

NEW JERSEY COURT OF ERRORS AND APPEALS,
NOVEMBER TERM, 1865.

Between JOSEPH N. TUTTLE, Trustee, &c., Complainant, and CATHARINE HOWELL and others, De- fendants.	}	<i>State of the Case.</i>
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IN CHANCERY OF NEW JERSEY.

To his Honor, Henry W. Green, Chancellor of the State of New Jersey :

Your orator, Joseph N. Tuttle, of the city of Newark, in the State of New Jersey, acting Trustee, as hereinafter set forth, respectfully shows to Your Honor that David Doremus, late of the said city of Newark, on or about the Twentieth day of February, in the year eighteen hundred and sixty-one, departed this life, having first made and duly executed his last will and testament, and two codicils thereto, in the manner directed by the statute of New Jersey in that behalf, of which said last will and testament, and the said codicils thereto, the following is a copy :

"In the name of God, Amen. I, DAVID DOREMUS, of the City of Newark, in the County of Essex, and State of New Jersey, being of sound mind and disposing memory and understanding, and calling to mind the uncertainty of human life, do make, ordain and publish this my last will and testament :—and, principally, I commend my soul to God who gave it, and my body to the earth, to be buried at the discretion of my Executors ; and as to my wordly estate I dispose of the same as follows :

First—I give and bequeath to my wife, Sarah, in case she survives me, five hundred dollars a year during her life, to be paid her by my executors in half-yearly payments, on the first days of April and October in each year. This bequest to my wife is made in lieu of dower, and on condition that my wife, at the request of my executors, sign off, and release in legal and valid form all her right of dower in my lands.

Second—I give and bequeath to my grand-daughter, Anna

Maria Duncan, my silver tea-pot, sugar dish, and cream cup, also my silver soup ladle, subject to the use of them by her mother during her life.

Third—I direct my executors and the survivor of them to pay three hundred and fifty dollars for the support of my son, Henry, during his life, each and every year, in such amounts, and at such times during the year as they may deem proper, and to such person or persons as will best carry out my object, which is the care and comfort of my said son: and I hereby declare it to be my wish and intention (as far as I may legally do so,) that my said son shall not, in case of the death of any of my children without leaving a child or children, take any share of my estate falling into the residue upon the happening of such event.

Fourth—I give and bequeath my furniture, excepting the silver hereinbefore disposed of, as follows: one fourth part to my wife, if living at my death; and one fourth part to each of my daughters, Sally Bragaw, Catharine Howell, and Maria Duncan:—and if my wife is not living at my death, I give my said furniture to my three daughters, in equal portions. I direct my executors to have no public vendue of any of my personal estate.

Fifth—I give and bequeath to the American Protestant Bible Society of the United States, two hundred and fifty dollars, and to the Protestant Home Missionary Society of the United States, two hundred and fifty dollars. These sums are to be paid by my executors, in one year after my death, to the Treasurer of each of the said institutions, and that by whatever name either of the said institutions may be designated.

Sixth—I give my daughter-in-law, Jane, widow of my son Josiah, two hundred and fifty dollars, payable two years after my death, if she do not marry again before that time, and two hundred and fifty dollars, payable three years after my death, if she do not marry again before such day of payment arrives.

Seventh—I give, devise, and bequeath all the rest, residue and remainder of my estate (which constitutes the main part thereof), both real and personal, always subject to the previous dispositions made in this my will, to my friends William A. Myer and Joseph N. Tuttle, Esquires, of Newark aforesaid, and the survivor of them, his heirs and assigns forever, in trust, to receive the rents, issues and profits of my real estate, and interest and income of my personal estate, keeping the same in use, in the best way in their power, to keep my personal estate well invested, and whenever new investments are made by them, which they are fully authorized to make, the same shall be made on Bond and Mortgage, and always on the first mortgage; and in trust to pay over all the interest and income, rents, issues and profits arising from my said estate, after deducting all legal charges on the same, in three and one-eighth parts, to wit: one third part to my daughter, Catharine Howell, one third part to my daughter, Sally Bragaw, and one third and one-eighth parts to my daughter, Maria Duncan: the said moneys to be paid my said daughters during their respective lives, on their separate receipts, without their husbands joining in the same; the said payments not to be made on the receipt of the husbands of either of my said daughters, or to be in any way subject to their control; and in trust, that upon the death of either of my said daughters, leaving no child or children, to pay the interest and income, rents, issues and profits arising from my estate, in the proportions aforesaid, to my surviving daughters or daughter, it being my intention that on the death of any daughter, leaving no child or children, the share of such daughter shall sink into and constitute a part of my estate, in the hands of my said Trustees, and the interest and income arising therefrom, to be divided among my surviving daughters and daughter in manner aforesaid; and in trust, to pay over to the child or children of any of my said children (daughters) named in this clause of my will, who may die, the principal of my estate on which his other parent may have received the interest and income as aforesaid, calculating the

principal on the same basis as the interest is herein calculated, that is one-third to each of my daughters, except my daughter Maria Duncan, whose share is to be that of one-third and one-eighth of principal as well as interest; and in case there be children of such deceased daughter, the said estate to be paid over or conveyed to them in equal parts, share and share alike; and in trust, to pay over and convey on the death of my surviving daughter the principal of my estate then remaining and interest unpaid to my grand-children in the same ratio: provided, always, that a child of any grandchild, in case its parent be dead, shall represent such parent, and take the share such parent would, if living, have taken, and in case of more than one child, share and share alike; and upon no construction of this clause in my will shall the children of one deceased daughter have more than the children of another, except the children of my daughter Maria Duncan, who shall have one-eighth *the* more in manner aforesaid. And I do order and direct my said trustees to exhibit to their cestui que trusts, their accounts once in every six months, and oftener on their reasonable request, and to pay dividends on all interest and income received, to and among the cestui que trusts, in manner aforesaid, every six months, to wit: on the first days of April and October in each year.

