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NEW JERSEY

Court of Errors and Appeals.

Between
THOMAS F. POTTER ET AL.,
Appellants,
and
ELIZABETH ASHHURST,
Respondent.
} On Appeal.

POINTS BY W. M. LANNING FOR RESPONDENT.

I. THE FACTS.

Thomas F. Potter, the testator, made his will, dated October 21st, 1851.

He died October 1st, 1853.

His will was proven October 12th, 1853.

His widow, Sarah Jane, survived him and died in 1876.

His children, all of whom survived him, were (1) John, (2) William Hubley, (3) Elizabeth, the complainant below and the respondent here, (4) Alice, and (5) James.

By the first section of the will the testator directs his debts and funeral expenses to be paid.

By the second section he gives his lands in Mercer county, New Jersey, to his widow for life, with remainder in fee to his son John.

By the third section he gives to his widow an annuity of $6,000, to be secured by a fund set aside for that purpose.

By the fourth section he gives to his executors in trust $50,000 for his son James, to be paid to James at twenty-one years of age.

By the fifth section he gives the residue of his estate to his executors, in trust for the use of his children, John, William Hubley, Elizabeth, Alice and James, to be equally divided between them, each taking his share at twenty-one years of age, except the daughters Elizabeth and Alice, who were to have the income of their respective shares for life with remainder to their children. "But," says the will, "*if either of them die without issue, her share is to go to her surviving brothers and sister equally to be divided between them.*"

By the sixth section power of sale is given to the executors.

By the last section the executors are appointed.

James Potter (son of testator) died during his minority, unmarried, intestate and without issue, and soon after his father.

John died in 1881, leaving him surviving his widow, Helen (now intermarried with James Stewart Thorndike), and his children, Maude (now intermarried with George De Reuter), and Thomas F. Potter, unmarried.

Alice (who intermarried with J. Dundas Lippincott), died July 21st, 1894, leaving a will, of which her husband is executor. *She left no issue.*

William Hubley is still living and has assigned one-half of his interest to The Fidelity Trust and Safe Deposit Company, in trust for his daughter, Alice.

Elizabeth (who intermarried with Henry Ashhurst, now dead), is living and is the respondent, having one child, William H. Ashhurst, of full age.

The executors are all dead and the trust is now being executed by the Chancellor, as to the corpus, and by H. H. Hamill, as to the income.

II. The Question to be Decided.

The question to be decided is, shall the corpus of the Alice Lippincott trust be divided amongst Elizabeth Ashhurst (the respondent) and William Hubley Potter and his assigns; or shall it be distributed amongst them *and the representatives of John?*

III. Argument.

On behalf of the respondent, I submit that the representatives of John take no interest. One-half goes to the respondent, and the other half to William Hubley Potter and his assigns.

The solution of the question depends on the construction to be given to the last clause of the fifth section of the testator's will, viz.: "*But if either of them (the daughters) die without issue, her share is to go to her surviving brothers and sisters equally, to be divided between them.*"

John died in 1881. Alice died in 1894. John did not survive Alice. Under the terms of the will it is submitted that the remainder in the corpus of the Alice Lippincott trust was a contingent and not a vested remainder during the life of Alice. The period of survivorship, referred to in the will, is clearly the time of the death of the daughter, and not the time of the death of the testator.

It was insisted by the counsel for the appellants, in the court below, that the will, when taken as a whole, shows an intention on the part of the testator to establish equality between his children, and that consequently the word "survivers" should be read "other," and that, unless such construction should be given to the word, then if the respondent, Mrs. Ashhurst, should die without any child surviving her, there would be intestacy as to the corpus of the fund from which she now receives the income. These points are all referred to by the learned Vice Chancellor in his opinion, and, I submit, correctly decided by him. A review of the English authorities,

and of the authorities in our own State, clearly supports, I think, the conclusion of the learned Vice Chancellor.

It is quite clear that the will shows that the testator did not intend to establish equality between his children. He gives to his son John, by the second section of the will, all his messuages, lands and tenements in Mercer county, and by the fifth section an equal share in the residue of his estate. And as to the residue, he gives the respective shares of the sons to them absolutely, while the daughters receive only the interest of their respective shares.

A few of the English cases and the cases of our own State, that are in point, are hereunder referred to.

Cripps v. Wolcott, 4 Madd., 11, decided in 1819. The earlier English cases held uniformly that where a gift was made to one for life with remainder to the survivor of a class of persons named, the period of survivorship was referred to the date of the testator's death, and not to the time of distribution or to the time when the remaindermen should come into possession. The soundness of this rule finally came to be doubted, and it was, after a series of cases, at last settled in England by *Cripps v. Wolcott* that words of survivorship in a will are, both in cases of the gift of real estate and of personalty, *to be referred to the period of distribution and enjoyment and not to the period of the testator's death, unless there be some special intent to the contrary expressed in the will.*

There is an exhaustive and interesting review of the cases upon the subject to be found in *3 Jarman on Wills (Randolph & Talcott's Edition of 1881), pages 573 to 589,* and also in *2 Jarman on Wills (Bigelow's Edition of 1893), on pages 662 to 676.*

In *Blackmore v. Snee, 1 De Gex & Jones, 455,* decided in 1857, it appears that Thomas Blackmore, by his will, gave to trustees all his property in trust for his wife for life or widowhood, with the following gift over: "From and immediately after the decease of my said wife I direct my said trustees or trustee to sell and dispose of such part of my said trust estate and effects as may be in its nature saleable, and to pay, assign or transfer the

moneys arising therefrom and all and singular other my said trust estate, moneys and premises, unto Eunice Wilmot Blackmore, my daughter, to James Blackmore, my son, to Eliza Blackmore, my daughter, and to John Blackmore, my son, equally to be divided between them share and share alike, or to equally divide the aforesaid effects between the survivors of my said children immediately after the decease of my said wife in case the youngest of my said children for the time being shall then have attained the age of twenty-one years." In this case Lord Chancellor Cranworth said that "if there be a gift to the children of A., or the survivors or survivor of them, *and such gift follow a gift of a life estate the period at which the survivorship is to be ascertained must be taken to be that of the death of the tenant for life.*" But in the case under consideration he said that such a rule is not to be followed where there is anything in the will by which an intention to the contrary is shown. He declared that in the will under consideration he thought there was such a contrary intention shown. That contrary intent he finds in the words of the will which directed an equal distribution amongst the testator's children.

In *Smith v. Osborne, 6 H. L. Cases, 375*, decided in 1857, it appears that Thomas Carr by his will devised certain lands to his daughters, Elizabeth and Frances, as tenants in common in tail, and "if either daughter should die without issue, then to the use of the surviving daughter in tail, with remainder to the use of his right heirs." On *page 393* the Lord Chancellor said: "When Mrs. Osborne (that is, the daughter Elizabeth) died in 1830 her moiety in these houses descended on her son, Richard Boyse Osborne, who became tenant in tail in possession. He became tenant in tail in possession of the other moiety on the death of his Aunt Frances in 1840, for I think the word 'survivor' in the will of Thomas Carr must be construed 'other.' I entirely approve of the rule now generally acted on of giving to the word 'survivor' its ordinary and literal meaning, and not construing it to mean 'other.' Courts have no

right to alter the language of a testator merely to effect what they conjecture him to have intended to say when that is in variance with what he has in fact said. But the words of the will after all are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the court to execute the intention, however inartificially expressed. And here the language shows that by the word 'survivor' the testator must have meant 'other.' This is not a gift to a class, and on the death of one or more to the survivor or survivors, but a gift to two designated devisees, that is, the testator's two daughters as tenants in common in tail, and if either should die without issue, then to the 'surviving daughter' and the heirs of her body. Unless the word 'survivor' is to be taken here to mean 'other' the intention cannot be carried into effect, that he means his gift over to go into operation if either of his daughters dies without issue, that is on the death of the daughter who dies first or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'survivor' should be so read as to be rendered capable of being applied to the predeceasing daughter." The Lord Chancellor further observed, and this is a material consideration in the case, that "the gift over to the testator's right heirs is only in default of 'such issue,' that is, all such issue, which includes issue of both daughters. I think it clear, therefore, that Richard Boyse Osborne succeeded to both moieties of this estate as tenant intail under the limitations contained in his grandfather's will."

In *Waite v. Littlewood, 8 Chancery Appeal Cases, 70,* decided in 1872, the testator, John Waite, by his will bequeathed to trustees a certain sum in trust, to apply the dividends for the maintenance of his daughter Jane until she should reach the age of twenty-one years, or be married, and afterwards to pay the dividends to his said daughter for her own separate use, and, after her decease, upon trust to pay the principal thereof unto Jane's children as she should appoint, and, in default of appoint-

ment, then unto her child or children. A similar provision was made for each of his other daughters. Then followed this clause: "Provided always, and my will and mind further is, that in case any of my said daughters shall happen to die without leaving a child who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, to attain that age or be previously married, then and in every such case the parts or shares of such of my said daughters as shall so die and of whom there shall be such failure of children as aforesaid shall, after her or their decease or respective deceases and such failure of children as aforesaid, go and be in trust *for my surviving daughters in equal shares*, if more than one, *during their respective lives for their separate use and benefit respectively*; and, after their respective deceases, for their respective children *per stirpes* and not per capita, in the same shares, and at the same times, and with and subject to the same powers of appointment and provisions for maintenance and advancement, and in the same manner, in all respects and to all intents and purposes as hereinbefore declared or expressed of and concerning the said original shares intended for them respectively, and such benefit of survivorship shall extend as well to the share or shares accruing by virtue of this clause or direction as to the said original share and shares respectively." In construing this language Lord Selborne said: "I do not entirely assent to the language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word 'survivor' is to be read 'other.' I think there is certainly a very strong probability that anyone using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into 'other' and say it is used merely by mistake for the word 'other,' which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast upon anyone who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they

simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether and substitute a word which has a different meaning." In construing the particular language in the Waite will Lord Chancellor Selborne, further on in his opinion, said: "Nor was there any serious difficulty arising from the introduction of the words 'my surviving daughters.' The difficulty instead of being increased was very much diminished by the addition of the words 'during their respective lives for their separate use and benefit respectively,' because, of course, a tenant for life could not possibly take in possession unless he was living." It was, therefore, under the peculiar language of the will, to which reference is above made, held by Lord Selborne that in that case, where a daughter had died without leaving a child, the children of other daughters who had predeceased her took shares in her one-sixth part, and the words "my surviving daughters" were consequently held to be equivalent to the words "my other daughters."

In re Bowman, Law Reports (41 Chan. Div.), 525, decided in 1889. In this case the testatrix, Ann Rebecca Bowman, who died September 3d, 1839, by her will, dated in 1835, and two codicils dated in 1839, made certain specific bequests to her four nieces, daughters of her sister Mrs. Whytehead, and bequeathed her personal estate to her nephew, William Whytehead, upon trust, as to eight thousand pounds thereof, to invest and pay the income equally amongst her said nieces during their respective lives and, after the decease of any of them, to pay the principal of her share to or among he children as she should appoint, and in default of appointment to pay the same equally amongst such children, the shares of sons to be vested interests at their respective ages of

twenty-one years, and the shares of daughters at their ages of twenty-one years, or days of marriage which should first happen, with benefit of survivorship among them as to the original and accruing shares of any of them who should die before attaining a vested interest; and she gave to her nephew, William, powers of advancement and maintenance in favor of her niece's children, and continued as follows: "And in case any of my said nieces shall die without having any children who shall have attained a vested interest, I give the share of such niece after her decease, and also the interest thereof, to my said nephew, William, his executors and administrators, upon trust to pay and dispose thereof to or among *her surviving sisters and their respective children in the same manner as I have hereinbefore directed respecting their original shares*" The residue of her personal estate she gave to her nephew, William, who was appointed sole executor. One of the nieces, Jane Overton, died April 30th, 1882, leaving three children; another, Margaret Whytehead, died March 31st, 1886, without issue; another, Rachel Lay, died January 11th, 1889, without issue. On the death of Margaret Whytehead her share was divided into three parts and one-third was paid to the children of Jane Overton. William Whytehead having died, the suit in this case was instituted to determine whether the payment to the children of Jane Overton was rightly made, and whether the share of Rachel Lay was to be divided in like manner between the surviving niece, Ann Boulton, and the children of Jane Overton, or whether such share was to go altogether to the surviving niece and her children. It was urged upon the argument of the cause that the literal meaning of the direction to pay and dispose of the share and interest thereof to and among her *surviving sisters and their respective children*, was the respective children of the surviving sisters only. But the court considered the words immediately following such direction, namely, "*in the same manner as I have hereinbefore directed respecting their original shares;*" and it was held that when taking into consideration the entire language,

it appeared clear that the testatrix contemplated a disposition *per stirpes*, that the sisters who survived were only to take a life interest with remainder to their children, and that it was clear that there was no intention on the part of the testatrix of omitting the children of any one of the sisters, who had died prior to the death of one who left no issue. Because of the peculiar language in this will used, it was held that the words "surviving sisters" would be meaningless unless "surviving" should be read "other." The court declared that the general scheme of the will was to provide for the nieces and their children by settling each share, and if any niece should die without issue, that her share should be added to the others.

The preceding cases of *Blackmore v. Snee*, *Smith v. Osborne*, *Waite v. Littlewood*, and *In re Bowman*, show that in them clear reasons existed for holding that the survivorship was not referred to the time when distribution was to be made. They differ in essential respects from the case now before this court.

It is submitted that the following English cases show what rule should be applied to the case at bar.

In *De Garagnol v. Liardet, 32 Beav., 608*, decided in 1863, it appears that the testator had two sons and four daughters. By his will he gave £8,000 to his daughter Mary Ann for life, with remainder to her issue. The residue of his estate he disposed of as follows: two-sevenths to his son Henry absolutely; two-sevenths to his son Peter absolutely; one-seventh to trustees for his daughter Jane for life, with remainder to her children or issue; one-seventh to trustees for his daughter Phoebe for life, with remainder to her children or issue, and the remaining seventh to trustees for his daughter Elizabeth for life, with remainder to her children or issue. The will contained the following language: "And I do hereby declare it to be my will and mind that in case any one or more of my said several daughters, Jane, Phoebe, Elizabeth and Mary Ann, shall happen to depart this life not having had any children of her or their body or respective bodies who shall live to attain the age

of twenty-one years, or shall die under that age without leaving issue of his or her body living at the time of his or her decease, then and in every such case I do hereby order and direct that the three several seventh parts or shares of the residue of the said moneys to arise as aforesaid and hereinbefore bequeathed to my said trustees for the separate use of my daughters, Jane, Phoebe and Elizabeth, and also the said sum of £8,000 hereinbefore bequeathed to my said trustees for the benefit of my daughter Mary Ann, shall go to and be divided *amongst the survivors of them, my said sons and daughters*, in such parts, shares and proportions as the residue and remainder of the moneys arising from the sale of my said real and personal estate is hereinbefore by me given and bequeathed, and that the respective parts and shares of such surviving daughter or daughters therein shall immediately become vested in my said trustees," upon like trusts for their respective lives, and after their decease respectively for their respective issue and payable and with the like benefit of survivorship and subject to the like powers, etc., as their original sevenths. The daughter Jane died in 1862 without having been married, and her seventh share went over. Her two brothers and her sister Phoebe survived her, but Mary Ann had died in 1848 without having been married, and Elizabeth had died 1860, leaving one child, the plaintiff. In construing this language, Sir John Romilly, Master of the Rolls, said: "Here are four daughters, and if their shares had been given over to the survivors of them, it would then have been possible to read 'survivors' as 'others,' but if the shares are given over to the survivors, not *of them* but of the daughters *and their brothers*, that construction cannot be admitted. To do so the gift over must be to *others of the particular class*, on the failing of the issue of one of whom his share is given over, and is to take effect for the benefit of the others of the same class. * * * Where a person gives property in shares to three or four persons, and says that on failure of issue of any one his share is to go over to the 'survivors' it may be read 'others;' but if he says survivors *of a differ-*

ent class, the word 'survivors' must be read strictly. I do not find any case where 'survivors' has been read 'others' when the gift over is to *a separate and distinct class*. I am of opinion that it is here given over to a separate and distinct class, and as much so as if it had been given to the survivor of the daughters and of the children of A. B., a stranger. I am of opinion that 'survivors' in this will must be read strictly, and that Jane's share must be divided between her two brothers and Phoebe. I think the share is divisible into five parts, that the sons will each take two-fifths and the surviving daughter will take the remaining fifth, but on the same trusts as her original share. That construction might possibly lead to an intestacy, *but that is not so serious a consequence as altering the words of the will.*"

In re Usticke, 35 Beav., 338, decided in 1866. In this case it appears that the testator bequeathed his personal estate in trust for all the children of his niece, and directed that the securities constituting the fund from which each daughter received the income during her life should go to, and be divided equally between her children upon her decease; and "if there should be no such child of such party so dying, then that the trustees should stand possessed of the said trust moneys and securities in trust for the survivors or survivor of *all* the children of his niece, etc." Lord Romilly, Master of the Rolls, held, as he did in the last case above referred to, that the words "survivors or survivor" must be read as they stand, and that it would be impossible to hold otherwise unless a new will should be made for the testator.

