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Notice of Appeal

Filed February 11, 1921

IN CHANCERY OF NEW JERSEY.

Between OLE N. OLESEN et al., Complainants, and STEPHEN F. SOMOGYI, administrator, et als., Defendants.	On Appeal. Notice of Appeal.

Take notice that the defendants, Stephen F. Somogyi, administrator, &c. of the estate of Garret V. Evans, deceased, and Mary E. Evans hereby appeal from so much of the final decree entered in the above cause as:

1. Decrees that by the 3rd section of the will of Margaret E. Evans the legal heirs and next of kin entitled to the distribution of the estate of said testatrix as though she had died intestate are the nieces, nephew and grand-niece of the testatrix.

2. Directs that the nieces, nephew and grand-niece take under said distribution to the exclusion of Mary E. Evans, the widow of Garret V. Evans, son of testatrix and her sole heir and next of kin at the time of the making of her will and codicil and who survived the testatrix.

3. Directs the payment to John Banker, one of the defendants, of the sum of $950.00 and accrued interest.

4. Fails to direct the distribution and payment of

the personal estate of the testatrix, Margaret E. Evans, to the defendant, Stephen F. Somogyi, administrator &c. of the estate of Garret V. Evans, son of the testatrix.

5. Fails to decree and direct that under the 3rd clause of the will the legal heirs and next of kin of the testatrix are to be ascertained at the time of her death.

6. Fails to decree that as to the remainder of her estate the testatrix died intestate.

7. Fails to decree that, the testatrix dying intestate, her estate should be paid to her son, her sole legal heir and next of kin at the time of her death, or to his legal representative.

8. Fails to decree that upon the testatrix directing her estate to be distributed as though she died intestate, that her said estate should be distributed according to the statute of distribution at the time of the death of the testatrix.

9. Fails to decree that the estate of the testatrix became vested at the time of her death in her son, Garret V. Evans, her sole legal heir and next of kin at the time of her death.

10. Fails to decree that the sole heir of testatrix living at the time of her death should not be deprived of a vesting in him or in his representative of the corpus of the estate notwithstanding the fact that the income was payable to him during his life through a trustee.

11. Fails to decree that testatrix could not be held to have in mind her nieces, nephew and grandchild, as her brother was living when she made the will.

12. Denies the prayer in the answer filed by the defendant, Stephen F. Somogyi, administrator &c. of the estate of Garret V. Evans, deceased, that the complainants be instructed and directed to deliver

all of the personal property of the estate of said testatrix, Margaret E. Evans, to said defendant as such administrator.

And the defendants appeal from so much of said final decree as is set forth above in the Court of Errors and Appeals in the last resort in all causes.

STEPHEN F. SOMOGYI

Solicitor pro se and of the
defendant, Mary E. Evans.

Dated January 31, 1921.

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

STEPHEN F. SOMOGYI,

Of Counsel pro se and with the
defendant, Mary E. Evans.

Petition of Appeal

Filed June 21, 1921

NEW JERSEY COURT OF ERRORS AND APPEALS

Between OLE N. OLESEN et al., Complainants- Respondents, and STEPHEN F. SOMOGYI, administrator, &c., and Mary E. Evans, Defendants-Appellants. HARRY J. VAN HORN et als., Defendants-Respondents.	On Appeal. Petition of Appeal.

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

The petition of Stephen F. Somogyi, administrator, &c., of the estate of Garret V. Evans and Mary E. Evans, defendants, and 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 the State of New Jersey, bearing date the 21st day of September, 1920, in a cause wherein the said Ole N. Olesen and The Perth Amboy Trust Company, executors and trustees of Margaret E. Evans, deceased, were complainants, and Stephen F. Somogyi, administrator, &c., of the estate of Garret V. Evans, deceased, Mary E. Evans, Helen E. Gregory, Harry J. Van Horn, Edwina M. Soper,

Elizabeth J. Melick, Amy G. Russert and John Banker, were defendants, in this respect, to wit:

1. That said decree decrees that by the 3d section of the will of Margaret E. Evans the legal heirs and next of kin entitled to the distribution of the estate of said testatrix as though she had died intestate are the nieces, nephew and grand-niece of the testatrix.

2. That said decree directs that the nieces, nephew and grand-niece take under said distribution to the exclusion of Mary E. Evans, the widow of Garret V. Evans, son of testatrix and her sole heir and next of kin at the time of the making of her will and codicil and who survived the testatrix.

3. That said decree directs the payment to John Banker, one of the defendants, of the sum of $950.00 and accrued interest.

4. That said decree fails to direct the distribution and payment of the personal estate of the testatrix, Margaret E. Evans, to the defendant, Stephen F. Somogyi, administrator &c. of the estate of Garret V. Evans, son of the testatrix.

5. That said decree fails to decree and direct that under the 3rd clause of the will the legal heirs and next of kin of the testatrix are to be ascertained at the time of her death.

6. That said decree fails to decree that as to the remainder of her estate the testatrix died intestate.

7. That said decree fails to decree that, the testatrix dying intestate, her estate should be paid to her son, her sole legal heir and next of kin at the time of her death, or to his legal representative.

8. That said decree fails to decree that upon the testatrix directing her estate to be distributed as though she died intestate, that her said estate should

be distributed according to the statute of distribution at the time of the death of the testatrix.

9. That said decree fails to decree that the estate of the testatrix became vested at the time of her death in her son, Garret V. Evans, her sole legal heir and next of kin at the time of her death.

10. That said decree fails to decree that the sole heir of the testatrix living at the time of her death should not be deprived of a vesting in him or in his representative of the corpus of the estate notwithstanding the fact that the income was payable to him during his life through a trustee.

11. That said decree fails to decree that testatrix could not be held to have in mind her nieces, nephew and grand-child, as her brother was living when she made the will.

12. That said decree denies the prayer in the answer filed by the defendant, Stephen F. Somogyi, administrator &c. of the estate of Garret V. Evans, deceased, that the complainants be instructed and directed to deliver all of the personal property of the estate of said testatrix, Margaret E. Evans, to said defendant as such administrator.

And your petitioners appeal from the said decree for the following reasons:

1. Because the trust estate created by the 2nd clause of the will terminated with the death of the testatrix.

2. Because testatrix died intestate as to the remainder of her estate and the same became vested in her son, Garret V. Evans at the time of the death of testatrix.

3. Because the personal estate of testatrix should be distributed in accordance with the statute of distribution of New Jersey in force at the time of the death of testatrix.

4. Because the son of testatrix was her sole legal heir and next of kin and his legal representative is entitled to all the personal estate of testatrix.

5. Because the legal heirs and next of kin of the testatrix should be ascertained at the time of her death.

6. Because of distribution only, and not the vesting, of the estate is postponed.

7. Because the language of clause 3 of the will forbids the distribution of the estate to the nieces, nephew and grand-niece to the exclusion of the widow of testatrix's deceased son or his legal representative.

8. Because a sole legal heir or next of kin can take a remainder notwithstanding the fact that he is the beneficiary under a trust estate during his life.

9. Because the death of testatrix, intestate, cannot be postponed to, or become operative at, a time later than the date of her death.

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.

STEPHEN F. SOMOGYI,

Solicitor for and of Counsel pro se and with the defendant, Mary E. Evans.

Answer of Amy Russert

Filed June 24, 1921

NEW JERSEY COURT OF ERRORS AND APPEALS

Between OLE N. OLESEN et als., Complainants, and STEPHEN F. SOMOGYI, Administrator, &c., and Mary E. Evans, Defendants-Appellants, HARRY J. VAN HORN et als., Defendants-Respondents.	On Appeal. Answer of Amy J. Russert, one of the Defendants-respondents.

The answer of the above-named respondent, Amy J. Russert, to the petition of appeal of the above-named appellant.

This respondent, Amy J. Russert, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the twenty-first day of September last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and she prays that the same may be

affirmed, with costs to be adjudged to this respondent.

IRVING LIPMAN,

Solicitor of Amy J. Russert,
one of the defendants-respondents in said cause.

Consent to the filing of the within answer as of time is hereby given.

STEPHEN F. SOMOGYI,

Solicitor pro se, &c.,
of Mary E. Evans.

June 17, 1921.

Answer of Edwina M. Soper and Elizabeth J. Melick

FILED April 21, 1921

NEW JERSEY COURT OF ERRORS AND APPEALS

Between OLE N. OLESEN et als., Plaintiffs, and STEPHEN F. SOMOGYI et als., Defendants.	On Bill, &c.

The answer of Edwina M. Soper and Elizabeth J. Melick, respondents, to the petition of appeal of the above appellants.

These respondents, Edwina M. Soper and Elizabeth J. Melick, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a final decree was on the 21st day of September, last, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said final decree is agreeable equity and

they pray that the same may be affirmed with costs to the adjudged to these respondents.

BEEKMAN & SPENCER,

Solicitors for Edwina M. Soper and Elizabeth J. Melick, respondents.

JNO. W. BEEKMAN,

of counsel.

I hereby consent that the within answer be filed as within time.

S. F. SOMOGYI,

Solicitor pro se.

Bill of Complaint

Filed April 11, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and the PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of MARGARET E. EVANS, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Bill of Complaint.

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

Ole N. Olesen and the Perth Amboy Trust Company, executors and trustees under the last will and codicil of Margaret E. Evans, formerly of the City of Perth Amboy, County of Middlesex and State of New Jersey, deceased, respectfully shows:

1. That the said Margaret E. Evans died on the 4th day of March, 1917, leaving a last will and testament bearing date December 17th, 1913, and a codicil bearing date February 9th, 1916, which will and codicil were duly admitted to probate before the Surrogate of the County of Middlesex on the 26th day of March, 1917, a copy whereof is hereto annexed and made a part hereof, and to which these complainants for greater certainty refer.

2. That in and by the terms of said will and codicil the said testatrix appointed these complainants, the said Ole N. Olesen and the Perth Amboy Trust Company executors and trustees under the said will;

that letters testamentary were issued to them on the said 26th day of March, 1917, by Daniel W. Clayton, Esq., Surrogate of the County of Middlesex, and that they duly qualified as such executors and trustees and that they have taken upon themselves the execution of the said will and codicil.

3. That the corpus of said estate, as nearly as these complainants can ascertain, is upwards of $32,000.00, of which upwards of $28,000.00 is personal property consisting particularly of cash in banks, bonds and mortgages, &c.

4. By the second paragraph of the said will the said testatrix devised and bequeathed her estate to the said executors in trust, to keep the same safely rented and invested and from out of the income thereof to pay the expenses for the education of her grand-niece, Helen E. Felch until she shall be able to obtain a certificate as a kindergarten teacher and to pay the remainder of said income to her son Garret V. Evans as long as her said son shall live.

5. That the said Garret V. Evans, son of the testatrix, survived his mother only about five months, dying on the 21st day of August, 1917, and that during the lifetime of the said Garret V. Evans the said Helen E. Felch was not pursuing any course of instruction which would enable her to get a certificate as a kindergarten teacher.

6. The third paragraph of said will reads as follows: "At and after the death of my said son I direct my said executors to distribute my estate among my legal heirs and next of kin who shall be by law entitled to the same, as though I died intestate."

7. The said Garret V. Evans left him surviving a widow, Mary E. Evans. No children were born to his marriage. The said Garret V. Evans was the only child of the said testatrix, and her other heirs

and next of kin are Edwina M. Soper, Amy G. Russert, Harry J. Van Horn and E. Jane Melick, all children of David J. Van Horn, deceased, who was a brother of testatrix, and the said Helen E. Felch, who was the daughter and only child of Ida A. Felch, deceased, who was the daughter of said David J. Van Horn.

8. These complainants are informed and believe that said Helen E. Felch has lately married and is now the wife of one Arthur Gregory.

9. Stephen F. Somogyi, administrator of said Garret V. Evans, claims to be entitled to the personal property under the Statute of Distribution and has served notice on these complainants requiring them to pay the same to him as such administrator, while the said Edwina M. Soper, Amy G. Russert, Harry J. Van Horn, E. Jane Melick and Helen E. Gregory dispute his claim and say that they are the only ones entitled to the said estate.

10. These complainants are ready and willing to distribute said estate as the same shall appear of right to belong, but they are in doubt as to the true meaning and construction to be placed upon the third paragraph of the said will and by reason of the claim of the said administrator of Garret V. Evans on behalf of the widow Mary E. Evans, the complainants are advised by counsel that they cannot safely for themselves and the rights and interests of others proceed in the execution of the said will and of the distribution of the funds in their hands without the advice and protection of this Honorable Court in giving a construction to the said third paragraph of the said will and defining the rights and interests of the said parties claiming thereunder.

Complainants therefore pray that the said complainants may be fully instructed and directed as to

their duties under the said will and as to the manner of the distribution of the said estate.

1. 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.

CHARLES C. HOMMANN,

Solicitor and of Counsel with
the Complainant.

Will

Filed with Bill April 10, 1918

IN THE NAME OF GOD, AMEN.

I, Margaret E. Evans, of the City of Perth Amboy, in the County of Middlesex and State of New Jersey, being of sound mind and disposing mind and memory, do make, publish and declare this my last will and testament as follows:

First—I direct my executors hereinafter named to pay all my just debts and funeral expenses as soon as they conveniently may after my decease.

Second—I give, devise and bequeath all the rest and residue of my estate both real, personal, or mixed, and wheresoever situate, to my friend Frederick F. Fox, and the Perth Amboy Trust Company, and the survivor of them in trust, to keep the same safely rented and invested, and from out of the income thereof to pay the expenses for the education of my grandniece Helen E. Felch until she shall be able to obtain her certificate as a kindergarten teacher, and to pay the remainder of said income to my son Garret Van Evans in equal quarterly payments, as long as my said son shall live. Should my said son at any time through illness or personal injury be in such circumstances that the income from my estate should be insufficient for his financial needs, I direct my said trustees to use or expend for him such part of the principal or corpus of my estate as they may, in their discretion deem necessary for the use of my said son.

Third—At and after the death of my said son I direct my said executors to distribute my estate among my legal heirs and next of kin who shall be by law entitled to the same, as though I died intestate.

Fourth—I hereby nominate, constitute and appoint

the said Frederick F. Fox, and said Perth Amboy Trust Company, the executors of this my last will and testament with full power and authority to grant, bargain, sell and convey any or all of my lands to any person or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms as they shall think fit.

In Witness Whereof I have hereunto set my hand and seal this seventeenth day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

MARGARET E. EVANS (L. S.)

Signed, sealed, published and declared by the said Testatrix as and for her last will and testament in the presence of us who were both present at the same time, and who in her presence and in the presence of each other have subscribed our names as witnesses hereto at her request.

OLE N. OLESEN
CHARLES C. HOMMANN

Perth Amboy, N. J.

This is a codicil to be added to the Last Will and Testament of me, Margaret E. Evans, which bears date on the seventeenth day of December, nineteen hundred and thirteen.