And I fully authorize and empower my said trustees, and the survivor of them, his heirs and assigns, to sell and convey any of my lands, whenever they shall deem it proper to do so, upon the consent in writing of the said cestui que trusts, and not otherwise, and by this I refer to the cestui que trusts at the time.

Eighth—I constitute, name and appoint the said William A. Myer and Joseph N. Tuttle, Esquires, and my son-in-law, John Duncan, and the survivors and survivor of them, Executors of this my last will and testament, hereby revoking all former wills and testaments by me at any time heretofore made.

In witness whereof I have hereunto set my hand and seal,

at Newark aforesaid, in the County of Essex and State of New Jersey, this thirteenth day of January, in the year of our Lord one thousand eight hundred and fifty-eight.

DAVID DOREMUS, [L. S.]

Signed, sealed, published, pronounced
and declared by David Doremus,
the testator the day and year afore-
said, as his last will and testament,
in our presence, who, at his request,
in his presence, and in the presence
of each other, have subscribed our
names as witnesses. Signed in our
presence.

WM. PENNINGTON,
A. WOODRUFF,
C. M. WOODRUFF.

I, David Doremus, the Testator named in the foregoing will,
do make this Codicil to the same—

First—I give and bequeath to my wife Sarah, in case she survives me, the additional sum of one hundred dollars a year during her life, upon the terms mentioned in my will, and payable at the same time with the bequest to her made in my will.

Second—I direct my Executors and the survivors and survivor of them, to pay towards the support of my son Henry, annually, the further sum of one hundred and fifty dollars, in the manner and upon the terms designated in my will for making the payment of three hundred and fifty dollars therein directed.

Third—I give and bequeath to Eliza A. Bruen, the granddaughter of my wife, on the death of my wife, if she survives her, one hundred dollars, and in one year after the death of my wife, the further sum of one hundred dollars.

Fourth—I constitute, name, and appoint Isaac Van Wageningen, Esq., a co-Trustee (but not Executor) with those already named in my will, and with the same and equal powers there-by conferred on them.

In witness whereof, I have hereunto set my hand and seal, at Newark, this twenty-fourth day of September, in the year one thousand eight hundred and fifty-nine.

DAVID DOREMUS, [L. s.]

Signed, sealed, published and	}	WM. PENNINGTON,
declared in presence of		WM. R. SAYRE.

I, David Doremus, the Testator, named in the foregoing will, do make this additional Codicil to the same—

I direct my Executors, and the survivors and survivor of them, to pay towards the support of my son Henry, annually, the further sum of one hundred dollars in the manner and upon the terms designated in my will, which, with the sum mentioned in the previous codicil, will make the whole annual sum six hundred dollars for the support of said Henry.

In witness whereof, I have hereunto set my hand and seal this fifth day of November, in the year eighteen hundred and sixty.

DAVID DOREMUS, [L. s.]

Signed, sealed and delivered	}	A. LEMASSENA,
in presence of		D. C. WHITMAN.

And your orator further shows, that William A. Myer, one of the executors in said last will named, refused to prove the same, and renounced the execution thereof, and that John Duncan and your orator, the other two executors named therein, duly proved the same, on the seventh day of March, in the year eighteen hundred and sixty-one, and have taken upon themselves the burden of the execution thereof.

And your orator further shows that the said Isaac Van-Wagenen and William A. Myer refused to accept and perform the duties of trustees, as in said last will and the codicils thereto provided, but that on the contrary thereof, on or about the seventh day of March, in the year eighteen hundred and sixty-one, they renounced the same by writing, under their hands and seals, of which the following is a copy :

"Know all men by these presents, that whereas David Do-remus, late of the city of Newark in the State of New Jersey, deceased, by his last will and testament bearing date the thirteenth day of January, in the year eighteen hundred and fifty-eight, did, after making disposition of certain parts of his estate, give and bequeath all the rest and residue of his property to William A. Myer, and Joseph N. Tuttle upon certain trusts, therein particularly set forth; and by a codicil thereto bearing date the twenty-fourth day of September, in the year eighteen hundred and fifty-nine, did constitute and appoint Isaac Van Wagenen a co-trustee, with the said William A. Myer, and Joseph N. Tuttle, with equal powers—

Now therefore be it known that we, the said William A. Myer, and Isaac Van Wagenen, both of the said city of Newark, do, and each of us for himself, does absolutely disclaim renounce and decline the said trust; and all and singular the estate and estates, trusts, powers and authorities by the said last will devised, limited, created or declared.