In *Carver v. Burgess, 18 Beav., 541*, decided in 1853, it appears that the testator gave to each of some but not all of his daughters the interest of £5,000 for life, with remainder to their respective children, but if they left no children surviving them then "it" that is, the corpus of the fund, "is to be divided among *her surviving sisters, share and share alike.*" In construing this will, Sir John Romilly, Master of the Rolls, said: "It is to be divided among her surviving sisters, the obvious meaning of

which is her sisters surviving at the time when the legacy is to go over, or the period of distribution. The argument that 'surviving' is superfluous, and that the gift over is to all the other sisters, would have the effect, not only of changing the meaning of the testator, but of doing so in violation of the useful and convenient rule, that the period to which survivorship refers or when the class is to be ascertained is the period of distribution, and which rule was acted upon in *Cripps v. Wolcott.* The convenience of this rule arises from this—that it explains what, in almost every instance, is the clear and manifest intention of the testator."

The following New Jersey cases likewise show that in a case, such as the one now in hand, survivorship is referred to the date of distribution and not to the date of the testator's death:

In *Dean v. Sayre, Penn., 598,* decided in 1809, the testator gave his farm to his sons John and Abraham, and then proceeded as follows: "As neither of my said sons is married, if they, or either of them, should so continue until death, then his or their part of my farm so gave shall be equally divided amongst all my surviving children." The testator had nine children who survived him, but only two of the nine survived Abraham who died without having been married. It was held that the interest in the farm given to Abraham passed at his death to the two children of the testator who survived Abraham.

In *Seddel v. Wills, Spen., 223,* decided in 1843, where the testator, Samuel Wills, had devised a tract of land to each of his sons and daughters, and then declared that if any son or daughter should die without issue, the lands devised to such son or daughter should be equally divided among his "surviving sons and daughters" before mentioned, Chief Justice Hornblower declared that tho words "surviving sons and daughters" meant sons and daughters who should actually survive a child dying without issue, and not "*other* sons and daughters."

In *Holcomb v. Lake, 4 Zab., 686,* decided in 1855, it ap-

pears that Richard Holcomb, by his will, devised certain lands to his son, John Holcomb, and his heirs (of his body lawfully begotten) forever. The testator then declared that if John should die without issue of his body lawfully begotten, then the lands devised to him should be "equally divided amongst my surviving children." John had two sisters who died in his lifetime leaving issue. John, having survived them, died without lawful issue and testate. It was held, in construing this will, that the survivorship was referred to the death of John and not to the death of the testator. It was further declared by Justice Potts that while decisions are to be found conflicting with this doctrine, it accords with the later authorities. This cause was affirmed in *1 Dutch., 605.*

In *Williamson v. Chamberlain, 2 Stock., 373,* decided in 1855, where a testator after giving certain portions of his estate to his wife for life, gave the remainder to certain of his children, with a provision that if any of such children should die without issue his share should be divided amongst the survivors, it was held that the children surviving the wife took the whole.

In *Van Tilburgh v. Hollinshead, 1 McCart., 32,* decided in 1861, the testator directed that "*at the decease of* my son William, I will that his said part of my landed property be given to his *surviving* children according to law." A life estate had been devised to William. Chancellor Green held that the will created a contingent and not a vested estate as to the remainder. "The rule is," said he, "that where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place."

In *Slack v. Bird, 8 C. E. Gr., 238,* decided in 1872, Chancellor Zabriskie referred to the older and the later English authorities and expressed his preference for the doctrine of the later cases. He said that unless there be words in the will to show a contrary intent, the word "survivors" includes, according to the late English cases, only those surviving at the period of distribution. The Chancellor follows this rule and the one in *Van*

Tilburgh v. Hollingshead. The will devised to the trustees a house and lot in trust for the use of three persons (a father, his daughter and the daughter's husband) for life, and on the death of the last survivor of the three persons, the house and lot were to be sold, and the proceeds divided among the surviving children of the daughter and her husband. At the date of the will and at the date of the testator's death the daughter and her husband had four children living. Before the time of distribution one of these four children died, leaving issue. The court held that such issue *took no interest.*

Van Tilburgh v. Hollingshead and *Slack v. Bird* are followed in *Dutton v. Pugh, 18 Stew., 430,* and the rule again declared (see *page 432*) that the words "and the survivors and survivor of them" must be held to refer to the period of distribution unless a contrary intent appears in the will.

The doctrine of the foregoing cases, it is submitted, must lead to the conclusion that the survivorship referred to in the fifth section of the will now before this court has relation to the date of the death of testator's daughters, and not to the date of the testator's death, and that the children of John, who died before Mrs. Lippincott, can take nothing. It will be observed that the gift over of the corpus of the Lippincott Trust Fund, which was to take effect only in case Mrs. Lippincott should die without issue, is to a class of persons who could be ascertained and determined only after Mrs. Lippincott's death. To construe the word "surviving" as meaning "other" would alter the plain meaning of the language of the gift. The word "other" necessarily defines part only of a class of objects. If the word "other" should be substituted for the word "surviving" in the case at bar, the class would necessarily include all of the children of the testator, including Mrs. Lippincott herself. But it is clear that the testator designated a class of persons as the objects of his bounty, in case Mrs. Lippincott should die without issue, which at least did not include Mrs. Lippincott. If the word "other" should be substituted for

the word "surviving," it would be necessary to read the last clause of the fifth section of the will as follows: "But if either of them die without issue her share is to go to *my other children* equally to be divided between tween them," instead of to "*her surviving brothers and sister* equally to be divided between them." Such construction, it is submitted, is opposed not only to the English cases above referred to, especially the cases of *De Caragnol v. Liardet*, *In re Usticke*, and *Carver v. Burgess*, but to the express adjudications of the New Jersey cases.

Such a construction would, moreover, have the effect of striking out the word "surviving" from the will, so that the clause in question would read as follows: "But if either of them die without issue her share is to go to her brothers and sister equally to be divided between them," instead of to "her *surviving* brothers and sister equally to be divided between them." It certainly is not necessary to argue that this cannot be done, and I submit that the corpus of the Lippincott trust now goes, one-half to Mrs. Ashhurst, and one-half to William Hubley Potter and his assigns, to the exclusion of the children of John, and that the decree of the Court of Chancery should be affirmed, with costs.

W. M. LANNING,
Of Counsel with Respondent.

The language of the fifth section of the will contemplates a future division and a future vesting of the gifts in case a daughter die without issue. That language is: "and upon the death of my said daughters, their respective shares are to be (that is, shall be) equally divided among their children; but if either of them die without issue, her share is to go (that is, shall go) to her surviving brothers and sister equally to be divided between them."

Court of Errors and Appeals.

NEW JERSEY.

BETWEEN

THOMAS F. POTTER *et al*,
Appellants.

AND

ELIZABETH ASHHURST *et al*,
Respondents.

ARGUMENT FOR WILLIAM H. POTTER AND THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, TRUSTEE, *Respondents.*

Counsel for the appellants appear to admit the existence of a well settled rule of construction in New Jersey, that where there is a devise or a bequest for life, followed by a devise or bequest to "survivors," at the termination of the life estate, the word "survivors" refers to the survivors at the death of the life tenant, unless a contrary intent be gathered from the tenor of the whole will.

This was the position taken by them at the argument before the Vice-Chancellor, and is so stated in the learned opinion of the Vice-Chancellor. (Record p. 34.)

This doctrine certainly is firmly established by the cases of

Van Gilburgh *vs.* Hollinshead, 1 McCart., 32;
Slack *vs.* Bird, 8 C. E. Green, 238;
Dutton *vs.* Pugh, 18 Stew., 426.

It is entirely in harmony with the plain meaning of the testator's words:

"If either of them (his daughters) die without issue, her share is to go to *her surviving brothers and sister.*"

Clearly "*her* surviving" brothers and sister can mean only *such of her brothers and sister as may survive her*, or *brothers and sister surviving her.*

Where language is as plain as this, and as clear in its meaning, it is perhaps unnecessary to have recourse to any rule of construction. This part of the will speaks in terms that are unmistakable. They cannot be misunderstood. The rule of construction above referred to, as well settled in this State, is really nothing more than a judicial recognition of the meaning of the phraseology used in this will or similar phraseology importing the same intent.

So clear is the intent here that it would require the very plainest expression in some other part of the will to alter the interpretation; something equivalent to a positive direction that the word "survivor" is to be taken as of the testator's death. Certainly no general or vague or uncertain provision found elsewhere in the will could alter the meaning of the language in this clause or wrest it from its natural meaning and interpretation.

The rule that a will is to be construed from its four corners, or that every part must be considered, or that the intention is to be gathered from the entire will never was taken and cannot be taken to mean that a clause which is perfectly clear can be construed into something which it does not mean, unless by giving to it its natural meaning the interpretation of the whole will is thereby made inconsistent.

It cannot well be argued that such is the case here.

The burden of the argument is entirely on the appellants. To sustain the burden they have against them the common sense meaning of the words used and a well settled rule of law that the words used mean what they seem to mean—a rule which has placed the stamp of judicial approval upon the meaning of the language for which the respondents contend.

The first argument advanced by the appellants' counsel is that the controlling thought of the testator was equality among the objects of his bounty. But in this counsel appear to be mistaken.

(*a.*) The will discriminates in clause 2 by giving to John, the eldest son, (subject to the widow's life estate,) the valuable mansion house and grounds at Princeton, known as "Prospect."

(*b.*) He gives to his sons an absolute gift of one-fifth of his estate, while his daughters take but a life estate, and that in trust and with no power of appointment.

(*c.*) He favors his son James by a special gift of $50,000, and while this is said to be given to equalize him with his brothers and sisters who had received property from their grandfather, yet it is, *quoad* this will, a clear inequality.

(*d.*) His son's children took nothing under the will, while his daughter's children, if they should survive their parents, took among them a full share.

These considerations show that there certainly was not such a controlling thought of equality in the mind of the testator as will justify a court in disregarding plain terms and making a new will by construction.

And yet this argument, based upon a fancied equality, is used on behalf of the very grand-children (that is, his *son's* children), who took nothing under the will, admittedly, although the daughter's children took among them, after their mother's death, a full share.

It may be added that few wills indicate a less decree of equality than this. The amount of discrimination and difference between his children and grand-children, is far ~~below~~ the above average.

Again the appellant's counsel argue that our contention must be erroneous, because by it, if a "bachelor son" should die, a daughter's children would take, while if a "spinster aunt" should die, a son's children would not take. But this is again erroneous. The "bachelor son" took a vested estate

under the will, absolutely, and free of trust. If he died after his father, his estate went, as *his* estate, to *his* next of kin, or under his will, while the daughters took but a life estate, in trust, with remainder to surviving brothers and sisters. Under this language it is clear that a son's children cannot take on the death of an aunt, but no more do the daughter's children take the share of a bachelor uncle at his death. Another argument is, that if both daughters should die without issue, and William H. Potter should be the only surviving brother or sister, the words "brothers and sister" could not, at the death of the daughter dying last, have any meaning, because there would be no sister living to meet the requirements of the phrase "brothers and sister."

It is sufficient to say in reply to this that the lack of a daughter then living to take a share on the death of her sister would not be adequately met by giving this share to a deceased son's children.

There is no difficulty in understanding what the testator meant by "surviving brothers and sister. He meant any child of his, be it a son or a daughter that should be living at the death of a daughter, dying without issue. It might be that on the death of a daughter without issue, there would be but a single child living. The gift was to all the members of a class, be they one or more, who should be either a brother or a sister, and who should survive a daughter dying without issue.

The appellant's argument on this point seems fanciful.

A third argument was that the primary intent was to benefit the testator's five children, *nominatim*, equally. Excepting the special and large gifts to John and James and the fact that the sons' took absolutely and the daughter's for life only, this is true to a certain extent, but it is true only as to the original five shares. To extend it to the present share would be to beg the question in dispute.

It was also urged that if William should now die before Elizabeth and she should die childless, intestacy would follow. But even this cannot wrest the plain meaning of the words in question. If such was the testator's will, it must stand as he wrote it, we cannot rewrite it.

All these arguments are fully and ably met and answered by the learned opinion of the Vice-Chancellor. Counsel can add nothing to what he has said.

Respondent's counsel argue that the phrase "equally divided" occurs three times in the residuary clause of the will. That is true; but it is invariably used only when a gift is made to a class, and directs equality among the members of that class. He could not well have provided otherwise.

The result of the Respondent's contention would be to write into this will the ordinary clause usually expressed thus: "Provided that if any child shall die before such daughter, so dying, leaving issue, such issue shall take the share which such parent would have taken if then living." The absence of this proviso, always used, if such be the testator's intent, shows that such was not the intent of this will.

On the general question of construction, Holcombe *vs.* Lake, 24, N. J. L, 690, is in point. There it was said that both daughters died before J., their brother, and that they were never in a position to take; for while they lived, the contingency of his having lawful issue stood in their way, and therefore the remainder never vested in them.

So in the case at bar. How could an interest in remainder have vested in John Potter fourteen years before it was ascertained whether Alice would die without issue? There was a limitation to the children of Alice before the one to her "brothers and sister." The future contingency of her dying without issue was an absolutely uncertain contingency, and a remainder limited on it was clearly contingent. Therefore,

John took no vested estate in his lifetime, as he died before the contingency happened. He was *not* a "surviving brother" at the time of the death of Alice.

Counsel cited a passage from 2 Jarm., Wills (6 Am. Ed.) 551, to the effect that Courts "yield to the slightest indication in the context to use the word (surviving) for 'other'."

But this is a text book error, probably perpetuated from some early edition of Jarman, before the present English rule had become fully settled. Certainly it is not law in New Jersey. In Dutton *vs.* Pugh (1889) 45 N. J. Eq. 431, it is said that the rule which we now contend for "must control the case unless upon taking the whole will into consideration, the testator's intention that the words indicated shall be taken in another sense *plainly appears.*"

In re Hopkins Trust (1865) 4 Hen. & Miller Ch. 414, it was said by Wood V. C.:—

"The rule laid down in Crupps *vs.* Coolcott is not only settled but is one which the Court *never seeks to evade by any slight circumstance which might suggest a distinction.* That rule was not arrived at without overruling many earlier decisions, and it must be taken as the *deliberate doctrine* of the Court to apply that doctrine in every case where *no very cogent reasons militate against* such a construction. At the same time the rule must yield to a *very clear indication* of the Testator's meaning."

In Waite *vs.* Littlewood L. R. 8 Ch. App. 73, the Court said:—

"I think there is certainly a very strong probability that any one using the word "survivor" does not precisely mean "other" by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into "other," and say it is used merely by mistake for the word "other" which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast upon any one who would do that violence to the literal mean-

ing of the word. It would be a strange thing to hold that so many testators were in the habit of using the word "survivor" when they simply meant 'other'." Some of the cases where "survivor" has been taken to mean "other" may be noticed.

Beck's Trust, 37 L. J. Ch. 233, can easily be distinguished. The testator's elaborate scheme for the equal benefit of his grand-children and their issue could not be fully carried out except by construing "surviving" as "other." As the intent was clear, the word was so construed. The testator had apparently provided for the children of a deceased grand-child in every emergency, but one; and when this one happened, the Court concluded that he intended the same provision in that emergency, and so read that intent into the will. Nothing of the sort is found in the present case.

In Huntress *vs.* Place, 137 Mass. 409, the gift was to brothers and *sisters* and their heirs. It was held that as the plural was used, although but one sister was living at the date of the will, a fact known to the testator, he must have meant that the heirs of a deceased sister should take her share.

In *in re* Bowman, L. R. 41 Ch. Div. 526, the Court pointed out that the testatrix had by every word in her will, expressly shown that she intended a disposition *per stirpes*, and therefor the children of a pre-deceased niece took a part of the share of a niece who died without issue.

In Gowling *vs.* Thompson, L. R., 11 Equity 366, Note, the Court said that "when a testator speaks of his brothers and sisters at a time when he must be taken to have known that all his brothers and one of his sisters were dead, the only rational inference is that he named the brothers and sisters for the purpose of showing how the property was to be divided. He must have intended the property to go to his brothers and sisters if living, but if they were dead then to the issue.

In Smith *vs.* Osborne, 6 H. of L., 375, there was a gift by will to two designated devisees as tenants in tail and if either

should die without issue then to the surviving devisee. It was held that in this instance the word *surviving* must be taken to mean *other*, because it was not a gift to a class and on the death of one or more to the survivor or survivors; but a gift to two designated devisees, that is the testator's two daughters as tenants in common in tail, and if either should die without issue then to the surviving daughter and the heirs of her body. Unless the word "surviving" should be taken to mean "other" the intention could not be carried into effect.

Waite *vs.* Littlewood, L. R. H. Ch. App. 70, was very much like Beck's Trust in 37 L. J. Ch. 233, because the will contained throughout provisions for the children of deceased legatees and the testator had provided for every contingency he could think of and shown an evident intention to provide for every contingency, the Court was willing to write in a provision for the contingency he had evidently omitted. This was, of course, redrawing a man's will for him and the Court held that it was a dangerous doctrine and not to be extended.

FRANCIS RAWLE,
of Counsel.

Court of Errors and Appeals.

Thomas F. Potter et al., *Appellants*,
vs.
Elizabeth Ashhurst, Respondent.
} On Appeal.

APPELLANTS' BRIEF.