Whereas, by my said Will I gave, devised and bequeath all the rest and residue of my estate to Frederick F. Fox and the Perth Amboy Trust Comany and the survivor of them in trust to carry out certain trusts therein set forth, and by the fourth item of my will I nominated and appointed the said Frederick F. Fox one of the executors of my said will.

Now, the said Frederick F. Fox having departed

this life I hereby give, devise and bequeath all the rest and residue of my estate to Ole N. Olesen of the City of Perth Amboy and the Perth Amboy Trust Company and the surivivor of them in trust to carry out the provisions of the second paragraph of my said Will and do nominate, constitute and appoint Ole N. Olesen one of the executors in the place of the said Frederick F. Fox deceased, and I declare that my said will shall be construed and take effect as if the name of the said Ole N. Olesen was inserted in my said will instead of the name Frederick F. Fox and in all other respects I confirm my said will.

In Witness Whereof I have hereunto set my hand and seal this ninth day of February, in the year of our Lord One thousand Nine Hundred and sixteen.

MARGARET E. EVANS. (L. S.)

Signed, sealed, published and declared by the said Testatrix as and for a codicil to her last will and testament in the presence of us who were both present at the same time, and who in her presence and in the presence of each other have subscribed our names as witnesses hereto at her request.

CHARLES C. HOMMANN
Perth Amboy, N. J.

PETER CLAUSEN
Perth Amboy, N. J.

Appearance of Stephen F. Somogyi

Filed June 24, 1918

IN CHANCERY OF NEW JERSEY

Between

OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased;

Complainants,

and

STEPHEN F. SOMOGYI, Administrator, et als.,

Defendants.

Appearance. On Bill, &c.

Appearance entered for Stephen F. Somogyi, administrator of the goods and chattels, &c., of Garret Van Evans, deceased, defendants in the above-stated cause, by

STEPHEN F. SOMOGYI,
Solicitor.

Answer of Stephen F. Somogyi

Filed June 24, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	On Bill, &c. Answer.

The defendant, Stephen F. Somogyi, administrator of the goods and chattels, &c., of Garret Van Evans, deceased, answering the bill of complaint, says:

1. Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 are admitted.

2. This defendant says that on the 9th day of April, 1918, he was appointed administrator of the goods and chattels, rights and credits of the said Garret Van Evans, deceased, by the Surrogate of the County of Middlesex in the State of New Jersey, and has taken upon himself the duties of the said administration, and that he respectfully insists that as such administrator he is entitled to all of the personal property, assets of the estate of the said Margaret E. Evans, deceased, now in the hands of the complainants as executors and trustees under her said will, by virtue of the statute of New Jersey known as the Statute of Distribution.

3. And this defendant joins with the complainants in their prayer that the will may be construed by this said Honorable Court and further prays, that the said complainants may be instructed and directed to deliver all of the personal property of the estate of the said Margaret E. Evans to this defendant as administrator as aforesaid.

STEPHEN F. SOMOGYI,

Solicitor and of Counsel per se.

I consent that this answer may be filed as within time.

C. C. HOMMANN,

Solicitor and of Counsel with the Complainants.

Appearance of Amy G. Russert, Edwina M. Soper and E. Jane Melick

Filed August 3, 1918

IN CHANCERY OF NEW JERSEY

Between

OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased,

Complainants,

and

STEPHEN F. SOMOGYI, Administrator, et als.,

Defendants.

On Bill, &c. Apearance.

Appearance entered for Amy G. Russert, Edwina M. Soper and E. Jane Melick, defendants in the above-stated cause, by

BEEKMAN & SPENCER,
Solicitors.

Filed August 3, 1918

Answer of Amy G. Russert, Edwina M. Soper and E. Jane Melick

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bills, &c. Answer.

The answers of the defendants Amy G. Russert, Edwina M. Soper and E. Jane Melick.

These defendants answering respectively the bill of complaint say that:

1. Paragraphs 1 to 9 inclusive are admitted.

2. These defendants as heirs at law and next of kin of the said Margaret E. Evans, deceased, claim that by virtue of the third paragraph of the said last Will and Testament of the said deceased that they are by law and by the terms of said Will, as such heirs and next of kin, entitled to receive and have paid to them by the said complainants (such executors and trustees of the said last Will and Testament of said deceased) such distributives part of said estate of said deceased in said bill mentioned.

3. These defendants deny that the defendant

Answer of Amy G. Russert, Edwina M. Soper and E. Jane Melick

Stephen F. Somogyi as administrator of the said Garret V. Evans, deceased or otherwise, is entitled by the said third clause of the said last Will and Testament of the said Margaret E. Evans deceased or by the terms of said Will, to receive the said distributive share of said estate in the complainant's Bill mentioned and that he has no right or claim therein or thereto as such administrator or otherwise.

BEEKMAN & SPENCER,

Solicitors of said answering defendants Amy G. Russert, Edwina M. Soper and E. Jane Melick.

JOHN W. BEEKMAN,

Of Counsel.

I hereby consent to the filing the within answer as within time.

C. C. HOMMANN,

Solicitor of Complainant.

Appearance of Helen E. Gregory

Filed August 14, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	Appearance. On Bill, &c.

Appearance entered for Helen E. Grgeory, defendant in the above-stated cause, by

WILSON & SMOCK,

Solicitors.

Answer of Helen E. Gregory

Filed August 14, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	On Bill, &c. Answer of Helen E. Gregory.

The answer of Helen E. Gregory, one of the defendants in the above-entitled cause, to the bill of complaint filed therein.

This defendant, for answer unto said bill of complaint, says:

1. She admits paragraph 1 of complainants' bill of complaint.

2. She admits paragraph 2 of complainants' bill of complaint.

3. She has no knowledge of the allegations and matters contained in paragraph 3 of complainants' bill of complaint, and leaves said complainants to establish the same by sufficient proof.

4. She admits paragraph 4 of complainants' bill of complaint.

5. She admits that the said Garret V. Evans, son of the testatrix, died on the 21st day of August, 1917, as alleged in paragraph 5 of complainants' bill of

complaint, and that this defendant at the time of the death of Margaret E. Evans was not pursuing any course of instruction with a view of procuring a certificate as a kindergarten teacher, but this defendant says that she was then only eighteen years of age, and was desirious of pursuing a course of instruction for the purpose of obtaining a certificate as a kindergarten teacher, and so informed the executors of said last will and testament, and requested the said executors to pay out of the income of said estate of Margaret E. Evans, the necessary expense of such education, as provided in the second paragraph of the last will and testament of the said Margaret E. Evans; that said executors neglected and refused to pay the expenses of such education, and neglected and refused to provide such education and schooling as would enable this defendant to obtain a certificate as a kindergarten teacher, and still refuse and neglect so to do, notwithstanding the continued requests and demands of this defendant.

6. She admits paragraph 6 of complainants' bill of complaint.

7. She admits paragraph 7 of complainants' bill of complaint.

8. She admits paragraph 8 of complainants' bill of complaint.

9. She has no knowledge of the allegations and matters contained in paragraph 9 of complainants' bill of complaint, and leave said complainants to establish the same by sufficient proof.

10. She denies that Stephen F. Somogyi, as administrator of the estate of the said Garret V. Evans, deceased, or otherwise, is entitled, under the last will and testament of the said Margaret E. Evans, to the estate of the said Margaret E. Evans or to any part thereof, and she further says that she is

one of the heirs at law and next of kin of the said Margaret E. Evans, deceased, and is entitled to one-fifth of the entire estate of the said Margaret E. Evans, deceased.

WILSON & SMOCK,

Solicitors for and of Counsel with Defendant Helen E. Gregory.

I hereby consent that the within answer be filed now as in time.

C. C. HOMMANN,

Solicitor for Complainants.

Appearance of Harry J. Van Horn

Filed September 20, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	On Bill, &c. Appearance.

Appearance entered for Harry J. Van Horn, defendant in the above-stated cause, by

JOHN P. KIRKPATRICK,

Solicitor.

Answer of Harry J. Van Horn

Filed September 20, 1918

IN CHANCERY OF NEW JERSEY

OLE N. OLESEN and the PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Answer and Appearance of Harry J. Van Horne.

Harry J. Van Horne, one of the defendants in the above-entitled matter, hereby enters his appearance in said suit, and answering the Bill of Complaint of the said complainants, he says that:

1. Paragraph One is admitted.
2. Paragraph Two is admitted.
3. Paragraph Three is admitted.
4. Paragraph Four is admitted.
5. Paragraph Five is admitted.
6. Paragraph Six is admited.
7. Paragraph Seven is admitted.
8. Paragraph Eight is admitted.
9. This defendant further answering the said Bill

of Complaint says that he has been informed that come claim upon the said Estate has been made by Stephen F. Somogyi, administrator of Garret V. Evans, deceased, but he avers the fact to be that this defendant, together with the said Edwina M. Soper, Amy G. Russert and E. Jane Melick, are the persons entitled to the distribution of the said estate by virtue of the terms of the said Will, and he further charges and avers that by the terms and the true meaning and construction of the said Will of the said Margaret E. Evans deceased, that this defendant, together with the said sisters were the persons intended, by the said testatrix, to be the recipient of her estate, after the decease of her said son, the said Garret V. Evans.

10. And this Defendant further answering, avers the fact to be that at the time of the making of the said Will, and for many years prior thereto, the said Garret V. Evans, and his wife, Mary E. Evans, were not living together, but were living in a state of separation, due to differences, disagreements, and disputes between them. That the state of separation was known to the said Testatrix and that she did not feel friendly or kindly to her said daughter-in-law, the said Mary E. Evans, and that it was undoubtedly the intention and purpose of the said Margaret E. Evans, as evidenced by the said Will, to leave her said estate so that her said daughter-in-law, the said Mary E. Evans, could not benefit therefrom.

11. And this Defendant further answering the said Bill of Complaint joins with the said complainants in their prayer that the said complainants may be fully instructed and directed as to their duties under said Will and as to the manner of the distribution of the said Estate, which this defendant charges

and insists should be as if the said Margaret E. Evans had died intestate, without husband, or child or representative of deceased child, her surviving, and to this defendant and his said sisters, as next of kin and heirs at law of the said Margaret E. Evans.

JOHN P. KIRKPATRICK,

Solicitor and of Counsel with the defendant Harry J. Van Horne.

I consent to filing out of time.

C. C. HOMMANN,

Solicitor of Complainants.

Petition of John Banker

Filed September 23, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	On Bill. Petition.

The petition of John Banker, of the City of New Brunswick, in the County of Middlesex and State of New Jersey, respectfuly shows:

1st. That on the twelfth day of September in the year nineteen hundred and seventeen (September 12, 1917), Harry J. Van Horne, a defendant in this cause, and one of the heirs-at-law and next of kin of Margaret E. Evans, late of said county of Middlesex, deceased, by deed of assignment under his hand and seal of that date, sold, assigned and transferred unto your petitioner all his right, title, estate and interest, of, in and to a certain devise, bequest or legacy, to which he is or may be entitled under and by virtue of the last will and testament of said Margaret E. Evans, deceased, a copy of which said deed of assignment is hereto annexed.

2. That the said assignment was made and given by the said Harry J. Van Horne to the petitioner to secure the payment of the sum of nine hundred and

fifty dollars ($950.) for which sum the petitioner holds a promissory note of the said Harry J. Van Horne, bearing date the fifteenth day (15th) day of August in the year nineteen hundred and seventeen (1917) payable in three months from and after the date thereof.

3. That the whole sum of nine hundred and fifty dollars ($950.) is still owing, unpaid and due to the petitioner, with interest thereon, no part thereof either of principal or interest having been paid.

4. That the said deed of assignment was not recorded or filed in the office of the clerk of the county of Middlesex, but the complainants, Ole N. Olesen and The Perth Amboy Trust Company, Executors and Trustees, &c., of the said Margaret E. Evans, deceased, had and have actual notice and knowledge of the said deed of assignment and of the nature, contents and purport thereof.

5. That at the time of the execution and delivery of said deed of assignment to the petitioner the said Harry J. Van Horne claimed, and still claims, to be an heir at law and one of the next of kin of the said Margaret E. Evans, deceased, and as such is entitled to a share and interest of, in and to her estate under and by virtue of her last will and testament mentioned and set forth in the bill of complaint in this cause.

6. The petitioner claims to be entitled to be paid the sum of nine hundred and fifty dollars ($950.) with interest from and out of the share and interest of the said Harry J. Van Horne, of, in and to the estate of Margaret E. Evans, deceased: that the petitioner has a legal and equitable lien and claim on said share and interest by virtue of said deed of assignment.

The petitioner therefore prays that, in order to

establish and protest his claim and interest, upon and in said share of the estate of Margaret E. Evans, deceased, under and by virtue of said deed of assignment, he may be admitted as a party defendant to this suit and allowed to answer said bill of complaint as he may be advised, or as may be necessary and proper to protect his interests therein.

SILAS D. GRIMSTEAD,

Solicitor and of Counsel with
the Petitioner.

Assignment of Legacy

To All to Whom These Presents Shall Come or May Concern, Greeting:

Be it known that I, Harry J. Van Horne, of the city of New Brunswick in the county of Middlesex and state of New Jersey, in consideration of one dollar of lawful money and other good, valuable and sufficient considerations to me in hand paid and bestowed, the receipt whereof is hereby acknowledged, at or before the ensealing and delivery of these presents, have sold, assigned, transferred and set over and by these presents do sell, assign, transfer and set over unto John Banker, of the said city of New Brunswick, county of Middlesex and state of New Jersey, and to his legal representatives and assigns forever, a certain gift, bequest or legacy to which I am or may be entitled under and by virtue of the last will and testament of Margaret E. Evans, late of the city of Perth Amboy in said county of Middlesex and state of New Jersey, executed in due form of law and bearing date the seventeenth (17th) day of December in the year nineteen hundred and thirteen (1913) and who died on or about the fouth (4th) day of March in the year nineteen hundred and seventeen (1917) and which said last will and testament was admitted to probate in the office of the Surrogate of said county of Middlesex on the twenty-sixth day of March in the year nineteen hundred and seventeen and duly recorded in book 31 of wills for said county of Middlesex at page 220, &c., in the office of the Surrogate aforesaid; and the money due and to become due and payable upon the said gift, bequest or legacy, with the interest, if any, under and by virtue of the provisions of said last will and testament of the said Margaret E. Evans, deceased.

Whereas, I, Harry J. Van Horne, am justly indebted unto the said John Banker, in the sum of nine

hundred and fifty dollars ($950.) for which sum the said John Banker holds my certain note of hand bearing date the fifteenth day of August in the year nineteen hundred and seventeen, payable three months from the date thereof, and this deed, transfer and assignment being made, executed, given and delivered as security for the payment of the said note when the same becomes due and payable, or of any renewal or renewals thereof becoming due and payable.

Now, therefore, the condition of this assignment and transfer is such that if the above-named sum of nine hundred and fifty dollars, secured by said note shall be well, truly and fully paid unto the said John Banker or to his legal representative or assigns at the time and in the manner designated and provided in the said note or in any renewal or renewals thereof, then this assignment to be null and void and of no effect, otherwise to be and remain in full force and virtue.

