERSEY.

Between

20 PERCIVAL FORSHEE,  
Complainant,

and

IDA DOWDNEY, *et als.*,  
Defendants.

On Bill, etc.

The defendants Ida Dowdney, Stella Fox and Herbert Straut, answering the bill of complaint, say that:

30 1—They admit paragraphs one, two, three, four and five of the bill of complaint.

2—As to the allegations contained in paragraph six, these defendants have no knowledge or information sufficient thereof to form a belief.

3—As to the allegations contained in paragraph seven, these defendants have no knowledge or information sufficient thereof to form a belief.

40 4—These defendants aver that Peter F. Straut, a brother of the testatrix, died on May 17th, 1887,

*Answer of Ida Dowdney et al.*

and that Charles Straut, the only son of said Peter F. Straut, died on April 20th, 1916.

5—These defendants aver that Jacob E. Straut, a brother of the testatrix, died February 26th, 1895, and that Eva Mackay, a daughter of the said Jacob E. Straut, deceased, died on October 16th, 1908. 10

6—These defendants further aver that they are advised that under the true construction to be placed upon the will, the share of the estate of the said testatrix, given, devised and bequeathed to the children of Peter F. Straut, is to be paid over to the defendant Ida Dowdney, she being the only child of Peter F. Straut who was living at the time of the making of the said will and that the share of the estate of the said testatrix given, devised and bequeathed to the children of Jacob E. Straut is to be divided equally between the defendants Stella Fox and Herbert Straut, they being the only children of the said Jacob E. Straut, who were living at the time of the making of said will. 20

These defendants therefore join in the prayer of the complainant, that this court construe the said last will and testament of the said Matilda McLaurin, deceased, and that a decree may be entered in this cause accordingly, adjudging and declaring the rights of the several parties entitled to share in the estate of said testatrix. 30

MELOSH, MORTEN & MELOSH,  
Solicitors and of Counsel with Defendants.

**Answer to Bill of Complaint.**

(Filed June 10, 1927.)

IN CHANCERY OF NEW JERSEY.

|    |  |   |  |
|----|--|---|--|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br>and<br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } | On Bill, etc.<br>Answer of De-<br>fendants Edith<br>Sholl, Lillian<br>Rothrock and<br>Sidney Straut. |
| 20 | The answer of the defendants Edith Sholl, Lil-<br>lian Rothrock and Sidney Straut.                                     |   |  |

The answer of the defendants Edith Sholl, Lil-  
lian Rothrock and Sidney Straut.

These defendants Edith Sholl, Lillian Rothrock  
and Sidney Straut, answering the bill of complaint,  
say that:

1. Paragraphs 1, 2, 3, 4, 5 and 6 are admitted.
2. These defendants have no knowledge or in-  
30 formation sufficient to form a belief as to the state-  
ments in paragraph 7.
3. Peter F. Straut, a brother of Matilda Mc-  
Laurin, deceased, died on or about May 17, 1887,  
leaving him surviving a daughter, the said Ida  
Dowdney, and a son named Charles Straut. Said  
Charles Straut died on or about April 20, 1916,  
leaving these defendants, Edith Sholl, Lillian Roth-  
rock and Sidney Straut, him surviving as his only  
40 heirs at law and next of kin.

*Answer of Edith Sholl et al.*

4. Each of these defendants, under the terms  
of the will of Matilda McLaurin, deceased, is en-  
titled to a one-thirtieth share or part in and of  
her residuary estate.

5. These defendants join in the prayer of the  
complainant for a construction of the said will of  
Matilda McLaurin, deceased, and pray that a de-  
cree may be made in this cause adjudging and  
declaring that each of these defendants is entitled  
to a one-thirtieth share or part in and of the said  
residuary estate.

KELSEY & LUDWIG,  
Solicitors for and of Counsel with the  
Defendants Edith Sholl, Lillian Roth-  
rock and Sidney Straut.

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Order Appointing Guardian ad Litem.

(Filed June 13, 1927.)

IN CHANCERY OF NEW JERSEY.

|    |  |   |
|----|--|---|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } On Bill, etc.<br>} Order<br>} Appointing<br>} Guardian<br>} ad Litem of<br>} Defendant<br>} Eva Mackay. |
|----|--|---|

20 Upon reading the petition filed in this cause by Eva Mackay, one of the defendants in this cause, setting forth that she, the said Eva Mackay, is a minor over the age of fourteen years, and praying that John M. Mackay, the father of the petitioner, may be appointed her guardian *ad litem*, for her and in her behalf to make answer and defense to the complainant's bill of complaint; and upon reading the written assent of the said John M. Mackay annexed to said petition, that said appointment be

30 made, and also the affidavit of Jesse L. Kerchoff, verifying the age of the said petitioner, and setting forth that the said petition and assent were signed in his presence:

It is, on this 13th day of June, nineteen hundred and twenty-seven, ORDERED, that the said John M. Mackay be appointed guardian *ad litem* of the said Eva Mackay, by whom she may appear and answer, and defend this suit.

40 E. R. WALKER,  
C.

Answer to Bill of Complaint.

(Filed October 17, 1927.)

IN CHANCERY OF NEW JERSEY.

|    |  |  |    |
|----|--|--|----|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } On Bill, etc.<br>} Answer of De-<br>} fendant Eva<br>} Mackay, an<br>} infant, by<br>} John M.<br>} Mackay, her<br>} Guardian. | 10 |
|----|--|--|----|

20 The answer of the defendant Eva Mackay, an infant under the age of twenty-one years, by John M. Mackay, her guardian, to the bill of complaint of Percival Forshee, executor under the last will and testament of Matilda McLaurin, deceased, complainant.

