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1899

Received of the Treasurer of the
Board of Directors of the
City of New York
the sum of \$100.00
for the year ending
December 31, 1899

Witness my hand and seal
this 1st day of January
1900

Mayor of the City of New York

City of New York

By _____
Deputy Mayor

Bill of Complaint.

(Filed May 9, 1930.)

In Chancery of New Jersey

10

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

The complainant, Annie Fink, of the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows that:

1. She is in the peaceable possession of the following described lands and premises and claims to own the same:

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FIRST TRACT: ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, in Block number two hundred and forty-seven (247) as said block is laid down on a certain map made by Joseph F. Mangin, entitled "A map of that part of the town of Jersey commonly called Aharsimus," filed in the clerk's office of the county of Bergen, A. D. 1804, which said lot is known as number Twelve (12) in said block and described as follows: BEGINNING at the northerly side of South Sixth (now Third) street at a point distant one hundred and seventy-five (175) feet westerly from the northwesterly corner of said street and Monmouth street, thence running northerly and parallel with Monmouth street one hundred (100) feet; thence westerly and parallel with Third Street Twenty-five (25)

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Bill of Complaint.

feet; thence southerly parallel with Monmouth street one hundred (100) feet to the northerly side of Third Street; thence easterly along the northerly side of Third street, twenty-five (25) feet to the place of beginning. The said premises are now known as Lot number 10, in City Block 387, in the City of Jersey City aforesaid, and by the street numbering as 340 Third Street.

SECOND TRACT: ALL that certain piece or parcel of land and premises, situate, lying and being in the City of Jersey City, County of Hudson, and State of New Jersey, bounded and described as follows, to wit: BEGINNING at a point on the northerly side of Sussex Street, distant one hundred and sixty-six (166) feet and eight (8) inches westerly from the corner formed by the intersection of the westerly line of Warren Street with the northerly line of Sussex Street; thence northerly parallel with Warren Street, one hundred (100) feet to the center of the block; thence westerly, parallel with Sussex Street, sixteen (16) feet and eight (8) inches; thence southerly, parallel with Warren Street, one hundred (100) feet to the northerly line of Sussex Street; thence easterly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the point or place of beginning. The northerly and southerly courses run partly through the centre of party walls. The said premises are now known as Lot L, in City Block 133, in Jersey City aforesaid, and by the street numbering as 134 Sussex Street.

Bill of Complaint.

THIRD TRACT: ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, with the dwelling house thereon erected, formerly known as street number 10 Henderson Place, being the tenth house in the row on the northerly side of Sussex Street easterly from the northeasterly corner of Sussex and Van Vorst Streets, and more particularly described as follows, to wit: BEGINNING at a point on the northerly side of Sussex Street distant one hundred and fifty (150) feet and four (4) inches easterly from the northeasterly corner of Sussex and Van Vorst Streets, thence running northerly to, through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining westerly thereto, one hundred (100) feet; thence easterly, parallel with Sussex Street sixteen (16) feet and eight (8) inches; thence southerly to, through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining easterly thereto one hundred (100) feet to the northerly line of Sussex Street; thence westerly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the place of beginning. The said premises are now known as Lot P, in City Block 133, in Jersey City aforesaid, and by the street numbering as 142 Sussex Street.

2. The aforesaid premises were purchased by Louisa Fink, who died seized of the same on or

Bill of Complaint.

about the first day of June, in the year of our Lord one thousand nine hundred and one, leaving a last will and testament whereof a true copy is hereto annexed and marked Schedule "A"; and said last will and testament was duly admitted to probate
10 on or about the seventeenth day of June, one thousand nine hundred and one, by the Surrogate of Hudson County, and the aforesaid Louisa Fink, dying seized of the aforesaid lands and premises, left her surviving her son, George Fink, who is named in the said last will and testament, and her son, Frederick Poths, named therein, who predeceased the said George Fink, leaving a last will and testament in which he gave, devised and bequeathed his estate to Charlotte Kall, as this complainant is informed and believes.
20

3. The aforesaid George Fink named in the said last will and testament of said Louisa Fink, departed this life at Jersey City, New Jersey, on or about the third day of October, nineteen hundred and twenty-six, leaving a last will and testament, wherein and whereby he devised all his estate, both real and personal, unto the complainant, which said last will and testament has been
30 duly admitted to probate by the Surrogate of Hudson County.