In Witness Whereof, I, the said Harry J. Van Horne, have hereunto set my hand and seal this twelfth day of September in the year nineteen hundred and seventeen.

HARRY J. VAN HORNE.

Signed, sealed and delivered in presence of

SILAS D. GRIMSTEAD.

State of New Jersey, }
County of Middlesex, } ss.

Be it Remembered That on this thirteenth (13th) day of September in the year nineteen hundred and seventeen, before me, a Master in Chancery of New Jersey, personally appeared Harry J. Van Horne, who, I am satisfied is the grantor named in and who signed the within deed of assignment, and I having first made known to him the contents thereof he thereupon acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

SILAS D. GRIMSTEAD,

Master in Chancery of New Jersey.

State of New Jersey, }
County of Middlesex, } ss.

John Banker, of said county and state, being duly sworn on his oath says, that he is the petitioner above named and that all and singular the allegations and statements contained and set forth in said petition are in all things true to the best of his knowledge, information and belief.

JOHN BANKER.

Sworn and subscribed before me this the 30th day of August, in the year 1918.

WILLIAM RUBIN,

M. C. C. of N. J.

Notice of Application for Admission as Party

Filed September 16, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Notice of Application to be Admitted as Party Defendant on Petition.

To Charles C. Hommann, Esq., Solicitor of the Complainants in the above cause and others whom it may concern as defendants therein:

Take notice of application to be made to the Chancellor of New Jersey, on Monday, the 16th day of September in the year of nineteen hundred and eighteen (1918) at the hour of ten o'clock in the forenoon or as soon thereafter on that day as counsel can be heard thereon, at the Chancery Chambers at Jersey City for an order that John Banker be admitted as a party defendant in the above stated cause upon his petition for that purpose, and for

such other or further relief as may be just, equitable and proper in the premises.

Dated September 3rd, A. D. 1918.

Respectfully,

SILAS D. GRIMSTEAD,
Solicitor of John Banker, Petitioner.

Due and legal service of the within notice is hereby admitted September 11, 1918.

STEPHEN F. SOMOGYI,

Solicitor for Prosecutors.

Due service of the within notice is admitted for the defendants Amy G. Russert, Edwina M. Soper and Elizabeth J. Melick this 10th day of September, 1918.

BEEKMAN & SPENCER,

Solicitors for Amy G. Russert, Edwina M. Soper and Elizabeth J. Melick, Defendants.

Notice of Application for Admission as Party

Filed September 16, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Notice of Application to be Admitted as Party Defendant on Petition.

To John P. Kirkpatrick, Esq., Solicitor of Harry J. Van Horne, a defendant in this cause:

Take notice of application to be made to the Chancellor of New Jersey, on Monday the 16th day of September in the year of nineteen hundred and eighteen (1918) at the hour of ten o'clock in the forenoon or as soon thereafter on that day as counsel can be heard thereon, at the Chancery Chambers at Jersey City for an order that John Banker be admitted as a party defendant in the above stated cause upon his petition for that purpose, and for

Notice of Application for Admission as Party

such other or further relief as may be just, equitable or proper in the premises.

Dated September 3rd, A. D. 1918.

Respectfully,

SILAS D. GRIMSTEAD,

Solicitor of John Banker, Petitioner.

Due service admitted September 7, 1918.

JOHN P. KIRKPATRICK,
Solicitor of H. J. Van Horne.

Notice of Application for Admission as Party

Filed September 16, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Notice of Application to be Admitted as Party Defendant on Petition.

To Charles C. Hommann, Esq., Solicitor of the Complainants in the above cause, and others whom it may concern as defendants therein:

Take notice of application to be made to the Chancellor of New Jersey, on Monday the 16th day of September in the year nineteen hundred and eighteen (1918) at the hour of ten o'clock in the forenoon or as soon thereafter on that day as counsel can be heard thereon, at the Chancery Chambers at Jersey City for an order that John Banker be admitted as a party defendant in the above stated cause upon his petition for that purpose, and for such other or fur-

ther relief as may be just, equitable and proper in the premises.

Dated September 3rd, A. D. 1918.

Respectfully,

SILAS D. GRIMSTEAD,

Solicitor of John Banker, Petitioner.

Due notice of the within notice is admitted this 10th day of September, 1918, for the defendant Helen Gregory.

WILSON & SMOCK,

Solicitors.

Notice of Application for Admission as Party

Filed September 16, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Notice of Application to be Admitted as Party Defendant on Petition.

To Charles C. Hommann, Esq., Solicitor of the Comlainants in the above entitled cause, and others whom it may concern as defendants therein:

Take notice of aplication to be made to the Chancellor of New Jersey, on Monday the 16th day of September in the year nineteen hundred and eighteen (1918), at the hour of ten o'clock in the forenoon or as soon thereafter on that day as counsel can be heard thereon, at the Chancery Chambers at Jersey City for an order that John Banker be admitted as a party defendant in the above stated cause upon his petition for that purpose, and for such other or fur-

ther relief as may be just, equitable and proper in the premises.

Dated September 3rd, A. D. 1918.

Respectfully,

SILAS D. GRIMSTEAD,

Solicitor of John Banker, Petitioner.

Due and legal service acknowledged.

C. C. HOMMANN,

Solicitor, etc., of Complainant.

Order Admitting Party

Filed September 23, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator, et als., Defendants.	On Bills, &c Order on Petition.

An application being made to the Chancellor by petition of John Banker, due notice of which was given to all parties in interest, praying that he be made a party defendant in this cause and the Chancellor having considered the said petition and the matters therein contained and set forth, and being of opinion that the petitioner is a proper party defendant to this cause: It is thereupon on this sixteenth day of September in the year 1918, on motion of Silas D. Grimstead, solicitor of and of counsel with the petitioner, ordered that the said John Banker be, and he is hereby admitted as a party defendant in this cause and that he have five days from the date of this order to file his answer to the bill of complaint herein.

Respectfully advised.

E. R. WALKER, C.

EUGENE STEVENSON, V. C.

Appearance of John Banker

Filed September 23, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST CAMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants. and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Appearance.

Appearance entered for John Banker, defendant in the above-stated cause, by

SILAS D. GRIMSTEAD,

Solicitor.

Answer of John Banker

Filed September 23, 1918

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill. Answer of John Banker.

The answer of John Banker, a defendant in the above-entitled cause, admitted to answer the bill of complaint therein.

This defendant, for answer unto the said bill of complaint, says:

1. This defendant admits paragraphs 1 and 2 of the complainants' bill of complaint.

2. This defendant has no knowledge of the matters set forth in paragraph 3 of the complainants' bill of complaint.

3. This defendant admits paragrpah 4 of the complainants' bill of complaint.

4. This defendant has no knowledge of the matters set forth in paragraph 5 of the complainants' bill of complaint.

5. This defendant admits paragraphs 6, 7, 8 and 9 of the complainants' bill of complaint.

6. This defendant denies that Stephen F. Somogyi, as administrator of the estate of Garret V. Evans,

deceased, or otherwise, is entitled under the last will and testament of the said Margaret E. Evans, deceased, or otherwise, to the estate of the said Margaret E. Evans deceased, or to any part, share or portion thereof.

7. This defendant says that the defendant Harry J. Van Horne, is one of the heirs at law of the said titled to one-fifth of the entire estate of the estate of said Margaret E. Evans, deceased.

8. This defendant further says that on the 12th day of September in the year 1917, the said Harry J. Van Horne, by deed of assignment of that date, under his hand and seal, sold, assigned and transferred to this defendant, all his right, title, estate and interest of, in and to a certain devise, bequest or legacy to which he was or might be entitled under and by virtue of the last will and testament of the said Margaret E. Evans, deceased.

9. This defendant says that the said deed of assignment was made and given to this defendant by the said Harry J. Van Horne and now held by this defendant as security for the payment of the sum of of nine hundred and fifty dollars ($950.) for which sum this defendant holds a promissory note of the said Harry J. Van Horne, bearing date August 15th, 1917, payable in three months from and after the date thereof; and this defendant says and claims that he is entitled to have and receive and be paid from and out of the one-fifth share and interest of said Harry J. Van Horne of, in and to the estate of the said Margaret E. Evans, deceased, the sum of nine hundred and fifty dollars ($950.) so intended to be secured as aforesaid, together with lawful interest thereon and his costs in this behalf to be taxed.

SILAS D. GRIMSTEAD,
Solicitor and of Counsel with Defendant John Banker.

Consent to Substitution

Filed May 2, 1919

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Consent to Substitution of Solicitor.

We hereby consent to the substitution of Irving Lippman as the Solicitor of Record of Amy G. Russert, one of the defendants in the above-entitled cause.

BEEKMAN & SPENCER,
Solicitors.

Dated April 3d, 1919.

Order for Substitution

Filed May 2, 1919

IN CHANCERY OF NEW JERSEY

Between

OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased,

Complainants,

and

STEPHEN F. SOMOGYI, Administrator et als.,

Defendants.

Order for Substitution.

It appearing to the Court that Beekman & Spencer, the solicitors of record for the defendant Amy G. Russert in the above-stated cause has filed a consent Irving Lipman be substituted in their place and stead, and no cause appearing to the contrary:

It is thereupon, on this 2nd day of May, in the year of our Lord one thousand nine hundred and nineteen, ordered that Irving Lipman be substituted as solicitor for Amy G. Russert in the place and stead of the said Beekman & Spencer.

E. R. WALKER, C.

Petition for Admission as Party

Filed August 6, 1919

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN et als., Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, etc. Petition.

The petition of Mary E. Evans, residing in the City of Perth Amboy, in the County of Middlesex and the State of New Jersey, respectfully shows:

1. That your petitioner is the widow of Garret V. Evans, who died intestate in the City of Perth Amboy on August 21st, 1917.

2. Your petitioner claims that said Garret V. Evans became entitled as sole heir-at-law of Margaret E. Evans to all the real estate of which the said Margaret E. Evans died seized.

3. That by virtue of the will of said Margaret Evans she died intestate of said real estate and that the same descended at her death to said Garret V. Evans, her only child and sole heir-at-law at the time of her death.

4. Upon the death of said Garret V. Evans your petitioner became entitled to her dower in said real estate as the widow of said Garret V. Evans.

5. That the above entitled proceedings were brought in order to construe the will of said Margaret E. Evans.

6. That your petitioner, by virtue of her said claim, is a necessary and proper party to said proceeding.

7. Your petitioner therefore prays that she may be admitted as a party defendant in the above-stated cause.

And your petitioner will ever pray.

STEPHEN F. SOMOGYI,
Solicitor of and of Counsel with the Petitioner.

State of New Jersey,
County of Middlesex, } ss.

Mary E. Evans, being duly sworn according to law upon her oath says that she is the petitioner in the foregoing petition made and that the facts therein stated are true.

MARY E. EVANS.

Sworn and subscribed to before me this 5th day of July, 1919.

J. J. PERRINE,
Clerk of Perth Amboy District Court.

We hereby consent to the filing of the above petition and the admission of Mary E. Evans as a party defendant in said case.

EDWARD SMOCK,
Solicitor and of Counsel with Helen Gregory, a defendant.

BEEKMAN & SPENCER,
Solicitors of answering defendants Amy G. Russert and Edwina M. Soper, John W. Beekman, of Counsel.

JOHN P. KIRKPATRICK,
Solicitor and of Counsel with Harry J. Van Horne.

IRVING LIPMAN,
Solicitor of Amy G. Russert.

C. C. HOMMANN,
Solicitor for Complainants.

SILAS D. GRIMSTEAD,
Solicitor of John Banker, answering defendant.

Order Admitting Party

Filed August 6, 1919

IN CHANCERY OF NEW JERSEY

Betwene OLE N. OLESEN, et al., Complainnts, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, etc. Order.

Upon reading the petition of Mary E. Evans in the above-stated cause it is on this first day of August, 1919, on motion of Stephen F. Somogyi, solicitor of and of counsel with said petitioner,

Ordered, that the said Mary E. Evans be admitted as a defendant in the above proceedings.

E. R. WALKER, C.

Respectfully advised.

FREDERIC W. STEVENS, V. C.

Opinion

Filed August 14, 1919

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN et al, Exrs., Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill.

Mr. Chas. C. Hommann, for Complainants.

Mr. Irving Lipman, Mr. J. P. Kirkpatrick, Mr. John W. Beekman and Mr. Edmund Wilson, for Defendants.

Mr. Somogyi, pro se.

STEVENS, V. C.

This is a bill for the construction of the will of Margaret E. Evans. The will bears date in December, 1913, and the codicil in February, 1916. Testatrix died in March, 1917, at the age of seventy-one. She left a son who was, at the date of the will and at her death, her sole heir at law and next of kin. Her estate consisted of a house and of personal property worth about twenty-eight thousand dollars.

After payment of her debts and funeral expenses, testatrix gave the residue of her estate to Ole N. Olesen and the Perth Amboy Trust Company in trust to keep the same rented and invested and from out of the income to pay the expenses of the education of a grand niece and to pay the remainder of the in-

come to her son Garret Van, as long as he should live and if he, at any time through illness or personal injury, should be in such circumstances that the income would be insufficient for his financial needs, the trustees were to use for his benefit such part of the corpus of the estate as they in their discretion might deem necessary.

The third section of the will, which has given rise to the present controversy, reads as follows: "At and after the death of my said son, I direct my said executors to distribute my estate among my legal heirs and next of kin who shall be by law entitled to the same, as though I died intestate."

The son died after his mother, leaving a widow. The widow's contention is that the corpus of the estate, at testratrix's death, vested in the son and that she is entitled to the personalty, as his next of kin under the statute.

The issue of a brother of testatrix contend that they are the legal heirs and next of kin, intended by her.

The law applicable to the situation is thus stated in Williams on Executors (vol. 2, pg. 989, 7th ed.): "If there is nothing in the context of the will or the circumstances of the case, to control the natural meaning of the testator's words, his next of kin living at his death, will be entitled; and if the tenant for life happen to be one of such next of kin or to be the only such next of kin, he is not on that account to be excluded. But where the context demonstrates that the person or persons to take under the description of next of kin is a person or persons to be ascertained at a future period or that it is the testator's intention to exclude the tenant for life from the description of next of kin, the expression must be neces-

sarily understood as meaning the testator's next of kin living at the death of the tenant for life."

Emory, V. C., in Tuttle vs. Woolworth, 62 N. J. E. 532, says, "In a legal sense, 'heirs' implies a reference to the time of the ancestor's death, and if a testator makes a devise or gift to his heirs or next of kin, those standing in that relation at the time of his death would seem to be the persons intended, unless there is something in the will itself to show that the testator had another period in his mind and that the legal sense of the word is to be restricted by indications that some other time is fixed. If the gift to testator's heirs or next of kin follows a previous gift to a person, not one of the heirs or next of kin of the testator, there could generally be no question, that the class was fixed at testator's death."