The case arises under the will of Thomas F. Potter. The sole question presented by the record is whether, under the will, the testator intended that when one of his daughters died without issue the legal representatives of sons who survived the testator, and who had died before said daughter, should or should not have an interest in said daughter's estate. In other words, whether the testator intended that the issue of deceased sons should be barred from all inheritance in the estate of their aunt who died without issue, and whether, as the appellee claims, the distribution of the estate of such aunt depends on a tontine principle, and goes to the longest liver.

The material portions of the will of Thomas F. Potter were as follows:—

By item 4 the testator provided as follows:—

> "*Fourth.*—I give and bequeath unto my Executors hereinafter named, and the Survivors or Survivor of them the sum of Fifty Thousand Dollars, in trust nevertheless and for the use of my son James Potter, in order to put him upon a footing of equality with my other children, for whom provision has been made by the will of their grandfather the said Sum of Fifty Thousand Dollars to be paid to him when he arrives at the age of twenty-one; the interest in the mean time, or so much thereof as may

be necessary for that purpose, to be applied to his education and support."

By the fifth item the testator provided :—

"*Fifth.*—All the rest and residue of my estate real and personal, wherever it may be situated, and of whatever it may consist, I give and devise unto my said Executors and the Survivors or Survivor of them, in trust nevertheless and for the use of my children John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them share and share alike; the shares of my said sons to be paid to them respectively as they attain to the age of twenty-one, the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my said Executors to their education and support; but in the case of my said daughters, my will is that the interest of their respective shares is to be paid to them yearly during their lives, and in case they should marry, not to be under the control of their husbands or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue her share is to go to her surviving brothers and sister equally to be divided between them."

The Will was admitted to probate on October 12th, 1853. At the time of testator's death *all* of his children named in the will were living. Shortly after the death of the testator his son, James Potter, died, a minor, intestate, and without issue. On or about July 1st, 1881, his son, John Potter, died, intestate, leaving a widow, Helen (afterwards intermarried with James Steuart Thorndike, who has since died), and two children, Thomas F. Potter and Maud Potter (intermarried with George De Reuter), appellants. The testator's daughter, Elizabeth Potter (intermarried with Henry Ashhurst, who has since died), is still living. The testator's daughter, Alice Potter (intermarried with J. Dundas Lippincott), died on or about July 21st, 1894, without issue. The testator's son, William Hubley Potter, is still living.

The question is whether the representatives of John Potter

are excluded from any portion of the share of Alice Lippincott (formerly Alice Potter), who was one of the two daughters of Thomas F. Potter, the testator, and therefore the aunt of the claimants.

ARGUMENT.

In New Jersey and England the law is well settled that in the absence of any intention to the contrary the survivorship is referred to the period of distribution. Thus in New Jersey :—

Van Tilburgh *vs.* Hollinshead, 1 McCarter, 32;
Slack *vs.* Bird, 8 C. E. Green, 238;
Dutton *vs.* Pugh, 45 New Jersey Equity, 426;
Jones *vs.* Jones, 46 New Jersey Equity, 554.

In England the latest well-considered case is
In re Bowman, 41 Chancery Division, 525.

In other States, as in Pennsylvania, different rules prevail, and the survivorship is referred to the period of the testator's death, for the purpose of preventing the inequality which whould otherwise exist between members of the same family :—

Johnson *vs.* Morton, 10 Pa., 245;
Patrick's Estate, 162 Pa., 181.

But whichever *prima facie* rule is adopted, it is universally admitted, without exception, that the word "surviving" is not a technical term of the law, and if from a consideration of the entire will it appears that the testator intended a certain result, then that intention will prevail, and the survivorship will be referred to a state of facts which will effectuate such intention.

In Van Tilburgh *vs.* Hollinshead (1861), 1 McCarter, 32, 34, the court said that if when the will was executed, and the law of primogeniture prevailed, the testator had expressed an intention that his property should be divided according to that law, this would have prevailed although the law was subsequently changed.

In Slack *vs.* Bird (1872), 8 C. E. Green Eq., 238, 241, the Chancellor said:—

> "The doctrine, therefore, that in such cases the word 'survivors' includes only those surviving at the period of distribution, *unless it is referred to some other period by words in the will*, must now be considered the settled doctrine in that country."

In Dutton *vs.* Pugh (1889), 18 Stewart Eq., 426, 431, the Chancellor, referring to the two cases just cited, says:—

> "These two cases have established a rule of construction in this court that must control this case, unless, upon taking the whole will into consideration, the testator's intention that the words indicated shall be taken in another sense plainly appears. The cardinal rule of testamentary construction is that the testator's real intention, gathered from the entire will, shall govern the interpretation of that instrument, and all subordinate rules which fix a meaning to forms of expression must yield to that intention. * * * The phraseology has received its accepted interpretation because it is supposed that such interpretation will carry out the view of the testator. The consequence is the rule is always subject to be modified or abrogated by the conditions of the case to which it is applied."

Four of the judges of this court dissented from the decree in this case, and their opinion, delivered by Dixon, J., is reported *sub. nom.* Jones *vs.* Jones (1890), 1 Dickinson Eq., 554, and the whole foundation for their opinion was that the testator *had* expressed a different intention.

So in the latest English case,

In re Bowman, Law Reports, 41 Chancery Division, 530,

the court follow the doctrine of

Smith *vs.* Osborne, 6 House of Lords Cases, 375,

wherein the Chancellor said:—

> "The words of a will after all are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the court to execute the intention, however inartificially expressed; and here the language shows that by the word 'surviving' the testator must have meant 'other.'"

So in Pennsylvania, where the *prima facie* rule is diametrically opposed to the modern English and New Jersey rule, the court said in

Woelpper's Appeal, 126 Pa., 562:—

"Is there any such rule settled in the sense that it must be unbendingly applied to all cases? Has any phrase or description of persons acquired a set and absolute meaning that must be conclusively presumed and adhered to, without regard to the context, or the circumstances, or the actual intent of the testator? If so, it is a clear perversion of fundamental principles, and the ground for maintaining it should be strong indeed. In the construction of wills the great general and controlling rule is that the intent of the testator shall prevail. By his intent is meant his actual intent. * * * With the desire to reduce to a minimum the perplexity and uncertainty inseparable from the subject, courts have established certain more or less artificial and arbitrary canons of construction by which certain forms of expression are presumed to have certain meanings and in doubtful cases these presumptions are held to be decisive. But all of these canons are subservient to the great rule as to intent, and are made to aid, not to override it. As in all such cases, care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as a means of reaching it. * * * Even strict technical terms—words of art—which are edged tools dangerous in unskilled hands, will be taken out of their technical meaning by a clear intent of the testator to use them in a different sense; and it is not tenable for a moment that any more unyielding force should attach to words or phrases, like "surviving brothers," &c., which are not technical words at all, and have a set presumptive meaning as to time, only because experience has appeared to indicate that they are most commonly used with reference to that period. Giving them a *quasi* technical meaning for the purpose of aiding in the ascertainment of intention is far short of making them a Procrustean bed, on which every unfortunate testator's will shall be stretched out of its proper shape or shorn of its members, to make it conform to the arbitrary standard."

And the result of all the cases, down to 1893, is summed up in

2 Jarman on Wills, 6 Am. Ed., 651 [*1521],

as follows:—

"The result would seem to be that the word 'survivor' when unexplained by the context must be interpreted according to its literal import; *but the conviction that this construction most commonly defeats the actual intention of testators, and that the word is one peculiarly liable to misuse, has induced a readiness in courts to yield to the slightest indication in the context of the intention to use the word for 'other.'*"

It is submitted that the harsh result contended for by the appellees, viz., that the entire estate is to be appropriated by one brother and a sister who are alive, to the exclusion of the

family of a deceased brother, is opposed to the plainly expressed intention of the testator to the contrary, many times reiterated in his will; and that the intention appears both in the scheme of the testator's will and in the language which he has expressly used.

I. By the language of the item in which the word "surviving" occurs the intention plainly appears that the testator used that word as referring to the brothers and sister previously named who were the primary objects of such residuary bequest.

The testator by his fifth item devised all the rest and residue of his estate to his executors in trust,

> "For the use of my children John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter and to be equally divided between them share and share alike."

The shares of the sons to be held in trust until they respectively attained their majority, and the shares of the daughters to be held in trust for their respective lives,

> "And upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue her share is to go to her surviving brothers and sister equally to be divided between them."

It will be observed that the primary gift of the residue is to equally benefit five named children and their right heirs. The residue is expressly stated by the testator to be for the use of the five named children equally. The subsequent portion of the clause provided the machinery whereby the testator works out this benefit for those five named children, and the ultimate limitation over on the death of a daughter without issue is not to a new class, but to the previously named brothers and sister of a daughter dying without issue, and is, in fact, to the same persons who were the primary objects of the testator's residuary gift.

See Blackmore *vs.* Snee, 1 De Gex & Jones, 455, quoted fully *infra*, page 16.

The bequest does not use the ordinary words indicating that survivorship at the period of distribution is to be the sole test

of the capacity to receive. The language of the will is *not* to the brothers and sister "and the survivors or survivor of them." This omission is all the more marked, because when the testator did intend that strict survivorship should be the test of capacity to take he clearly and expressly says so. Thus in the first paragraph of this very item he bequeaths the estate to the executors "*and the survivors and survivor of them.*" He again uses the same language in the fourth and sixth items.

The language used in the fifth item is not to surviving "brother or brothers." It is not to surviving "brothers *or* sister;" but it is to surviving "brothers *and* sister." If the word "surviving" is to be read in the harsh, literal manner contended for by the appellees the rest of the clause must also be literally read. Yet it is obvious that if so read it is impossible to literally give effect to the said clause. It is to "brothers (in the plural) and sister." There are to-day no "brothers." Upon the death of both daughters there is no *surviving* sister. There may be one surviving brother, but the estate is not given to one surviving brother. It is given to the "brothers and sister equally to be divided between them."

Again, if the sisters outlive the brothers, upon the appellees' construction the entire clause fails of effect, and there is either an intestacy or (as the Vice-Chancellor holds) as the subsequent clause does not provide for this event, the property of said surviving sister dying without issue would pass under the first clause of item 5 of the will, wherein the testator gives his estate to be equally divided between all his children absolutely, upon the ground that so far as the subsequent clauses

> "Do not extend or apply to any fair or reasonable construction of the whole will, then the previous absolute devises or bequests will remain unaffected by the subsequent limitations."

But this language is directly in the line of the appellants' argument, for it holds that the primary purpose was to invest the estate equally in all the children and their heirs without any element of the chances of survivorship, and that the primary intention can only be cut down by clear language to the contrary.

Upon the appellees' construction the will could not be literally followed. The testator was evidently not considering

the fact that the brothers might die first. He has overlooked the fact that the first sister who died might die leaving issue, and thereafter the second sister might die without issue. The testator has assumed that the first death would be that of a daughter, and hence, if that daughter left no issue, then he bequeathed his estate to her surviving brothers and sister, being in testator's contemplation the brothers and sister previously named by the testator. Any other construction renders the whole will contradictory, and entirely subverts the idea of equality which prevails throughout that item of the will. In other words, the condition of facts assumed by the testator was, when the first daughter died without issue her three brothers and sister would be surviving.

If Elizabeth Ashhurst had died first, leaving issue, and then Alice Lippincott had died, as she has done, without issue, would Elizabeth Ashhurst's issue have been excluded from any share of Alice Lippincott's estate?

Under the appellees' construction Mrs. Ashhurst's children would in that event not get a dollar of Mrs. Lippincott's estate. But does the court see such an intention in the testator's will? On the contrary, are not the children of Elizabeth Ashhurst expressly substituted in their mother's place after her death as to their original share, and can any intention be perceived in the testator's will to apply a different result to accrued shares? Upon the appellees' contention there is no provision that the issue of a predeceased daughter can take the share of the second daughter dying without issue. For when the first sister dies with issue, and the second dies without issue, there can be no surviving "sister" to take the latter's share; and upon appellees' construction the children of the deceased sister cannot take. If the brothers die first there can be no "surviving brothers," and in either event there cannot be both surviving "brothers and sister" to take a share which was not to go to any one of them solely, but was to be "equally divided between them." So, if Alice Lippincott survived her brothers and sister, and died without issue, there must be either an intestacy or her estate must go under the first paragraph of the residuary clause; and in either case the issue of deceased brothers and sister would be heirs. All these im-

possibilities of strict literal construction of the language used are avoided if the cardinal intent of the testator be observed of equally dividing the residue among his children and their descendants. Hence, when the testator provided that on the death of either of his daughters without issue there would be surviving brothers and sister, he contemplated that the first death would be that of a daughter without issue, and the testator accordingly gave her share to those surviving brothers and sister.

It is frequently decided that the parties entitled are not those who actually survive, but those it appears from the will the testator contemplated would survive.

In re Beck's Trusts, 37 Law Journal Reports, Chancery, page 233, the testator devised real estate in trust for his three granddaughters for life, share and share alike, remainder to their children; and in case any one of the three granddaughters died without leaving issue to the two surviving granddaughters, and after the death of each of such two surviving granddaughters to their children; and in case either of such two surviving granddaughters died without issue to survivor of granddaughters, and after her death to her children. *Held*, that the word "survivor" and "surviving" must be construed "other."

Vice-Chancellor Wood said:—

> "In the will there was a plain indication of the testator's intention that on the death of any one of his three granddaughters, without leaving issue which should attain twenty-one, or die under twenty-one leaving issue, there should be a disposition of such granddaughter's share among the other objects of his bounty. In the expression, 'my two surviving granddaughters,' the testator, contemplating the death of one of his granddaughters without leaving issue who should fulfill the conditions above mentioned, immediately assumed that, on the happening of such an event, there would be two surviving granddaughters with issue. He plainly considered that this was the only way in which the event of one dying without issue could take place. Similarly, when providing for the event of the death of one of the two surviving granddaughters without issue, he assumed that the third granddaughter had issue who would be surviving. *The testator seemed to think that when he had got rid of one of his granddaughters without issue he should have two left with issue. The word 'surviving' was used in a blundering sort of way to describe his other granddaughters; and here, if ever, it was to be read as 'other.'*"

In Barber *vs.* Barber, 3 Mylne and Craig, 697, the Chancellor said:—

> "A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it, and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time those who constitute the class at the time will take; but if the legacy be given to B., C., and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, *or to certain individuals who, it was supposed, would constitute it?*"

So Daniel *vs.* Daniel, 6 Vesey, 297, was based upon what was apparently the conception of the testator as to the order in which the deaths would occur.

So in Williams *vs.* James, 20 Weekly Reporter, 1010, the devise was to certain children of Owen Morgan, and in case either or all of the within-named children of Owen Morgan shall happen to die leaving no lawful issue, then to be "equally transferred to the use and uses of the *surviving* child or children of Owen Morgan *that are herein named.*" *Held*, that the word "surviving" should be construed "other;" and Bramwell, B., said:—

> "By the words as they stand the testator apparently undertakes to name the children who will be surviving at a future epoch. This it is impossible for him to do, for no man can forsee who will be living at a time which has not yet arrived. * * * Once it is clear that the words of a devise cannot be taken literally it is allowable to read them in a reasonable and probable sense instead of an unreasonable and improbable sense, and I think that by substituting the word 'other' for the word 'survivor' we shall put a reasonable construction upon the testator's language, which shall carry out what was probably his intention."

The question here is *not* so much the *time* indicated by the phrase "surviving brothers and sister," but *to whom do they refer?* In the present will the testator, to use the language

of Vice-Chancellor Wood in Beck's Trust, 37 Law Journal Reports, Chancery, 233, "seemed to think that when he had got rid of one of the daughters without issue," she would have left the other sons and daughter whom the testator had mentioned in his will, and "the word 'surviving' was used in a blundering sort of way to describe his other children." The condition of the testator's family would seem to show that this must have been the testator's intention. The testator had three sons but only two daughters, and he provides that "upon *either* of my daughters dying without issue her share is to go to her surviving brothers and sister equally to be divided between them." The testator has expressly stated that the gift over comes into operation if *either* of his daughters die; that is, on the death of the daughter who dies first or the death of the daughter who dies last. Yet upon the death of the last daughter the testator's object cannot be accomplished unless the word "surviving" be so read as to apply to a predeceased sister who has left issue.

So, again, under the appellees' construction the gift over on the death of *either* of the testator's daughters without issue cannot take effect under the language of the will if the last survivor is a sister who died without issue, and although all the other sons and daughter had themselves left issue. Yet the testator meant it to take effect in this case, for he states if *either* daughter, viz., the one dying first or the one dying last, "dies without issue," &c. Hence the phrase "surviving brothers and sister" must refer to the other named brothers and sister who are specifically mentioned in the first paragraph of this residuary clause.

Upon the appellants' construction the whole residuary clause is harmonized. The primary thought in the testator's mind was that the entire residuary estate should go to his five named children, "to be equally divided between them, share and share alike." To effect this the testator declared the residue was for their use, and the testator's machinery for effecting this was to give the sons upon their majorities absolute estates, and the daughters life estates, with remainder to their children, and in default of to the other brothers and sister the testator had previously named, equally to be divided between them.