4. The complainant has ever since the death of her husband, the aforesaid George Fink, been and now is in the peaceable possession of the lands and premises hereinabove described in paragraph one, whereof the said Louisa Fink died seized as aforesaid, and the complainant claims to own the same in fee simple.

40 5. The aforesaid Charlotte Kall, to the best of complainant's knowledge, information and belief

Bill of Complaint.

is deceased, and prior to her death executed a last will and testament, which was duly probated, as complainant believes, in the State of New York; and the said Charlotte Kall by the said last will and testament devised her estate to her children, namely: to a daughter, Olga Kall Harder, who is the wife of Julius Harder; to her son, William F. Kall, who is married but whose wife's name is unknown to the complainant; to her son, George Kall, who is married but whose wife's name is unknown to the complainant; to her son, Henry Kall, who is married but whose wife's name is unknown to complainant; to her son, Frank Kall, who is married and whose wife's name is Elizabeth Kall; and to her son, Frederick Kall, who has died since the death of said Charlotte Kall, and who left him surviving his widow, whose name is unknown to the complainant except that she is the wife of Frank Muller; and the said Frederick Kall also left him surviving several children, but whether or not he left a last will and testament the complainant knows not.

6. The title in fee simple of the complainant to the lands and premises hereinbefore described, or some part thereof, is denied and disputed by the heirs, devisees and personal representatives of Frederick Poths, and their or some of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest, by the heirs, devisees and personal representatives of Charlotte Kall, and their or some of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest, by the aforesaid Olga Kall Harder and Julius Harder, her husband, by the aforesaid William F. Kall and his wife, Mrs. William F. Kall, by the aforesaid

Bill of Complaint.

George Kall and his wife, Mrs. George Kall, by the aforesaid Henry Kall and his wife, Mrs. Henry Kall, by the aforesaid Frank Kall and his wife, Elizabeth Kall, by the heirs, devisees and personal representatives of the aforesaid Frederick Kall, and their or some of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest, and by the aforesaid Mrs. Frank Muller, widow of the aforesaid Frederick Kall, and by Frank Muller, her present husband, all of whom are the defendants in this suit and who claim or are claimed or reputed to own the aforesaid lands and premises or some part therein; and no suit or action of any kind whatsoever is pending to enforce or test the validity of such title or claim, and the complainant charges that such claims so made by the said defendants, or in their behalf, are utterly without foundation, unjust and vexatious.

7. The complainant is informed and believes that the said Olga Kall Harder and her husband, Julius Harder, reside on Nelson Avenue, in Bayside, Long Island, New York; the aforesaid William F. Kall and his wife, Mrs. William F. Kall, reside on Warburton Avenue, Bayside, Long Island, New York; the aforesaid George Kall, and his wife, Mrs. George Kall, reside in the Borough of the Bronx, in the City, County and State of New York; the aforesaid Henry Kall and his wife, Mrs. Henry Kall, reside at Babylon, Long Island, in the State of New York; the aforesaid Frank Kall and his wife, Elizabeth Kall, reside at Bridgeport, in the State of Connecticut; the aforesaid Frank Muller and his wife, Mrs. Frank Muller, reside at Bayside, Long Island, in the State of New York; and the complainant is further advised and

Bill of Complaint.

believes that the children of the aforesaid Frederick Kall reside at Bayside, Long Island, in the State of New York, and that all of the aforesaid parties are proper parties defendant to this bill of complaint, but they are out of the State of New Jersey and cannot upon due inquiry be found therein, and the complainant after diligent and careful inquiry has been unable to ascertain the names and addresses of the heirs, devisees or personal representatives, or such of them as may be proper parties defendant to this cause, of the aforesaid Frederick Poths, Charlotte Kall and Frederick Kall, except as hereinabove set forth and that she is informed and believes that Julius Harder aforesaid is the executor of the last will and testament of the said Charlotte Kall.

8. The title in fee simple of the complainant to the aforesaid lands is denied and disputed by the heirs, devisees and personal representatives of the aforesaid Frederick Poths, Charlotte Kall and Frederick Kall, or their heirs, devisees and personal representatives claim or are claimed to own the same, and are said or reputed to have some title or interest in the aforesaid lands or some part thereof.