This defendant, Eva Mackay, by John M. Mackay, her guardian, answering the bill of complaint, says that she is a stranger to all and singular the matters and things in the said bill of complaint contained, otherwise than that this defendant is informed that Jacob E. Straut, a brother of Matilda McLaurin, deceased, died on or about February 26, 1895, leaving him surviving a son, Herbert Straut, and two daughters, Stella Fox and Eva Straut Mackay, and that said Eva Straut Mackay died on or about October 16th, 1908, leaving this defendant, Eva Mackay, her surviving as her only heir at law, and that, under the terms of the will of said Matilda McLaurin, deceased, this defendant is entitled to some share in or part of her residu-  
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 40  
 40

*Answer of Guardian ad Litem.*

tender years, submits herself to the judgment of this honorable court, and prays that her interest may be protected and saved to her.

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EVA MACKAY,  
By JOHN M. MACKAY,  
Her Guardian.

STATE OF NEW YORK, }  
CITY OF NEW YORK, } SS.:  
COUNTY OF }

20 JOHN M. MACKAY, the guardian *ad litem* of the above-named defendant, being duly sworn on his oath says that he has read the foregoing answer, and that he is informed and verily believes that the facts stated therein are true.

JOHN M. MACKAY.

Sworn and subscribed to before me  
this 11th day of October, 1927.

30 ALFRED H. CARL,  
Notary Public in and for the County of  
In the State of New York.  
(Seal)

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**Replication.**

(Filed June 13, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

PERCIVAL FORSHEE, Executor,  
etc.,  
Complainant,

and

IDA DOWDNEY, *et als.*,  
Defendants.

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On Bill, etc.

The complainant joins issue on the answers of  
the defendants. 20

PH. F. SAUER,  
Solicitor of Complainant.

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**Order of Reference.**

(Filed June 22, 1927.)

IN CHANCERY OF NEW JERSEY.

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|                               |   |               |
|-------------------------------|---|---------------|
| Between                       | } | On Bill, etc. |
| PERCIVAL FORSHEE, Executor,   |   |               |
| etc.,                         |   |               |
| Complainant,                  |   |               |
| and                           |   |               |
| IDA DOWDNEY, <i>et als.</i> , |   |               |
| Defendants.                   |   |               |

20

On motion of Philip F. Sauer, solicitor of the complainant herein, the defendants, through their solicitors, consenting hereto,

It is thereupon on this 21st day of June, 1927, Ordered that the above-stated cause be referred to Hon. J. F. Fielder, one of the Vice Chancellors, to hear the same for the Chancellor and to report thereunto him and advise what order or decree should be made therein.

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E. R. WALKER,  
C.

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**Stipulation.**

(Filed October 21, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

|                               |   |               |
|-------------------------------|---|---------------|
| PERCIVAL FORSHEE, Executor,   | } | On Bill, etc. |
| etc.,                         |   |               |
| Complainant,                  |   |               |
| and                           |   |               |
| IDA DOWDNEY, <i>et als.</i> , |   |               |
| Defendants.                   |   |               |

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It is hereby stipulated by and between Philip F. Sauer, solicitor for the complainant, and Kelsey & Ludwig, solicitors for the defendants Edith Sholl, Lillian Rothrock, Sidney Straut and Eva Mackay, and Melosh, Morten & Melosh, solicitors for the defendants Ida Dowdney, Stella Fox and Herbert Straut, that the following affidavits of John M. Mackay, Lillian Rothrock and Edith Sholl hereto annexed be filed with the Court in the above-entitled cause and be of the same force and effect as if taken in open court on an examination and cross-examination of the affiants.

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PHILIP SAUER,  
Solicitor for Complainant.

KELSEY & LUDWIG,  
Solicitors for Defendants Edith Sholl, Lillian Rothrock, Sidney Straut and Eva Mackay.

MELOSH, MORTEN & MELOSH,  
Solicitors for Defendants Ida Dowdney, Stella Fox and Herbert Straut.

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**Deposition of Lillian Rothrock.**

IN CHANCERY OF NEW JERSEY.

|    |  |   |               |
|----|--|---|---------------|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } | On Bill, etc. |
|----|--|---|---------------|

20 STATE OF NEW JERSEY, }  
 COUNTY OF HUDSON, } ss. :

LILLIAN ROTHROCK, being duly sworn according to law on her oath says: I am the wife of Edmund Rothrock and reside at No. 22 Greenville Avenue, in the City of Jersey City, in the State of New Jersey. Charles Straut was my father and he died on April 20, 1916, leaving three children him surviving, viz., this affiant and Edith Sholl and Sidney Straut. My father and Ida Dowdney were the only children of Peter F. Straut living at the time of the latter's death in 1887. There had been other children of said Peter F. Straut, but they had predeceased him and none of them left any children. Mrs. Matilda McLaurin was the sister of my grandfather, the said Peter F. Straut, and at the time of her death, in December, 1926, she was about 84 years of age and lived at No. 150 Stegman Street, in the said City of Jersey City, which address is about thirteen blocks from where I lived. My grand-  
 aunt, said Matilda McLaurin, visited me and my mother at my home and she called there on April

*Deposition of Lillian Rothrock.*

7, 1925 (my birthday), one day prior to the making of her will. She and Mrs. Jane Maria Forshee came there on this occasion for the purpose of ascertaining where my brother Sidney and my sister Edith were living. Prior to this last-mentioned visit, said Matilda McLaurin had in my presence spoken of the death of my father, Charles Straut, and she was familiar with the circumstances of his death. Jane Maria Forshee had three children, viz., Eugene Forshee, Margaret Forshee and Annie Forshee. In April, 1925, when Matilda McLaurin made her will, Margaret and Annie had been dead a number of years and Eugene was the only child then living. Margaret never married, but Annie married and left only one child her surviving, viz., Percival Forshee, the executor named in the said will.