The English cases in which this question has been considered are numerous and their general result is stated in the above passage from Williams. The inquiry has always been whether the content or the circumstances show that some persons other than the heirs or next of kin, who were such at testator's death, are the persons intended.

As Vice-Chancellor Emery remarked there could ordinarily be no question when the gift to the heirs or next of kin followed a gift to a person other than those heirs or next of kin. The difficulty has arisen where there has been a gift to A or to A, B and C, expressly for life (they being the heirs or some of the heirs and next of kin) followed by a gift to testator's heirs and next of kin on his or their death with or without other contingency. And even among cases of this kind there is a distinction. If the testator has several heirs or next of kin A, B, and C, and as in Tuttle v. Woolworth, gives property to A for life and at A's death to his (testator's) heirs and next

of kin, there is less difficulty in saying that the corpus shall be distributed among A, B and C (A being, under the description, as much entitled as B and C) than there is in saying that where the testator has only one child and gives the income to that child for life and at his death to his (testator's) heirs at law and next of kin, that that child is the person intended to take the corpus. In this latter case, I think the ordinary testator would certainly conceive that by the terms of his bequest he had given the corpus to persons other than the child. Delany v. McCormick, 88 N. Y. 174, 183. If he had wished, in fact to give it to the child he would have done it in a less roundabout way. He would hardly have said, in effect, I give the income of my estate to my son for life and if he die, then I give my estate to my son. But even in this case it has been decided that such is the inherent force of the expressions "heirs at law" and "next of kin"—viz., those who are such immediately at the death—that what might be called the natural presumption is overcome by the legal presumption which arises from the use of the technical words. It is however obvious, that testator's real intention being what is sought after, slighter indications would in the case of a gift to a single heir suffice to take the case of the general rule than would be required in the case of a gift for life to one of several heirs followed by a gift of the corpus to the heirs generally.

One of the early cases is Jones v. Colbeck, 8 Ves. 38. The residuary bequest was to testator's daughter for life and to her children at their ages of twenty-one; and after the decease of the daughter and of her children under that age, the estate was to go to and be distributed among his relations in a due course of administration. The Court construed "relations" to mean next of kin; and the daughter dying

without leaving issue it was held that the property went to the great nephews and nieces rather than to the personal representatives of the daughter who was testator's sole next of kin at his death. Sir William Grant, M.R., said "I think in the present case it is evident the testator intended to speak of 'relations' not at the time of his own death, but at that of his daughter or her issue under the age of twenty-one. As to the claim of the daughter, it is hardly possible the testator could mean to describe an only daughter by the term 'my relations' directing also that the residue be distributed among those relations. Next, it is impossible that he could take this strange circuitous method of giving her the whole residue in the event of her dying without children, instead of directly saying so." I quote this case as being not only very much in point but because, in spite of some intermediate criticisms, it was thought to be correctly decided by the Lord Justices in Lees v. Massy, 3 DeG. Fish, and Jones 113.

In Briden v. Hewlitt, 2 My. and Keen 90, the gift was to testator's mother for life and in case she died without will, "then to such person or persons as would be entitled to the same by virtue of the statute of distributions," and it was held that the word "would" imported that testator intended his next of kin at his mother's death and not at his own death. In Butler v. Bushnell, 3 My. and Keen 232, it was said that the words "such persons as happen to be" or "such persons as shall or should be" my next of kin indicate an intention to confine the gift to such persons as shall answer the description at the death of the tenant for life. In Minter v. Wraith, 13 Sim. 52, the gift was to testator's two daughters for life with a gift over to his next of kin, his, her or their heirs, etc. The word "his" was held to be not ap-

plicable to daughters. In Lay v. Creed, 5 Hare, 580, Wigram, V. C., said in the course of his judgment "When therefore testatrix in such circumstances described her next of kin to whom she had given her property in terms which import that she contemplated a plurality of persons under that description, the question is whether her words of plurality interpreted, do not describe some persons other than" (her sole next of kin to whom she had given the property for life).

I have specially referred to these cases among many others because they seem to me to bear directly upon the case in hand. There are several indications of testatrix's intention to give the corpus of the estate, not to her son, but to those who should be her next of kin at his death. In the first place she gives her trustees power to use the corpus for his benefit. This would have been unnecessary if she had intended to give him the corpus outright. Second, she uses the word "shall," adverted to by the Master of the Rolls in Butler v. Bushnell (supra) as indicating an intention to give to the persons who answer the description at the death of the tenant for life rather than at her own death; for the will speaks from the death. Third, she directs her executors to distribute her estate among her legal heirs and next of kin, that is among a plurality of persons. These indications seem to me, in accordance with the cases cited, to be sufficient to take the case out of the general rule.

The strongest case that I have found on the other side is perhaps Bird v. Luckie, 8 Hare 301. There the direction was, upon the grandson's death to distribute the whole of the residue among such next of kin, etc. This was a distribution apparently among a plurality of persons. Knight Bruce, V. C., said "I do not see why it should be supposed that when tes-

tator made his will he contemplated, as impossible to happen in his lifetime, any event which was then possible to happen in his lifetime, though in fact it did not." In other words, it was possible for him to have had other next of kin of the same degree at his death, and to have so contemplated. In the case in hand such an impossibility exists. Mrs. Evans at the age of sixty-eight was past child bearing and if her son survived her she could have but one next of kin, and she could have contemplated having any other of like degree. It is said, in this class of cases, to be the duty of the Court to put upon words their proper meaning and to give effect, if possible, to every word. It cannot, in the present case, be held that a sole next of kin was intended without doing violence to language which necessarily imports more than one. There is to be a distribution among next of kin—a thing impossible if only one take; and when such a construction furthers what seem to be, on the face of things, testator's real intention as contradistinguished from that somewhat artificial intention deduced from the use of the techical words, why should the Court hesitate? I think the nephews and nieces take to the exclusion of the son's widow.

Decree

Filed September 21, 1920

IN CHANCERY OF NEW JERSEY

Between OLE N. OLESEN and PERTH AMBOY TRUST COMPANY, Executors and Trustees, &c., of Margaret E. Evans, Deceased, Complainants, and STEPHEN F. SOMOGYI, Administrator et als., Defendants.	On Bill, &c. Decree.

This cause coming on to be heard in the presence of:

Charles C. Hommann, Esq., of Counsel with the complainants.

Messrs. Wilson & Smock, of Counsel with the defendant, Helen E. Gregory.

John Kirkpatrick, Esq., of Counsel with the defendant, Harry J. Van Horn.

Messrs. Beekman & Spencer, of Counsel with the defendants, Edwina M. Soper and Elizabeth J. Melick.

Irving Lippman, Esq., of Counsel with the defendant, Amy G. Russert.

Shephen F. Somogyi, Esq., of Counsel pro se, and of Mary E. Evans.

Before his Honor, Frederick W. Stevens, now deceased, late Vice-Chancellor, who heard the case

and filed his opinion herein and who died without having advised a decree herein.

And it appearing to the Court that Margaret E. Evans executed her Last Will and Testament, bearing date December 17, 1913, and her Codicil thereto dated February 9, 1916, and that at the time of the making and execution of said will there were living Garret V. Evans, the son of said Margaret E. Evans, Mary Evans, his wife, and David J. Van Horn, the brother of said Margaret E. Evans.

And it further appearing that said David J. Van Horn died on September 29, 1915, leaving him surviving Edwina M. Soper, Amy G. Russert, and E. Jane Melick, daughters, Harry J. Van Horn, son, and Helen E. Gregory, granddaughter, who was a daughter of Ida H. Felch, deceased, a daughter of said David J. Van Horn; and that said Margaret E. Evans died on the 4th day of March, 1917, leaving said Last Will and Testament and Codicil which were duly proved before the Surrogate of the County of Middlesex, and that letters testamentary were issued thereon to the complainants herein.

And it further appearing that Garret V. Evans, the son of said testatrix, died on August 21, 1917, and was survived by Mary E. Evans, his widow, and one of the defendants herein.

And it further appearing that said testatrix was survived by her said son, her said daughter-in-law, and her said nieces, nephew and grand-niece.

And the proceedings in this cause having been read and the testimony taken and the arguments of the respective counsel having been heard and considered and the Court having duly considered said proceedings and arguments.

And it appearing to the Court that the Complainants, executors and trustees under the will of said

Margaret E. Evans, deceased, are entitled to instructions from this Court as to their duties and to the relief sought and prayed for in the bill of complaint in this cause.

It is on this 21st day of September, 1920, Ordered, Adjudged and Decreed by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, and the said Chancellor by virtue of the power and authority of this Court does hereby Order, Adjudge and Decree that the respective rights and interests of the parties to this suit in the lands, real estate and personal property, constituting the principal of the estate in the hands of said trustees, and the income thereof and therefrom, are as hereinafter set forth, and the principal and income of said estate shall be hereafter paid and distributed by said trustees and said trustees are instructed as follows, to wit: That by the 3rd section of said will and which reads as follows, "At and after the death of my said son I direct my said executors to distribute my estate among my legal heirs and next of kin who shall be by law entitled to the same, as though I died intestate," the legal heirs and next of kin entitled to the distribution of the estate of said testatrix as though she had died intestate, are the said nieces, nephew and grand-niece, and that they take to the exclusion of Mary E. Evans, the widow of said Garret V. Evans, and daughter-in-law of said testatrix, subject, however, to the payment to John Banker, one of the defendants herein, of the sum of $950.00 and accrued interest thereon and which moneys shall be deducted from the share or interest of said Harry J. Van Horn, by said trustees before payment by said trustees to said Harry J. Van Horn of his distributive share or interest.

It is further Ordered, Adjudged and Decreed that

the costs of this proceeding shall be borne by the Complainants and paid out of the said estate, and that Charles C. Hommann, of Counsel with the complainants, be paid by said trustees a counsel fee of one hundred and fifty dollars for his services in this cause, and that each counsel for said several defendants be paid by said trustees the sum of seventy-five dollars for their respective services in this cause; and that said counsel fees be included in the taxed bills of costs herein.

E. R. WALKER, C.

Admission of Fact

Filed September 27, 1920

IN CHANCERY OF NEW JERSEY

Between

OLE N. OLESEN et als.,
Complainants,
and
STEPHEN F. SOMOGYI, Administrator et als.,
Defendants.

} On Bill, &c.

It appearing that at the hearing on the above matter before His Honor Vice-Chancellor Stevens on the 25th day of June, 1919, that no testimony was adduced as to the age of the testatrix at the time of her death, it is hereby admitted by the complainant and the said defendants that the age of the said testatrix on the 4th day of March, 1917, being the date of her death, was 71 years 2 months and 23 days.

C. C. HOMMANN,
Solicitor, etc., of Complainants.

SILAS D. GRIMSTEAD,
Solicitor of defendant John Banker.

EDMUND WILSON,
Solicitor for Helen E. Felch (nee Gregory),

STEPHEN F. SOMOGYI,
Solicitor for Mary E. Evans and pro se as Administrator, etc.

Admission of Fact

BEEKMAN & SPENCER,
Solicitors for Edwina Soper, Amy Russert and Jane Melick.

JOHN P. KIRKPATRICK,
Solicitor of Harry J. Van Horn, defendant.

IRVING LIPMAN,
Solicitor of Amy G. Russert.

New Jersey Court of Errors and Appeals.

BETWEEN OLE N. OLESEN, et al., *Complainant-Respondent,* *and* STEPHEN F. SOMOGYI, Administrator, et al., *Defendants and Appellants.*	On Bill, &c. On Appeal of Stephen F. Somogyi, Administrator, et al.

BRIEF OF RESPONDENTS, EDWIN A. M. SOPER AND ELIZABETH J. MELICK.

Lord Coke, upwards of two hundred years ago, well said, which is as true now as it was then, "that wills and construction of them do more to perplex a man than any other learning."

Roberts vs. Roberts, 2 Bulst. 130.

Two questions are presented:

1. What was the intention of the testatrix?

2. When did the estate become vested for distribution?

Mrs. Evans, by her will, leaves her property to trustees for certain purposes. First, to pay her son the income for his support during his lifetime, subject to paying the expenses for the education of her grand-

niece, and to also use the principal for such purpose if necessary. Second, "At and after the death of her said son, to be distributed *among her legal heirs and next of kin,* as if she died intestate" vide will. She contemplated that her son would survive her, which he did.

There is a marked distinction between this case and the one much relied on by the solicitor of the son's widow. *Tuttle vs. Woolworth,* 62 Eq. 533, where Macknet bequeathed personalty to his executors in trust to pay the expenses of a house given to widow for life, and then devised this to his daughter Hattie *and her heirs,* and on his wife's decease or marriage, and after his widow's death, to give such personalty to his daughter *or her heirs* (i. e. the daughter's heirs) and in case of the daughter's death without issue, etc., the same was to revert to testator's estate, which was a limitation only. This will is set out in full in *Macknet vs. Macknet,* IX C. E. Greene 277, and where the rights of Hattie were settled and where Chancellor Runyon held that from the will as a whole the intention of the testator governed, and hold different from what he did would have created a condition which would have enured to the benefit of his other children at the expense of Hattie, which could *not have been the intention* of the testator. See Page 290 and 291 above case. This devise and bequest to Hattie was subject to the life estate of her mother.

Could it be possible that Mrs. Evans intended to cut off those of her own blood and give her estate to this daughter-in-law, a stranger in blood, especially to the exclusion of this grandniece who was at one time a member of her family, and whose education she had provided for and those of her own blood? Is it possible, even probable?

Runyon, C., in 9 C. E. Greene 290, speaks about the circumstances of the parties. What was natural—what must have been the testator's intention? Vide do. So intention also appears to be one of the prin-

cipal key notes besides the natural object of the testator's bounty. Her son was only to have the remainder of the income (after paying for the education of the niece) during his lifetime, and no more of her estate. To claim that he was not only to have a life annuity but the corpus of the estate, creates an absurdity which would puzzle the human intellect. .The words of the will are positive. There is no mistaking their meaning. "At and after the death of my said son I direct my said executors to distribute my estate among my legal heirs and next of kin, who shall, &c." The word "among" having future probabilities in sight at the time. Could words make it plainer what the intention of the testatrix was? Can it be claimed under such wording that her estate was to be distributed and become vested in her son on her death? She thus fixes the time for distribution and the vesting of her estate. She by these words marks the time when her estate shall vest in her heirs by distribution. The case of *Gifford, Adm., vs. Thorn, et al.*, 1st Stockton, 702, is strongly in point on this question of vesting.

Green, C. J., sitting for the Chancellor (page 708) and where the court held that the estate did not vest until the happening of the event provided for.

Williams on Exec., Volume 2, page 1334, 6th Am. Edition, says, "Where there is no gift but a direction to divide and pay at a future time or transfer from and after a given event, the vesting will be postponed until after that time has arrived or that event has happened, unless from particular circumstances a contrary intention is to be collected," and cases cited in notes.

There was no gift in this case until the son died—giving a part of income is not a gift of the principal—from which such income is derived.