9. No suit or action of any kind whatsoever is pending to enforce or test the validity of the title or claim of the said heirs, devisees and personal representatives of the said Frederick Poths, Charlotte Kall and Frederick Kall, or any or either of them, to the aforesaid lands, and the complainant charges that such claims so made by the said defendants or either or some of them, are utterly without foundation, unjust and vexatious, and complainant hereby calls upon the said defend-

Bill of Complaint.

ants, and the heirs, devisees and personal representatives of the said Frederick Poths, Charlotte Kall, and said Frederick Kall, to set forth and specify their titles and claims to the said lands and premises or any part thereof, and how and
 10 by what instruments the same are derived or created.

10. The aforesaid defendants, Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the un-
 20 known heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, or some of them, deny and dispute the title of the complainant to the aforesaid lands and premises.

Complainant is without adequate remedy in the courts of law, and therefore prays—

1. That the said Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, who are defendants to this suit, may answer this bill of complaint and each statement therein made.
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2. That the aforesaid defendants may particularly answer and set forth exactly what title or claim to said lands or any part thereof, or any
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Bill of Complaint.

interest therein, they or any of them, make or claim, and to what part or what interest, and how or by what instrument such title or claim is derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that the complainant may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void; and that the complainant may have such other or further relief in the premises as the nature of the case may require and as she shall be entitled to, pursuant to the statutes in such case made and provided. 10 20

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

JOHN F. GOUGH,
Solicitor and Of Counsel
with the Complainant. 30

Schedule A.

IN THE NAME OF GOD, AMEN.

10 I, Louisa Fink, widow, of number 134 Sussex Street, Jersey City, New Jersey, being of sound and disposing mind do make, publish and declare this to be my last will and testament, hereby revoking any and all former wills by me at any time made in manner following, namely:

First—I direct that all my just debts and funeral expenses be paid by my executor hereinafter named as soon as conveniently may be after my decease.

20 *Second*—I give, devise and bequeath to my sons Frederick Poths and George Fink all my estate, both real and personal and appoint my son George Fink as sole executor and trustee to collect the rents, issues and profits and income of all my estate, both real and personal and divide the same equally between my sons Frederick Poths and George Fink. Should my son Frederick Poths predecease my son George Fink then his entire share is to fall to my son George Fink but should my son George Fink predecease his wife, Annie Fink, then his share is to fall to the said Annie Fink, but
30 should both my son George Fink and his wife Annie Fink, predecease my son Frederick Poths, then the whole of my estate will fall to my son Frederick Poths and however the case may be the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death.

Third—From and after the death of my said sons Frederick Poths and George Fink and the said Annie Fink, I give and bequeath all the rest of my estate, both real and personal to the children
40 of my son George Fink, if there be any, or their lawful issue.

Fourth—I hereby make, constitute and appoint

*Affidavit of Inquiry of John F. Gough Annexed to
Bill of Complaint.*

my son George Fink sole executor of this my last will and testament.

Fifth—I specially direct that the above named executor, my son George Fink shall be exempt from giving any bond for the faithful discharge of his duty. 10

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of June in the year One Thousand Eight Hundred and Ninety-seven.

LOUISE FINK (L. S.)

Signed, sealed, published and declared by the Testatrix, Louisa Fink to be her last will and testament in the presence of us who were present at the same time and subscribed our names as witnesses, in the presence of the testatrix and each other at her request. 20

Minnie Schneider 134 Sussex Street
Johanna Wessels 142 Sussex Street

Affidavit of Inquiry of John F. Gough.

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA KALL HARDER, *et al.*,
Defendants.

On Bill, etc.

30

State of New Jersey, }
County of Hudson, } ss.:

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JOHN F. GOUGH, being duly sworn according to law upon his oath deposes and says:

*Affidavit of Inquiry of John F. Gough Annexed to
Bill of Complaint.*

1. I am the solicitor of the complainant in this cause.

10 2. The heirs, devisees or personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, are proper parties defendant to the foregoing bill of complaint.

20 3. I have made diligent and careful inquiry to ascertain who are the heirs, devisees and personal representatives of the foregoing named persons, and I have been unable to ascertain the names and addresses of their heirs, devisees or personal representatives, or such of them as may be parties defendant to the foregoing bill of complaint, except as therein set forth, and the gist of that information was furnished to me by Julius Harder therein named, who stated to me that he had been the executor of the last will and testament of Charlotte Kall, deceased, and who furnished to me the information in the bill of complaint set forth as to the descendants of Charlotte Kall and of Frederick Kall, deceased.

30 I made due inquiry of him for the Christian names of the wives of William F. Kall, George Kall, Henry Kall, and the widow of Frederick Kall, who is now Mrs. Frank Muller, and I could not ascertain from said Julius Harder what their Christian names are, as he stated that he had forgotten them.