Mary Amealine Palmer has two children, Clara and Nellie, both of whom are living.

LILLIAN ROTHROCK.

Sworn and subscribed to before me at  
 Jersey City this October 20, 1927.

EDWARD H. HOOS,  
 Master in Chancery of New Jersey. 30

Deposition of Edith Sholl.

IN CHANCERY OF NEW JERSEY.

|    |  |   |               |
|----|--|---|---------------|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } | On Bill, etc. |
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|----|--|
| 20 | STATE OF NEW JERSEY, }<br>COUNTY OF HUDSON,    }ss.: |
|----|--|

EDITH SHOLL, being duly sworn according to law on her oath says: I reside at No. 60 Simonson Avenue, Mariners Harbor, in the Borough of Richmond, in the City and State of New York, and I am a daughter of Charles Straut, who died in the month of April, 1916, and he was buried from my home in the City of Jersey City, in the State of New Jersey. My grand aunt, Mrs. Matilda McLaurin, attended the funeral of my father. I saw her there.

EDITH SHOLL.

Sworn and subscribed to before me at Jersey City this October 20, 1927.

EDWARD H. HOOS,  
Master in Chancery of New Jersey.

Deposition of John M. Mackay.

IN CHANCERY OF NEW JERSEY.

|    |  |   |               |    |
|----|--|---|---------------|----|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } | On Bill, etc. | 10 |
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|    |  |    |
|----|--|----|
| 20 | STATE OF NEW JERSEY, }<br>COUNTY OF HUDSON,    }ss.: | 20 |
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JOHN M. MACKAY, being duly sworn according to law on his oath says: I reside at Princess Bay, in the Borough of Richmond, in the City and State of New York, and I am the father of the defendant Eva Mackay, and the guardian appointed by order of the Chancellor of New Jersey to make answer and defense for her to the bill of complaint of the complainant. My wife, Eva S. Mackay, died on October 16, 1908, leaving the defendant Eva Mackay as our only child her surviving. My daughter Eva was 21 years of age on August 27, 1927. Mrs. Matilda McLaurin was the sister of Jacob E. Straut, the father of my said wife. My wife and I frequently visited said Matilda McLaurin, who lived with her son Edward McLaurin in the City of Jersey City, in the State of New Jersey. At the time of the death of my wife we lived at No. 85 West 104th Street, in the Borough of Manhattan, City and State of New York. Said Matilda McLaurin attended the funeral of my said



*Conclusions of Vice Chancellor.*

FIELDER, V. C.

Matilda McLaurin died December 20, 1926, leaving a will dated April 8, 1925, probated January 5, 1927, paragraph 3 of which is as follows:

10 "Third After paying my just debts and funeral expensis i direct the balance of my estate remaining be divided into five (5) equal parts or shares; one part or share i give. devise and bequeath unto my Sister Jane Maria Forshee, if living: if not living, then to her children in equal parts among them, one part or share i give, devise and bequath unto to my Sister Mary Amealine Palmer, if living: if not living, then to her children in equal parts among them, one part or share i give, devise and bequeath unto the children of my deceased brother, Peter F. Straut one part or share i give, devise and bequeath unto the the children of my deceased brother Jacob E. Straut one part or share i give, devise and bequeath unto my brother, George Straut, if living: if not living then i direct that his part or share be paid to my sister Jane Maria Forshee, my sister Mary Amaline Palmer. and the children of my deceased brother Peter F. Staut and the children of my deceased brother Jacob E. Straut."

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Peter F. Straut died May 17, 1887. He had two children, namely, Ida Dowdney, who is still living and Charles Straut, who died April 20, 1916, leaving three children, all of whom are still living.

40 Jacob E. Straut died February 26, 1895. He had three children, namely, Stella Fox and Herbert Straut, both of whom are still living, and Eva Mac-

*Conclusions of Vice Chancellor.*

kay, who died October 16, 1908, leaving a child who is still living.

The bill is filed by the executor of the will of Matilda McLaurin praying a construction of a portion of the quoted clause of the will. The questions presented are (a) Does Ida Dowdney take the entire share given to the children of Peter F. Straut, or does she take one-half thereof and the children of Charles Straut (deceased child of Peter F. Straut) take the other half? (b) Do Stella Fox and Herbert Straut take the entire share given to the children of Jacob E. Straut, or do they each take one-third thereof and the child of Eva Mackay (deceased child of Jacob E. Straut) take the other third?

10

The word "children" in a will does not ordinarily have anything other than its natural or usual meaning in every day language (Redmond v. Gummere, 94 N. J. Equity, 216, 218). It may be given a more extensive meaning either from necessity, to prevent a provision of a will from becoming inoperative unless the usual meaning of the word is extended, or where other words contained in the will show that the testatrix intended to use the word in a more extensive sense (Brokaw v. Peterson, 15 N. J. Equity, 194; Feit v. Vanatta, 21 N. J. Equity, 84; Dildine v. Dildine, 32 N. J. Equity, 78; Dunn v. Cory, 56 N. J. Equity, 507).