The will says, "from and after the death of my son," to whom she leaves only an annuity, no part of the corpus of the estate is given him, or any remainder

in his heirs, so no estate vested in him or his heirs by the terms of the will, at any time, only a life support. She does not either devise or bequeath to her son any part of the corpus of her estate, she vested it in her executors to pay the income to him only for his life with a provision for her grandniece, and "after his death" she gives it to her (not his) heirs, and next of kin.

Williams on Exec., 6 Am. Ed., page 1326, Volume 2, bottom page 1224, says, "But when a future time for the payment of a legacy is defined by the will, it will be vested or continued according as upon construing the will it appears whether the testator meant to annex the time to the payment of a legacy or to the gift of it." This distributing was not to be permissive but only became absolute on the death of her son, and could not become absolute before. See cases cited in note.

Thus Mrs. Evans' will fixes absolutely the time when the devise and legacies should be distributed and vest in her heirs and next of kin. Not in one but in several—that she evidently had in mind when she made her will.

If it was the intention and the wish of Mrs. Evans that her estate was to vest in her son and he to be her heir at her death, then the will was only a bit of waste paper and of no use.

Mrs. Evans did not intend (taking the will as a whole) that her son, Garret, should have more than she specified in her will. The will provided that after his death her estate should go to her next of kin and heirs and not *his*. 88 N. Y. Ct. of Appeals 183, a case strongly in point, and cases cited.

The direction was to distribute under the will at a future time, namely, at the death of her son, and that was to be by her executors. There could be no distribution until the death of Garret, her son, thus marking the time, then the estate was to be distributed among her heirs and not before. As the estate could

not be distributed before under the will and never vested and could not under the terms of this will, in Garret in his lifetime, it is puzzling to conceive how it could after his death vest in his heirs. This is not a case of substituted devise or legacy, and falls within the well known rule that where there is a gift of money and direction for the conversion absolute and the legacy given to a class of persons, it will vest in those who answer the description and who are capable of taking at the time of distribution. (The distribution could only be on Garret's death). This is not only law but common sense. There can be no distribution to one—it must be to two or more. It means to divide.

Another point: Mrs. Evans gave her estate to trustees. She gives nothing of the corpus to her son by will with a remainder to others, as no part of the corpus of the estate vested in him but vested in the trustees absolutely. The trustees were seized of the estate and not the son. Query: Can it be claimed that on the death of the testatrix that the powers of the trustees ended and the estate as a whole vested in the son?

Can it be questioned that the intention of Mrs. Evans was—judging by the words which she said, "After the death of my said son," etc.—that the estate was not to be distributed and to vest in her next of kin and heirs until such time as such vesting would have destroyed the annuity and the provision made for her niece. Garret's interest was limited to only a part of the income till his death. Is it possible to conceive that Mrs. Evans intended to give this widow of her son's what she did not intend her son to have?

The direction for distribution when her son died constituted a gift. The gift could not take place until such death. The widow of Garret was not next of kin to the testatrix, not being of her blood.

Williams on Exec., 6th Am. Ed., page 1212, 2 Vol., the law is well laid down that "Where the will dem-

onstrated the person or persons to take under the description of next of kin, is a person or persons to be ascertained at a future period, or that the testator intended to exclude the tenant for life from the description of next of kin, the expression must be necessarily understood as meaning the testatrix's next of kin *living at the death of the tenant for life,*" and cases cited.

In *Furners vs. Fox,* 1 Cush. 134, Justice Metcalf said, "If the time of payment merely is postponed and if it appears to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind, *but if the time becomes annexed to the substance of the gift as a condition precedent, it is contingent and not transmissible.* See Cush. 9-576.

Although the law favors the vesting of estates, yet it is held that such favor is not to be pressed to defeat the intent of the testator. *Richardson vs. Wheatlan,* 7 Met. 171.

From the will of Mrs. Evans, it shows that her son was only to have this annuity during his lifetime, and no more. *Delaney vs. McCormick,* 88 N. Y. 174. That the distribution of her estate was to be held in abeyance till such son's death, and to be distributed to her heirs and next of kin. No interest in the corpus was intended to pass until the death of her son. See Williams on Exec., page 1343, Vol. 2, 6 Am. Ed., also cases cited in V. C. Stevens opinion, especially *Jones vs. Colbeck,* 8 Vesey 30.

These two distinct gifts were, namely (1) An income to her son for life. (2) The corpus of her estate, after her son's death to her heirs.

From the will, the son's interest was limited to an annuity. Most all cases I have been able to find and those cited by the solicitor of the widow, were cases where the tenant for life received the annuity or benefit for life with a remainder to such tenant's heirs.

Mr. Somogyi, in his lengthy and voluminous brief,

criticizes the Vice-Chancellor for taking the position that Mrs. Evans had reached an age that she was past child-bearing. It must be remembered also that she was a widow, who had reached an age at which they cease to be attractive to the other sex, unless he too has reached an age at which he also would be as unproductive in the same direction. Mr. Somogyi cites "Sarah" as an example in support of his argument. That was in an age of miracles, which age no longer exists.

As to the point of counsel for appellant, that V. C. Stevens must have overlooked the fact that at the time the will was made, her only next of kin after her son was her brother, David J. Van Horn, that therefore in that case that there could not be but one heir and next of kin, therefore the words "among my heirs and next of kin" could have no application or meaning. I have only to say as to that, that the testatrix evidently had in mind that from all probability her son would survive her brother according to the law of nature which he did, and therefore at her son's death when her estate was to be distributed among her heirs, it would be among these respondents, her nephews and nieces, which is further strengthened by the fact that her said brother died some two years before the testatrix. Is it possible to believe under the circumstances and conditions, that testatrix intended that her estate or any part of it was to go to the wife of her son, a stranger in blood to the exclusion of those of her own blood?

The able opinion of the late V. C. Stevens fully covers the facts and the law of the case and cases cited by him.

The appeal should be dismissed and decree affirmed.

BEEKMAN & SPENCER,
Solicitors of Edwina M. Soper and Elizabeth J. Melick, two of the defendants-appellants in said cause.
JOHN W. BEEKMAN
Of Counsel.

New Jersey Court of Errors and Appeals

BETWEEN

Ole N. Oleson et al.,
Complainants-Respondents,

AND

Stephen F. Somogyi, administrator, and Mary E. Evans,
Defendants-Appellants,

Harry J. Van Horn, et als,
Defendants-Respondents.

ON APPEAL.

BRIEF OF APPELLANTS.

Statement of Facts.

This is a case wherein the executors and trustees under the Will of Margaret E. Evans seek instructions as to the distribution of her estate.

No testimony was taken before the late Vice Chancellor Stevens, to whom the case was referred, except that Helen Felch, who was to receive the education set forth in the second paragraph of the will, was sworn for the purpose of establishing her disclaimer as she had no intention of becoming a Kindergarten teacher.

Mr. Hommann, counsel for the complainant, stated orally at the hearing the facts in the case, which were accepted by all counsel interested in lieu of the taking of testimony and which facts are as follows:

Margaret E. Evans executed her Last Will and Testament bearing date December 17, 1913, and her Codicil thereto dated February 9, 1916, the Codicil simply providing for the change in person of one of the executors under said will.

At the time of the execution of the will there were living Garret V. Evans, the son of testatrix, Mary E. Evans, the wife of said Garret V. Evans, and David J. Van Horn, brother of testatrix.

David J. Van Horn died on September 29, 1915, leaving him surviving Edwina M. Soper, Amy G. Russert and E. Jane Melick, daughters, Harry J. Van Horn, son, and Helen E. Gregory, granddaughter, and who is the daughter of Ida H. Felch, a deceased daughter of said David J. Van Horn.

Margaret E. Evans, died on March 4, 1917, leaving said Will and Codicil which were proved before the Surrogate of Middlesex County and that letters testamentory were issued thereon to complainants.

Garret V. Evans, son of the testatrix, died August 21, 1917, after the death of David J. Van Horn, and was survived by Mary E. Evans, his widow, one of the defendants herein.

Stephen F. Somogyi, one of the defendants-appellants, was appointed administrator of the estate of Garret V. Evans, by the Surrogate of Middlesex County, on April 9, 1918.

The construction sought is upon the meaning of the words in the third paragraph of the Will which are as follows: "At and after the death of my said son I direct my executors to distribute my estate among my legal heirs and next of kin who shall be by law entitled to the same, as though I died intestate."

Since receiving the brief from the printer advance sheet No. 9 of the Atl. Rep. Vol. 113, published June 30, 1921, reached me and at the case of Riley et al., vs. Riley et al., page 777, 779, bears out my contention that Mrs. Evans could not be presumed in law to be unable to bear children.

POINT 1.

The Reasoning and Argument of the Vice Chancellor in His Opinion and Upon which the Decree was Made is Without Foundation in Law or in Fact.

The opinion of the Vice Chancellor and his conclusion to the effect that the nieces and nephew of the testatrix take to the exclusion of the son's widow is based upon the fact that the words "distribute" and "among" are used in the third clause of the will and upon the fact that the testatrix, being sixty-eight years of age, was past child-bearing.

It is admitted that the testatrix was sixty-eight years of age, but there was absolutely no evidence produced at the hearing or any intimation made by counsel that she could not give birth to a child at that age. There is no legal presumption that such a thing is impossible. In fact we all know of cases quite to the contrary. It might be the rule but nevertheless the possibility exists and I respectfully submit that the Vice Chancellor had no legal right to take for granted this proposition as a matter of law or of presumption.

If my memory serves me clearly, there is an old English case which I am not able to cite, but in which reference is made to Chapter 17, Verse 15 of Genesis in which Abraham, aged one hundred, and Sarah, ninety years old, had a son named Isaac.

The Vice Chancellor in his opinion lays some stress upon the context of the Will demonstrating the person or persons to take under the description of next of kin. This proposition might be very true, but we must also take into consideration the situation at the time when the Will was made, at which time there were living the son of the testatrix, his wife and the brother of testatrix. The reasoning in the opinion that the words "distribute" and "among" imply a

plurality of persons is to a certain extent erroneous in-so-far as it is applicable to the construction of *this* Will because we must determine what the testatrix had in mind or could have had in mind at the time of the making of the Will. Could she possibly have meant by the words "next of kin" the nephew and nieces and grandniece? I say **no** emphatically because she must have known the law and the nephew and nieces could not have been in her mind for the reason that their father was then living.

Suppose that her brother had survived both the testatrix and her son, the life tenant. Could it then be said that the brother would not be the next of kin and would not take under the third clause of the Will because of the words "distribute" and "among" being used in said clause? Could the nieces and nephew take the estate to the exclusion of their father living at such time?

I claim that we are bound to assume that the only persons whom the testatrix could have contemplated were either her son or her brother. It cannot be argued that she might have possibly thought of her brother dying before the time arrived for distribution because, if this were so, then a much stronger argument can be made to the effect that she might have thought of her son and his wife having children and that they might be the persons to take.

Suppose that David Van Horn would have had other children besides those who are defendants in this case or that some of them had died before the estate was distributed. Can it be said that that would alter the situation? I really believe that the late Vice Chancellor entirely lost sight of the fact that the brother of the testatrix was alive at the time of the making of the Will, and that he had firmly embedded on his mind the fact that there was a son on one hand who through his representative claims the personal estate and that there were the nephew and nieces on the other hand who also made such

claim, and decided that, inasmuch as there was a plurality of persons on one hand and a single person on the other, that the words "distribute" and "among" meant the nephew and nieces because he says in the last part of his opinion "it cannot in the present case be held that a sole next of kin was intended without doing violence to language which necessarily imports more than one." He says further that a distribution among next of kin is impossible if only one take.

That is not the fact nor is it the law. The Orphans' Court Act in existence at the time of the death of the testatrix and relating to the distribution of personal estates was amended in 1914 and is chapter 47 of the Pamhlet Laws of 1914, page 69. Section 169 of said act begins as follows: "The whole surplusage of the goods, chattels and personal estate of which any person shall die intestate, shall be **distributed** in manner following, that is to say." Subdivision 2 of said section on page 71 of said laws reads as follows: "In case there be no children nor any legal representative of them, then the whole of the said estate shall be alloted to the husband or widow, as the case may be, of the said intestate."

Here we have a distribution pure and simple to a single person and, inasmuch as by the Will the testatrix directed the distribution to be made to the persons entitled thereto by **law as though she died intestate,** it means that she was satisfied with parceling out a trust fund for two particular purposes as contained in paragraph two of the Will and that she did not care what became of her estate afterwards but that it was to be distributed as though she had never made a will, that it was to be distributed according to law, therefore according to the law in existence at the time of the death of the testatrix. The son was the sole distributee of the personal estate and the only person entitled to the same as the next of kin of testatrix and as her heir at law. It was in-

cumbent upon the testatrix to use words in futurity in order to make a sensible document and, as is said in Theobald on Wills, 342, words of futurity alone will not alter the ordinary rule that makes the death of the testator the time for the ascertainment of the beneficiaries.

Barrett vs. Egbertson, et al., 111 Atl. 326, 329.

It would be different if the words "then" were used for that would certainly postpone the time of such ascertainment, as held in

In re Daly, 111 Atl. 922.

I respectfully submit that the Court is constrained to look at the Will and the statement of facts made at the hearing in the Court of Chancery, and nothing else in coming to a proper determination of this cause and if it is to be a matter of conjecture or of doubt, then the same must be resolved agreeably to the law and the statute in force at the time of the death of the testatrix and if she provided for a partial intestacy, she had a perfect right to do so, and no court can prevent it. If she used technical terms they must be presumed to be employed in their technical sense with the meaning ascribed to them by usage and sanctioned by judicial decisions; more so because the will is drawn by a member of our bar of the highest standing and ability who also is a witness to the Will.

POINT 2.

What Construction Shall be Placed Upon the Will?

It may be argued by my adversaries as it has been in the court below that the third paragraph of the Will should read as though the words "at the time of the death of my son" were added after the phrase "as though I died intestate."

This would certainly be an unwarranted altering of the will.

It is my contention that the words in the will must be taken in their natural meaning and, as has been held in

Woodruff vs. White, 79 Atl. 304; aff. 81 Atl. 1134,

the court is called upon to construe what the testatrix has said, and not to supply language and thereby make her say what she did not say.

A person can die but once, and the words "as though I died intestate" mean her death intestate at the time of her decease and not a postponement of her death to a later day which might be any uncertain or indefinite day named to suit the desire or fancy of the persons who seek to derive a benefit under the will.

If these words could mean the death of the testatrix intestate at the time of the death of her son, it might just as well be said to mean her death at a time not yet arrived. There must be a certainty in the construction and not a mere conjecture.

The will is not to be construed in the light of events subsequent to the death of testratrix.

Gray vs. Hattersley, 50 N. J. Eq., 206.

Words which are expressive of futurity without pointing to any definite period are satisfied when referred to the time of testator's death.

Jarman on Wills, Vol. 2, star page 135.

The words here used are plain and clear and, read in their ordinary sense, must control in searching the intent of the testatrix.

Burnet vs. Burnet, 30 N. J. Eq. 595, 597.