In witness whereof, we have hereunto set our hands and seals this seventh day of March, in the year eighteen hundred and sixty-one.

W. A. MYER, [L. s.]

ISAAC VAN WAGENEN, [L. s.]

Signed, sealed and delivered }
in the presence of }

GEORGE F. TUTTLE.

And your orator further shows that he has accepted said appointment of trustee, and is sole acting trustee by virtue of the provisions of said last will.

And your orator further shows that the estate thus devised by the said testator consisted of both personal and productive real estate of large amount and value after payment of all debts of the said testator, and all funeral, testamentary and other charges against his said estate, and that your orator is and has been ever since the death of said testator in receipt of the rents, issues and profits of his said real estate, and in possession thereof and managing the same.

And your orator further shows that the said John Duncan and your orator, acting executors as aforesaid, having been advised by their counsel that they might safely pay to the said Catharine Howell, Sally Bragaw, and Maria Duncan, such sums as might be in their hands of the income of said estate, after payment of said debts and charges, and the legacies, which they were required by the said last will and the codicils thereto, to pay, notwithstanding the period of one year limited to them for the settlement of their accounts, and in which they could not be required to pay legacies, had not elapsed, have, inasmuch as the said Catharine Howell, Sally Bragaw and Maria Duncan were in needy circumstances and desired that such payments should be made to them, paid to the said Catharine Howell the sum of six hundred and seventy-five dollars, and to the said Sally Bragaw the sum of six hundred and fifty dollars, and to the said Maria Duncan the sum of seven hundred dollars—and the said acting executors have had the final account of and concerning the administration of said estate duly audited, adjusted and allowed by the Orphans' Court of the said County of Essex, having in all respects complied with the provisions of the statute of New Jersey, in that behalf, and are now ready and desirous to pay over to your orator as such acting trustee, the residue of the personal estate, in their hands, part of which is the accumulations of interest and dividends, accruing since the death of the testator.

And your orator further shows, that at the date of said last will, the said Catharine Howell, Sally Bragaw and Maria Duncan were married women, the said Catharine Howell having before that time intermarried with Samuel M. Howell, and the said Sally Bragaw with Abraham Bragaw, and the said Maria Duncan with the said John Duncan; that the said Samuel M. Howell has since departed this life, and that the said Abraham Bragaw and John Duncan are still living, and that as the issue of such intermarriages the said Sally Bragaw has six children, to wit: Sarah E., now the wife of David W. Crane; Isaac A. Bragaw, Aaron D. Bragaw, Mary J., now the wife of John U.

Kumerle; Susan, now the wife of Jacob W. Crane, and David D. Bragaw. And the said Maria Duncan has four children, whose names are David D. Duncan, John W. Duncan, Catharine P. Duncan, and Anna Maria Duncan. And the said Catharine Howell has no children now living or any descendants thereof. And that the said David D. Bragaw, David D. Duncan, John W. Duncan and Catherine P. Duncan are minors above the age of fourteen years; that the said Anna Maria Duncan is under the age of fourteen years, and that the said Sarah E. Crane, Isaac A. Bragaw, Aaron D. Bragaw, Mary J. Kumerle and Susan Crane are now above the age of twenty-one years; and that none of the children of said Sally Bragaw and Maria Duncan have died leaving issue.

And your orator further shows, that the said executors are desirous of transferring and delivering all the personal estate of the said testator now remaining in their hands to your orator, as such acting trustee, upon condition that he will pay to them on the first days of April and October in each year during the natural life of the widow of the testator, the sum of three hundred dollars, to enable them to make the half-yearly payments to her, which they are required to make by the said will and the first codicil thereto; and the further yearly sum of six hundred dollars, during the lifetime of the testator's son Henry, which by the said will and the codicils thereto, the said executors are directed to pay for his support; and also the further sum of two hundred and fifty dollars, which by the sixth clause of said last will, upon the contingency therein named is given to the testator's daughter-in-law Jane; and the further sum of two hundred and fifty dollars, mentioned in said sixth clause, upon the contingency secondly therein set forth, given to the said daughter-in-law Jane, upon the happening of such contingencies; and, also, that he will pay to them the further sum of one hundred dollars, which by the third clause of the first codicil to said last will, upon the contingency therein mentioned, is given to Eliza A. Bruen; and the further sum of one hundred dollars, which, by said

last mentioned clause, is given to said Eliza A. Bruen, upon the contingency secondly therein set forth, upon the happening of such contingencies, if they should occur; and, also, the two legacies of two hundred and fifty dollars each, given in said will by said testator to the two benevolent societies therein named.

And your orator further shows, that he is willing to receive the same upon the said conditions, (being by this Honorable Court directed and authorized so to do, and to invest and re-invest the same from time to time, as is provided in said last will respecting the residuary estate) at the value thereof, appearing by the inventory and appraisement made by the said acting executors pursuant to the statute, and filed in the Surrogate's office of said County of Essex, inasmuch as the said personal estate consists largely of stocks whose market or saleable value is fluctuating and uncertain.