20

30

Without extending the ordinary meaning of the word "children" where it is used in this will, to include grandchildren, the provisions under consideration are fully operative because there is a child of Peter F. Straut and there are children of Jacob E. Straut, all of whom survived the testatrix. When the testatrix executed her will she knew that Charles Straut (child of Peter F. Straut) had been dead about nine years and that Eva Mackay (child of Jacob E. Straut) had been

40



*Final Decree.*

part or share of her estate should go to the children of her deceased brother, Peter F. Straut, and one part or share to go to the children of her deceased brother, Jacob E. Straut.

10 And the said court being satisfied that under the true construction of the said third paragraph of the said last will and testament, the persons designated as children of the testatrix's deceased brother, Peter F. Straut, is the defendant, Ida Dowdney and the children of the testatrix's deceased brother, Jacob E. Straut, are the defendants Stella Fox and Herbert Straut, and that Ida Dowdney is entitled to receive the entire share given to the children of Peter F. Straut and that Stella Fox and Herbert Straut are to receive the entire share  
20 given to the children of Jacob E. Straut and that the defendants Lillian Rothrock, Edith Sholl, Sidney Straut and Eva Mackay are not entitled to any part or share as claimed by them.

It is on this 5th day of December, 1927, Ordered, Adjudged and Decreed, that the complainant, as executor under the last will and testament of Matilda McLaurin, deceased, pay over the share bequeathed unto the children of the testatrix's deceased brother, Peter F. Straut, to Ida Dowdney  
30 and pay over the share bequeathed to the children of the testatrix's deceased brother, Jacob E. Straut, to Stella Fox and Herbert Straut.

It is further ordered that a counsel fee of \$300.00 be allowed to Philip F. Sauer, solicitor for the complainant, and a counsel fee of \$300.00 be allowed to Melosh, Morten & Melosh, solicitors for defendants Ida Dowdney, Stella Fox and Herbert Straut, and a counsel fee of \$300.00 be allowed to Kelsey & Ludwig, solicitors for defendants Lillian Rothrock,  
40 Edith Sholl, Sidney Straut and Eva Mackay, together with their costs of this suit, which said sums

*Final Decree.*

are to be charged equally, to wit: against the share of the children of Peter F. Straut and against the share of the children of Jacob E. Straut.

Respectfully advised.

E. R. WALKER, 10  
C.

JAMES F. FIELDER,  
V. C.

We hereby consent to the making of the above decree.

PH. F. SAUER, 20  
Solicitor for Complainant.

MELOSH, MORTEN & MELOSH,  
Solicitors for Defendants Ida  
Dowdney, Stella Fox and Her-  
bert Straut.

KELSEY & LUDWIG,  
Solicitors for Defendants Lillian  
Rothrock, Edith Sholl, Sidney  
Straut and Eva Mackay. 30

Order Amending Final Decree.

(Filed January 31, 1928.)

IN CHANCERY OF NEW JERSEY.

|    |  |   |               |
|----|--|---|---------------|
| 10 | Between<br>PERCIVAL FORSHEE, Executor,<br>etc.,<br>Complainant,<br><br>and<br><br>IDA DOWDNEY, <i>et als.</i> ,<br>Defendants. | } | On Bill, etc. |
|----|--|---|---------------|

20 Upon reading and filing the petition of Edith Sholl, Lillian Rothrock and Sidney Straut, defendants in the above-entitled cause, and it appearing that due notice of the application for this order has been given, and Philip F. Sauer, Esq., appearing for the complainant on this application, and no one appearing on behalf of the defendants Ida Dowdney, Stella Fox and Herbert Straut; and it further appearing that at the time the written consent to the making of the final decree in said cause

30 was signed by Messrs. Kelsey & Ludwig, the solicitors for the defendants Edith Sholl, Lillian Rothrock, Sidney Straut and Eva Mackay, it was their intention to consent to the form of said final decree and not to the substance thereof, and that said consent in its present form was inadvertently signed by them and might preclude the said defendants from prosecuting an appeal from said final decree:

40 It is, on this thirtieth day of January, nineteen hundred and twenty-eight, on motion of said Kelsey

Order Amending Final Decree.

& Ludwig, solicitors for said defendants Edith Sholl, Lillian Rothrock, Sidney Straut and Eva Mackay, ORDERED, that the written consent of said solicitors, Kelsey & Ludwig, to the making of said final decree be amended by writing the following consent over their names, viz.: "We consent to the form, but not the substance of the above decree." 10

And it is further ORDERED that the said petitioners pay the costs to be taxed on the making of said amendment.

Respectfully advised,

E. R. WALKER,  
C.

JAMES F. FIELDER, 20  
V. C.

[36720]

102MAY.T.1928

NEW JERSEY

Court of Errors and Appeals

Between

PERCIVAL FORSHEE, Executor of  
the Last Will and Testament  
of Matilda McLaurin, de-  
ceased,

Complainant-Respondent,

and

IDA DOWDNEY, STELLA FOX and  
HERBERT STRAUT,  
Defendants-Respondents,

and

LILLIAN ROTHROCK, EDITH  
SHOLL, SIDNEY STRAUT and  
EVA MACKAY,  
Defendants-Appellants.