JOHN F. GOUGH.

Sworn to and subscribed before }
me at Jersey City, N. J., this }
8th day of May, 1930. }

40

REYNIER J. WORTENDYKE,
Master in Chancery
of New Jersey.

Affidavit of Non-Residence of Defendants.

(Filed May 21, 1930.)

New Jersey, Hudson County, ss.:

THOMAS J. PRIOR, Under Sheriff of Hudson County, being duly sworn, on his oath saith that he has inquired for Olga Kall Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, named in the annexed process for the purpose of serving them therewith, and has not been able to find them in said County, and this deponent is credibly informed and verily believes that they cannot be found in this State.

THOMAS J. PRIOR,
Under Sheriff

Subscribed and sworn to this }
15th day of May, 1930, at }
Jersey City, before me, }

THOMAS ENRIGHT,
Notary Public, N. J.

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Statutory Ticket.

(Filed May 21, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between ANNIE FINK, <i>Complainant,</i> and OLGA KALL HARDER, <i>et als.</i>, <i>Defendants.</i>	} D 79-167. } On Bill to Quiet } Title. } Ticket.
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20 To: OLGA KALL HARDER, JULIUS HARDER, Individu-
 ally and as executor of the last will and testa-
 ment of Charlotte Kall, deceased, William F.
 Kall, Mrs. William F. Kall, George Kall, Mrs.
 George Kall, Henry Kall, Mrs. Henry Kall,
 Frank Kall, Elizabeth Kall, Frank Muller,
 Mrs. Frank Muller and the unknown heirs,
 devisees and personal representatives of
 Frederick Poths, Charlotte Kall and Fred-
 erick Kall, defendants.

SIRS and MESDAMES:

30 The bill of complaint in the above stated cause
 is filed to settle the title of Annie Fink, in and to
 All those three certain tracts, lots of lands and
 premises described as follows:

FIRST TRACT (as described in bill of com-
 plaint, p. 1).

SECOND TRACT (as described in bill of com-
 plaint, p. 2).

40 THIRD TRACT (as described in bill of com-
 plaint, p. 3).

Subpoena to Answer.

The aforesaid Annie Fink claims to be the owner in fee simple of the aforesaid premises and you are made a defendant to the bill of complaint in said cause; and if you claim any title or interest in or encumbrance upon said lands, you are required to answer said bill of complaint, but not otherwise.

10

JOHN F. GOUGH,
Solr. of Complt.

Subpoena to Answer.

(Filed May 21, 1930.)

NEW JERSEY; to wit:—The State of New Jersey to Olga Kall Harder, Julius [L. S.] Harder, individually and as executor of the last will and testament of Charlotte Kall deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall.

20

GREETING; Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Annie Fink to be relieved touching the matter therein contained.

30

THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said Court at Trenton, on or before the expiration of twenty days from and after the twenty-fourth day of May, 1930, and in default thereof such order or decree

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Subpoena to Answer.

will be made against you as the Court shall think equitable and just.

10 WITNESS his honor, Edwin Robert Walker, Chancellor of our said State, at Trenton, the fourteenth day of May in the year of our Lord one thousand nine hundred and thirty.

FERD GARRETSON,
Clerk.

JOHN F. GOUGH,
Sol'r

May 15th 1930

20 This writ returned *non est* as to the defendants, Olga Kall Harder, individually, and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall. See affidavit annexed.

30 William V. O'Driscoll, Sheriff.
By Thomas J. Prior, Under Sheriff.

Order of Publication.

(Filed June 3, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA KALL HARDER, *et al.*,
Defendants.

D 79-167
On Bill, etc.

10

The complainant having filed her bill of complaint affecting the title to lands mentioned and described, as follows:

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FIRST TRACT.

A plot on the northerly side of Third Street, being twenty-five (25) feet by one hundred (100) feet, known as Lot number 10, in City Block 387, in the City of Jersey City, and by the street numbering as 340 Third Street.

SECOND TRACT.

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A plot on the northerly side of Sussex Street, being sixteen feet eight inches (16 feet 8 inches) by one hundred (100) feet, known as Lot L, in City Block 133, in the City of Jersey City, and the street numbering as 134 Sussex Street.

THIRD TRACT.

A plot on the northerly side of Sussex Street, being sixteen feet eight inches (16 feet 8 inches) by one hundred (100) feet, known as Lot P, in

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Order of Publication.