To give such argument some weight, it would be necessary to hold that there are two intentions on the face of the will. Even if this were so (and we deny

this) the intention as claimed by our opponents would be special and **inconsistent with the rules of law** and would have to yield to our contention as to the date of death of testatrix, viz., the actual date of her death. The intention as claimed by me being consistent with the rules of law, must control. Further, the words being technical and having a well defined legal meaning, must be presumed to have been used in their settled legal meaning.

The will should be construed as speaking of and taking effect at the time of the death of the testatrix and not at the date of death of her son, because the law favors a construction which will make a distribution as nearly conform to the general rule of inheritance as the language will permit.

Smith vs. Garber (Ill.) 121 N. E. at p. 175.
In re Shumway (Mich.) 160 N. W. at p. 598.

POINT 3.

The Intent of the Testatrix Must be Gathered and Ascertained from the Words of the Will.

The will must form the basis for construction. If the testatrix intended to express something different from what the words of the will, taken in their ordinary meaning, indicate, it is an omission which no court can supply. We cannot add words to show that the intention is other than as expressed; we cannot make a will; we can but say what is meant by the words as used in the will.

Tyndale vs. McLaughlin, 94 N. J. Eq. 652, 657.

There is no latent ambiguity in the will. The words used are plain and intelligible and are susceptible of a certain and definite application. Why should the court contradict, enlarge or vary the

words when, under the law, they have a certain meaning which the testatrix is presumed to have known?

If she did not herself know the meaning of those words, she had counsel learned in law to draw the will in accordance with her expression and he used words, the meaning of which has been construed time and time again by the courts and he must have used them in the sense of their legal definition. A case directly in point on this proposition is that of

Hay vs. Dole, et al. (Me.) 111 Atl. 714.

An ordinary contract could not be changed by adding to or striking from it certain words. A fortiori, the sacredness of a will should not be violated by such an action. To add words to the third paragraph of the will would have the same effect as though parol proof were admitted to contradict the language used in the will, and even a partial or total failure of testatrix's intention would not justify such a course.

Farnum vs. Penna. Co for Ins. on lives (N. J. Ch.) 11 Atl. 145.

The intention must be discovered from the will.

Leigh vs. Savidge, 14 N. J. Eq. 124.

As was held in

Griscom vs. Evens, 40 N. J. L. 402, 406,

the sole question is "*non quod voluit sed quod dixit.*"

The expression of a contrary intention which will preclude the application of the rule must be clear and unambiguous.

Cusack vs. Rood, 24 Week. Rep. 391.

It is not sufficient that there is in the will that which raises a doubt, ever so serious.

Mitchell vs. Bridges, 13 Week. Rep. 200.

To add to the words of the third paragraph would be making a change upon a mere conjecture of what the testatrix meant and in opposition to the plain sense of the instrument as it stands.

Schouler on Wills, 5th Ed., Sec. 477.
2 Jarman on Wills, 843.

If without other influence, other proof, a clear and unambiguous disposition is obtained, that disposition prevails; and should the testatrix's real intention be thereby frustrated, it is her own carelessly or ill chosen language that must answer for it.

Schouler on Wills, Sec. 569 and cases cited.

The court is not at liberty to conjecture what the testatrix would have provided if she had thought beforehand of the event which happened and **for which she** might or **did not provide.** The words which express her intent and which are in the will must be read according to their natural and reasonable meaning.

Adrian vs. Koch, 83 N. J. Eq. 484, 487.

The language used cannot possibly be said to be of doubtful terms and it must, as expressed, show the intent of the testatrix.

White vs. Graves (N. J. Ch.) 104 Atl. 205.

It will be argued that the testatrix could not have intended her daughter-in-law to take under her will, because at the time of the making of the will her son was her sole heir. Did she think that he would die so soon after her? Suppose he had outlived her by a number of years. **Suppose that he would have had issue with his then wife,** or, if she were dead and he had remarried, with another wife. Could she not have thought of such a happening rather than the fact that her nieces and nephew would claim her

estate, when as a matter of fact she had a brother living at the time the will was made?

I most respectfully urge that it was the intention of the testatrix to carve out a particular estate for the benefit of her grand niece who was to receive an education paid for by the trustees under the will and for her son and for reasons best known to herself. She might have given him the use of the estate during his life because she feared that, were he to inherit directly, he might dissipate or misuse the estate. She might have created the trust for divers reasons, one of which would be the provision for the education of her grand niece, and it is fair to assume that she did it in order to secure to him the enjoyment of the remainder of the estate. She certainly had the welfare of her son in mind, for she even provided for the use of the corpus in the event of his illness or personal injury. It can readily be argued that the reasons for her making the will as it is were the same as found in the case of

Lippincott vs. Pancoast, 47 N. J. Eq. 21.

POINT 4.

The Words "At and After" Are Not Adverbs But Are Used as Conjunctives Affecting Only the Distribution of the Estate and Not Postponing the Vesting.

"And *after* her decease" was held to give a vested remainder.

Green vs. Howell, 1 Vr. 326, aff. 2 Vr. 570.

The first taker received a fee although "After her death" the property was further devised.

Tuerk vs. Schueler, 71 N. J. L. 331, 333.

"At her decease" was held to state the time when the class became entitled to the possession, and did not postpone the vesting.

Cushman vs. Arnold, (Mass.) 70, N. E. 44.

Schouler in his work on wills, paragraph 563, page 730, says that if the gift be to A for life and *after* his death to the testator's next of kin, they should be ascertained at the death of the testator and not at the death of A, and that if A were the sole next of kin when the testator died, the gift goes to him absolutely, citing

Holloway vs. Holloway, 5 Ves. 399.
Ware vs. Rowland, 2 Phill 635, cited in
Scudder vs. Van Arsdale, 13 N. J. Eq. 109.

"From and after" were held to have a like meaning in

Hersee, et als., vs. Simpson (N. Y.) 48 N. E. 890.

I desire to call attention particularly to the case of

Donohue vs. McNichol, 61 Penna. St. 73,

in which the devise was to the son of testatrix, her only heir, for life, and if he die leaving issue, to pay the income to them, and *after* their death to testatrix's *lawful heirs.* It was held in this case that the son as testatrix's heir at the time of her death got a fee and that the estate did not go to the nephews and nieces who were the heirs of testatrix at the time of the death of the son without issue.

Why should it be said that the words "at and after" used by the testatrix postpones the vesting when the phrase "and after her decease, then I give" was held to indicate but the period at which the gift will take effect in possession?

Benyon vs. Madison, 2 B. C. C. 75.

"On his death," relating to the death of the life tenant, was held to have a like meaning,

Guild vs. Mayor etc. of Newark, 99 Atl. 120.

The Guild case and the case of

Tuttle vs. Woolworth, 62 N. J. Eq. 532,

should have a great bearing upon the case now under consideration for in each of them words like "on" and "after" were construed as to their meaning and in neither case were they held to postpone the period at which the testator's heirs were to be ascertained, but the intestacy and its results were determined to take effect at the time of the testator's death and not at the expiration of the life estate.

"From and after" were held to define the time of enjoyment and not of the vesting.

Nelson vs. Russell (N. Y. App.) 31 N. E. 1008.

Thus we find that in the construction of the words "after the death of my said wife I give, devise and bequeath unto my beloved children" it was held by Vice Chancellor Pitney that the words "after the death" did not postpone the vesting.

Kinkhead vs. Ryan, 64 N. J. Eq., 454.

Even if the testatrix knew that her son, Garret, could not possibly take the remainder in possession and enjoy it as such, it would not change the ruling and is not a justification for the Court to change the terms of the will. The words used were simply, as I already stated, conjunctives, a mere continuation of the flow of language of the testatrix and having no effect whatsoever upon her intention to be satisfied to let the property go as though she had never made a will, and I respectfully urge that she could not have possibly used any stronger language to indicate such a desire.

In re Shumway (Mich.) 160 N. W. 595.
Howell vs. Green, 1 Vr. 326, aff. 2 Vr. 570.
Beaty vs. Montgomery, 21 N. J. Eq. 324.
Cusick vs. Rood, 24 Week. Rep. 391.
Doe ex dem. Pilkington vs. Spratt, 5 Barn. & Ad. 731.
In re Wilson (1907) 2 Ch. 572.
Hersee vs. Simpson, 154 N. Y. 496.
Collisam vs. Sams, Tamlyn 346.
Thompson vs. Smith, 27 Can. S. C. 628.
Lee vs. Lee, 1 Drew. & S. 85.
Rawlinson vs. Wass, 9 Hare 673.
Childs vs. Russell, 11 Mit. 16.
Brown vs. Lawrence, 3 Cush. 390.
Kenniston vs. Mayhew (Mass.) 47 N. E. 612.
McDaniel vs. Allen, 64 Miss, 417.
Smith vs. Allen, 32 App. Div. 374.
Kenyon's Petition (R. I.) 20 Atl. 294.
Tucker vs. Tucker (Vt.) 21 Atl. 272.
Wrightson vs. Macauley, 14 Mees. & W. 214.
Ware vs. Rowland, 2 Phill. Ch. 635.
Bird vs. Luckie, 8 Hare 301.
In re Barber, 1 Smale & G. 118.
Markham vs. Ivatt, 20 Beav. 579.
Bullock vs. Downes, 9 H. & L. Cas. 1.

I do not desire to appear being frivolous in citing the above number of cases. I have gone over them and find that they all bear out my contention that under paragraph three of Mrs. Evans' will her son received only a life estate but all of the estate left by his mother and that Garret Evans' administrator as his representative is entitled to all of the personalty, and Mary E. Evans, his widow, to her dower in the realty.

The above cases do not only construe such words as "upon, at, after," but determine what is meant by the use of such terms as "lawful heirs," "pay and

divide," "shall then go to the legal heirs," "go to my nearest of kin," "in case I died intestate."

The Lee case above cited also holds that the **only child and next of kin** of the testator, **having received a life estate, took also the remainder** notwithstand- the fact that she had a life estate or that the remainder was to be **"divided between and amongst** testator's next to kin;" and that, although the last quoted words seemed to import a plurality of next of kin yet such daughter, being the only next of kin at testator's death, took the remainder.

POINT 5.

Textatrix Did Not "Devise or Bequeath" Her Estate by Paragraph Three. She But Directed the Estate to be Distributed.

By this I mean that she, in the strongest terms, indicated that she did not care what became of her property as long as she kept it intact during her son's life; that she did not intend to disinherit him, but rather wanted him to have it in such manner as would be most beneficial to him. It was her intention to die intestate except that she feared that her son would be better protected by the trust for life and she wanted to make a provision for her grand niece's education. I argue honestly and frankly that the provision for her grand niece proves this to be a fact, for, if she had intended to designate her as her next of kin on the termination of the life estate, she certainly would have added some further provision in the will, and again, she could not have thought of her nephew and nieces as her brother was alive at the time of the making of the will.

As I said, she merely **ordered** the **distribution** after the life trust and "distribution" cannot possibly be stretched to mean "bequeath or devise." It simply

means to pay out and to do so in accordance with the terms of the law existing or in force at the time of her own death. The term "distribute" is not a futurity annexed to the substance of the gift, but relates to the time of payment only, and the vesting took place at testatrix's death, rather, that it was not disposed of at all, and became the property of the son on testatrix's death.

Jarman on Wills, star pages 837, 839.
In re Peterson's estate, (N. J.) 95 Atl. 613.

Thus in the case of

Whitney vs. Whitney, 14 Mass. 88,

the devise was to testator's widow for life and then "to be distributed" in the same manner as though it had not been devised it was held that it vested in testator's heirs living at the time of his death.

The distribution being but the time of payment, the title vested on the death of the testatrix.

Kihler vs. Whitman, 2 Harr. 401.

If there is any doubt as to what testatrix meant, then the doubt should be resolved in favor of the administrator of Garret Evans and of his widow, for had there been no will, they would have taken under the statute of descent and distribution and the will should be construed to conform most clearly to the statutes of descent or distribution.

It would be a great injustice to say that, had Margaret Evans died without making any will, her son would have taken all her estate, but she died partly testate and partly intestate, there is a doubt as to what she meant to do with her property, the laws of intestacy should be disregarded and a construction placed upon the will which would give the property of which she died intestate under the will,

to persons who could never have taken had she died entirely intestate and had she never made a will.

Schouler on Wills, 5th Ed. Sec. 480, pp. 601, 602

and cases cited.

We find the word "distribute" construed in the *Tuttle-Woolworth* case, the court saying: "When there is the further express direction in the will, as there is in this case, that the estate shall be **distributed** among testator's heirs (or next of kin) in the manner provided by law respecting intestate's estates, the conclusion seems unavoidable that the testator, as to the estate limited over, intended the same persons to receive the estate as would have received it *at his death, by law, had he died intestate* as to its future disposition after the failure of the particular estate." The next of kin were held to be ascertained at the time of the death of testator.

This case on this point is very similar to one in New York where, after giving a life estate, the will ordered the estate to be *distributed* according to the laws of that State for the distribution of intestate property. And it was held that the words of the will were imperative and that the class was to be ascertained at the death of the testator.

Delaney vs. McCormick, 88 N. Y. 174.

So again we find that after a life estate the property was to be *distributed* among testator's next of kin, *according to the statute.* The persons to take were held to be the next of kin under the statute at the time of testator's death.

Michell vs. Bridges, 13 Week. Rep. 200.

Other cases on this point are

Halloway vs. Radcliffe, 23 Beav. 163.
Wharton vs. Barker, 4 Kay & J. 483.
Re Winn (1910) 1 Ch. 278.

A limitation over to persons entitled under the provision of the statute of distribution was regarded as militating against a construction by which the next of kin would be determined at the time of the first taker's death, as in such case the fund could not be divided in the same proportions as directed by statute.

Cable vs. Cable, 16 Beav. 507.

A direction to "distribute at the decease of a life tenant among *testator's lawful heirs* was held to designate the persons who were testator's lawful heirs at the time of his death.

Tucker vs. Tucker, 63 Vt. 104.

And again where a bequest of a fixed sum per year was given to a daughter during her life the fund was held to become distributable on her death between her brother and her own legal representative, she and the brother being testator's heirs at the time of his death.

Merrill vs. Wooster (Me.) 59 Atl. 596.

POINT 6.

The Words "Shall be Entitled" Refer to the Death of Testatrix.

This is an expression in futurity. It refers to something taking place some time in the future. The question then is as to whether the time is to be fixed at the death of the testatrix or at the death of her son, both being future times. If it can be said that no definite period is pointed out, then the expression is satisfied by referring to the time of the death of testatrix. I do not admit that the expression is ambiguous, but, were I to do so for the purpose of

argument, I claim that the words used should not be allowed to control a known legal meaning, that is, that the heirs and next of kin who shall be entitled to the property are those *in esse* at the time of the death of the testatrix, viz: her son Garret.

The will speaks as of the date of the death of the testatrix. Naturally words of futurity must be used in drawing the will, as what is to happen with the estate takes place not at the drawing of the will but at the date of death of a testator.