On Appeal  
from Final  
Decree of  
the Court of  
Chancery.

**Brief on Behalf of Defendants-Respondents**

The question in this case is the construction to be placed upon the word "children" as used in the will of Matilda McLaurin, deceased. The facts are all conceded and appear in the opinion of the Vice Chancellor on page 30 of the printed state of the case.

The appellants in their brief cite the cases of *Dunn v. Cory*, 56 Eq. 507 and *Brokaw v. Peterson*, 15 N. J. Eq. 194, in which the rule has been laid down that the word "children" does not comprehend grandchildren unless the will would remain inoperative if grandchildren were not included or

where the testatrix has shown by other words that she does not mean that the word "children" should be used in its proper sense, but in a more extensive significance.

The appellants concede that it is not a case of necessity and that the will of the testatrix will not be inoperative if the word "children" receives its ordinary and usual meaning.

The appellants rely upon the other principle, namely: that in this will the testatrix has shown that when she used the word "children," she used it in its more significant sense and that she meant to include thereby all of the descendants of the deceased brothers.

In support of this contention, they refer to four instances, namely:

1. That the testatrix spoke of "children" of her sister Jane Maria Forshee, when as a matter of fact, at the time the will was drawn, Jane Maria Forshee had only one child living.

2. That the testatrix spoke of "children" of her deceased brother Peter although, as a matter of fact, Peter was dead and only one of his children were living at the time the will was drawn.

3. The use of the word "among" in referring to the share of the children of Jane Maria Forshee, when as a matter of fact, there was at that time only one child of Jane Maria Forshee living.

4. The designation of the complainant Percival Forshee as a "nephew," when as a matter of fact, he was a grand-nephew.

Jane Maria Forshee was living at the time the will was drawn, and as a matter of fact, survived the testatrix. Therefore, so long as she was living there was no certainty at the time the testatrix drew her will that her sister would not be survived by more than one child.

It is true that in the case of her brother, Peter, he was dead at the time the will was drawn and he was survived by one child who was living when the testatrix drew her will. But if we look at the third clause of her will, we will find that it seems to have one general scheme and it is not at all difficult to ascribe the use of the word "children" to

an error rather than to try to say that it was used in the sense of grandchildren.

In fact, the word "child" does not appear to have been used by the testatrix anywhere in her will.

The use of the word "among" in referring to the distribution of the share of the estate given to the children of Jacob Straut is an error that is very common in the use of the English language. Very many times, persons who are careless in the use of the English language, use the word "among" and the word "between" interchangeably without recognizing any difference in their meaning or use and when we look at the general scheme of the third clause, it is not difficult to understand this error.

To confirm our theory we point out that the testatrix uses the word "among" in speaking of the children of her sister Jane Maria Forshee, where there was only one child living; she used the word "among" in referring to the children of her deceased brother Jacob of whom there were two living. In each instance the use of the word is incorrect.

Likewise, the designation of the complainant as a "nephew" rather than a grand-nephew. This would seem to favor the argument of the respondents that the use of the words in this will was not the use of a careful scrivener, but rather the use that is made of the language by one who is indifferent as to correct speaking and writing.

We contend that it is a far greater stretch of the imagination to include "grandchildren" under the term "children" because of the incorrect use of the English language in this will than it is to limit the word "children" to its ordinary meaning and account for the words that were used as an erroneous use of language.

We therefore respectfully submit that the decree of the Court of Chancery in this case is in all things correct and should be affirmed.

Respectfully submitted,  
MELOSH, MORTEN & MELOSH,  
Sol'rs for Defendants-Respondents.

NEW JERSEY

Court of Errors and Appeals

Between  
PERCIVAL FORSHEE, Executor of  
the Last Will and Testament  
of Matilda McLaurin, de-  
ceased,

Complainant-Respondent,

and

IDA DOWDNEY, STELLA FOX and  
HERBERT STRAUT,  
Defendants-Respondents,

and

LILLIAN ROTHROCK, EDITH  
SHOLL, SIDNEY STRAUT and  
EVA MACKAY,  
Defendants-Appellants.

On Appeal  
from Final  
Decree of  
the Court of  
Chancery.

BRIEF ON BEHALF OF APPELLANTS.

This appeal is from a final decree of the Court of Chancery of New Jersey advised by Vice Chancellor Fielder.

The complainant-respondent, Percival Forshee, executor of the last will and testament of Matilda McLaurin, deceased, filed a bill of complaint in the Court of Chancery for a construction of the third section of the will, and the appeal is from the whole and every part of the amended decree except such part thereof as provides for the payment of counsel fees and costs.

The Vice Chancellor decided and the decree adjudges that by the true construction of said will Ida Dowdney is entitled to the entire share of the estate devised and bequeathed therein unto the children of Peter F. Straut, a deceased brother of the testatrix, and that Stella Fox and Herbert Straut are entitled to the entire share devised and bequeathed therein unto the children of Jacob E. Straut, a deceased brother of the testatrix, and that the appellants, Lillian Rothrock, Edith Sholl and Sidney Straut, grandchildren of said Peter F. Straut, and the appellant, Eva Mackay, a grandchild of said Jacob E. Straut, are not entitled to any share in the estate.

#### The Facts.

The testatrix, Matilda McLaurin, died a resident of Jersey City, New Jersey, on December 20, 1926, leaving a last will and testament dated April 8, 1925. A copy of her will is set forth in full on pages 12 to 14 of the printed book.