And your orator further shows, that as sole acting trustee as aforesaid, he is ready and anxious to make division of the net proceeds of the rents, issues and profits of the real estate of said testator already in his hands, and of the interest and income of the said personal estate now ready to be transferred to him as aforesaid, in pursuance of the terms of said will. But so it is, that the said Catharine Howell and Sally Bragaw, each claim by virtue of the provisions of said last will, to be severally entitled to eight twenty-fifth parts of the said rents, issues and profits, interest and income, and insist that the said Maria Duncan is only entitled to nine twenty-fifth parts thereof; and the said David W. Crane and Sarah E., his wife, Isaac A. Bragaw, Aaron D. Bragaw, John U. Kumerle, and Mary J., his wife; Jacob W. Crane and Susan, his wife, and David D. Bragaw, claim that upon the death of the said Sally Bragaw they will be jointly entitled to eight twenty-fifth parts of the principal of said trust estate; and inasmuch as the said Catharine Howell has no issue, that upon her death without issue they will be entitled in the whole to eight-seventeenth parts of said principal; and the said Sally Bragaw in like manner

claims, that in case of the decease of the said Catharine Howell without issue, in the life time of said Sally Bragaw, that she will be entitled thereafter to eight-seventeenth parts of the said rents, issues and profits, interest and income, and the said Maria Duncan to only nine-seventeenth parts thereof; while the said Maria Duncan claims to be entitled to ten twenty-fourth parts of said rents, issues and profits, interest and income, and that in case of the death of said Catharine Howell without issue, in the lifetime of said Maria Duncan, that she will thereafter be entitled to nine-sixteenth parts of said rents, issues and profits, interest and income, or some greater proportion; and the said David D. Duncan, John W. Duncan, Catharine P. Duncan, and Anna Maria Duncan, or some of them, also claim, that upon the death of the said Maria Duncan they will be jointly entitled to ten twenty-fourth parts of said principal, and after the death of both, the said Maria Duncan and the said Catharine Howell, without leaving lawful issue, that then they will be entitled jointly to nine-sixteenth parts of said principal, or some greater proportion; and the said David W. Crane, and Sarah E., his wife, Isaac A. Bragaw, Aaron D. Bragaw, John W. Kumerle, and Mary J., his wife, Jacob W. Crane and Susan, his wife, David D. Bragaw, David D. Duncan, John U. Duncan, Catharine P. Duncan, and Anna Maria Duncan, further claim, that no payments out of the said rents, issues and profits, interest and income, should be paid to the said Catharine Howell, Sally Bragaw and Maria Duncan, or any of them, until the expiration of one year after the death of the testator; and by reason of, or on account of such opposite and several claims, your orator is unable to divide and pay the said rents, issues and profits, interest and income, and the principal of said estate, now in, or hereafter to come to his hands and possession as such trustee, amongst the several claimants or any of them, with safety to himself, without the sanction and direction of this Honorable Court for his indemnity, or until the aforesaid several claims shall have been decided upon.

Therefore, in order that the rights and interests of the several parties, to and in the said rents, issues and profits, interest and income, and in and to the said principal sum, may be ascertained and declared by and under the decree of this Honorable Court, as well as of the said executors to make the payment in the manner and upon the condition aforesaid to your orator as such acting Trustee; and also as to what part of such personal estate so to be transferred by said executors to your orator as aforesaid, shall be deemed principal, and what, if any part thereof, interest and dividends.

Your orator, being otherwise without remedy in the premises, solicits the aid of this Honorable Court, and to that end prays that proper direction may be given him, by this Honorable Court, for the distribution and payment of said rents, issues and profits, interest and income, and of the said principal, and that the payments so made by the said acting executors as aforesaid to the said Catharine Howell, Sally Bragaw and Maria Duncan, may be confirmed and declared proper payments under the trusts of said will: your orator hereby offering and submitting to divide and pay the same, in such manner, and to such persons as this court shall direct, being indemnified therein, and paid his costs and expenses occasioned thereby, and of this suit; and to set forth and discover a true and particular account of the rents, issues and profits of the said real estate, and of all payments and expenses made and incurred by him by reason thereof, from time to time as this court shall direct, and that your orator may have such other and further relief from time to time, as the nature and circumstances of the case may require, and as shall be agreeable to equity and good conscience.

May it please Your Honor, the premises considered, to grant unto your orator a writ or writs of subpoena of the State of New Jersey, to be issued out of this Honorable Court, and directed to the said Abraham Bragaw and Sally his wife, Catharine Howell, John Duncan and Maria his wife, David W. Crane, and Sarah E., his wife, Isaac A. Bragaw, Aaron D.

Bragaw, John U. Kumerle, and Mary J., his wife, Jacob W. Crane, and Susan, his wife, David D. Bragaw, David D. Duncan, John W. Duncan, Catharine P. Duncan, and Anna Maria Duncan, therein and thereby commanding them and each of them, on a certain day, and under a certain penalty therein to be expressed, personally to appear before Your Honor in this Honorable Court, to answer the premises, and to stand to, abide by, and perform such decree, as to your Honor shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

IN CHANCERY OF NEW JERSEY.