Upon the appellees' construction, violence must be done to some portion of the clause, and the entire item would be but a partial disposition of the estate. Thus, if Elizabeth died first with issue, and then Alice died without issue, the will of the testator would have been wholly ignored, for under appellees' contention Alice's estate would go alone to her surviving brothers, and the words "brothers and sister equally to be divided between them" would be entirely rejected. Under the present state of facts there are no brothers. There is but one brother, and if that brother had predeceased Alice Lippincott there would have been no brothers at all. If Elizabeth survives William and dies without issue, then the entire clause falls to the ground, and there must be either an intestacy or an absolute estate in Elizabeth under the primary clause of the residue. The court will not reject the phrase, "if *either* daughter dies without issue," or the subsequent phrase "brothers and sister equally to be divided between them."

Huntress *vs.* Place, 137 Massachusetts, 409, is in point. There the use of the plural words "brothers and sisters," as in this case, was held conclusive of the testator's intention. The bequest of the residue of the property after the decease of the testator's wife to be "equally divided among my brothers and sisters and their heirs." When the will was made and at the testator's death there were living three brothers, one sister, and issue of deceased sisters, which the testator knew. *Held*, that the testator intended that the heirs of deceased sisters should take by right of representation equally with his surviving brothers and sister, and the court said:—

> "The argument of the appellants is that this is a gift to a class; that only those of the class take who survive the testator, and that the words 'and their heirs' are words of limitation and were used to express the intention of the testator to give the absolute property. The argument of the appellees is that by the use of the plural word 'sisters' the testator must have intended not only his sister who was living, but his sisters who had deceased; and as these last could not take, the testator intended that in the division their heirs should take the shares appropriated to them.
>
> "The question is one of difficulty, but we are inclined to the view of their appellees for the reasons given in Gowling *vs.* Thompson, L. R., 11 Eq., 366, *n.*"

So in

Gowling *vs.* Thompson, Law Rep., 11 Eq., 366, note, the testator had two sisters but no brother living at the date of his will, and gave his residuary personal estate to all and every his "*brothers and sister or their issue.*" *Held*, that the issue of three brothers and a sister who had died before the date of the will were entitled.

In the present case the class which the testator assumed upon the death of the daughter without issue would be the "surviving brothers and sister" were the three brothers and sister whom he had designated by name in the primary gift to those brothers and sisters.

The point that it would be impossible to carry out the testator's language literally if a strict interpretation of the word "surviving" was given arose in

Smith *vs.* Osborne, 6 House of Lords Cases, 375, where the court held that where there is in a will a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other." And the Chancellor said:—

> "The words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the court to execute the intention, however inartificially expressed. And here the language shows that by the word 'surviving' the testator must have meant 'other.' This is not a gift to a class, and on the death of one or more, to the survivor or survivors, but a gift to two designated devisees, that is, the testator's two daughters, as tenants in common in tail, and if either should die without issue, then to 'the surviving daughter' and the heirs of her body. Unless the word 'surviving' is to be taken here to mean 'other,' the intention cannot be carried into effect, *for he means his gift over to come into operation if either of his daughters die without issue; that is, on the death of the daughter who dies first or of the daughter who dies last; and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter.*"

And Lord Wensleydale said:—

> "If the word 'surviving' is to be construed literally, then the event never took place; neither sister died without issue leaving the other sister surviving, and the remainder in Frances Ann Carr's tail in the moiety did not pass by the will, but descended to the

heir at law as being undisposed of. This would be to create an intestacy as to that remainder. My opinion therefore is that the word 'surviving' is to be read as 'other,' and then the whole interest in each moiety is disposed of."

The same difficulty occurred and the same result was reached in

Waite *vs.* Littlewood, 8 Chy. App., 70,

where the Chancellor, Lord Selborne, said:—

"It must also be considered that there was a just disposition of the court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty. Moreover, it was quite manifest that the last of the daughters dying might die without leaving a child, in which case the word 'survivor' could not apply; and the children of more than one of them who might die leaving children might be living at the death of the last survivor of the daughters, and might afterwards die under age and unmarried. Therefore the argument which was thought conclusive in the case of Smith *vs.* Osborne applied, though with rather less force, because in that case there were two children only."

So *In re* Bowman, Law Reports, 41 Chy. Div., 525, the court, referring to the will in that case, said:—

"It seems almost impossible to believe that the testatrix deliberately intended to exclude the children of a deceased niece from the benefit of sharing in the one-fourth of another who died without issue. The general scheme is to provide for the nieces and their children by settling each share, and if any niece should die without issue, that her share should be added to the others."

And referring to the previous cases the court said:—

"Another consideration which has had weight in some of the cases is that the gift over applies in case of the death of any niece without issue, and therefore in case of the death of the last surviving niece, when the words 'surviving sisters' would be meaningless, unless 'surviving' be read 'other,' or be confined to the sisters and not extended to children of sisters. But what seems to me most important is the express mention of children of nieces as objects of the gift over. The words 'in the same manner, &c.,' would be sufficient to introduce the limitation to children of surviving sisters. The mention of children with surviving sisters shows that in the mind of the framer of the will children were among the principal objects of the gift over. 'Surviving' is necessarily applicable to the sisters, because, as they had only life interests, no sister who did not survive could take any share, but children, without doing violence to the words, may be read children of sisters generally, not of surviving sisters only—a construction which is more consonant with the general scheme of the will."

These decisions were independent of any gift over. In fact, in the latest case of

In re Bowman, Law Reports, 41 Chy. Div., 531,

the court, referring to Smith *vs.* Osborne, said :—

> "The most cogent part of that reasoning is independent of the argument derived from the ultimate gift."

An ultimate gift over is merely one method of discovering the intention of the testator to exclude the literal meaning of the word "surviving." If that intention sufficiently appears in other portions of the will the presence or absence of an ultimate gift over is immaterial.

Williams *vs.* James, 20 Weekly Reporter, 1010 (1872).

As applied to the present will the same result follows, for if the three brothers and Elizabeth Ashhurst had died leaving issue prior to Alice Lippincott's death there would be no "surviving brothers and sister" at the time of distribution, and the will would have no effect whatever. So if Elizabeth Ashhurst had predeceased her sister, leaving issue, the words "and sister" would have to be stricken out of the will on the complainant's contention. So upon the facts as they now exist there are no "surviving brothers."

Again, the same conclusion is reached by considering the concluding phraseology of the clause, viz., "to her surviving brothers and sister, *equally to be divided between them.*"

It will be observed that this equality of the residue was apparently the primary object of the testator, for in that clause he uses the phrase to be "equally divided between them" no less than three times in the fifth item alone in reference to three different events, which otherwise might have resulted in an unequal distribution. Thus the first paragraph gives the entire residue in trust for the five named children, "to be equally divided between them, share and share alike." He again provides that on the death of a daughter with issue the shares to be "equally divided" among her children. And by the fourth clause the testator bequeathed the sum of $50,000 in trust for one of his sons, James Potter, "in order to put him on a footing of equality with my other children."

Blackmore *vs.* Snee, 1 DeGex & Jones, 455,

is almost identical in principle with the present case. There

the primary bequest was to *four children by name equally to be divided between them, share and share alike*, followed by the bequest to equally divide the said effects between *the survivors of said children* immediately after his wife's decease. It was held that the equality of distribution contemplated by the testator was sufficient in itself to prevent the application of the rule that the word "survivors" related to the period of distribution, and hence that the issue of children who had died in the lifetime of the wife were entitled to participate. The complete syllabus of the case is as follows:—

> "The testator devised and bequeathed his residuary estate in trust for his widow for life and at her death to sell and pay, assign or transfer the moneys arising therefrom to the testator's four children *by name*, equally to be divided between them, share and share alike, 'or equally to divide the aforesaid effects between the survivors of' his said children immediately after his wife's decease, in case the youngest of the said children for the time being should then have attained twenty-one years, but if the youngest should not then have attained twenty-one years, the testator directed the trustees to receive the annual interest, produce, profits, and proceeds of the trust moneys, and pay and apply as much of the interest as should arise from the equal share of each child in the maintenance and advancement of each such child as the trustees should deem expedient. *Held*, that there was a clear gift to the children equally, that the provision as to survivors was not sufficiently clear to control it, and that consequently all the children took vested interests which were not divested by their dying in the lifetime of the widow."

Lord Chancellor Cranworth said:—

> "The question is whether the wife, having had the four children mentioned in the will, but having left only one surviving her, the others having died, two having attained the age of twenty-one and one under that age, the son, upon a true construction of the will, takes the whole, or whether all of the four children took vested interests which have not been divested. A great deal has been said as to the authorities on such a point, and the principle of them is said to be, that if there be a gift to a class of persons, or to the survivor or survivors of them, the survivorship must *prima facie* be construed as applied to the period of distribution. Thus, if there be a gift to the children of A., or the survivor or survivors of them, and such a gift follow a gift of a life estate, the period at which the survivorship is to be ascertained must be taken to be that of the death of the tenant for life. Whether this is a good rule or not I do not stop to inquire; it is often better to adhere to a rule than to dispute about the propriety of it. I may, however, observe that where there is a gift to a parent

for life, and after his death to his children, or to the survivor or survivors of them, the intention of the testator is probably disappointed in ninety-nine cases out of one hundred by such a rule, for a testator would rarely intend that the accident of a child dying in the parent's lifetime should deprive the child of his share altogether. I agree, however, that *prima facie* such is the rule of construction. But it is only a rule to be followed where there is nothing to show an intention to the contrary. The question is, whether there is not enough here to show a different intention. I think here the testator has shown, that what he intended was that each child should have an equal share. But then follows the provision for the event of the children having all attained twenty-one in the widow's lifetime. What is the meaning of that provision? Was it intended to alter the description of the persons who were to take under the words contained in the preceding line of the will, or ought the subsequent line to be read so as to make it conformable to the preceding line? The court must look at the whole will, and see what is the more probable intention. Now, it is so probable that the testator intended to provide for all the children, and not for such only of them as should be living at a given period, that the court is entitled to construe, if it can, the second line in conformity with the preceding line. Throughout the will the testator speaks of the shares being equal, and I strongly incline to think that the subsequent direction in which the provision as to survivorship occurs, was not intended to interfere with this. * * * I am of opinion that there are words indicating a clear intention that all the children should take equally, and that there is no sufficient indication of a different intention to cut down the import of those words."

The effect of appellees' contention is, that children of a dead daughter may inherit from their bachelor uncle, while the children of a dead son may *not* inherit from their spinster aunt.

This is an inequality wholly foreign to the testator's idea. The testator never intended to discriminate against brothers' children. He discriminated in favor of brothers, for he gives them their estate absolutely, while he ties up the estate of the daughters to keep such estate in the testator's descendants.

The whole subsequent provision is merely the machinery to carry out the primary thought expressed in the main clause of the will.

This is not the ordinary case of a bequest over to third persons, after the termination of a life estate, but the residue is first given absolutely to the five children named, and the bequest over is to the same persons. This fact as well as the

language of the will distinguishes this case from the cases where a technical meaning has been given to the word "surviving."

In Cripps *vs.* Woolcott, 4 Maddox, 11 (the case which altered the law of England), the words were to "three children *and the survivors or survivor of them.*"

In Jones *vs.* Jones, 1 Dickinson Eq., 554, S. C., *nom* Dutton *vs.* Pugh, 18 Stewart Equity, 426, the bequest was "to be equally divided between them and *the survivors and survivor of them.*" And notwithstanding these words, the court in that case were divided as to whether the intention to refer the survivorship to the period of the testator's death did not sufficiently appear in the will.

In Slack *vs.* Bird, 8 C. E. Green, 238, the bequest was to A, B, and C, "and on the death of the last survivor of said three persons to divide the proceeds equally among the surviving children of B and C." In that case the gift over was to a totally new class, viz., the surviving children of B and C, and as to this the testator in that case had, of course, no idea or intention as to who would be such surviving children.

In the above cases and others of their type the question is, at what period of time did the testator mean that the children should be surviving? In Slack *vs.* Bird the testator doubtless meant such time to be at the period of distribution, for the ancestor was still living and other children might be born. But in the present case the question is *to whom* of certain previously named persons did the testator intend that phrase to apply, said previously named persons having been the primary objects of a residuary gift to be equally divided between them, share and share alike. As the Chancellor said in Ballantine *vs.* Wood, 15 Stewart Equity, 558, in distinguishing that case from Slack *vs.* Bird :—

> "It is to be observed that the gift is to the children individually and not as a class."

It is respectfully submitted that taking the entire will the word "surviving" has been used to indicate the persons who would remain after the death of one of their number.

If the shares of the daughters were not subsequently cut down to a life estate for the avowed purpose of protecting

them because they were women, and not to disturb the equality of distribution among both children and grandchildren, the interpretation which the law would place upon such a gift standing by itself is further confirmation of the position of the defendants. The question has often arisen, whether a bequest to persons by name who constitute a class, as distinguished from a gift to the class itself, implies an intention that the persons named shall take, or merely any persons who constitute a class shall do so. In the first place the heirs of the persons named would be substituted for their parents, and no right of survivorship would exist; and in the second case the heirs of any of the class who might die in the interval would not answer the class description, but, by right of survivorship, the number, however small, constituting the class on the event named would take the whole bequest. The rule is well settled that in naming the individuals it will be presumed the testator intended to benefit them and did not intend a right of survivorship to exist; or, stated in another form, the rule is that in such cases the will speaks from the testator's death, and not from the period of distribution.

Moreover, the phrases "equally to be divided between them," or "share and share alike," have from the earliest period been construed to exclude the intention of survivorship.

Heath *vs.* Heath, 2 Atkins, 122;
Dildine *vs.* Dildine (1880), 32 New Jersey Equity, 78;
Collins *vs.* Bergen (1886), 42 New Jersey Equity, 57.

This is not a devise to one person, and after that person's death a gift over to the survivors of another class. On the contrary, it is a gift to five designated persons, John, William, Elizabeth, Alice, and James, and if either Elizabeth or Alice die without issue her share to her "surviving," viz., the other named brothers, John, William, and James, and sister Elizabeth. As all the brothers and sisters are named in the primary gift made by the testator, so in the ultimate gift over he refers to the same brothers and sisters as participating in the share of a daughter who died without issue quite as clearly as if he had again repeated their names. There is, therefore, here a primary gift to five designated persons, composed of sons and daughters, and on the death of one of the daughters a gift

over to all the remaining designated persons, being sons and daughters.

The difference between this case and the case of Slack *vs.* Bird, 8 C. E. Green, 238, is obvious. In Slack *vs.* Bird the gift was to certain persons for life, with remainder over to a different class who had not been designated by the testator, and were not previous objects of his bounty, and who it is impossible the testator could have contemplated as being surviving at the time of his own death.

Thus :—

Potter Will.	*Slack* v. *Bird, 8 C. E. Green, 238.*
(1) In trust nevertheless for the use of my children John, William, Elizabeth, Alice and James, to be equally divided between them, share and share alike. [Sons to get their shares at 21, and trust for coverture for daughters; if daughters leave children, then their respective shares to their children.]	(1) In trust for A. C., R. L. and W. S. L. for their respective lives, and, [Upon death of the survivor of these three designated persons, the lot to be sold and proceeds thereof]
(2) But if either of my daughters die without issue, *her* share to *her* surviving *brothers and sister* equally to be divided between them.	(2) Equally divided among surviving children of W. S. L. and R. L.

In Slack *vs.* Bird the limitation over was a primary gift to parties who then for the first time received the benefit of the testator's bounty. There was nothing in the will to show what surviving children of W. S. L. and R. L. were meant by the testator. And the case turned upon the question of the time of survivorship contemplated by the testator, and it was held to refer to the time of distribution.

In the present case the gift over is not the primary gift to the parties named in such gift over. They are the objects of the testator's immediate bounty, and the effect of the will is simply that their shares, which they originally received, are increased by accrual from the happening of the event of a daughter dying without issue. The doctrine of Slack *vs.* Bird and kindred cases has no application; for it is not really a question as to whether "surviving" refers to any period of time or not,

but because the testator has intimated who he means by the phrase "surviving brothers and sister;" that is, those *other* brothers and sister who were the primary objects of his gift.

II. The testator obviously intended to benefit each line of his family who left descendants; for as to sons, the estate is given to them absolutely, and as to daughters, the issue is expressly substituted for those daughters who leave such issue.

If Mrs. Ashhurst had died leaving issue before the death of Mrs. Lippincott, would any one contend that under the will Mrs. Ashhurst's children could not have inherited the share their mother, if living, would have taken? There can be no difference in principle between the right to an accrued and an original share. The testator draws no such distinction. On the contrary, he expressly, throughout his entire will, struggles to preserve equality amongst the branches of his family, and directly substitutes the issue for their mother. Yet, on the appellees' contention, if Mrs. Ashhurst had died first her children would be excluded in a distribution of Alice Lippincott's estate. Children of a daughter who might die during the lifetime of her sister would take the same interest that would belong to children of a son dying intestate during the same period. The entire scheme of the will renders it impossible to presume that the testator intended children of a daughter to obtain more than children of a son, and to permit a substitution of the former for their parent, but not the latter.

The whole effect of the testator's will is to keep the estate in his family. The stock represent their ancestors and are substituted for their ancestors, and those ancestors survive by means of their stock.

There is no difference in testator's intention between original and accrued shares; yet the appellees, while vesting original shares in sons' representatives, contend that accrued shares do not go to those sons' representatives, thereby making a gross inequality in the mere chance of one uncle living longer than the others.