City Block 133, in the City of Jersey City, and the street numbering as 142 Sussex Street.

10 Process of subpoena having been issued and returned according to law, and it appearing that none of the defendants can be found in this state, and it further appearing by the allegations of said bill of complaint, duly verified as required by law, that Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and
20 the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, cannot, upon due inquiry, be found in this state, and that process cannot be served upon them within this state and that all of the foregoing persons named and the heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall are proper parties defendants;

30 And it further appearing that the complainant after diligent and careful inquiry therefor made as in case of absent defendants, is unable to ascertain the names and residences of the heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, or such of them as may be proper parties defendants to the said bill of complaint;

40 It is thereupon, on this 3rd day of June, 1930, ORDERED that Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F.

Order of Publication.

Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, appear and answer complainant's bill of complaint on or before the 4th day of August, 1930, or that, in default thereof, such decree be made against them as the Chancellor shall deem just and equitable; 10

And it is further ORDERED that notice of this order as prescribed by law and the rules of this court entitled in the court only and not in the cause, and containing the aforesaid descriptions of the said land, addressed to the said defendants be served personally upon each of them within fifteen days from the date hereof, by the delivery of copies thereof to them or by publishing the same in the Jersey Journal, one of the public newspapers printed and published in the City of Jersey City in this state, for four times, during four consecutive calendar weeks, at least once in each week, and in case of such publication, that a copy of such notice be mailed within said time to the said Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, prepaid, directed to them at the post office nearest their respective residences or the post 20 30 40

Order of Publication.

office at which they usually receive their letters,
or to the last known post office at which they re-
ceived their letters, unless such residence or post
office be unknown and cannot be ascertained upon
making the inquiries prescribed by law and the
10 rules of this court, and that the said notice shall
within fifteen days of the date hereof be posted
in three conspicuous places upon the said lands
and premises.

E. R. WALKER,
C.

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Proof of Mailing and Notice of Publication.

(Filed August 13, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,

Complainant,

and

OLGA KALL HARDER, *et als.*,

Defendants.

D 79-167.

On Bill, etc.

10

State of New Jersey, }
County of Hudson, } ss.:

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JOHN F. GOUGH, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the solicitor of the complainant, and the person actually intrusted with the conduct and management of this cause.

2. I have, in good faith, made diligent and careful inquiry, in the manner required by the rules of this court, and in every other manner that I suppose would probably give information thereof, if the same could be had, for the purpose of ascertaining the residence and post office addresses of Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte

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Proof of Mailing and Notice of Publication.

Kall and Frederick Kall, absent defendants in the above entitled cause, and am credibly informed, in such a manner that I believe it to be true, that the following are the residences and the post office addresses of the said defendants:

10

NAMES

ADDRESSES

Mr. Julius Harder, Individually and as executor of the last will and testament of Charlotte Kall, deceased

Nelson Avenue,
Bayside, Long Island,
N. Y.

Mrs. Olga Kall Harder

Nelson Avenue,
Bayside, Long Island,
N. Y.

20

Mr. William F. Kall

38-02 Linwood Avenue,
Bayside, Long Island,
N. Y.

Mrs. William F. (May)
Kall

38-02 Linwood Avenue,
Bayside, Long Island,
N. Y.

Mr. Henry Kall

P. O. Box 181
Babylon, Long Island,
N. Y.

30

Mrs. Henry Kall

P. O. Box 181
Babylon, Long Island,
N. Y.

Mrs. Frank (Otilie)
Muller

Florence Avenue near
Bradish Avenue,
Bayside, Long Island,
N. Y.

Mr. Frank Muller

Florence Avenue near
Bradish Avenue,
Bayside, Long Island,
N. Y.

40

Mr. Frank Kall

1256 Stratford Avenue,
Stratford, Connecticut

Proof of Mailing and Notice of Publication.

NAMES	ADDRESSES	
Mrs. Frank (Elizabeth) Kall	1256 Stratford Avenue, Stratford, Connecticut	
Mr. George Kall	1966 Valentine Avenue, Bronx, N. Y.	10
Mrs. George (Mary) Kall	1966 Valentine Avenue, Bronx, N. Y.	