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The joint and several answer of John Duncan and Maria Duncan, his wife, to the bill of complaint of Joseph N. Tuttle, Executor of the last will and testament of David Doremus deceased.

These defendants now and all times hereafter, saving and reserving to themselves all and all manner of advantage and exception to the many errors, uncertainties and omissions in said bill of complaint for answer thereto, or to so much thereof as it is material or advisable for them to make answer unto, (as they are advised by their counsel) answering, say :

That they admit that David Doremus in said bill mentioned, died at the time therein stated, having made as his last will and testament the will in the said bill set forth ; that the said complainant duly received letters testamentary thereon from the Surrogate of the County of Essex, as therein stated ; that William A. Myer and Isaac Van Wagenen, the other Executors named in said will duly renounced the trusts thereby sought to be conferred upon them, in manner stated in said bill, and that said complainant is sole acting trustee under said will.

And these defendants further answering say, that they further admit the truth of all and each of the statements made in said bill touching the proceedings of said complainant in executing his said trusts, the amount and character of the property in his hands, the names, condition (whether married or single) of the parties named as interested in said trusts, and their situation as to age, having children or not, and the like.

And these defendants further answering say, that it is true, as stated in said bill, that a difference of opinion exists

between the said Maria Duncan and the other legatees in said will respecting the share in the rents, profits and income of the estate of said David Doremus, to which the said Maria is, under said will, entitled during her life, and the said David D. Duncan, John W. Duncan, Catharine P. Duncan and Anna Maria Duncan are, after her death, entitled.

And these defendants further answering, say and insist, that the intention of the testator was that the said Maria Duncan should enjoy for her life, and her children at her death should receive one-eighth part of all his estate more than should go to or be enjoyed by any other one of his daughters or their descendants; that this is the proper construction of the said will, and that such was the explanation thereof given by the testator to his said daughter in her life time, and which she can prove to have been his intention by oral proof; of facts and circumstances if such evidence be in this case admissible, that the testator had strong reasons for making considerable difference between the defendant, Maria Duncan, and his other daughters; that they each had received advances in his life time; that, in later life, and for about ten years before his death said testator was under the peculiar care of his said daughter, expressed himself frequently as indebted to her for her kindness and affection, and that it was the general expectation of those acquainted with him that a large difference would be made by testator in favor of said Maria in the final disposition of his property. And these defendants pray leave to submit such testimony to this Honorable Court to aid the exposition of the confessedly peculiar language of said will.

And these defendants say, that it is manifestly impossible to execute said will, if it is to be understood so as to give each of the testator's daughters one-third part of his estate, and one of said daughters one-eighth thereof more, which is the literal language of the clause in said will upon which question arises. Yet, they are advised that this Court will regard it as their duty to endeavor to discover the testator's intent, and carry that intent out. And these defendants submit that the testator

intended, by the phrase "one-third part," one of three shares into which he desired his estate parcelled, not equal, but one of which should comprise one-eighth part of his estate, and besides that a portion equal to each of two other shares, one of which should go to each of his other daughters.

And these defendants pray, that said will may be so construed, and that the said Trustee may be directed to distribute the income of said property accordingly.

PARKER & KEASBEY,

Solicitors of said defendants.

CORTLANDT PARKER, *of Counsel.*

IN CHANCERY OF NEW JERSEY.

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The answer of David D. Duncan, John W. Duncan, Catharine P. Duncan and Anna Maria Duncan, infants, by their guardian *ad litem*, John Duncan, to the bill of complaint of Joseph N. Tuttle, Executor of David Doremus :

These defendants now and at all times hereafter saving and reserving to themselves all and all manner of advantage and exception to the many errors, uncertainties and omissions in said bill of complaint for answer thereto or to so much thereof as it is material or advisable for them to make answer unto (as they are advised by their counsel), answering say :

That they admit that David Doremus in said bill mentioned, died at the time therein stated, having made as his last will and testament, the will in the said bill set forth ; that the said complainant duly received letters testamentary thereon from the Surrogate of the County of Essex, as therein stated ; that William A. Myer and Isaac Van Wagenen, the other executors named in said will, duly renounced the trusts thereby sought to be conferred upon them in manner stated in said bill ; and that said complainant is sole acting trustee under said will.

And these defendants further answering say, that they further admit the truth of all and each of the statements made in said bill touching proceedings of said complainant in executing his said trusts, the amount and character of the property in his hands, the names, condition (whether married or single) of the parties named as interested in said trusts, and their situation as to age, having children or not, and the like.

And these defendants further answering say that it is true as stated in said bill that a difference of opinion exists between

the said Maria Duncan and the other legatees in said will respecting the share in the rents, profits and income of the estate of said David Doremus to which the said Maria is, under said will, entitled during her life, and the said David D. Duncan, John W. Duncan, Catharine P. Duncan and Anna Maria Duncan are, after her death, entitled.