In Waite *vs.* Littlewood, 8 Chancery Appeals, 70, the gift

was to the daughter for life, remainder to their children. In case any daughter should die without a child then to his surviving daughters in equal shares, and after their decease to their respective children. *Held*, that on the death of a daughter without children, the children of other daughters who had predeceased her took interests in her share. The Chancellor expressed his opinion:—

> "Upon the whole scheme of the will it is very improbable that the grandchildren were to take only if there should happen to be tenants for life to precede them. It must also be considered that there was a just disposition of the court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who are manifestly the object of the testator's bounty. * * * No one could read the sentence in question as a whole and not see plainly and distinctly that the general intention of the testator is to keep the property together and continually subdivide accruing shares between the same persons remaining, who were to take the original shares, and to refer to the gifts of the original shares as the scheme which was to govern the devolution of the accruing shares."

Lucena *vs.* Lucena, Law Reports, 7 Chy. Div., 257.

Evans *vs.* Evans (1858), 25 Beavan, 81, is much in point. In that case there was a gift to A for life, and after her death to "the surviving children of B and C except the youngest son of B," who was to have thirty pounds to his share more than the others. The will proceeded, "should either of the said children die having no issue, his or her share to be then equally divided amongst the survivors." *Held*, that the children of B and C took vested interests at the death of the testator in remainder expectant on the decease of A, with a gift to the survivors in the event of any one dying without issue in that interval. The Master of the Rolls said:—

> "The expressions which appear to me to take this case out of that rule are the following, viz.: He says: 'Should either of the said children die having no issue, his or her share to be equally divided among the survivors.' Now, unless I strike those words entirely out of the will, I can give them no meaning that will not repel the application of the rule laid down in Cripps *vs.* Wolcott, that the period of survivorship is to be referred to the death of the tenant for life. To what period of time, if I can give those words any meaning, does the dying without issue refer? It must be, of course, after the death of the testator, and being so it must either be before or after the death of the tenant for life. It is admitted,

and indeed it could not be disputed, that those words do not mean that if any one of the children of George and Richard who survived the tenant for life should after that period die without issue, in that case the share of the one so dying was to be divided between the others. It is admitted that the shares must at latest be indefeasibly vested on the death of the tenant for life, and if this be so, and undoubtedly consistently with settled rules and principles it cannot be otherwise, then the period to which the sentence refers must be to a dying without issue before the death of the tenant for life. The testator then directs that in case either of the children of George and Richard should die having no issue after his death and during the life of the tenant for life the share of that child shall go to the survivors. But what is to take place if a child die leaving issue during that period? *Expressio unius est exclusio alterius* in that event, the share of the child dying leaving issue is not to go over. It follows then that a child who survives the testator and who dies before the tenant for life, leaving children, takes a share which does not pass away from him. How can this be reconciled with the construction that no child takes a share unless he survive the tenant for life?

"I have always strongly supported the rule in Cripps *vs.* Wolcott (4 Madd., 11), which is conformable to reason and common sense, but a testator is not bound to adopt that mode of disposing of his property, and if he expresses a different intention the court must carry that intention into effect."

and the court after citing cases continued:—

"Both these cases confirm the view I have expressed to be apparent on the words used, viz., that the expressions used by the testator import a gift to a class to be ascertained at his own death, with a direction that if any one or more of that class should die before the period of distribution without leaving issue, his share is to be divided amongst the remaining and then surviving members of that class."

Applying the reasoning of the case just cited to the case at bar, it conclusively shows that the present testator did not intend to use the word "surviving" referring in a strict sense as to the period of distribution. While practically the same language is used in both wills, the present case contains strong evidence of intention in matters more or less obscure in the case just cited. In Evans *vs.* Evans, the right of a child to be substituted for its parent, in the event of the latter dying during the life of the tenant for life, was rested upon the maxim that the expression of one intention implied the exclusion of the contrary. Therefore it was held that because the testator had said that, if a child died without issue during the life of

the tenant for life, its share was to go over, this necessarily implied that if such child died during the life of the tenant for life, leaving issue, such issue should be substituted for the parent. In the present will nothing is left to implication, but it is expressly declared that "upon the death of my said daughters, their respective shares are to be equally divided among their children." Evidently this difference between the two wills simply adds force to the contention now made. In other respects the analogy is perfect. The side light which the use of this phrase throws upon the testator's intention is convincing. "If either of them (the daughters) die without issue her share is to go to her surviving brothers and sister," could not refer to a dying without issue after the death of the tenant for life (the other sister), but must refer to a dying without issue before the death of the other sister, the tenant for life. In that event the issue were to be substituted for the parent, and the whole theory of a right of survivorship which would exclude the substitution of children for their parent would fall to the ground. As to the period of time when the right of survivorship accrued, if under the express terms of the present will or under the interpretation which the law would put upon the language "die without issue," children could be substituted for their parent, they could only be thus substituted because the parent took, at the date of the testator's death, a vested interest in remainder expectant upon the death of a life tenant (a daughter). The children took what belonged to the parent, neither more nor less. Children of a daughter who might die during the lifetime of her sister would take precisely the same interest under this will that would belong to the children of a son dying during the same period. When the clauses referring to equality of distribution are compared with that just considered and relating to dying without issue, it would be impossible to maintain that the testator intended the children of a daughter to obtain more than the children of a son, and to permit a substitution of the former for their parent, but not the latter. Hence it follows that under the terms of the will it is logically and literally impossible to refer the word "surviving" to any other period than the testator's death.

This doctrine is consistently applied. Other applications will be found in

Re Hopkin's Trust (1865), 2 Hemming and Miller's Ch., 411, 414,

where the portion of the will in question reads as follows :—

> "The funded property, which I have already bequeathed to my dear wife during her natural life, I hereby will and bequeath to my dear father and sister should they survive my dear wife, to be enjoyed by them during their natural life, share and share alike, and after their several deaths I hereby give and bequeath the same, to be equally divided between the surviving children of Mr. William and Elizabeth Goble and the surviving children of the late Robert and Mary Driver, *or their heirs and assigns.*"

Four children of Mr. and Mrs. Goble and five of Mr. and Mrs. Driver survived the testator, and several of the latter at the time of the contest had married and left issue. It was contended that division must be made only among those who survived the tenant for life, but it was decided that the assigns or representatives of the children who were living at the date of the testator's death were also entitled. Vice-Chancellor Wood said :—

> "The only possible conclusion is that the period of survivorship referred to by the testator is not the same as the period of distribution, for on such a construction no intelligible meaning could be given to the whole will. I am not at liberty to strike out the words which make the difficulty or to read the word 'or' as 'and,' if any reasonable construction can be put upon the testator's language as it stands.
>
> "Where survivorship is referred to simply, without anything further, it must be referred to the period of distribution ; but where you find such words as occur in this will purporting to carry over the fund there is no alternative but to refer the survivorship to the death of the testator. The only choice is between the death of the testator and the date of the will, if the words 'or their heirs and assigns' are to be retained ; and the date of the will could obviously not be the right period. Had that been the meaning, the testator need not have described the then living children by designating them as a class of survivors when he could equally as well have named them. In was suggested in argument that the reference might be to the deaths of the father and sister, but I am of opinion that the 'several deaths' referred to mean those of all the persons named in the sentence, and cannot be confined to the father and sister to the exclusion of the widow. It would, moreover, be to impute a very capricious intention to the testator if I were to assume that he was indifferent whether

the objects of his bounty survived one of the tenants for life, provided they did not die in the lifetime of the other two—the testator's father and sister.

"There are but two periods to which it is possible to refer the survivorship—the death of the testator or the period of distribution. The very ground of the rule in Cripps *vs.* Wolcott, namely, that there should be persons to take when the fund is divisible, has no application here. I cannot read 'heirs and assigns' as next of kin; for if the children had dealt with their shares it is clear that these words must carry them to their assigns. Therefore, at the period of distribution you must pay to those children who are living, and to the assigns or representatives of any who are dead. The only period to which the survivorship, under such circumstances, can relate is the death of the testator; in other words, it is survivorship at the time from which the will speaks."

In

Shailer *vs.* Groves (1847), 6 Hare, 162–164,

a testator bequeathed to his wife £1000 consols and £200 bank annuities during her life, and "at her death, it is my will that one half the product of the said £1,000 and £200 stock shall be received and divided amongst my surviving brothers and sister, *and their issue*, share and share alike." The testator left his widow surviving, and also left six brothers and one sister, all of whom died in the lifetime of the widow—four of such brothers and sister leaving issue, and the others dying without issue. The question arose upon the death of the widow, between the personal representatives of the deceased brothers and sister of the testator, and the issue of the brothers and sister who left issue. It was contended on the one hand that the word "surviving" referred to the death of the widow, and on the other, that it referred to the death of the testator. Vice-Chancellor Sir James Wigram, in holding that the period referred to was the death of the testator, delivered the following opinion:—

"In deciding this case, I am glad to be able to say, as did the Lord Chancellor in Wordsworth *vs.* Wood (4 Myl. and Cr., 641), that it is not necesssary to come to any conclusion whether the decision of Sir J. Leach in Cripps *vs.* Wolcott (4 Madd., 11), or the cases to which it is opposed, ought to be preferred, because I find circumstances in this case which enable me to decide it without entering into that question.

"It is clear to my mind that in this case the testator must have intended a period of distribution later, in point of time, than the gift of the subject of distribution, and that he intended to substitute

for the primary objects of his gift the issue of such of them as should die between the time of the gift and the time of distribution. By this construction effect is given to every word of the will, according to its natural import, and I cannot make sense of the will according to any other construction of the words.

"The fund must be divided in equal parts among the brothers and sisters surviving at the death of the testator. The children or issue of those who died in the lifetime of the tenant for life leaving issue will take the shares of the parents, for whom they are substituted."

In Blisset *vs.* Cranwell (1695), 1 Salk, 226, a father devised land to his two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife. The court said that the testator's intention was—

"Not only to provide for his two sons but for their posterity; that not only his sons but their heirs should have an equal part; for the words are, equally to be divided between them and their heirs, and though by the first words it is given to them and to the survivors of them, yet the last words explain what he intended by the word 'survivor,' and that the survivor should have an equal division with the heirs of him that should die first; and though the testator has not aptly expressed himself, yet, upon all the words taken together, his meaning seems to be so."

To the same effect are the following cases :—

Rogers *vs.* Towsey (1845), 9 Jur., 575;
Moore *vs.* Lyons (1840), 25 Wend., 119;
Weed *vs.* Aldrich (1874), 5 Thomp. and C., 105;
Buckley *vs.* Reed (1850), 15 Pa., 83;
Haughton *vs.* Lane (1845), 3 Ired. Eq., 627;
Vickers *vs.* Stone (1848), 4 Ga., 461.

III. Unless the word surviving is read as referring to the other named brothers and sister or applied to the date of the testator's death an intestacy may occur, or in the alternative the final clause fails of effect, and resort must be had to the appellants' construction that such disposition of the estate is to be primarily found in the first paragraph of the residuary clause.

If a daughter survives the sons and dies without issue there would be a state of facts totally unprovided for by the last clause. The result would be one of two things—an intestacy, or a resort to the primary clause, wherein the testator has given to be equally divided among the five named children. If an intestacy, then the fact that an intestacy might result has always been deemed a circumstance, taken in connection with other circumstances, to disclose the intent of the testator;

Smith *vs.* Osborn, 6 House of Lords Cases, 400;

Wake *vs.* Varrah, Law Rep., 2 Chancery Div., 355.

If, on the other hand, the estate passes under the first paragraph of the will as if the last survivor had been seized absolutely (and this is the view the Vice-Chancellor maintains), then it only so passes because the said first paragraph controls the disposition of the estate, as being the primary thought of the testator, and, in the language of the Vice-Chancellor, the subsequent limitations

> "Will take effect only so far as they fairly extend to control the previous gift of absolute ownership."

This directly accords with the appellants' contention that the primary object was the equality of distribution between all sons and daughters, share and share alike. The subsequent limitation cannot fairly be construed to override this main cardinal intent of the testator, and to give the great bulk of his estate to one or two persons who by the accident of life have survived their brothers and sister.

There have thus been applied to the language of this residuary clause several well-recognized rules of law for the interpretation of wills, each of which has been held sufficient to show that the testator did not use the word "surviving," in a strict literal sense, as referring to the period of distribution; and each of the phrases construed, standing by itself, has been construed to prevent the application of the rule of Cripps *vs.* Wolcott, 4 Madd., 11.

Where these phrases are all found in one item of the same will, it is confidently submitted that in the many cases wherein the testator's intention has been followed in opposition to the

strict literal meaning of the word "surviving," no case exists so strong as the present, nor where the intention of the testator so plainly appears to promote equality between all his children and their descendants, and not to exclude the issue of a brother who chanced to die before his sister.

A. T. FREEDLEY,
S. MEREDITH DICKINSON.

THE JOHN L. MURPHY PUBLISHING CO., Printers, Trenton, N. J.

Court of Errors and Appeals.

Between

THOMAS F. POTTER et al,
Appellants,
and
ELIZABETH ASHHURST,
Respondent.

BILL OF COMPLAINT.

[Filed October 20, 1894.]

To His Honor Alexander T. McGill, Chancellor of the State of New Jersey:

Humbly complaining showeth unto your Honor your oratrix, Elizabeth Ashhurst, formerly Elizabeth Potter, of the city of Philadelphia and State of Pennsylvania.

(1) That on or about the first day of October, in the year of our Lord one thousand eight hundred and fifty-three, and for many years previous thereto, one Thomas F. Potter was a permanent resident of and had his domicil in the borough of Princeton, in the township of Princeton, county of Mercer and State of New Jersey, and being so resident and domiciled, he departed this life on or about the day and year last aforesaid, at his said residence and domicil; having first made, executed and published his last will and testament,

in due form of law, bearing date on the twenty-first day of October, anno domini eighteen hundred and fifty-one, and therein and thereby appointed James Potter, Robert F. Stockton and Richard S. Field the executors thereof; and that on the twelfth day of October, anno domini eighteen hundred and fifty-three, the execution of said will was duly proved by the said executors before the Surrogate of the county of Mercer and State of New Jersey, and was duly admitted to probate, and that letters testamentary were thereupon issued to the said James Potter, Robert F. Stockton and Richard S. Field, who took upon themselves the burthen of said executorship, as by the said will, probate and letters testamentary thereof will fully appear, and to which your oratrix refers.

(2) That the said testator, Thomas F. Potter, in and by his said last will and testament, did therein and thereby devise and bequeath his residuary estate to James Potter, Robert F. Stockton, and Richard S. Field upon certain trusts therein expressed and declared, as by the said will, reference being thereunto had, will more fully appear.

(3) That the said James Potter, Robert F. Stockton and Richard S. Field assumed the burthen of the execution of said trusts, and that thereafter each of them died in the order above named.

(4) That by the third clause of the said will, the said Thomas F. Potter, deceased, did give and bequeath as follows, to wit: "Third. I give and bequeath to my said wife, Sarah Jane Potter, an annuity of six thousand dollars, to be paid to her by my executors, hereinafter named, yearly and every year during her natural life; and to secure the punctual payment of the said annuity, I do hereby direct my said executors to set apart and appropriate such part of my estate as will yield the said sum of six thousand dollars, which is to be reserved as a fund for the payment of the said annuity. The above bequest and devise to my said wife to be in lieu of her dower in my lands."

(5) That by the fifth clause of the said will of the said Thomas F. Potter, deceased, he did therein give and devise

as follows, to wit: "Fifth. All the rest and residue of my estate, real and personal, wherever it may be situated, and of whatever it may consist, I give and devise unto my said executors and the survivors or survivor of them, in trust, nevertheless, and for the use of my children, John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them, share and share alike; the shares of my said sons to be paid to them respectively as they attain to the age of twenty-one, the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my said executors to their education and support, but in the case of my said daughters, my will is, that the interest of their respective shares is to be paid to them yearly during their lives, and in case they should marry, not to be under the control of their husbands or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue, her share is to go to her surviving brothers and sister equally, to be divided between them."

(6) The said testator, Thomas F. Potter, when he died as aforesaid, left him surviving his widow, Sarah Jane Potter (now deceased); a son, John Potter, who departed this life on or about the first day of July, anno domini eighteen hundred and eighty-one; that the said John Potter in his lifetime was intermarried with one Helen Norris, and that at his death he left him surviving the said Helen, his widow, and two children, Maud Potter, intermarried with George de Reuter, and Thomas F. Potter, who is unmarried, and that the said Maud de Reuter and Thomas F. Potter are twenty-one years of age and upward; that the said Helen Potter (formerly Norris), widow of the said John Potter, subsequently intermarried with one James Stewart Thorndike, who is now deceased; that the said testator, Thomas F. Potter, also left him surviving a son, James Potter, who died during his minority, soon after the death of his father, intestate and without issue; and he also left him surviving

a daughter, Elizabeth Potter, your oratrix, who subsequently intermarried with one Henry Ashhurst, who is now deceased, and has one child still surviving, William H. Ashhurst, who is of full age; and Alice Potter, who died on or about the twenty-first day of July, anno domini eighteen hundred and ninety-four, without issue, who was intermarried with one J. Dundas Lippincott, and who in her lifetime resided and was domiciled in the city of Philadelphia, and State of Pennsylvania, having first made and published her last will and testament in due form of law, and therein appointed her husband, J. Dundas Lippincott, to be the executor thereof, who, as your oratrix is informed and believes, presented the said last will and testament for probate to the proper probate court in said city of Philadelphia, and duly proved the same and assumed the burthen of the administration thereof; which said last will and testament was executed and published on the fifth day of July, anno domini eighteen hundred and seventy-seven, and duly admitted to probate on the seventh day of August, anno domini eighteen hundred and ninety-four, and letters testamentary were thereupon duly issued to the said J. Dundas Lippincott, to which said will, probate and letters testamentary, or an exemplified copy thereof, your oratrix prays leave to refer.