3. On Thursday, June 12, 1930, I placed in the U. S. Mail Chute on the 5th floor of the Commercial Trust Company Building, 15 Exchange Place, Jersey City, New Jersey, a letter directed to each of the following defendants:

NAMES	ADDRESSES	
Mr. Julius Harder, Individually and as executor of the last will and testament of Charlotte Kall, deceased	Nelson Avenue, Bayside, Long Island, N. Y.	20
Mrs. Olga Kall Harder	Nelson Avenue, Bayside, Long Island, N. Y.	
Mr. William F. Kall	38-02 Linwood Avenue, Bayside, Long Island, N. Y.	30
Mrs. William F. (May) Kall	38-02 Linwood Avenue, Bayside, Long Island, N. Y.	
Mr. Henry Kall	P. O. Box 181 Babylon, Long Island, N. Y.	
Mrs. Henry Kall	P. O. Box 181 Babylon, Long Island, N. Y.	

Proof of Mailing and Notice of Publication.

	NAMES	ADDRESSES
	Mr. Frank Muller	Florence Avenue near Bradish Avenue, Bayside, Long Island, N. Y.
10	Mrs. Frank (Ottile) Muller	Florence Avenue near Bradish Avenue, Bayside, Long Island, N. Y.
	Mr. Frank Kall	1256 Stratford Avenue, Stratford, Connecticut
	Mrs. Frank (Elizabeth) Kall	1256 Stratford Avenue, Stratford, Connecticut
	Mr. George Kall	Bronx, N. Y.
20	Mrs. George Kall	Bronx, N. Y.

And on Friday, June 13, 1930, I placed in the U. S. Mail Chute on the 5th floor of the Commercial Trust Company Building, 15 Exchange Place, Jersey City, New Jersey, a letter directed to each of the following defendants:

	NAMES	ADDRESSES
	Mr. George Kall	1966 Valentine Avenue, Bronx, New York
30	Mrs. George (Mary) Kall	1966 Valentine Avenue, Bronx, New York

Upon all of the foregoing letters the postage was fully prepaid and each letter contained a copy of the notice hereto annexed, marked Schedule A.

4. In making all of the foregoing inquiries, I stated to the person of whom they were made that this suit had been commenced against the persons inquired for, and that the object of the inquiry was to give them notice of such suit, that they

Schedule A Annexed to Proof of Mailing.

might appear and defend it. In all inquiries made by me by letter I enclosed a proper postage stamp for the return of an answer.

5. The information obtained was given me mainly by the defendants, Julius Harder, Individually and as executor of the last will and testament of Charlotte Kall, deceased, and his wife, Olga Kall Harder.

10

JOHN F. GOUGH.

Sworn to and subscribed before }
me, at Jersey City, this 12th }
day of August, 1930. }

ELSIE B. MACCRACKEN,
Master in Chancery
of New Jersey.

20

Schedule A.

IN CHANCERY OF NEW JERSEY.

To Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased; William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and to Frederick Poths, Charlotte Kall and Frederick Kall, and their unknown heirs, devisees and personal representatives:

30

By virtue of an order of the Court of Chancery of New Jersey, made on the 3rd day of June, 1930, wherein Annie Fink is complainant and you are defendants, you are required to appear and answer the bill of complaint of said complainant, on or before the 4th day of August, 1930, or the

40

Schedule A Annexed to Proof of Mailing.

said bill will be taken as confessed against you and such decree be made as the Chancellor shall think equitable and just.

10 The said bill is filed to compel the determination of claims and to quiet the title to the following described lands and premises situated in Jersey City, Hudson County, New Jersey, of which the complainant claims to be the owner:

FIRST TRACT

20 A plot on the northerly side of Third Street, being twenty-five (25) feet by one hundred (100) feet, known as Lot number 10, in City Block 387, in the City of Jersey City, and by the street numbering as 340 Third Street.

SECOND TRACT

A plot on the northerly side of Sussex Street, being sixteen feet eight inches (16 feet and 8 inches) by one hundred (100) feet, known as Lot L, in City Block 133, in the City of Jersey City, and the street numbering as 134 Sussex Street.

THIRD TRACT

30 A plot on the northerly side of Sussex Street, being sixteen feet and eight inches (16 feet, 8 inches) by one hundred (100) feet, known as Lot P, in City Block 133, in the City of Jersey City, and the street numbering as 142 Sussex Street.

You are hereby notified that you are required to answer the bill if you claim any title, interest

Schedule A Annexed to Proof of Mailing.

in, or encumbrances upon the said lands, but not otherwise.

Dated, June 3, 1930.