And these defendants further answering, say and insist that the intention of the testator was that the said Maria Duncan should enjoy for her life, and her children at her death should receive one-eighth part of all his estate more than should go to or be enjoyed by any other one of his daughters or their descendants; that this is the proper construction of the said will, and that such was the explanation thereof given by the testator to his said daughter in her life time, and which she can prove to have been his intention by oral proof of facts and circumstances, if such evidence be in this cause admissible; that the testator had strong reason for making considerable difference between the defendant, Maria Duncan, and his other daughters; that they each had received advances in his life time; that in later life, and for about ten years before his death, said testator was under the peculiar care of his said daughter, expressed himself frequently as indebted to her for her kindness and affection, and that it was the general expectation of those acquainted with him that a large difference would be made by testator in favor of said Maria in the final disposition of his property; and these defendants pray leave to submit such testimony to this Honorable Court to aid the exposition of the confessedly peculiar language of said will.

And these defendants say that it is manifestly impossible to execute said will, if it is to be understood so as to give each of the testator's daughters one-third part of his estate, and one of said daughters one-eighth thereof more, which is the literal language of the clause in said will upon which question arises. Yet, they are advised that this Court will regard it as their duty to endeavor to discover the testator's intent, and carry that intent out. And these defendants submit that the testator

intended by the phrase "one-third part," one of those shares into which he desired his estate parcelled; not equal, but one of which should comprise one-eighth part of his estate, and besides that a portion equal to each of two other shares, one of which should go to each of his other daughters.

And these defendants pray that said will may be so construed, and that the said trustee may be directed to distribute the income of such property accordingly.

PARKER & KEASBEY,
Solicitors of said defendants.
CORTLANDT PARKER,
of Counsel.

IN CHANCERY OF NEW JERSEY.

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Between JOSEPH N. TUTTLE, Acting Trustee, &c., Complainant, <i>and</i> CATHARINE HOWELL, ABRAHAM BRAGAW, and others, Defendants.	}	<i>Answer.</i>
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The joint and several Answer of Catharine Howell, Abraham Bragaw, and Sally, his wife, David W. Crane, and Sarah E., his wife, Aaron D. Bragaw, John U. Kumerle, and Mary J., his wife, Jacob W. Crane, and Susan, his wife, and David D. Bragaw, Defendants to the Bill of Complaint of Joseph N. Tuttle, Acting Trustee under the will of David Doremus, deceased, Complainant.

These defendants, saving and reserving to themselves all and manner of advantage of exception to the many errors and uncertainties in the said Bill of complaint, contained for answer thereunto or unto so much and such parts thereof as these defendants are advised it is material for them to make answer unto, they answering, say: they admit that David Doremus, the testator, died at the time stated in said bill, leaving a will of which the copy therein set forth is a true copy, both of the original will and of the codicils thereto; they also admit that the said William A. Myer renounced said executorship, and that the said Joseph N. Tuttle and John Duncan proved said will as set forth in said bill, also that said Isaac Van Wagenen renounced the trusteeship as therein stated, leaving the said complainant sole trustee; they also admit the payments, mentioned in said bill, to Catharine Howell, Sally Bragaw and Maria Duncan, and that said executors have made final account as stated in said bill, and are ready to pay over as stated to said trustee.

These defendants also admit that the statement, in said bill, enumerating the children and descendants of said David Doremus, deceased, is correct, and that the statement as to the marriage of some of them is also correct.

These defendants believe and admit that said complainant, as such trustee, is ready to make division of the property among those entitled to the same, under said will, and that the differing claims set forth in said bill do in fact exist as therein stated.

These defendants respectfully insist that the intention of said testator was in fact to divide the income, rents, issues and profits of said trust estate into three parts, so that two of said parts should be equal to each other, and that the other remaining part should exceed each of the other two by one-eighth of itself.

These defendants believe and insist that such was the intent of said testator, and they are advised that such is the true construction and meaning of his said will: they respectfully show that although it is true that the literal construction of the terms of said will involves or leads to a manifest absurdity, yet the natural and fair and most reasonable meaning of the same is that said property should be divided into three parts such that one part should be an eighth of a part larger than the other two parts respectively.

And these defendants pray that said will may be so construed, and that the said trustee may be directed to distribute the income of said property accordingly.

AMZI DODD,
Solicitor, and of Counsel with said Defendants.

NOVEMBER 14, 1864.

JOSEPH N. TUTTLE, Trustee,
vs.
CATHARINE HOWELL and others. }

The bill is filed to settle the construction of the will of David Doremus, in order to ascertain the shares of the estate to which the legatees are respectively entitled, and to guide the trustee in the discharge of his duty.

By his will the testator gave the residue of his estate, real and personal, in trust, to receive the rents and income thereof, and to pay over the net interest and income "in three and one-eighth parts, to wit: one-third part to my daughter Catharine Howell, one-third part to my daughter Sally Bragaw, and one-third and one-eighth parts to my daughter Maria Duncan." The point in controversy is whether Maria Duncan takes one-eighth of the estate, or only one-eighth of a share more than the other legatees. The language will not admit of a literal interpretation, and will bear, without doing violence to the phraseology employed, either of the constructions contended for. Taken however in connexion with other clauses of the will, the intention of the testator is sufficiently clear.