The said testator, Thomas F. Potter, also left him surviving a son, William H. Potter, who is intermarried with one Ellen Fordney, who is still surviving.

(7) That the said James Potter, Robert F. Stockton and Richard S. Field, who were appointed executors and trustees in and by the said last will and testament of the said Thomas F. Potter, deceased, have all departed this life; and that Richard S. Field was the surviving executor and trustee appointed in and by the said last will and testament; and that after the death of the said Richard S. Field, the last survivor of the said executors and trustees, the said Henry Ashhurst, the then husband of your oratrix, and others, filed their bill of complaint in this court, on or about the seventh day of June, anno domini eighteen hundred and seventy, against Francis S. Conover, administrator

of the said Richard S. Field and others, for an account of the administration of the said trust, and for the relief therein prayed; and that such proceedings were had in the said suit that, by an order of this court, made on the seventeenth day of June, anno domini eighteen hundred and seventy, Charles S. Olden was appointed receiver in the said cause; and that subsequently, the said receiver, having duly accounted for his administration of said receivership, was, by an order of this court bearing date the twenty-fourth day of December, anno domini eighteen hundred and seventy-two, discharged as such receiver from the duties and responsibilities of his receivership.

(8) That such further proceedings were taken in the said suit that, by an order made therein, bearing date the fourteenth day of January, anno domini eighteen hundred and seventy-three, Caleb S. Green was appointed to be trustee under the said will of Thomas F. Potter, deceased, in the place and stead of the said Richard S. Field; and the said Caleb S. Green accepted the burthen of the administration of said trust and estate.

(9) That some time in the year of our Lord eighteen hundred and seventy-six, the said Sarah Jane Potter, widow of Thomas F. Potter, and the annuitant aforesaid under his last will and testament, departed this life, and thereafter such further proceedings were taken in the said suit that that part of the trust estate under the will of Thomas F. Potter, deceased, set apart by the decree made in the cause aforesaid, to produce the annuity payable to the said Sarah Jane Potter in her lifetime, was, by a decree of this court, filed in the said cause and bearing date on the seventh day of October, anno domini eighteen hundred and seventy-nine, so divided that pursuant to the said decree one equal fourth part of the corpus of the said annuity fund was set off and allowed to the said Caleb S. Green, trustee, to be held by him under and pursuant to the trust created and declared by the said will of Thomas F. Potter, deceased, for the benefit of Alice Lippincott as tenant for life, and certain other *cestuis que trust* designated is said will, in remainder.

(10) That such further proceedings were taken in this court, in this matter, that an account was taken and stated under the order of this court by Barker Gummere, esquire, one of the masters of the court, of the administration by the said Caleb S. Green of the trust confided to him, up to the first day of October, anno domini eighteen hundred and seventy-six, which said account, so stated and taken, was duly allowed and passed by this court; and that a further account of the said Caleb S. Green of his administration of the said trust, and of his receipts and disbursements therein, was, by the order of this court, taken and stated by Hugh H. Hamill, esquire, one of the masters of this court, up to the sixth day of December, anno domini eighteen hundred and eighty-three; all the statements herein set forth as to the proceedings in the aforesaid suits are taken from the said proceedings now remaining of record in this court, but for greater certainty your oratrix prays leave to refer to the same, upon which reference the facts will more fully appear.

(11) That pursuant to the final decree of this court filed on the seventh day of December, anno domini eighteen hundred and eighty-three, in a suit wherein Caleb S. Green was complainant and Elizabeth Ashhurst and others were defendants, the said Caleb S. Green was ordered and decreed to assign and transfer the securities in his hands constituting the said trust estate, and pay over the cash balance stated in said reports, to the Chancellor of the State of New Jersey, and to execute a deed to the Chancellor of the State of New Jersey for the interest and estate held by him in a certain lot of land in Princeton, conveyed by Charles H. Skirm, Sheriff, to William H. Potter and Caleb S. Green; and that upon making such assignment, payment and deed, the said Caleb S. Green should be discharged from all liability for or on account of his administration of said trusts; that on the seventh day of December, anno domini eighteen hundred and eighty-three, the said Caleb S. Green, pursuant to the final decree last above mentioned, paid over the said cash, assigned and set over the said securities, and conveyed the said land to the Chancellor of the State of New Jersey,

amounting to the total sum or valuation of one hundred and eighty-seven thousand eight hundred and six dollars and eighty-three cents, exclusive of certain valueless securities; and that thereupon the said Caleb S. Green was duly discharged from the duties and responsibilities of his trusteeship; and that schedules of said valuable and valueless securities and cash will be found filed in the said cause, under the respective dates of April fourteenth, eighteen hundred and eighty-three, December third, eighteen hundred and eighty three, and February twenty-fourth, eighteen hundred and eighty-five.

(12) That such further proceedings were had in the said cause that a final decree was made therein by this court, bearing date on the seventeenth day of July, anno domini eighteen hundred and eighty-three, wherein and whereby Hugh H. Hamill was appointed to be trustee in the place and stead of the said Caleb S. Green, so far forth that the said Hugh H. Hamill was ordered and directed to invest from time to time and reinvest all moneys of the principal fund of the trust created by the will of Thomas F. Potter, deceased, in favor of Alice Lippincott, as tenant for life, and the *cestuis que trust* in reminder in that behalf designated and set forth in the said last will and testament of Thomas F. Potter, deceased, and to collect and pay over to the *cestuis que trust* entitled thereto all moneys arising from the securities, funds and assets belonging to the said trust estate, in conformity to the trusts declared in said will.

That the said Hugh H. Hamill, trustee as aforesaid, entered into bond with sufficient surety, as required by the said last mentioned decree, and took upon himself the duties of said trusteeship; and that he has performed all his said duties to the best of his skill and understanding, and has managed and administered the said trust estate under the direction of this court, pursuant to the various orders and decrees from time to time made and now on file in the said court; and that pursuant to the last mentioned decree and the various orders of this court subsequent thereto, the said Hugh H. Hamill, trustee, has filed annually his accounts

of his administration of said trust estate, known in these proceedings in this court heretofore referred to as the Lippincott trust, with full and detailed statements of the receipts and disbursements of the principal and income thereof, and of all investments and re-investments of the same, and of all the receipts and disbursements of the income of said trust estate; to which said accounts, decrees and orders your oratrix prays leave to refer; and which said accounts have all been duly passed and confirmed by the orders and decrees of this court, up to the thirty-first day of December, anno domini eighteen hundred and ninety-two; and that from the last account filed in this matter by the said Hugh H. Hamill, trustee, on the twenty-ninth day of May, anno domini eighteen hundred and ninety-four, it appears that the total amount of securities, land and cash constituting the corpus of the said Lippincott trust estate is the total sum of one hundred and eighty-six thousand five hundred and fifty-seven dollars and twenty-one cents.

(13) And your oratrix further shows unto your Honor that Alice Lippincott, the daughter of Thomas F. Potter, deceased, and the sister of your oratrix, having departed this life on or about the twenty-first day of July, anno domini eighteen hundred and ninety-four, as hereinbefore set forth, the said trust hereinbefore set forth as declared and created by the fifth clause of the said last will and testament of the said Thomas F. Potter, deceased, is completely executed, ceased and determined by the death of the said Alice Lippincott; and that the said Alice Lippincott left her surviving only your oratrix and her brother, William Hubley Potter, who still survive her, and by the terms of the said devise in the said fifth clause of the said will, upon the death of the said Alice Lippincott, her interest and share in the residuary estate of the said Thomas F. Potter, she having died without issue, is devised and bequeathed to the said William Hubley Potter and your oratrix, who are the surviving brother and sister, in equal shares, to be divided between them; and that in the due execution of the said gift, bequest and devise, one-half of the said residuary estate is now pay-

able to your oratrix in her own right, in fee simple; that the said William Hubley Potter, on or about the eighth day of October, anno domini eighteen hundred and ninety-four, by a deed by him on the day and date last aforesaid made, did grant and transfer unto The Fidelity Insurance, Trust and Safe Deposit Company, a corporation created by and existing under the laws of the State of Pennsylvania, to it and its successors and assigns, the full one-half part of all his undivided share and interest of, in and to the estate, real and personal, of the said Thomas F. Potter, deceased, to which he is entitled under the said will, together with all and every the rights and appurtenances in any way appertaining, to have and to hold, receive and take the same unto the said The Fidelity Insurance, Trust and Safe Deposit Company, its successors and assigns, in trust, to keep the same invested in the present securities in which it may now be invested, and to invest such part thereof as may be money in such securities approved by law as the said The Fidelity Insurance, Trust and Safe Deposit Company may deem proper; and to collect and receive the income, interest and dividends thereof, and after deducting the necessary charges and expenses, as may be proper in the management of the said trust, to pay over the net income unto Alice Potter, daughter of the said William Hubley Potter, for her sole and separate use, for and during her natural life, without power of anticipation, so that she alone, whether covert or sole, shall take and receive said income, and so that the capital and income thereof shall not in any event be liable for the debts of any husband she may thereafter marry; and from and after the death of her, the said Alice, to hold the said trust estate for the use and benefit of such person or persons, and for such estates and interest therein, and in such way and manner as she, the said Alice, shall by her last will and testament, or by any writing in the nature thereof, limit and appoint, and in default of such will or appointment, then to assign and convey the same absolutely to such person or persons as shall then be the heirs and legal representatives of her, the said Alice, in

such proportion as such person or persons shall be entitled to according to the laws of the State of Pennsylvania for the time being, regulating the descent of real and personal estates in cases of intestacy, as will more fully appear by the said deed now of record in the Mercer County Clerk's office, recorded on the nineteenth day of October, anno domini eighteen hundred and ninety-four, reference being thereunto had. But your oratrix is informed, and believes it to be true, that the widow and children of your oratrix's brother, John Potter, who died on or about the first day of July, anno domini eighteen hundred and eighty-one, during the lifetime of the said Alice Lippincott, claim that they are entitled to the one-third part, or some other share, of the said residuary estate, the use of which was given and devised to the said Alice Lippincott during her lifetime; and your oratrix therefore prays that the said Hugh H. Hamill, trustee as aforesaid, may render his account of the administration of the said Lippincott trust, from the foot of the account filed by him on the fourteenth day of December, anno domini eighteen hundred and ninety-three, and confirmed by the order and decree of this court made on the second day of January, anno domini eighteen hundred and ninety-four; and that the said Hugh H. Hamill, trustee as aforesaid, may be decreed to pay over to the said J. Dundas Lippincott, executor aforesaid of the last will and testament of Alice Lippincott, all the interest, income, dividends and rents derived from the corpus of the said Lippincott trust estate, found to be in his hands unpaid to the said Alice Lippincott during her lifetime, after deducting therefrom his commissions and expenses in said administration; and that the corpus of said Lippincott trust fund, or share of the said Alice Lippincott in the said residuary estate of the said Thomas F. Potter, may be assigned, transferred and conveyed by the Chancellor of the State of New Jersey, one equal half part or share thereof to your oratrix in her own right and absolute property, pursuant to the directions, devise and bequest in her favor contained in the said fifth clause of the said last will and testament of the said Thomas

F. Potter, deceased, and that the other equal half part or share thereof, may be in like manner assigned, transferred and conveyed by the Chancellor of the State of New Jersey in two equal parts, the one equal part thereof to the said William Hubley Potter in his own right and absolute property, and the other or remaining equal part thereof to the said The Fidelity Insurance, Trust and Safe Deposit Company, trustee; and that the said fifth clause of the said last will and testament of the said Thomas F. Potter, deceased, may be construed by this court to have now vested the corpus of the said share of the said Alice Lippincott in your oratrix, and in the said William Hubley Potter in equal shares, and that your oratrix may be paid her reasonable costs and counsel fees in this behalf sustained.

And that your oratrix may have such further and other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your oratrix the State's writ or writs of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said William Hubley Potter, The Fidelity Insurance, Trust and Safe Deposit Company, trustee; Alice Potter; J. Dundas Lippincott, executor of the last will and testament of Alice Lippincott, deceased; J. Dundas Lippincott, William H. Ashhurst, Helen Thorndike, Maud de Reuter, George de Reuter, Ellen Potter and Thomas F. Potter, commanding them and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

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

BARKER GUMMERE,

Solicitor for and of Counsel with Complainant.

EXHIBIT.

In the name of God, amen. I, Thomas F. Potter, of Princeton, in the county of Mercer, and State of New Jersey, do make and publish this my last Will and Testament, in manner following, that is to say:

First—It is my will, and I do hereby order and direct that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

Second—I give and devise all my messuages, lands and tenements, with the appurtenances, situated in the county of Mercer, and State of New Jersey, unto my beloved wife, Sarah Jane Potter, during her natural life, and after her decease to my son, John Potter, his heirs and assigns forever.

Third—I give and bequeath to my said wife, Sarah Jane Potter, an annuity of six thousand dollars, to be paid to her by my executors, hereinafter named, yearly and every year during her natural life; and to secure the punctual payment of the said annuity, I do hereby direct my said executors to set apart and appropriate such part of my estate as will yield the said sum of six thousand dollars, which is to be reserved as a fund for the payment of the said annuity. The above bequest and devise to my said wife to be in lieu of her dower in my lands.

Fourth—I give and bequeath unto my executors, hereinafter named, and the survivors or survivor of them, the sum of fifty thousand dollars, in trust, nevertheless, and for the use of my son, James Potter, in order to put him upon a footing of equality with my other children, for whom provision has been made by the will of their grandfather, the said sum of fifty thousand dollars, to be paid to him when he arrives at the age of twenty-one; the interest, in the meantime, or so much thereof as may be necessary for that purpose, to be applied to his education and support.

Fifth—All the rest and residue of my estate, real and personal, wherever it may be situated, and of whatever it may consist, I give and devise unto my said executors and the survivors or survivor of them, in trust, nevertheless, and for the use of my children, John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them, share and share alike; the shares of my said sons to be paid to them respectively as they attain to the age of twenty one, the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my said executors to their education and support, but in the case of my said daughters, my will is, that the interest of their respective shares is to be paid to them yearly during their lives, and in case they should marry, not to be under the control of their husbands or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue, her share is to go to her surviving brothers and sister equally, to be divided between them.

Sixth—I do hereby give to my executors, hereinafter named, and the survivors or survivor of them, full power and authority to sell and convey in fee simple, the whole or any portion of my real estate not herein specifically devised, and also to sell and dispose of any part of my personal estate, whenever, in their judgment, it may be advisable to do so, and the proceeds of all such sales to invest from time to time in bonds and mortgages or in productive stocks as they may deem best for the interests of my estate.

Lastly—I do hereby constitute and appoint my brother, James Potter; my brother-in-law, Robert F. Stockton, and my friend, Richard S. Field, executors of this my last will and testament, and guardians of my children until they attain to the age of twenty-one years.

In testimony whereof, I have hereunto set my hand and seal, this twenty-first day of October, in the year of our Lord one thousand eight hundred and fifty-one.

THOMAS F. POTTER. [L. S.]

Signed, sealed, published and declared by the said Thomas F. Potter to be his last will and testament, in the presence of us.

GEO. T. OLMSTED.
PHILIP HENDRICKSON.
PETER I. VOORHEES.

ANSWER OF THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, OF PHILADELPHIA.

[Filed November 22, 1894.]

The answer of The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, to the bill of complaint of Elizabeth Ashhurst, formerly Elizabeth Potter, of the city of Philadelphia and State of Pennsylvania, respectfully showeth as follows:

This defendant admits the truth of all the averments of the said bill of complaint.

This defendant is advised and here shows to the court that, under the provisions of the deed of trust executed to it by William Hubley Potter, bearing date and recorded as set forth in the bill of complaint, it is entitled to have assigned, transferred and conveyed to it by the Chancellor of the State of New Jersey, and to receive and take, under the provisions of the said deed, one equal fourth part or share in the corpus of the said Lippincott trust fund, or share of the said Alice Lippincott in the said residuary estate of Thomas F. Potter, deceased, and humbly prays that the same may be assigned, transferred and conveyed to it by the decree of this honorable court.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, [L. S.]
Trustee, &c.
R. L. WRIGHT, JR.,
Second Vice President.

Attest:
JOS. MCMORRIS,
Assistant Secretary.

CHARLES E. GUMMERE,
Solicitor and of Counsel with Defendant.

State of Pennsylvania, City and County of Philadelphia, *ss.*—The answer of the defendant, The Fidelity Insurrance, Trust and Safe Deposit Company, of Philadelphia, was taken this thirteenth day of November, in the year eighteen hundred and ninety-four, before me, under the common seal of the said corporation, as by its said seal, thereto affixed, appears.