JOHN F. GOUGH,
Solicitor of and of Counsel
with Complainant,
15 Exchange Place,
Jersey City, N. J.

10

ju 11-law-4w—W—\$23.94.

State of New Jersey, }
County of Hudson, } ss.:

20

HAROLD MELTZER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a clerk in the law office of John F. Gough, Esq., at 15 Exchange Place, Jersey City, N. J.

2. On June 13, 1930, in the forenoon, I posted three copies of notice, annexed hereto and marked schedule A, on each of the premises described in the aforesaid notice.

3. On the premises 340 Third Street, Jersey City, I posted one in the entrance to the hallway, one in the entrance to the store and one on the window of the store front.

30

4. On the premises 134 Sussex Street, Jersey City, I posted one on the front door, one on the vestibule door, and one on the tree growing on the premises.

5. On the premises 142 Sussex Street, Jersey City, I posted one on the front door, one on the

40

Schedule A Annexed to Proof of Mailing.

vestibule door and one on the fence in front of
the premises.

HAROLD MELTZER.

10 Sworn to and subscribed before }
me, at Jersey City this 12th }
day of August, 1930.

ELSIE B. MACCRACKEN,
Master in Chancery of New Jersey.

20 State of New Jersey, }
County of Hudson, } ss.:

ELIZABETH M. SOLT, being duly sworn, according
to law, upon her oath saith that she is the Book-
keeper of The Jersey Journal, a newspaper
printed and published in Jersey City, County and
State aforesaid, and that a notice of which the
annexed is a true copy, was published in said
newspaper for four weeks, four times, succes-
sively, at least once in each week, the first pub-
30 lication being on the 11th day of June, 1930, and
continued thereafter on June 18th, 25th-July 2,
1930.

ELIZABETH M. SOLT.

Sworn and subscribed before me this }
3rd day of July, A. D. 1930. }

ANNA E. BEAL,
Notary Public, N. J.

Answer of Defendants.

(Filed September 11, 1930, by Consent of
Complainant.)

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA KALL HARDER, *et als.,*
Defendants.

D 79/167

10

The defendants, Olga Harder, Julius Harder, individually and as executor of Last Will and Testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, his wife, George Kall and Mrs. George Kall, his wife, Henry Kall and Mrs. Henry Kall, his wife, Frank Kall and Elizabeth Kall, his wife, Frank Muller and Mrs. Frank Muller, his wife and Ottilie Muller, answering the bill of complaint say that:

20

1. Paragraph 1 is admitted except that the defendants have no knowledge or information sufficient to form a belief as to any claim of ownership of the complainant.

30

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted, except the defendants have no knowledge or information sufficient to form a belief as to any claim of ownership of the complainant.

40

5. Paragraph 5 is admitted.

Answer of Defendants.

6. Paragraph 6 is denied, except that the defendants admit that they deny and dispute the title of the complainant to the said lands as the heir, devisee and personal representative of Frederick Poths, now deceased.

10 7. Defendants allege that under the terms of the last will and testament of Louisa Fink, deceased, the said Frederick Poths having predeceased the said George Fink and the said George Fink having predeceased the said Annie Fink, the said Annie Fink became entitled to the issues, rents and income of the entire estate of the said Louisa Fink, deceased, including the property described in the bill of complaint herein, for her life
20 only and under the terms of said will the following described property will descend to the heirs of the said Frederick Poths, by reason of the fact that the said George Fink died without lawful issue and therefore would not take the said estate under provision Third of the said will, and for the reasons aforesaid the said Louisa Fink, deceased, died intestate as to her entire estate subject to the life estate thereon of the said Annie Fink:

30 First Tract: All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, in block number two hundred and forty-seven (247) as said block is laid down on a certain map made by Joseph F. Mangin, entitled "A map of that part of the town of
40 Jersey commonly called Aharsimus" filed in the Clerk's office of the county of Ber-

Answer of Defendants.

gen, A. D. 1804, which said lot is known as number twelve (12) in said block and described as follows: Beginning at the northerly side of South Sixth (now Third) street at a point distant one hundred and seventy-five (175) feet westerly from the northwesterly corner of said street and Monmouth Street, thence running northerly and parallel with Monmouth street one hundred (100) feet; thence westerly and parallel with Third Street twenty-five (25) feet; thence southerly parallel with Monmouth street one hundred (100) feet to the northerly side of Third Street; thence easterly along the northerly side of Third street; twenty-five (25) feet to the place of beginning. The said premises are now known as lot number 10 in City Block 387, in the City of Jersey City aforesaid, and by the street numbering as 340 Third Street.