If the testator had intended that his daughter Maria should have taken only one-eighth of a share more than her sisters, the idea would have been naturally and simply expressed by directing that the money should be paid to his three daughters in such proportions that the share of Maria should be one-eighth larger than the share of either of her sisters, or that her portion should be a share and an eighth of a share. But the testator employs no such phraseology. His direction is to pay over the money "in three and one-eighth parts." In other words, in three parts and one-eighth part, or in four parts, one of which shall be one-eighth of the estate, and the other three parts shall be equal to each other. For he adds,

"to wit: one-third part to my daughter Catharine Howell, one-third part to my daughter Sally Bragaw, and one-third and one-eighth parts to my daughter Maria Duncan. Now he cannot mean one-third part of the entire estate, for that would be palpably absurd. He must mean one-third part of the *residue*, or one of the three equal parts into which the fund is to be divided after deducting the one-eighth. The change of phraseology in the two clauses is worthy of notice. He does not and could not speak of dividing his estate into three-thirds and one-eighth. He directs it to be divided into three parts and one-eighth part, and then directs one of the *thirds*, or one of the three equal parts, and the one-eighth to be paid to Maria Duncan.

This view of the testator's meaning is confirmed by the language subsequently used in reference to the division of the principal of the fund. He directs that the principal shall be calculated upon the same basis as the interest is herein calculated, that is: "one-third to each of my daughters, except my daughter Maria Duncan, whose share shall be one-third and one eighth of principal as well as interest." Maria's share is to be, not one-third and one-eighth of a third, but the third and one-eighth of principal as well as interest. The very ingenious argument of the defendant's counsel in regard to the first clause of the will, rests upon the principle that the fractional number always represents the fraction of a unit, or of one integral number, and that the arithmetical formula $3\frac{1}{8}$ parts, technically and necessarily means 3 parts and the $\frac{1}{8}$ of one part. Conceding the force of the argument, it has no application to the clause now under consideration. For admitting that $3\frac{1}{8}$ dollars does mean 3 dollars and the $\frac{1}{8}$ of one dollar, it will not be contended that $\frac{1}{8}$ and $\frac{1}{8}$ of a dollar mean $\frac{1}{8}$ and the $\frac{1}{8}$ of one-third of a dollar. Both the numbers used are fractional, and they indicate fractions or parts of the principal and of the interest of the estate. The bequest is of one-third and of one eighth of the principal, as well as of the interest of the estate; that is, as above stated, one-eighth of the entire fund, and one-

third, or one of the three equal parts into which the fund is ordered to be divided after deducting the one-eighth.

The testator further directs as follows: "and upon no construction of this clause in my will shall the children of one deceased daughter have more than the children of another, except the children of my daughter Maria Duncan, who shall take the one-eighth more in manner aforesaid." The direction is not simply that the children of Maria Duncan shall take one-eighth more than the children of the other sisters, which would have been obviously proper, if that was the intention. But the direction is that they shall take the one-eighth more in manner aforesaid; thus directly referring to the plan of division previously indicated.

From these various provisions of the will it is apparent that in directing that the fund should be divided into three and one-eighth parts, the testator intended that the fund should be divided into four fractional parts, of which the entire fund should be the integer or unit, and that each of the parts should be a fraction of that unit, and not the fraction of a fraction. One of these fractions is declared to be one-eighth. The others are to be ascertained by dividing the residue into three equal parts.

The result formally expressed will be that the estate must be divided into twenty fourths. That the one-eighth will be represented by 3-24s, and the other three parts by 7-24s each, and that consequently the shares of Catharine Howell and Sally Bragaw will be 7-24s each, and the share of Maria Duncan 10-24s.

It is urged as an argument against this construction that a testator will not be presumed to have intended to make any greater difference between his children in the distribution of his property than his language clearly and necessarily indicates. That the law gives the estate to the children equally, and that such equality will not be disturbed, except such intent is clearly expressed or necessarily implied, and this in analogy to the familiar maxim that the heir at law can only be disinherited by express devise or necessary implication

The analogy relied upon is sufficiently obvious, where it is doubtful whether the testator has bequeathed a portion of his personal estate, or has died intestate in regard to it. The title of the heir at law will not be divested, except the intent be clear.

But it is perfectly clear in this case that the testator did not intend to die intestate as to any portion of his estate. Neither of his children can take anything by operation of law, as next of kin. They must take by gift from the testator, unless the bequest fail from uncertainty. It is equally clear that the testator intended that the shares of his children should be unequal. The degree of inequality is the only point of inquiry.

It is a pure question of construction, and cannot be materially affected by the operation of the principle contended for. The utmost that can be claimed for the principle is, that it should be resorted to where every other rule of construction fails. In the present case there is no room for its application.

IN CHANCERY OF NEW JERSEY.

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Between JOSEPH N. TUTTLE, Acting
Trustee under the will of DAVID
DOREMUS, deceased, Complainant,
and
CATHARINE HOWELL, ABRAHAM
BRAGAW and SALLY his wife,
JOHN DUNCAN and MARIA his
wife, and al, Defendants.

Final Decree.