Jarman on Wills, Vol. 2, star page 135.

"*Shall be entitled*" as my next of kin "*under the intestate laws*" was held to mean those persons who were such next of kin at the date of the death of the testator and not at the time appointed for the taking or coming into possession, so that the administrator of a son, a life tenant, took under the will.

In re McFillin's estate (Pa.) 83 Atl. 620.

POINT 7.

The Words "By Law" Mean the Statute Law in Force at the Time of the Death of the Testatrix.

The testatrix certainly could not have meant that the *words "by law"* would mean for instance a decision by a court. Her idea was to let the law take its course, to have the property go in accordance with the statute existing at the time of her death in the same manner as though she had never made a will. By these words she meant the statute of distribution and the statute of descent and according to those laws, the son of the testatrix was entitled to the personalty which upon his death could be claimed by his legal representative, viz., his administrator, and his widow had her dower right in the

realty which descended to him by virtue of the law of descent.

POINT 8.

"As Though I Died Intestate" Means Had She Died Without Making Any Will Whatsoever.

Testatrix could die but once. She died partly testate and partly intestate. The condition existing is not so very novel. Time and again were decisions rendered in cases on all fours with the case now under consideration. It is absolutely impossible to stretch one's imagination so far as to say that testatrix contemplated her death intestate after the termination of the life estate.

If this were to be true, it would result in a disinheritance by conjecture only, because there are no express words, nor is there any necessary implication, which could authorize the postponing of testatrix's death intestate to a date other than the actual date of her death.

Who are to be favored, the nephew and nieces, or the son's legal representative and the son's widow? Under the law of descent and distribution of this State the latter are entitled to take; the law favors them, and, therefore, those persons, who would take independently of the will, should take where the will does not dispose of the corpus of the estate, but provides for its distribution under the intestate laws existing at the time of the death of testatrix.

She certainly made no will as to the remainder. Our statute does not regulate the distribution in cases of total intestacy only, but the statutes of descent and of distribution must be applied to this case also, a case of partial intestacy.

It was held that "the intention of the testator is to govern only so far as he has declared it by his

will. With regard to that part of his property which his will did not pass, it must be declared he had no will, and, therefore, the *Court cannot know his intention* concerning it. The next of kin cannot take until intestacy is found and then they take, not in pursuance of the testator's intention, but by force of law; regardless of what his intentions were."

Skillinger's exrs. vs. Skillinger's exrs., 32 N. J. Eq. 659.

The testatrix expressly provided that as to the corpus of the estate she intended to die intestate, that she made no will as to it. We cannot, therefore, go beyond the words used in the will and must conclude that she meant those persons to take who would have the right so to do at the time of her death. They should not be excluded or disinherited except by plain words or necessary implication, neither of which can be held to exist in this case.

In re Grothe's estate (Pa.) 78 Atl. 88.

The words should be taken in a natural meaning; the words should be construed, and there should be no supplying of language and thereby make the testatrix say what she did not in fact say.

Woodruff vs. White, 79 Atl. 304, aff. 81 Atl. 1134.

The direction to the executors to distribute the estate * * * * * as though she had died intestate is an immediate gift to the son, her sole heir at law and next of kin at her death, and the case in this respect is similar to the case of

In re McGovern (Pa.) 42 Atl. 705,

where a direction was given to make such distribution "under the intestate laws of Pennsylvania."

The situation is like that arising in a case of a lapsed legacy, and the statute in force at the death of the person making the will applies.

Dildine vs. Dildine, 32 N. J. Eq. 78, citing
Scudder vs. Van Arsdale, 1 Beas. 109.

She provided for a partial intestacy and had a perfect right to do so. The intestacy is clearly fixed by her in unambiguous language and it cannot be prevented, nor has any court the right to thwart this expressed intent. It is as though she had not said anything about her estate after carving out the trust for the benefit of her son and grand niece and the estate must be distributed agreeably to the laws of descent and of distribution in force at the time of the death of testatrix.

Stenneck vs. Kolb, et al., 111 Atl. 277, 278.
May vs. Dole, et al., (Me.) 111 Atl. 713, 714.
Barrett vs. Egbertson, et al., 111 Atl. 326, 328.

In Jarman on Wills, Vol. 2, st. p. 88 we find the author saying "it is true that the words 'as if he had died intestate,' point expressly to the period of the testator's death, and in an even balance of arguments must weigh in favor of the general rule."

The general rule as already stated is to the effect that the testatrix had absolutely no desire to provide for anything but the trust created for the benefit of her son and of her grand niece. I dare say that had she not desired to provide for the Kindergarten course she would not have made any will at all.

In reading the second paragraph of the will we can readily assume that it was drawn for the express purpose of providing for the education of her grand niece, because after creating the trust, the first thing that she does is to direct the trustees to pay for the education of her grand niece and left the remainder of the income to the son with an express provision to

use the principal of the estate in case of illness or personal injury.

The intention of the testatrix is so patent and the will shows so conclusively that she had no thought of her nieces and nephew at the time of the making of the will that I deem it unnecessary to further dwell on this point.

Not only did the testatrix die intestate of the corpus of her estate, but she expressly said that she wished to die intestate as to it. She did not dispose of the corpus and it must go *at her death* to the persons *then* entitled to it under the statute.

Deats vs. Ziegener (E & A) 82 N. J. Eq. at p. 609.

POINT 9.

By Giving Her Son a Life Estate, Which is a Specific Gift, She Did Not Disinherit Him.

The son was entitled to take all her property had she died intestate. She gave him the income for his life, but she also provided for the use of the corpus, if that were necessary. Can it be said that the son was deprived of participating in the distribution of the remainder of which she died intestate?

A testator gave his son a certain legacy. There was property of which he died intestate. It was held that the son was not excluded from his share to the property of which testator died intestate.

Linnell's adm. vs. Linnell, 21 N. J. Eq. 81.

A stronger case of evident intention to disinherit was presented in

Nagle vs. Conard, 79 N. J. Eq. 124,

in which a legatee was not to receive "under any circumstance" more than her specific legacy. Yet Vice

Chancellor Howell held that, notwithstanding the above language the legatee was entitled to participate in the intestate property.

The right of a person to inherit property is given by law. It should not be taken away from him; it cannot be taken away except, possibly, by very strong terms. None such appear in this will. In fact the gift for the son's life is but a protection of the fund for some reason or other and does not cause a disinheritance in him of the corpus.

In this aspect the case is readily comparable to that of

Rand vs. Butler, 48 Conn. 298,

wherein the property was put in the hands of trustees for the benefit of testator's sole heir, during his life, from which, the Court held, it may be inferred that testator regarded him incapable of managing his own affairs. It was there held that this was not sufficient, of itself, to give the word "heirs" a different meaning from that ordinarily given to it under the law. See also

Nelson vs. Nelson, 57 N. J. Eq. 118.

POINT 10.

The Remainder Vested in the Son, Even Though He Was the Life Tenant, and, Upon His Death, the Personal Property Became Payable to His Administrator, and His Widow Became Entitled to Her Dower.

The leading case in this State, I believe, is that of

Nelson vs. Nelson, 57 N. J. Eq. 118,

in which a life estate was given to the husband. There was no bequest of the remainder and it was

held that an intestacy existed and that the husband, the life tenant, or in case of his death, his personal representative was entitled to it.

The situation in the case cited is identical with ours. In each case the life tenant became entitled to the remainder by virtue of the law of the state; the life tenant died, and the question was raised as to whether or not his representative took. By law the remainder vests immediately upon the death of the testatrix. It is a vesting at a time favored by law. If it so vests, it must descend further under the statute. Testatrix parcelled out the property in fractional interests in succession, one a life estate, the other a remainder under the laws of intestacy. The periods were certain—death. Therefore, both interests vested together.

Howell vs. Green, 1 Vr. 326, aff. 2 Vr. 570.

It might be argued that the son could not take because he answered the description of the heir or next of kin and was also the devisee of the particular estate. Quite to the contrary is the decision in

Mulford vs. Mulford, 42, N. J. Eq. 68.

Vested remainders have always been preferred to those that are contingent and as Schouler says in his work on wills, par. 563, "If the will gives the testator's own heir the gift, it vests naturally at the testator's own death."

To apply the language of the court in

Post. vs. Herbert's exrs., 27 N. J. Eq. at p. 544, upon the whole will, it must be held that the third paragraph directing the distribution as in a case of intestacy was only put in to let in the trust for Garret's life, and for the education of her grand niece, or for

the benefit of the estate, and it, therefore, became vested, although the enjoyment was postponed.

I again desire to call attention to the case of

Lippincott vs. Pancoast, 47, N. J. Eq. 21,

which should have great weight in determining whether or not testatrix's property vested in her son on her death.

Other cases on this point are:

Gest vs. Flock, et al., 2 N. J. Eq. 108.
Bolger vs. Mackell, 5 Ves. 509.
Warner vs. Durant, 76 N. Y. Rep., 133.
Hoath vs. Hoath, 2 Bro. C. C. 4.
Whitney vs. Whitney, 14 Mass. 88.

in which last case the estate was to be distributed after the death of the life tenant in the same manner as though it had not been devised, it being held that the reversion vested in testator's heirs living at the time of his death.

In Boydell vs. Golightly, 14 Sim. 327, there was a devise in trust for the maintenance of testator's son J. (his heir apparent) during life, with an ultimate remainder to testator's right heirs. It was held that the estate vested in testator's heirs at testator's death.

A like situation and a similar decision is found in

Wrightson vs. Macaulay, 14 M. & Wel. 214.

The will does not say anything about a devise or bequest after the life estate. It does not provide, in so many words, for the vesting of the remainder. In fact the remainder vests by virtue of the laws of intestacy in force at the time of the death of testatrix. It is but the distribution of such a vested estate which is to take place and to be made at a later period to the person who became entitled to the estate at the death of the testatrix. The earlier date must be adopted.

Brian vs. Tylor (Md.) 98 Atl. 532.
In re Ran's estate, (Pa.) 98 Atl. 1068.
Brown vs. Brown (Ill.) 97 N. E. 680.
Bullock vs. Downes, 9 H. L. Cas. 1.

The rule as to vesting applies in this case even in view of the fact that the widow of Garret Evans, through his administrator, will get all of the personalty. The statute gives her that right and it cannot be fairly argued that, because of an intestacy existing under this will, the law should not be the same as in cases of ordinary intestacy. Nor can it be said that Garret Evans' administrator should not take as his representative because from and through him the property personal will pass to the widow, a stranger, so to speak, and not a blood relative, and yet not a stranger, because the statute of distribution expressly cuts out blood relatives in cases of intestacy where a widow survives the deceased and gives all the personalty to the widow. It is therefore, no argument to say that the property will be taken out of the family of the testatrix.

Meeker vs. Forbes, 84 N. J. Eq. 271.
Bird vs. Luckie, 8 Hare, 301.

Nor can it be argued that the testratrix has made ample provision for her son who was her heir at the time of her death.

Boston, etc., Co. vs. Parker, (Mass.) 80 N. E. 307.

I respectfully call attention to the case of

Meeker vs. Forbes, 84 N. J. Eq. 271, aff. in 86 N. J. Eq. 254,

in which it was held that the widows of the remaindermen who died in the life time of the life tenant were entitled to their shares under the statute.

I claim that the fact that Garret Evans was both life tenant and remainderman shows no inconsistency nor is it repugnant; not even the fact that he could never come into actual possession of the remainder can be ground for a different construction.

Shumway vs. Shumway, (Mich.) 160 N. W. 595.

Cushman vs. Arnold (Mass.) 70 N. E. 43.

Michell vs. Bridges, 13 Week. Rep. 200.

The postponement of the time for distribution was for the purpose of letting in a trust during Garret's life and for his enjoyment of said trust as in the will provided. This postponement will not postpone, nor deprive him of, the vesting of the remainder in him on the death of his mother.

Trenton Trust, etc., Co. vs. Moore, 83 N. J. Eq. 584.

How could the testatrix be held to have meant anything else than as I contend? A person dies and leaves heirs or next of kin. They are ascertained at and as of the time of her death. We might as well say that such ascertainment should be made before her death as that it be made at a period after her death and not at her death. If Margaret Evans meant what the nephew and nieces claim, she would have said that the estate was to be distributed "among her heirs and next of kin who were such at Garret's death" or she would have used words strong enough to indicate such her intention in order that there might not be a dispute as to her meaning. Let us also not lose sight of the fact that the will is couched in very careful language and, had she intended what her blood-relatives claim, her attorney, the scrivener, Mr. Hommann, who also witnessed both the will and the codicil, would have taken steps to see that her intent would be expressed so

that it would be taken out of the rule of law existing in such cases.

The will uses technical words "heirs" and "next of kin." The scrivener, Mr. Hommann, long a member of the bar and learned in law, knew the legal definition of these words. He used them in the sense of a clear and concise legal expression, and we are constrained to presume that these words were used in their technical sense as sanctioned by our statutes and judicial decisions.

Hay vs. Dole, et al. 111 Atl, 713, 714.

Testator's heirs under an ultimate limitation were always held to be ascertained at the death of the testator. That is but natural. How can the words be used properly to designate anybody else?

Again I say that the testatrix was satisfied with carving out the life estate for the use of her son and grand niece. By doing so she exhausted her specific wish and was content thereafter to let the law take its course, and to show that she was content, she specifically said it in the paragraph under construction. I believe the cases of

Whall vs. Converse, 146 Mass. 345.

Sears vs. Russell, 8 Gray 86,

are proper authority for this contention and especially the latter wherein it was held that the intent of the testator governs if it does not conflict with the rules of law; if it does, it does not change the rule of construction and the will must fail because the law will not permit his intent to be accomplished.

And because the estate vested in Garret as the heir and next of kin of his mother, it did so at the time of her death.

Kouvalinka vs. Geibel, 40 N. J. Eq. 43.

It passed to his administrator on his death,

MacCarthy vs. Fish (Mich.) 49 N. W. 513,

and there could be no lapse of it.

Schouler on Wills, 5th Ed. p. 725.

Chafee vs. Maher, (R. I.) 24 Atl. 773, 742.

The remainder vesting at the death of the testator in cases like the one now being considered, the fact that the son was the next of kin who took the remainder as well as the *benefit of the life trust* does not alter the rule.

Williams on Exrs., Vol. 2, st. p. 987 and cases cited.

It cannot be argued that it appears at all in the will, less so clearly, that the testatrix desired her son to be deprived of that which the law gave him and of which she died intestate. Such argument cannot be supported in view of the decision in

Ward vs. Dood, 41 N. J. Eq. 416.

In the case of Peterson, 85 N. J. Eq. 135, the income was payable to the widow during her natural life. Her representative was held to be entitled to one-third of the estate of her husband of which he died intestate, the other two thirds going to his daughters.

Mrs. Evans' knowledge (if she had any) that her son would be dead when the time came to distribute the estate does not justify a change of the rule.

Robinson vs. Mitchell, (Md.) 57 Atl. 625.