The testatrix was one of a family of six children. She had two sisters, Mrs. Jane Maria Forshee and Mary Amealine Palmer, and three brothers, Peter F. Straut, Jacob E. Straut and George Straut. The two sisters and the brother George are living. Of the other two brothers, Peter died in the year 1887 and Jacob in the year 1895, both more than thirty years prior to the making of the will in question.

Peter left him surviving a daughter, Ida Dowdney, who is still living, and a son, Charles, who died in the year 1916, about nine years prior to the making of the will in question, leaving him surviving three children, viz., Edith Sholl, Lillian Rothrock and Sidney Straut.

Jacob E. Straut left three children him surviving, viz., Stella Fox and Herbert Straut, who are still living, and Eva Mackay, who died on October 16, 1908, sixteen years prior to the making of the will, leaving a child, Eva Mackay.

Jane Maria Forshee had three children, viz., Eugene Forshee, Margaret Forshee and Annie Forshee, only one of whom, Eugene, was living when the testatrix made her will. Annie left one child her surviving and this child was alive at the time the testatrix made her will.

Mary Amealine Palmer has had two children, both of whom are living.

The testatrix knew, when she made her will on April 8, 1925, that her brothers, Peter and Jacob, her nephew, Charles Straut, and niece, Eva Mackay, were dead and had left children, also that the only child of Peter then living was Ida Dowdney, and that her sister, Jane Maria Forshee, was living and that only one of the three children of Jane Maria Forshee and one child of a deceased child of Jane Maria Forshee were then living (*Case*, p. 31, lines 33-43, and p. 32, lines 5-7).

The third section of the will reads as follows, viz.:

"Third. After paying my just debts and funeral expenses i direct the balance of my estate remaining be divided into five (5) equal parts or shares; one part or share i give, devise and bequeath unto my sister Jane Maria Forshee, if living: if not living, then to her children in equal parts among them, one part or share i give, devise and bequeath unto to my sister Mary Amealine Palmer, if living: if not living, then to her children in equal parts among them, one part or share i give, devise and bequeath unto the children of my deceased brother Peter F. Straut, one part or share i give, devise and bequeath unto the children of my

deceased brother Jacob E. Straut, one part or share i give, devise and bequeath unto my brother George Straut, if living: if not living then i direct that his part or share be paid to my sister Jane Maria Forshee, my sister Mary Amaline Palmer, and the children of my deceased brother Peter F. Straut and the children of my deceased brother Jacob E. Straut."

It is the contention of the appellants, Edith Sholl, Lillian Rothrock, Sidney Straut and Eva Mackay, that in her devise and bequest of one part or share "unto the children of my deceased brother Peter," and in the devise and bequest of one part or share "unto the children of my deceased brother Jacob," the testatrix intended to include children of the deceased children of Peter and Jacob.

This intention is clearly shown from different expressions in the will when taken into consideration in connection with the situation existing at the time the will was executed, e. g., the use in two places in the will of the words "*children* of my deceased brother Peter F. Straut" when only one child of Peter F. Straut was, in fact, then living, and the use of the word "among" instead of "between" in the expression "one part or share I give, devise and bequeath unto my sister Jane Maria Forshee, if living; if not living, then to her children in equal parts *among* them," whereas there were but one child and a child of a deceased child of the devisee Jane Maria Forshee then living, and the testatrix must have intended that if said Jane Maria Forshee should predecease the testatrix her share could not be distributed between two children but would have to be distributed *among* the surviving child and the child of a deceased child. Then, again, considering that Ida Dowdney was the sole child of Peter living at the time of the making of

the will, if the testatrix had intended to give her a one-fifth share of the residuary estate and disinherit the children of Charles, she would have bequeathed and devised that share to her in so many words and in the same terms by which later on in the will she gave "2 parlor chairs with green buttons to my niece Ida Dowdney." It is also worthy of note in this connection that the testatrix refers in her will to her executor, Percival Forshee, as her nephew, whereas he was her *grand* nephew.

The appellants Edith Sholl, Lillian Rothrock and Sidney Straut, as has been shown, are children of Charles Straut, a deceased son of Peter, and the defendant Eva Mackay is a daughter of Eva Mackay, a deceased daughter of Jacob. The fact that Charles and Eva were dead when the will in question was made is of little consequence in view of the statute dealing with that subject and the construction placed thereon by the decided cases in this State.

The statute in question (*P. L. of 1887*, p. 63; Vol. 4, *Comp. Stat.*, p. 5866, Sec. 22) reads as follows, viz.:

"That whenever any estate of any kind shall or may be devised or bequeathed by the testament and last will of any testator or testatrix, to any person being a child or other descendant of such testator or testatrix, or being a brother or sister or any descendant of a brother or sister of such testator or testatrix, and such devisee or legatee shall, during the life of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children who shall survive such testator or testatrix, in that case such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix shall

not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants of such legatee or devisee, in the same manner as if such legatee or devisee had survived the testator or testatrix and had died intestate; but this provision shall not apply where the testator or testatrix shall, by the will or codicil thereto, or other instrument, have otherwise directed in regard to the children or descendants of the said devisee or legatee dying as aforesaid."