HENRY C. ESLING, [L. S.]
Notary Public.

ANSWER OF ELLEN POTTER AND ALICE POTTER, DEFENDANTS.

[Filed November 22, 1894.]

The joint and several answer of Ellen Potter and Alice Potter to the bill of complaint of Elizabeth Ashhurst, formerly Elizabeth Potter, of the city of Philadelphia, in the State of Pennsylvania, respectfully showeth as follows:

These defendants admit the truth of all the averments in the said bill of complaint as therein set forth, and humbly submit to such order as the court may make in respect to the matters set forth therein.

ELLEN POTTER,
ALICE POTTER.

CHARLES E. GUMMERE,
Solicitor and of Counsel with Defendants Ellen Potter and Alice Potter.

ANSWER OF THOMAS F. POTTER, GEORGE DE REUTER, MAUD DE REUTER AND HELEN THORNDIKE.

[Filed December 3, 1894.]

The joint and separate answer of Thomas F. Potter, George de Reuter and Maud de Reuter, his wife (formerly Maud Potter), Helen Thorndike (formerly Helen Potter) to the bill of complaint in the above cause.

1, 2, 3. 4. These defendants admit the statements contained in paragraphs 1, 2, 3 and 4 of said bill.

5. These defendants admit the fifth paragraph of the said bill of complaint, but these defendants, further answering, say that, in addition to the extracts from the will of Thomas F. Potter, deceased, in said fifth paragraph of the bill of complaint set forth, the said Thomas F. Potter did make divers other bequests and devises, as will by reference to said testament more fully and at large appear, a copy whereof is hereto annexed as part hereof, marked "A."

6, 7, 8, 9, 10, 11, 12. Further answering, these defendants admit the statements contained in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the said bill of complaint.

13. Further answering, these defendants say that as to the allegations contained in the thirteenth paragraph of the said bill of complaint, to the effect that, by the terms of the devise in the will of the said Thomas F. Potter, deceased, after the death of Alice Lippincott, deceased, her interest and share in the residuary estate of the said Thomas F. Potter is devised and bequeathed to William Hubley Potter and to Elizabeth Ashhurst, these defendants deny the said allegations, and aver that one third of the capital of the share of the estate formerly paid to Alice Lippincott has by her death become vested in these defendants, Thomas F. Potter, Maud de Reuter and Helen Thorndike, being the children and widow of John Potter, deceased, who was a brother of the said Alice Lippinoctt, and survived the original testator, Thomas F. Potter, deceased. And as to the allegations in the thirteenth paragraph of the said bill of complaint, as to any conveyance made by William Hubley Potter, these defendants, except as advised by the said bill

of complaint, are not informed, but these defendants are, for the purposes of this case, willing to admit the same to be true, in the manner and form as in the said bill of complaint stated. And as to the remaining allegations in the thirteenth paragraph aforesaid, these defendants pray that the corpus of the Lippincott trust fund, or share of the said Alice Lippincott, and the said residuary estate of the said Thomas F. Potter, may be assigned, transferred and conveyed by the Chancellor of the State of New Jersey, one equal third part or share thereof to the complainant in her own right and absolute property; that one other equal third part or share thereof may in like manner be assigned, transferred and conveyed by the Chancellor of the State of New Jersey in two equal parts, the one equal part thereof to the said William Hubley Potter in his own right and absolute property, and the other or remaining equal part thereof to The Fidelity Insurance, Trust and Safe Deposit Company, trustee; and that the other equal third part or share may be in like manner assigned, transferred and conveyed by the Chancellor of the State of New Jersey unto these defendants, Thomas F. Potter, Maud de Reuter and Helen Thorndike, in the proportion and interest to which they are entitled thereto as being the children and widow of John Potter, deceased; and that the said last will and testament of the said Thomas F. Potter, deceased, may be construed by this court to have now vested the corpus of the said share of the said Alice Lippincott in equal third parts between the complainant, the said William Hubley Potter, and these said defendants.

Wherefore these defendants pray to be hence dismissed with their reasonable costs and charges by them in this behalf sustained.

THOMAS F. POTTER,
GEORGE DE REUTER,
MAUD DE REUTER,
HELEN THORNDIKE,

By their attorney in fact,
A. T. TREEDLEY.

S. M. DICKINSON,
Solicitor of said Defendants.

"A."

In the name of God Amen. I Thomas F. Potter of Princeton in the County of Mercer and the State of New Jersey do make and publish this my last will and testament in manner following that is to say:

First—It is my will and I do hereby order and direct that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

Second—I give and devise all my messuages lands and tenements with the appurtenances, situated in the County of Mercer and State of New Jersey, unto my beloved wife Sarah Jane Potter during her natural life, and after her decease to my son John Potter his heirs and assigns forever.

Third—I give and bequeath to my said wife Sarah Jane Potter an annuity of Six Thousand Dollars to be paid to her by my Executors hereinafter named yearly and every year during her natural life; and to secure the punctual payment of the said annuity, I do hereby direct my said Executors to set apart and appropriate such part of my estate as will yield the said sum of Six thousand dollars, which is to be reserved as a fund for the payment of the said annuity. The above bequest and devise to my said wife to be in lieu of her dower in my lands.

Fourth—I give and bequeath unto my Executors hereinafter named, and the Survivors or Survivor of them the sum of Fifty Thousand Dollars, in trust nevertheless and for the use of my son James Potter, in order to put him upon a footing of equality with my other children, for whom provision has been made by the will of their grandfather the said Sum of Fifty Thousand Dollars to be paid to him when he arrives at the age of twenty-one; the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied to his education and support.

Fifth—All the rest and residue of my estate real and personal, wherever it may be situated, and of whatever it

may consist, I give and devise unto my said Executors and the Survivors or Survivor of them, in trust nevertheless and for the use of my children John Potter, William Hubly Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them share and share alike; the shares of my said sons to be paid to them respectively as they attain to the age of twenty-one, the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my said Executors to their education and support; but in the case of my said daughters, my will is that the interest of their respective shares is to be paid to them yearly during their lives, and in case they should marry, not to be under the control of their husbands or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue her share is to go to her surviving brothers and sisters equally to be divided between them.

Sixth—I do hereby give to my Executors hereinafter named, and the survivors or survivor of them, full power and authority to sell and convey, in fee simple, the whole or any portion of my real estate not herein specifically devised, and also to sell and dispose of any part of my personal estate whenever in their judgment it may be advisable to do so, and the proceeds of all such sales to invest from time to time in bonds and mortgages, or in productive stocks as they may deem best for the interests of my estate.

Lastly—I do hereby constitute and appoint my brother James Potter my brother in law Robert F Stockton and my friend Richard S. Field Executors of this my last will and Testament, and Guardians of my children until they attain to the age of twenty one years.

In testimony whereof I have hereunto set my hand and seal this twenty first day of October in the year of our Lord one thousand eight hundred and fifty one.

THOMAS F. POTTER. [L. S.]

Signed Sealed Published and declared by the said Thomas F. Potter to be his last will and testament in the presence of us

GEO. T. OLMSTED,
PHILLIP HENDRICKSON,
PETER L. VOORHEES.

ANSWER OF WILLIAM H. POTTER.

[Filed March 18, 1895.]

The answer of William H. Potter to the bill of complaint of Elizabeth Ashhurst, formerly Elizabeth Potter, of the city of Philadelphia in the State of Pennsylvania, respectfully showeth as follows:

This defendant admits the truth of the averments of the said bill of complaint.

This defendant further says that he is advised that, upon the death of the said Alice Lippincott, as set forth in the bill of complaint, he became and was entitled to an undivided half interest in the corpus of the said Lippincott fund, and entitled to have the same assigned, transferred and conveyed to him by the Chancellor of the State of New Jersey, pursuant to the provisions of the last will and testament of Thomas F. Potter, deceased.

And this defendant, further answering, says that if, under the proper construction of the will of Thomas F. Potter, it should be held by your Honor that John Potter did, under the provisions of the said will of Thomas F. Potter, deceased, take or become entitled to any vested interest in that part of the residuary estate of the said Thomas F. Potter, known as the Lippincott trust fund, as set up in this cause in the answer of Thomas F. Potter and others, the contrary of which this defendant is advised to be the case, the said interest therein passed to and is now vested in this defendant, inasmuch as this defendant says that the said John Potter did, by deed bearing date the eighth day of June,

eighteen hundred and sixty-five, for a consideration therein mentioned, grant, convey, assign and transfer to this defendant all the estate, right and interest of him, the said John Potter, in the said residuary estate, and in that part of the said residuary estate now before this court, which said deed is now before this court and in the records thereof in these proceedings; and this defendant further says that the said John was, in the year eighteen hundred and seventy, indebted to this defendant in more than $55,900 with arrears of interest, for money loaned and advanced by this defendant to the said John, payment of which the said John secured or intended to secure by the execution of the said deed dated June eighth, eighteen hundred and sixty-five; and this defendant further says that the said John is still indebted to him in more than $40,000, with interest thereon from January first, eighteen hundred and eighty.

WM. H. POTTER.

CHARLES E. GUMMERE,
Solicitor.

FRANCIS RAWLE,
Of Counsel.

State of Pennsylvania, County of Philadelphia, *ss.*—On this sixteenth day of March, anno domini eighteen hundred and ninety-five, before me, the subscriber, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia, personally appeared William H. Potter, named in the foregoing answer, and who subscribed to the same in my presence, who, being duly sworn according to law, deposes and says that the facts set forth in the said answer are true, to the best of his knowledge, information and belief.

Witness my hand and notarial seal, the day and year aforesaid.

HENRY C. ESLING, [L. S.]
Notary Public.

ORDER SUBSTITUTING SOLICITOR FOR COMPLAINANT.

[Filed December 12, 1895.]

It having been suggested to the court that Barker Gummere, esquire, formerly solicitor for the complainant in the above-stated cause, is now deceased: It is, on this twelfth day of December, in the year of our Lord eighteen hundred and ninety-five, ordered that William M. Lanning be and he hereby is substituted upon the record as solicitor for the complainant in said cause in the place and stead of the said Barker Gummere, deceased.

ALEX. T. MCGILL, *C.*

INTERLOCUTORY DECREE.

[Filed January 31, 1896.]

This cause coming on to be heard in the presence of William M. Lanning, of counsel with the complainant, of S. M. Dickinson and A. T. Freedley, of counsel with the answering defendants Helen Thorndike, Maud de Reuter and George de Reuter, her husband, and Thomas F. Potter, and of Charles E. Gummere and Francis Rawle, of counsel with the answering defendants William H. Potter, Ellen Potter, Alice Potter and The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, trustee; and it appearing to the court that the defendants J. Dundas Lippincott, individually and as executor of the last will and testament of Alice Lippincott, deceased, and William H. Ashhurst have not filed any plea, answer or demurrer to the complainant's bill of complaint within the time prescribed by law, although process of *subpœna ad respondendum* has been duly served upon them.

And it further appearing to the court that, on the first day of October, eighteen hundred and fifty-three, one

Thomas F. Potter, a resident of the borough of Princeton, in the county of Mercer and State of New Jersey, departed this life, having first made, executed and published his last will and testament in due form of law, and therein appointed James Potter, Robert F. Stockton and Richard S. Field the executors thereof, and that the said will was duly proven by the said executors and letters testamentary thereon issued to them by the Surrogate of the said county of Mercer.

And it further appearing to the court that said Thomas F. Potter, by his last will and testament, did make the following gift and bequest to wit: "Third. I give and bequeath to my said wife, Sarah Jane Potter, an annuity of six thousand dollars, to be paid to her by my executors, hereinafter named, yearly and every year during her natural life; and, to secure the actual payment of the said annuity, I do hereby direct my said executors to set apart and appropriate such part of my estate as will yield the said sum of six thousand dollars, which is to be reserved as a fund for the payment of the said annuity. The above bequest and devise to my said wife to be in lieu of her dower in my lands."

And it further appearing to the court that the said Thomas F. Potter by his said will did devise and bequeath his residuary estate as follows, to wit: "Fifth. All the rest and residue of my estate, real and personal, wherever it may be situated, and of whatever it may consist, I give and devise unto my said executors and the survivors or survivor of them, in trust nevertheless, and for the use of my children John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them share and share alike; the shares of my said sons to be paid to them respectively as they attain the age of twenty-one, the interest in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my said executors to their education and support; but in the case of my said daughters my will is, that the interest of their respective shares is to be paid to them yearly during

their lives, and in case they should marry, not to be under the control of their husbands or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue, her share is to go to her surviving brothers and sister equally, to be divided between them."

And it further appearing that the said James Potter, Robert F. Stockton and Richard S. Field assumed the burthen of said trusts, and that thereafter each of them died in the order named.

That the said testator, Thomas F. Potter, when he died, left him surviving his widow, Sarah Jane Potter, now deceased.

That said testator, Thomas F. Potter, also left him surviving a son James Potter, who died, intestate and without issue, during his minority, soon after the death of said testator and prior to the death of any of the other children of said testator.

That said testator, Thomas F. Potter, also left him surviving a son John Potter, who died intestate on the first day of July, eighteen hundred and eighty-one (having intermarried in his lifetime with one Helen Norris), leaving him surviving his widow, Helen Norris (who thereafter intermarried with one, James Stewart Thorndyke, now also deceased), and two children, Maude Potter, intermarried with George de Reuter, and Thomas F. Potter, who is unmarried.

That said testator, Thomas F. Potter, also left him surviving a son William H. Potter, now intermarried with one Ellen Fordney, both of whom are still living, and that the said William H. Potter has one child, Alice Potter.

That said testator, Thomas F. Potter, also left him surviving a daughter Elizabeth Potter, the complainant, who subsequently intermarried with one Henry Ashhurst, who is now deceased, and has one child still surviving, William H. Ashhurst.

That said testator, Thomas F. Potter, also left him surviving a daughter Alice Potter, who died on the twenty-first day of July, eighteen hundred and ninety-four, without issue, having been intermarried with one J. Dundas Lippincott, and having first made, executed and published her last will and testament, in due form of law, whereof the said J. Dundas Lippincott was appointed sole executor.

And it further appearing that Richard S. Field was the surviving executor and trustee appointed in and by the said last will and testament of said testator, Thomas F. Potter, and that after his death one Henry Ashhurst and others filed their bill of complaint in this court against Francis S. Conover, administrator of the said Richard S. Field and others, for an account of the administration of the said trust, and that, by an order of this court made on the seventeenth day of June, eighteen hundred and seventy, Charles S. Olden was appointed receiver in the said cause; and that subsequently the said receiver, having duly accounted for his administration of said receivership, was, by an order of this court made on the twenty-fourth day of December, eighteen hundred and seventy-two, discharged as such receiver.

That, by an order made in said cause on the fourteenth day of January, eighteen hundred and seventy-three, Caleb S. Green was appointed trustee under the said will of Thomas F. Potter, deceased, and that the said Caleb S. Green accepted the burthen of the administration of said trust and estate.

That after the death of said Sarah Jane Potter, widow of Thomas F. Potter, such further proceedings were taken in the said cause that a part of the trust estate under the will of Thomas F. Potter, deceased, set apart in the decree made in the cause aforesaid to produce an annuity payable to the said Sarah Jane Potter in her lifetime was, by a decree of this court made on the seventh day of October, eighteen hundred and seventy-nine, so divided that, pursuant to said decree, one equal fourth part of the corpus of the said annuity fund was set off to said Caleb S. Green, trustee, to be held by him under and pursuant to the trust created and

declared by the said will of Thomas F. Potter, deceased, for the benefit of Alice Lippincott for life and other *cestuis que trust* designated in said will in remainder.

That, pursuant to a decree of this court made on the seventh day of December, eighteen hundred and eighty-three, in a certain cause wherein Caleb S. Green was complainant, and Elizabeth Ashhurst and others were defendants, the said Caleb S. Green was ordered to assign the securities in his hands constituting the said trust estate, and pay over the cash balance in his hands to the Chancellor of the State of New Jersey, and to execute a deed to the Chancellor of the State of New Jersey for the interest and estate held by him in a certain lot of land in Princeton, Mercer county, New Jersey, conveyed by Charles H. Skirm, Sheriff, to William H. Potter and Caleb S. Green, and that, in pursuance of said decree, the said Caleb S. Green did, on the seventh day of December, eighteen hundred and eighty-three, pay over the said cash, assign and set over said securities and convey said land to the Chancellor of the State of New Jersey, and was thereupon discharged from the duties and responsibilities of said trusteeship.

That on the seventeenth day of July, eighteen hundred and eighty-three, a decree was made in said cause by this court, wherein and whereby Hugh H. Hamill was appointed to be trustee in the place and stead of said Caleb S. Green, to invest from time to time and reinvest all moneys of the principal fund of the trust created by the will of Thomas F. Potter, deceased, in favor of Alice Lippincott, for life, and the *cestuis que trust* in remainder designated and set forth in the said last will and testament of Thomas F. Potter, deceased, and to collect and pay over to the *cestuis que trust* entitled thereto all moneys arising from the securities, funds and assets belonging to the said trust estate, in conformity to the trusts declared in said will.