In further support of my contention that Garret, the life tenant, took the remainder I desire to cite the cases of

Childs vs. Russell, 11 Met. 16,

Stewart's estate (Pa.) 23 Atl. 599,

Jewett vs. Jewett, et al., (Mass.) 86 N. E. 308,

and numerous other cases in 33 L. R. A. N. S. 321.

As far as the proposition of Garret being the sole heir is concerned and that he had been provided for

by the terms of the will, I contend that he still took as sole heir and next of kin of the testatrix.

Urquhart vs. Urquhart, 13 Sim. 613.
Seifferth vs. Badham, 9 Beav. 370.
Donohue vs. McNichol, 61 Penna. St. 73.
Rawlinson vs. Wass, 9 Hare, 673.
Scudder's exrs. vs. Van Arsdale, 13 N. J. Eq. 109.

Gift to A for life with remainder "to my personal representatives and next of kin according to statute." A was the sole next of kin at testator's death and was held entitled, and, on her death without issue, her representatives were held to take.

Langs' will, 9 W. R. 589.

Gift to wife for life, remainder to his son A when 21 and, if he die before, to "such persons as *shall* be my next of kin according to the statute." Here the words "shall be" were used, the same words as in the Evans will. A was such next of kin at testator's death and was held to take although he died under 21 and before testator's wife.

Harrison vs. Harrison, 28 Beav. 21.

Garret Evans took under the will, also, not because he might have been the person intended by his mother but because *he answered the description* of the persons who were to take.

Pearce vs. Vincent, 2 N. Y. & K. 800.

Garret Evans through his representative can be the only person entitled to the distribution under the ruling in

Voorhees vs. Singer, 73 N. J. Eq. 532.

It was held that the words "heirs or next of kin" are technical words and in their legal sense bear *within themselves* an indication as to the time in-

tended for fixing the class, which cannot be overlooked; that the legal status arises *only* upon the the death of the ancestor and arises *immediately.* The decision is quite lengthy and great stress is laid by us upon the fact that it controls the situation in the case to be decided and that it supports our contention absolutely.

Tuttle vs. Woolworth, 62 N. J. Eq. 532. See also

Woolsey vs. Woolsey, et al., 85 Atl. 595.

Vice Chancellor Stevens, to whom was referred the case now under consideration, held in the case of

Albright vs. Van Voorhees, 104 Atl. 30,

that those **who answer the description of next of kin cannot be known until the death of the person whose next of kin they are.** And we contend that that is the only time at which they are to be ascertained.

Trenton Trust, etc., vs. Donnelly

is also in point, so also is the case of

Welsh vs. Crater, 32 N. J. Eq. 177 and

Hayes vs. King, 38 N. J. Eq. 520.

After a life estate directions were to distribute among testator's next of kin according to the "laws for the distribution of intestate personal property." It was held that the class was to be ascertained at the death of the testator.

Delaney vs. McCormick, 88 N. Y. 174.

Smith vs. Allin, 161 N. Y. 478.

In the Boston Safe Deposit and Trust Co.—Parker, et al. case, hereinbefore cited, a bequest was made in trust to pay the net income to the daughter during her life and at her death, if she die without issue, the estate was to be divided and distributed among testator's heirs. It was held that the heirs were to be

ascertained at testator's death, he having exhausted his specific wishes by previous limitations and being content thereafter to let the law take its course.

POINT 11.

Garret Evans' Administrator Takes the Personalty Notwithstanding the fact that the Will Directs a Distribution Among Testator's Legal Heirs, etc.

His death so soon after the death of the testatrix was most probably not expected by her when she made her will. She might have had in mind that he might be survived by children. There is no proof before the Court that there was no possibility of that happening. But the plural term does not change the rule of law, it does not affect the conclusion that his representative takes.

Lee vs. Lee, 1 Drew & S. 85.
Urquhart vs. Urquhart, 13 Sim. 613.
Bird vs. Luckie, 8 Hare 301.
Re Barber, 1 Smale & G. 118.

The personalty must go to the administrator in order that he might pay the same over to Garret Evans' widow, who is the next of kin under the statute, she being such in the sense of distributee under the statute.

Gill vs. Roberts, 33 N. J. Eq. 474.
P. L. 1914, page 69, sec. 3.

I insist that under the decisions cited by me there can be no question as to the contention of the administrator and the widow of Garret Evans being correct and that they are entitled to take under the intestate clause of the will.

In conclusion I would call attention to the case of Barrett vs. Egbertson et al., 111 Atl. 326, in which Vice Chancellor Backes states that the words "next of kin" have not been judicially defined by the Courts of this State. It is true that in the case cited the language used was "next or nearest of kin on the father's side" and this phrase has an entirely different meaning from the words "next of kin" themselves.

According to the case of *Slosson vs. Lynch*, cited by Vice Chancellor Backes, the words "next of kin" have a fixed legal meaning, **born of the statute** and "when used without more, means next of kin as therein defined." That is that "next of kin" shall be given the meaning in accordance with the statute or law and they shall not have some popular meaning which a person might give to the words contrary to their legal definition or contrary to the meaning applied to them by law.

STEPHEN F. SOMOGYI,
Counsel pro se and of
Mary E. Evans.

New Jersey Court of Errors and Appeals

Between

OLE N. OLESEN and
THE PERTH AMBOY
TRUST COMPANY,
executors and trustees
of MARGARET E. EVANS,
deceased, et als,
Complainants,
Appellees

- and -

STEPHEN F. SOMOGYI,
administrator,
Defendant
Appellant.

ON APPEAL
FROM
COURT OF CHANCERY

Sat below Stevens
V. C.

BRIEF FOR APPELLEE
Harry J. Van Horne

The bill in this case was filed by the executors of the last Will and Testament of Margaret E. Evans, deceased, praying for a construction of her Will and instruction, as to the distribution of the Estate in their hands. Mrs Evans made her Will in 1913 and ratified it by a Codicil made in February 1916. She died on the fourth day of March, 1917, aged 71 years. Her son, Garret Van Evans, for whom she had made provision in her Will, survived her. Her provision for her son, consists of a direction to the executors and trustees, to whom the fee of her Estate passed, to pay the income from her Estate to her son Garrett Evans during his lifetime, with further provision and direction that should her son at any time, through illness or personal injury, be in such circumstances that the income of the estate was insufficient for his financial necessities, then in the discretion of

the trustees and the executors such portion of the corpus of her Estate as may be sufficient for the use of her said son, should be expended in his behalf.

She further provided in the second clause of her Will that her grand-niece, Helen E. Felch should receive at the expense of Mrs. Evan's Estate, an education that would enable her to obtain a certificate as a kindergarten teacher. Miss Felch has been unable to avail herself of the provisions made for her by the Will and has disclaimed her intention to now avail herself of the provision, because of circumstances which have intervened since the death of Mrs. Evans.

Garret Van Evans died in August, 1917, or about four months after the death of his mother. No part of the corpus of the Estate had to be expended for his needs, as permitted by paragraph two and it does not appear how much, if any, of the income of the Estate had been distributed to him prior to his death.

After making the provisions for the use of the income of the Estate by Garret Evans, Mrs. Evans, in the third paragraph of her Will, instructs her executors and trustees concerning after the death of her son Garret, and in making such disposition she makes use of the following language:-

> "At and after the death of my said son, I direct my said executors to distribute my estate among my legal heirs and the next of kin who shall be by law entitled to the same, as though I died intestate."

It is because of doubt as to the legal meaning of these words that the aid of the Court was sought. Mrs. Evan's only direct heir was her son Garret Van Evans. Garret Evans married, his wife being Mary E. Evans. They had no children. Garret Evans died intestate and after his death, one of the defendents on this suit, Stephen F. Somogyi, was appointed the administrator of Garret Evans's Estate, the Surrogate of the County of Middlesex. Mrs. Evans had one brother David J. Van Horne who predeceased her and left several children, who are parties to this suit and claim the total Estate as her heirs at Law and next of kin.

The Estate of Margaret Evans, at the time of her death, consisted of realty and personalty. The

personalty consisted of stocks, bonds, mortgages, furniture, books, etc., and has been valued by the executors at approximately $28000. The realty consists of a house and lot in the City of Perth Amboy, worth approximately $6,000. The administrator of Garret Evans' Estate claims that under a proper construction of Mrs. Evans's Will, he, as administrator of Garret Evans's Estate, is entitled to the personal Estate left by Mrs. Evans, for distribution to the widow of Garret Evans, under the Statute of Distribution of Intestates Estate. He bases, as I understand it, his claim to this Estate upon a rule of law which seems to prevail now in this State, that where a testator provides for a life estate with the remainder over to the testator's heirs, as though he had died intestate, that the Will speaks as of the instant immediately succeeding the testator's death. As I have stated this seems to be a rule of law, generally applicable in this State, but like all rules of law, there are equally well fixed exceptions to the general rule, and the exception has been clearly indicated by Vice Chancellor Emery, in the case of Tuttle vs. Woolworth, 62 N. J. Eq. 532; and at page 538, of his exhaustive opinion in that case, he states the rule to be as follows:

> "In a legal sense, therefore, "heirs" implies a reference to the time of the ancestor's death, and if a testator makes a devise or gift to his "heirs" or "next of kin", those standing in that relation at the time of his death would seem to be the persons intended *unless there is something in the will itself to show that the testator had another period in his mind, and that the legal sense of the words is to be restricted by indications that some other time is fixed.* If the gift to testator's "heirs" or "next of kin" follows a previous gift to a person, not one of the heirs or next of kin of the testator, there could generally be no question that the class was fixed at testator's death."
> Welsh v Crater, supra; Hayes v King, 10 Stew. Eq. 2 (Chancellor Runyon, 1883); 2 Wms. Ex. *986 (R. & T. ed. 402, 403).

It is the insistment of Mrs. Evans's nieces and nephews that the plain intent of Mrs. Evans in framing her Will was that the Will should speak,

not as of the time of her death, but as of the time of the death of her son Garret, and that this intention is indicated by the language employed by her in the third paragraph of her Will, because in that paragraph she says that "at and after the death of my said son I direct my said executors to distribute my Estate among my legal heirs at law and next of kin, who shall be by law entitled to the same, as though I died intestate." I think that she had in mind not only the postponement of the distribution of her Estate to that time, which would, undoubtedly, the legal meaning of the words "at and after", but also the limitation of that entire clause to operate both as to the distribution and as to the time from which it would speak, to a time subsequent to the death of Garret Evans, and I think this is further borne out by her use of the words "MY legal heirs" and by her use of the term "who shall be". I think that these words denote that it was her intention that the estate should go to her blood-relatives, and not to the next of kin and heirs at law of her son. I think that this is what the testatrix must have had in mind at the time she employed this peculiar language. And if she did mean that, then it was clearly not her intention that the Will should speak as of the instant immediately after her death. To my mind this is further indicated by the use of the words "shall be". If she had intended the Will to speak as of the time of her death she would have used, I believe, instead of the future tense, the present, and would have employed the word "are" so that that clause of her Will would read "among my legal heirs and next of kin who are by law entitled to the same, as though I died intestate".

I think the construction attempted to be placed upon this clause by the administrator is such a stretch of imagination, as to produce a legal absurdity. The testatrix at great length limits her son's enjoyment of this estate to the income alone, unless exigencies due to the illness or personal injury in the discretion of the trustees and executors, made it necessary to expend a part of the corpus of the Estate. But if the construction which the administrator now attempts to place upon the third paragraph should prevail, we have the extraordinary situation of this testatrix saying in one paragraph,

Garret shall have only the income, and in the next paragraph, at his death shall have it all. If she intended to put this Estate in such shape that he could not dissipate and waste the Estate, and if her intention was to so provide for him, that he might enjoy the Estate during his lifetime and then at his death his heirs or next of kin, come into the enjoyment of the property, how much more simple, how much more concise, how much more reasonable would have been the ordinary life Estate in Garret, with the remainder to his heirs. No complex or extraordinary language would have been necessary to have effected that disposition of this Estate. Virtually the administrator of Garret Evans says that that is what Mrs. Evans, by this testamentary language, intended. It seems to me that such a conclusion is not only an extreme stretch of imagination, but that if it is adopted by this Court, it will in effect, bring about a condition quite the contrary of the intention of the testatrix, as that intention may be gleaned from the reading of the entire Will. It is a well settled principle in this State that it is the duty of the Court to construe Wills so as to give effect to the intention of the testator as ascertained from the Will, so well settled, that it is unnecessary to cite authorities on that point. It seems to me that such a construction as the administrator would seek to have the Court place upon this Will, does violence to this rule.

The problem before the Court is to determine what Mrs. Evans intended in the use of this peculiar language. Her intent must be found in the Will itself, supplemented by certain facts such as her age, and the identity of the persons she would naturally be expected to provide for.

The Court below, in the opinion filed in this Matter makes the statement that there existed an impossibility of Mrs. Evans, at the time of the making of her Will, having other heirs or next of kin of the same degree as her son. Counsel for Appellant argues that this statement must be based upon an improper legal premise and argues that there can be no legal presumption of the impossibility of a woman having issue, whatever her age. With this argument we agree. There is no age, however great, at which the law will presume the power of pro-

creation or conception extinct. But we do not understand the Court below to have stated any proposition contrary to this principle. We understand his statement to mean that Mrs. Evans being 68 years old, had reached the age when she would not contemplate as a possibility the birth of further issue. She could not, therefore, have had in mind, in the use of the plural designation of her heirs, that, in the natural course of events, she would have another child or children, and thus enlarge the class to several persons of the same degree as her son.

Now if our logic and reasoning is sound and if this Will should be construed as to speak from the death of Garret Evans, it is pertinent to determine who are the persons entitled to distribution of the Estate

It is settled by the Court of Errors and Appeals of this State, in the case of Meeker v. Forbes, 86 N. J. Eq, page 255, confirming the decision of Vice Chancellor Stevens, whose opinion is reported in 84 N. J. Eq. page 271, that where there is a testamentary gift of real and personal property to heirs-at-law, heirs-at-law, properly so called, take the realty, while next of kin, under the statute of distribution take the personalty. I do not see however, how this would effect the final distribution in the case at bar, because the heirs at law and next of kin of the testatrix, to my mind, will be the same persons, that is, the children and grand-children of David J. Van Horne, a brother of the testatrix, who had predeceased her.

The statute of distribution adopted at the session of the Legislature in the year 1914, Section four, page 71 Ph. Laws, 1914 provides as follows:

> "If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, then all of the estate to be distributed equally to the next of kindred, in equal degree, of or unto the intestate and their legal representatives as aforesaid."

I believe therefore, that the same persons would take both the real and personal estate left by Mrs.

Evans, and those persons are the defendants in this case, to wit:-Edwina M. Soper, Amy G. Russert, Harry J. Van Horne and E. Jane Melick, all children of David J. Van Horne and Helen E. Felch, now Helen Gregory, grand-daughter of the said David J. Van Horne.

Respectfully submitted,

JOHN P. KIRKPATRICK,

Solicitor for and of Counsel with the Defendant, Harry J Van Horne.

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