In the case of *Murphy v. Keon*, 53 N. J. Eq. 406, it was held:

"The rule is that a devise or legacy will lapse by the death of the devisee or legatee before the testator, unless provision shall be made, by will or by statute against a lapse. \* \* \* There is a distinction, also, between a lapsed and a void devise. In the former case the devisee dies in the intermediate time between the making of the will and the death of the testator, but in the latter case the devise is void from the beginning, as if the devisee be dead when the will was made. \* \* \* It is observed that by strict grammatical construction the event provided against is a lapse of the devise. This language has led to the objection that the statute is not applicable to the case of a void devise, as where the devisee died before the making of the will. \* \* \* But I think that the better opinion gives a broader meaning to the word 'lapse,' upon a construction of similar statutes which regards rather their beneficial policy and ends than the strict meaning of their language."

In the foregoing case it was also held that the words "shall die" contained in the statute had reference to the future and that future was not after the making of the devise but after the taking effect of the statute.

The expression in the will, "one part or share I give, devise and bequeath unto the children of my deceased brother Peter F. Straut," is tantamount to saying, "one part or share I give, devise and bequeath unto Ida Dowdney and Charles Straut, the children of my deceased brother Peter F. Straut."

"The word 'children' in a will is a word of personal description limited to persons standing in the same relations, and has the same effect as if all the names were given."

Significance in the use of the word "between" instead of "among" also pointed out.

*Rowley v. Currie*, 94 N. J. Eq. 612.

*Schouler on Wills, etc.* (Ed. of 1915), Sec. 585.

In the case of *Farmers' Trust Co. v. Borden*, 83 N. J. Eq. 222, the testator directed his executor to fund his estate and to pay the net income of one-half to his daughter for life and upon her death the principal

"to and among the children of my said daughter, Theodosia Borden, in equal shares or parts, and in case my said daughter, Theodosia Borden, should die without leaving lawful issue, then my will is, and my executors are hereby directed to divide the said sum, so as aforesaid invested for my daughter's benefit, together with the interest due thereon, equally among all my brothers and sisters, the child or children of any deceased brother or sister to take their parents' share."

The daughter was dead and the testator had brothers and sisters and among them a brother named James who was dead at the time the will was made. He left a son, William, who was also

then dead but who was survived by a daughter, and it was held (at pp. 224-225):

"The granddaughter of James, the brother of the testator, took a vested interest. At the time the will was executed, her father and grandfather were both dead, which fact was well known to the testator. Although the will substitutes children only, the conclusion is irresistible from these circumstances, that the testator intended to embrace within the terms of 'child' or 'children' this grandchild."

In *Dunn v. Cory*, 56 N. J. Eq. 507, it was held (at p. 511):

"There are two cases in which the word 'children' has received another construction; first, the case of necessity, where the will would remain inoperative unless the sense is extended; next, where testator has clearly shown by other words that he does not use the word children in the proper sense, but means it in the more extensive significance."

The case of *Brokaw v. Peterson*, 15 N. J. Eq. 194, has little bearing on the present case, but it was held (at p. 198):

"The word 'children' does not, ordinarily and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is only permitted in two cases, viz., from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by *other* words that he did not intend to use the term 'children' in its proper actual meaning, but in a more extensive sense. 1 Roper on Leg. 69."

In the case of *Reichle v. Steitz*, 64 N. J. Eq. 789, the testator made his will in April, 1878, devising land to a brother who had died in March, 1878, one month *before* the making of the will, leaving children who survived him; and the Court of Errors and Appeals, in considering the effect of the supplement of March 29, 1887, held that the remedial force of the act did not operate in favor of the brother's children because he had died years before the act took effect; but the opinion contains this significant language:

"So William, the devisee, had died nine years before the supplement was enacted, which *would have preserved his interest for his children.*"

This was only another way of saying that if the supplement of March 29, 1887, had been passed and in effect prior to the death of the brother of the testator, the children of the brother would have been entitled to his share in the estate notwithstanding the fact that he was dead at the time the testator made his will.

In his consideration of the same statute, Vice-Chancellor Fielder states, *inter alia*, in the opinion filed by him (*Case*, p. 32, lines 13-35):

"But the will gives no devise or legacy to Charles Straut or Eva Mackay. The gifts are to the children of Peter F. Straut and to the children of Jacob E. Straut, which are gifts to a class and not to individuals who might come within the class. In a gift of this nature there is no lapse of a share in the event of death, prior to the death of the testatrix, of one who might have come within the class, nor will the share which such deceased person might have received but for such death, pass under the above mentioned statute to his children or descendants; the whole gift goes to those who come within the class and survive the testatrix."

In the recent case of *Supp v. Second National Bank & Trust Co.*, 98 N. J. Eq. 242, it was held that:

“A gift to a class arises where the gift is of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, and who shall take in equal or otherwise definite proportions.”

We respectfully submit that the devise and bequest unto “the children of my deceased brother, Peter F. Straut,” measured by the foregoing rule, cannot be held to be a gift to a class, for the testatrix knew when she made her will that there was only one child of Peter F. Straut, viz., Ida Dowdney, then living; and, obviously, if the devise and bequest was intended to be to a class, there would have to be more than one person in that class, and the only other persons who could possibly form a constituent part of that class to share with said Ida Dowdney were the appellants, Lillian Rothrock, Edith Sholl and Sidney Straut, the children of Charles Straut, the deceased child of said Peter F. Straut, or such of them as survived the testatrix.

From *Vol. 30 Am. & Eng. Ency. Law* (2nd Ed.), page 815, we take the following:

“The testator’s language may, however, show that he intended the issue of persons dead at the date of the will, who would have been members of the class if alive, to take their parent’s share, and in such case the intent will be given effect. Thus, where the testator directs the residue of his estate to be divided among his ‘brothers and sisters or their heirs,’ and at the date of the will he has one or no brothers living, but has had others who are dead leaving issue, it will be

presumed that he intended to include such issue, as otherwise the plural ‘brothers’ would be meaningless.”