That the said Hugh H. Hamill took upon himself the duties of said trusteeship, and has performed the duties of the same, and has filed in this court annual accounts of his receipts and disbursements and investments of said trustee-

ship, and that, from the last account filed in this matter by said Hugh H. Hamill, trustee, on the twenty-ninth day of May, eighteen hundred and ninety-four, it appeared that the total amount of securities, land and cash constituting the corpus of the said Lippincott trust estate is the sum of one hundred and eighty-six thousand five hundred and fifty-seven dollars and twenty-one cents.

And it further appearing to the court that, upon the death of said Alice Lippincott, the said trust for her during the term of her life, set forth in the aforesaid residuary clause of Thomas F. Potter's last will and testament, became completely executed and then ceased and determined, and that the said Alice Lippincott left her surviving only her sister, the complainant, and her brother, William Hubley Potter, and the widow and children of her deceased brother, John Potter.

And it further appearing to the court that the said William Hubley Potter, on or about the eighth day of October, eighteen hundred and ninety-four, by a deed made by him on the day and date aforesaid, did grant and transfer unto The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, the full one-half part of all his undivided share and interest of, in and to the estate, real and personal, of the said Thomas F. Potter, deceased, to which he is entitled under the said will, in trust, to invest the same and to collect and receive the income, interest and dividends thereof, and, after deducting the necessary charges and expenses incurred in the management of said trust, to pay over the net income unto Alice Potter, daughter of the said William Hubley Potter, for her sole and separate use during the term of her life, and, after her death, to hold the said trust estate for the benefit of such person or persons and for such estates and interest therein and in such way and manner as she, the said Alice Potter, should by her last will and testament limit and appoint, and, in default of such will and appointment, then to assign and convey the same absolutely to such person or persons as should then be her heirs and legal representatives.

And it further appearing to the court that the complainant, Elizabeth Ashhurst, and some of the defendants, insist that, by the true construction of the said residuary clause of said will, the said Elizabeth Ashhurst, as the surviving sister of said Alice Lippincott, is entitled to receive and have conveyed, assigned, transferred and paid over to her one equal half part of the corpus of the aforesaid Alice Lippincott trust estate, and that the said defendants William Hubley Potter and The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, are each entitled to receive and have conveyed, assigned, transferred and paid over to them one equal fourth part of the corpus of said Alice Lippincott trust estate.

And it further appearing to the court that the defendants Helen Thorndyke, Maud de Reuter and George de Reuter, her husband, and Thomas F. Potter insist that, by the true construction of the aforesaid residuary clause of said will, the said Elizabeth Ashhurst is entitled to receive and have conveyed, assigned, transferred and paid over unto her one equal third part of the corpus of the said Alice Lippincott trust estate only, and that the said William Hubley Potter and his assigns are entitled to receive and have conveyed, assigned, transferred and paid over unto them one equal third part of the corpus of said trust estate only, and that the remaining equal third part of the corpus of said Alice Lippincott trust estate should be conveyed, assigned, transferred and paid over to the said Helen Thorndyke, Maud de Reuter and Thomas F. Potter in the proportions and interest to which they are entitled as the children and widow of John Potter, deceased.

And it further appearing to the court that the interests of all the parties in this cause may be promoted by a decree of this court adjudging and determining, in the first place, the true construction of the aforesaid residuary clause of said will only, and reserving for future adjudication and determination all other questions that may be raised in the cause, either upon the pleadings now or hereafter to be filed, or upon both pleadings and proofs; and the respective

counsel of the complainant and of the answering defendants having all in open court consented to argue in this cause upon the pleadings already filed, and a copy of the last will and testament of Thomas F. Potter, deceased, first the single question as to the true construction of the aforesaid residuary clause of the said will of Thomas F. Potter, deceased, in reference to the claims aforesaid and having unanimously requested of the court a consideration of such question and a decree adjudging and determining the true construction of said residuary clause, with such reservations as aforesaid, and the court having now duly considered the arguments of the respective counsel respecting such question:

It is thereupon, on this thirtieth day of January, in the year of our Lord eighteen hundred and ninety-six, by his Honor Alexander T. McGill, Chancellor of the State of New Jersey, on motion of William M. Lanning, of counsel with the complainant, ordered, adjudged and decreed, and the Chancellor does hereby order, adjudge and decree, that the said complainant's bill of complaint be taken as confessed as against the defendants William H. Ashhurst and J. Dundas Lippincott, individually, and as executor of the last will and testament of Alice Lippincott, deceased, to the end that such decree may be made against them as may seem equitable and just.

And it is further ordered, adjudged and decreed that, by the true construction of the fifth clause or section, being the residuary clause, of said last will and testament of Thomas F. Potter, deceased, hereinabove particularly recited and set forth, and under the facts and circumstances now existing in this cause, the said complainant, Elizabeth Ashhurst, as the surviving sister of said Alice Lippincott, is entitled to receive, and to have conveyed, assigned, transferred and paid over unto her, one equal half part of the corpus of the aforesaid Alice Lippincott trust estate, and also one equal half part of all the income derived from said trust fund since the date of the death of the said Alice Lippincott, less, however, such portion of all expenses, commissions, fees

and costs as may hereafter be duly allowed by the order or decree of this court; that the said defendant William Hubley Potter is entitled, as the surviving brother of said Alice Lippincott, who has assigned one-half of his share as such surviving brother, to receive, and to have conveyed, assigned, transferred and paid over unto him, one equal fourth part of the corpus of the aforesaid Alice Lippincott trust estate, and also one equal fourth part of all the income derived from said trust fund since the date of the death of the said Alice Lippincott, less, however, such portion of all expenses, commissions, fees and costs as may hereafter be duly allowed by the order or decree of this court; and, also, that the defendant The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, trustee as aforesaid, as assignee of one-half of the share of William H. Potter aforesaid, is entitled to receive, and to have conveyed, assigned, transferred and paid over unto it, one equal fourth part of the corpus of the aforesaid Alice Lippincott trust estate, and also one equal fourth part of all the income derived from said trust fund since the date of the death of the said Alice Lippincott, less, however, such portion of all expenses, commissions, fees and costs as may hereafter be allowed by the order or decree of this court.

And it is further ordered, adjudged and decreed that all questions affecting the interests of any or all of the parties to this cause, not hereinabove adjudged and decreed, be and the same are hereby reserved for future adjudication and determination upon the final hearing of said cause, and the question as to whether any and how much of the fund in court or under its control, either of principal or income, belongs to the estate of said Alice Lippincott, deceased, as her share of the estate of her deceased brother, James Potter, is specially and expressly reserved.

ALEX. T. MCGILL, *C.*

Respectfully advised,

JOHN R. EMERY,
Vice Chancellor.

NOTICE OF APPEAL.

[Filed February 3, 1896.]

The defendants Thomas F. Potter, Maud de Reuter, George de Reuter and Helen Thorndike hereby appeal from the interlocutory decree made in this court in the above-stated cause, on the thirtieth day of January last past, and the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

S. M. DICKINSON,
Solicitor of Defendants.

Dated February 3, 1896.

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

S. M. DICKINSON,
Of Counsel with Defendants.

PETITION OF APPEAL.

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

The petition of Thomas F. Potter and Maud de Reuter, children of John Potter, deceased, and Helen Thorndike, widow of said John Potter, the appellants in above appeal, find themselves aggrieved by a decree made in the Court of Chancery of New Jersey, bearing date the day of , eighteen hundred and ninety-six, in the cause wherein Elizabeth Ashhurst is complainant and your petitioners and others are defendants in this respect, to wit, that the said decree adjudges that the said widow and children of John Potter, who was a son of Thomas F. Potter, are not entitled to any interest in that portion of the estate of said Thomas F. Potter, deceased, which was held in trust for his daughter, Alice Lippincott, for life, and because the

said decree adjudges that, by the true construction of the fifth clause of the last will and testament of Thomas F. Potter, deceased, so much of the share of the said estate as was held in trust for Alice Lippincott for life, was, upon her death, payable, one-half to Elizabeth Ashhurst, one-fourth to William Hubley Potter, and one-fourth to The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, trustee, and that your petitioners are not entitled to any share or portion thereof.

And your petitioners humbly appeal from the decree aforesaid, upon the ground that the same is erroneous in the respects aforesaid, and is in divers other respects erroneous and contrary to law and equity.

Your petitioners therefore pray that the said decree of the Chancellor may be 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.

S. M. DICKINSON,
Solicitor and of Counsel with Appellants.

OPINION.

[Filed July 26, 1895.]

EMERY, V. C.

This case involves the construction of the residuary clause of the will of Thomas F. Potter and the disposition of a corpus or principal fund in which Alice Potter Lippincott, one of the testator's daughters, had a life interest. She is now deceased, and the precise question is whether the fund in which, by the residuary clause, she had a life interest, is to be equally divided between a brother, William Hubley Potter, and a sister, Elizabeth Ashhurst, the complainant, who survived Alice Lippincott, as the persons solely entitled to the fund, or whether the children of a brother, John Potter, who died after the testator and before his sister,

Alice Lippincott, are also entitled to share in the fund. The fund is now in the Court of Chancery, which is administering the trust throug Hugh H. Hamill, esquire, and the complainant, Mrs. Ashhurst, files this bill, praying payment of one-half of the fund to her, making defendants to the bill Willliam Hubley Potter, the surviving brother, and also the children of John Potter, the deceased brother, who claim one-third of the fund as vested in their father on the death of the testator, and therefore passing to them. The husband of Alice Lippincott and the assignees of William Hubley Potter are also parties.

The portions of the will which are material to the decision of the case are as follows:

"Fourth. I give and bequeath unto my executors hereinafter named, and the survivors or survivor of them, the sum of fifty thousand dollars, in trust, nevertheless, and for the use of my son, James Potter, in order to put him upon a footing of equality with my other children, for whom provision has been made by the will of their grandfather, the said sum of fifty thousand dollars to be paid to him when he arrives at the age of twenty-one, the interest, in the meantime, or so much thereof as may be necessary for that purpose, to be applied to his education and support.

"Fifth. All the rest and residue of my estate, real and personal, wherever it may be situated, and of whatever it may consist, I give and devise unto my said executors, and the survivors or survivor of them, in trust, nevertheless, and for the use of my children John Potter, William Hubley Potter, Elizabeth Potter, Alice Potter and James Potter, and to be equally divided between them, share and share alike, the shares of my said sons to be paid to them respectively as they attain to the age of twenty-one, the interest, in the meantime, or so much thereof as may be necessary for that purpose, to be applied by my executors to their education and support; but in the case of my said daughters, my will is that the interest of their respective shares is to be paid to them yearly during their lives, and, in case they should marry, not to be under the control of their husbands

or liable for their debts; and upon the death of my said daughters, their respective shares are to be equally divided among their children; but if either of them die without issue, her share is to go to her surviving brothers and sister, equally to be divided between them."

Alice Potter Lippincott, one of the daughters, has died without issue, leaving her surviving one brother and her sister, and also the children of another brother, all claiming under the last clause of the fifth item.

The construction of this will seems to come within the application of the general rule of construction recognized by Chancellor McGill in Dutton *v.* Pugh, 18 Stew. 426, 431 (1889), as established by the cases there referred to. This rule is that, where there is a devise or bequest for life, followed by a devise or bequest to "survivors" at the termination of the life estate, the word "survivors," in its natural and ordinary meaning, refers to the survivors at the time of distribution; and unless, upon taking the whole will into consideration, the word is plainly used in some other sense, this ordinary and natural construction must prevail.

The special clause in controversy here is this: "If either of them (my said daughters) die without issue, her share is to go to her surviving brothers and sister, equally to be divided between them." This is the clause indicating primarily and directly who is to take a daughter's share on her death without issue, and reading this clause alone, it is, I think, impossible to say that the idea of survivorship of his daughters was not in the testator's mind, and that testator did not intend that any one of the brothers and sister who were to take, should survive the sister. If this be so, then as Lord Selborne says, in Waite *v.* Littlewood, L. R. 8 Ch. App., 70, 73 (Court of Appeals, 1872), there is undoubtedly a strong *onus probandi* cast upon anyone who would do violence to the literal meaning of that word. Counsel for the children of John Potter, admitting the general rule, and also the burden of proof cast upon these children, claim that this construction of the word "survivor" is negatived by other portions of the will,

and by the general scheme of the whole will, which, as they claim, clearly establish that the word "surviving" brothers and sister, as used here, meant "other" brothers and sister, and that therefore the estate in remainder vested in such "other" brother or sister immediately on the testator's death, without reference to his or her surviving the life tenant, Alice. And many cases have been collected in the very able and exhaustive brief of Mr. Freedley, in which courts have, on a survey of the whole will, construed the word "survivor" as meaning "other." Smith *v.* Osborne, 6 H. L. Cas. 375, and Waite *v.* Littlewood, *supra*, are illustrations of this class of cases. But these cases almost, if not entirely, without exception have been cases where the words "survivor" and "other" were equally apt and proper words, to be used in designating the children or other relatives who were the objects of the gift over. A testator, for example, after a life estate given to *one* of his children, might well in a gift over to this "surviving children" intend his "*other* children," and they would be properly designated as the children "*other*" than the life tenant. But in this case the word "other," as applied to the brothers and sister of Alice, would be a misapplication of terms, inasmuch as the previous estate was that of the life tenant herself, and not an estate in *one* of her brothers or sister. One of her brothers or sister must first be designated by the testator as the life tenant, in order that there may be other "brothers and sister." To construe "surviving" as meaning "other" brothers and sister in this case would therefore impute to the testator not simply the intention to use a word which did not express the idea of survivorship, but the intention to substitute another word, which is, strictly speaking, inappropriate.

In fact, it seems clear in this case, that in order to treat the estates limited over after the death of either daughter without issue as vested in the testator's other children from the time of the testator's death, it will be necessary either to strike from the will altogether the word "surviving," or to adopt, in lieu of this word, not the word "other," but

some form of words such as "above named," or "said," or their equivalent. Either of these methods of construction altogether eliminate from the direct primary bequest to the surviving brothers and sister, not only the word "surviving," but also the whole idea of survivorship of his daughter, which seems clearly to have been in the testator's mind in designating the objects of the gift over, and neither of them should be adopted in the absence of clear and controlling expressions in other portions of the will.

Counsel urge very strongly that unless this word "surviving" is read as "other" or "other named" brothers and sister there must be an intestacy as to his corpus, because the bequest over being "to her surviving brothers and sister," and there being but one brother surviving her, the clause of the will cannot be literally construed and an intestacy must result. But, in the first place, it seems to me that the gift to surviving brothers must naturally be taken as including all or any surviving brother, just as a gift to surviving children would naturally include a single surviving child as one of the objects of bounty. I therefore read this clause as certainly reaching a surviving brother and sister. Whether it can also be read surviving brother or sister in order to save what is claimed to be a possible intestacy hereafter as to Mrs. Ashhurst's share if a literal interpretation of the clause is insisted on, need not now be considered. For, as it seems to me, counsel, in reference to the occurrence of intestacy under any construction of this clause, overlooks the fact that by the order and arrangement of the devises in the residuary clause an intestacy is provided against. The testator first vests in his daughters an absolute ownership of their shares of the same character as the ownership of the sons in their shares, and the subsequent clauses limiting the terms of this gift to a life interest in the daughters, with a bequest over, will take effect only so far as they fairly extend to control the previous gift of absolute ownership. So far as they do not extend or apply, by any fair or reasonable construction of the whole will, then the previous absolute devises or bequests will remain

unaffected by the subsequent limitations. In this respect this will differs from those in which the terms of the limitation over were the only portions of the will applicable to the disposition of the estate. In such cases the construction of the will rests, to some extent, on the presumption against intestacy.

There remains to be noticed the argument that the general scheme of the will shows an intention to establish equality among the testator's children, and that a construction of that part of the residuary clause now in question, which includes the children of a deceased (child) from participation in the estate limited over, is opposed to this idea of equality. This argument, as applied to the present dispute, seems to me to beg the very question in issue. So far as relates to the original share of the residuary estate the brothers are put on a basis of equality, both as to shares and extent of estate, but the sister's original share, although an equal share in amount with that of the brothers, is made unequal in extent, by being limited to a life interest. The estate in remainder, in the share given to the sisters, is a new subject of disposition, as to which the testator has disclosed no intention whatever, except by the clause now in dispute. This clause gives the remainder as he might well have intended to give it, to the surviving brothers and sister of a daughter dying without issue and without reference to the children of a deceased brother. Nowhere in the will have the children of the sons been mentioned as objects of the testator's bounty, and as the words of the limitation over in their natural construction exclude these children, the theory that they must be so construed as to include them in order to effectuate a supposed intention of the testator to equalize the brothers and their respective children, as to this share, seems to me to be without foundation.

I will therefore advise a decree that, under the will, the surviving brother and sister take equal shares in the funds so limited over, to the exclusion of the children of John Potter.

This will not include any portion of the fund which Alice Potter Lippincott was entitled to receive as her one-fifth share in the estate of her brother, James Potter, who died after testator's death and in her lifetime. This one-fifth she held absolutely, and, unless otherwise disposed of by her will, goes to her husband, the defendant J. D. Lippincott, as executor of his wife. The terms of this will are not set out in the pleadings. As a portion of the interest of William H. Potter, in the estate now in dispute, has been assigned in trust, and the other defendants are interested, the form of decree should be settled on notice.