This cause coming on to be heard in the presence of George F. Tuttle, of counsel with the complainant, and Cortlandt Parker and Amzi Dodd, of counsel with the respective defendants, and the bill, answers and replications being read, and the arguments of the respective counsel having been heard, and the Chancellor having considered the same, it is thereupon, on this tenth day of March, A. D. eighteen hundred and sixty-five, ordered, adjudged, and decreed, that the said Maria Duncan is entitled to ten twenty-fourth parts of the net income and interest, annually arising, of the estate held by the said complainant, as mentioned in the bill of complaint in this cause, during her life, and that the said Catharine Howell and Sally Bragaw are each entitled to seven twenty-fourths of the net income and interest annually arising from the said trust estate during their lives, respectively, to be paid to them each and every year during their respective lives; and that the said David D. Duncan, John W. Duncan, Catharine P. Duncan and Anna Maria Duncan, children of the said Maria Duncan; and the said Sarah E. Crane, Isaac A. Bragaw, Aaron D. Bragaw, Mary J. Kumerle, Susan Crane and David D. Bragaw, children of the said Sally Bragaw, are entitled, upon the decease of the said Sally Bragaw and Maria Duncan, respectively, to the principal sum from which their said mothers respectively have re-

ceived the interest, and in the like proportions, that is to say, the children of the said Maria Duncan to ten twenty-fourths of the said principal sum to be equally divided between them, and the children of the said Sally Bragaw to seven twenty fourths of said principal sum to be equally divided between them; and that, upon the decease of the said Catharine Howell, without leaving lawful issue, if it shall happen in the life-time of the said Sally Bragaw and Maria Duncan, the income arising from the share of the said Catharine Howell shall be divided between the said Sally and Maria in the proportions above-mentioned, and, at their decease, or in case the said Catharine survive the said Sally and Maria, at her decease, the remaining seven twenty-fourths of said trust estate shall be divided in like manner between the children of the said Maria Duncan and Sally Bragaw; and the Chancellor doth hereby, by virtue of the power and authority of this Court, on this tenth day of March, in the year eighteen hundred and sixty-five, order, adjudge and decree that the said complainant, acting trustee as aforesaid, do pay to the said Maria Duncan, Catharine Howell and Sally Bragaw, the net interest and income, in the proportions and manner aforesaid.

And the Chancellor doth further order, adjudge and decree, that the said complainant do pay from the principal of the said trust estate the costs of the said complainant and the respective defendants in this suit, and also a counsel fee of fifty dollars each to the solicitors of the complainant and of the defendants respectively; and either party is to be at liberty to apply to this Court for further directions or relief in the premises if occasion shall require.

HENRY W. GREEN, C.

COURT OF APPEALS IN THE LAST RESORT.

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Between CATHARINE HOWELL, ABRAHAM BRAGAW and wife, and others,	}
appellants,	
<i>and</i>	}
JOSEPH N. TUTTLE, Acting Trustee,	
&c., and others, appellees.	

To the Honorable, the Court of Appeals in the last resort in all causes of law :

The humble petition of Catharine Howell, Abraham Bragaw and Sally his wife, David W. Crane and Sarah E. his wife, Aaron D. Bragaw, John U. Kumerle and Mary J. his wife, Jacob W. Crane and Susan his wife, and David D. Bragaw, 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, Henry W. Green, Chancellor, bearing date the tenth day of March, in the year of our Lord one thousand eight hundred and sixty-five, in a certain cause wherein Joseph N. Tuttle, acting trustee under the will of David Doremus, deceased, was complainant, and these appellants and John Duncan and Maria his wife, and David D. Duncan, John W. Duncan, Catharine P. Duncan and Anna Maria Duncan were defendants, whereby it was adjudged that the said Maria Duncan is entitled to ten twenty-fourth parts of the net income and interest annually arising of the estate held by the said complainant as such trustee during her life, and that the said Catharine Howell and Sally Bragaw are each entitled to seven twenty-fourths of the net income and interest annually arising from the said trust estate during their lives respectively, and that the children of the said Maria Duncan and the children of the

said Sally Bragaw in said decree named are entitled upon the decease of their said mothers respectively to the principal sum from which their said mothers shall have received the interest, and in like proportions; and that upon the decease of the said Catharine Howell, without leaving lawful issue in the life time of said Sally Bragaw and Maria Duncan, the net income arising from the share of the said Catharine Howell shall be divided between the said Sally and Maria in the proportions above mentioned, and at their decease, or upon her decease (she surviving said Sally and Maria), the remaining seven twenty-fourths shall be divided in like manner between the children of the said Maria Duncan and Sally Bragaw. 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, and that the said Maria Duncan is entitled to receive but nine twenty-fifths of said income and interest, and that each of the said defendants, Catharine Howell and Sally Bragaw, is entitled to receive eight twenty-fifths of said income and interest, and that upon the deaths of said Sally and said Maria respectively the principal of said trust property shall go as follows: nine twenty-fifths to the children of said Maria, and eight twenty-fifths to the children of said Sally; and upon the death of said Catharine Howell, without issue, the principal sum of eight twenty-fifths shall go to the children of said Maria and Sally in like proportions—the said Maria and Sally receiving during their lives, if surviving said Catharine, in like proportions, her said share of income and interest.

Your petitioners therefore pray that the said decree of the 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 this Honorable Court shall think them entitled to by the law of the land.

AMZI DODD,

Solicitor of Appellants and of Counsel.

Dated March 25, 1865.