The cases cited in support of the foregoing proposition are:

*Gowling v. Thompson*, L. R. 11 Eq. 366.

*Barnaby v. Tossell*, L. R. 11 Eq. 363.

*Fuller v. Martin*, 96 Ky. 500 (29 S. W. Rep. 315).

*Huntress v. Place*, 137 Mass. 409.

“So, where the gift is to my ‘eleven children,’ and in case of the death of any of my children, to their issue, the issue of a child dead at the date of the will take, it appearing that only ten were, to the testator’s knowledge, alive at that period.”

*Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

In *Gowling v. Thompson* (*supra*), the opinion was written by Sir W. Page Wood, L. J., wherein he said in part:

“The singularity of this case is, that the testator speaks of his brothers and sisters, when in fact all his brothers have been dead several years. It must be assumed that he knew they were dead, and some meaning must be given to the words which he has used introducing his brothers. The general principle laid down in *Christopherson v. Naylor* (1 Mer. 320), that where a testator refers to a class he cannot be held to have intended to include dead persons in it, is displaced in this instance by the fact that the testator must have known that his own brothers were all dead. It is idle to talk of substitution when the persons for whom it is contended some one else was to be substituted have never formed one of the original

class at all. But when a testator speaks of his brothers and sisters at a time when he must be taken to have known that all his brothers and one of his sisters were dead, the only rational inference is, that he named the brothers and sisters for the purpose of showing how the property was to be divided."

In *Huntress v. Place* (*supra*), when the will was executed three brothers and only *one* sister of the testator were living, two of his sisters having died prior thereto. He provided in one of the clauses of his will that:

"The residue and remainder of the property left by my said wife shall be equally divided among my brothers and *sisters* and their heirs."

It was there held that by the use of the plural word "sisters," the testator must have intended not only his sister who was living, but his sisters who had deceased; and, as these last could not take, the testator intended that in the division their heirs should take the shares appropriate to them.

The Court of Appeals of Kentucky, in the case of *Fuller v. Martin*, 96 Ky. 500 (29 S. W. Rep. 315), held:

"Testator bequeathed all his property 'to my brothers and sisters' to be divided between them \* \* \* The will was dated October 1, 1890, and at that time, and in February, 1893, when he died, the testator had one living brother and five living sisters. He also had two brothers dead, who left children. \* \* \* The statutes in effect leave the question where we found it. It is conceded that, if the testator meant to include his dead brothers and sisters by the words 'brothers and sisters,' then their children

take what the parents would have taken. It seems to us that, as the words used cannot be applied as a description of living objects, the testator must have meant to describe all his brothers. He could not properly describe his living brother as 'brothers'; and, if effect be given to the language used, we must suppose that the testator, knowing that the issue of the dead brothers and sisters took by substitution, meant to include all his brothers and sisters as a class, the dead as well as the living. By this construction, all those who are the natural objects of the testator's love partake of his bounty and not a part only."

The general plan of the testatrix in disposing of her residuary estate was to divide it into five equal shares representing her five brothers and sisters or their lineal descendants. It was her intention that her brother George and the two sisters who survived her should each have one of the parts and that in the instances where her two brothers were dead at the time of the making of her will, the share which would have gone to them had they survived her should go to their descendants. In endeavoring to carry out this general plan she, like a great many other testators before her, used the word "children" to include both children and grandchildren.

She left one of the five shares to the children of Peter, when she knew at the very time she was drawing up her will that he had been dead nearly forty years, and that he had only one child living, and that Charles, the other of his two children, had been dead nine years and had left three children, all of whom were living.

Likewise, she knew that her sister, Jane Maria Forshee, had only *one child* living and that her only other lineal descendant was a son of a deceased daughter; still she gave one of the five shares to Jane, if she survived her, otherwise to her *children*.

One of the cardinal rules laid down for the construction of wills is that all words should, if possible, be given effect, and while it might be urged that a testatrix had in one devise used the word "children" when she meant to say "child," it could hardly be contended that she made the same error in two separate and entirely independent devises.

In these instances, the testatrix did not use the word "children" by mistake and she must have meant by the use of that term to include more than one person. The only persons she could have referred to in addition to the one living child of Peter were the three children of his deceased child Charles, viz., Edith Sholl, Lillian Rothrock and Sidney Straut, and both the child and one grandchild of Jane Maria Forshee.

Inasmuch as the intention of the testatrix to include grandchildren when she used the term "children" and to include all the descendants of her deceased brothers as objects of her bounty has been clearly shown, it is only fair to assume that in her devise and bequest to the children of her deceased brother Jacob she intended to include not only his two living children but also his grandchild, Eva Mackay.

Giving the same force and effect to the wording of the bequest and devise to the children of Jacob as that given the bequest and devise to the children of Peter, the defendant Eva Mackay is entitled to a one-fifteenth part or share of the residuary estate.

It is respectfully submitted that under the will of Matilda McLaurin the defendants Edith Sholl, Lillian Rothrock and Sidney Straut are each entitled to one-thirtieth part of share and the defendant Eva Mackay to a one-fifteenth part or share of the residuary estate, and that the decree entered in the Court of Chancery should be reversed.

KELSEY & LUDWIG,  
of Counsel with the Appellants.