Second Tract: All that certain piece or parcel of land and premises, situate, lying and being in the City of Jersey City, County of Hudson, and State of New Jersey, bounded and described as follows, to wit: Beginning at a point on the northerly side of Sussex Street, distant one hundred and sixty-six (166) feet and eight (8) inches westerly from the corner formed by the intersection of the westerly line of Warren Street with the northerly line of Sussex Street; thence northerly parallel with Warren Street, one hundred (100) feet to the center of the block; thence westerly, parallel with Sussex Street, sixteen (16) feet and

Answer of Defendants.

10 eight (8) inches; thence southerly, parallel with Warren Street one hundred (100) feet to the northerly line of Sussex Street; thence easterly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the point or place of beginning. The northerly and southerly courses run partly through the centre of party walls. The said premises are now known as lot L, in City Block 133, in Jersey City aforesaid, and by the street numbering as 134 Sussex Street.

20 Third Tract: All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, with the dwelling house thereon erected, formerly known as street number 10 Henderson Place, being the tenth house in the row on the northerly side of Sussex Street easterly from the northeasterly corner of Sussex and Van Vorst Streets, and more particularly described as follows: to wit: Beginning at a point on the northerly side of Sussex Street distant one hundred and fifty (150) feet and four (4) inches easterly from the northeasterly corner of Sussex and Van Vorst Streets thence running northerly to, through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining westerly thereto, one hundred (100) feet; thence easterly, parallel with Sussex Street sixteen (16) feet and eight (8) inches; thence southerly to, through and beyond a party wall standing partly on the premises hereby conveyed and

30

40

Answer of Defendants.

partly on the premises next adjoining easterly thereto one hundred (100) feet to the northerly line of Sussex Street; thence westerly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the place of beginning. The said premises are now known as lot P in the City Block 133, in Jersey City aforesaid, and by the street numbering as 142 Sussex Street. 10

8. These defendants are the only living heirs of the said Louisa Fink by reason of the fact that the said George Fink left no issue as hereinbefore stated but that the said Frederick Poths died leaving him surviving a daughter, Charlotte Kall, who has since died leaving her surviving the defendants herein named. 20

9. These defendants claim that under the terms of the said last will and testament and for the reasons aforesaid they are entitled to the estate of said Louisa Fink which includes the land above described as the heirs-at-law of the said Louisa Fink, subject however, to the life interest therein of Annie Fink.

IRVING S. REEVE,
Solicitor of the Defendants. 30

Replication.

(Filed September 13, 1930.)

IN CHANCERY OF NEW JERSEY.

10

Between

ANNIE FINK,

Complainant,

and

OLGA KALL HARDER, *et als.,**Defendants.*

D 79-167.

On Bill to Quiet
Title.

Replication.

20

The complainant joins issue on the answer of
the defendants.

JOHN F. GOUGH,

Solicitor of the Complainant.

30

40

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA KALL HARDER, *et al.*,
Defendants.

On Bill, &c.

10

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Wednesday, January 21, 1931, at 10 o'clock in the forenoon, before His Honor JOHN J. FALLON, Vice-Chancellor.

20

APPEARANCES:

JOHN F. GOUGH, Esq., For the Complainant.

IRVING S. REEVE, Esq., For the Defendants.

Mr. Gough: May we have it on the record that we agree that, if in the judgment of your Honor the question of the legitimacy of Charlotte Kall is material, either party may make such application to your Honor either for the taking of further testimony or to a reference to the law court if it is permissible. Is that right?

30

Mr. Reeve: Yes, except, as I see it, I think the bill is for the construction of this will.

(Mrs.) ANNIE FINK, sworn in her own behalf testified as follows:

Direct examination by Mr. Gough:

Q. Where do you live, Mrs. Fink? A. 162 Arlington Avenue.

40

Annie Fink, direct.

Q. Did you know Louisa Fink in her lifetime?
A. Oh, yes; yes, sir.

Q. When did Louisa Fink die? A. She died in the fall of 1901.

10 Q. When Louisa Fink died did she leave any children? A. Yes, George Fink and Frederick Poths.

Q. Were those her only surviving children? A. Those were her only surviving children, yes.

Q. Had she had any other children? A. She had had years ago but they died in infancy. No, one died in about 1898 or 1897, William—

Q. William what? A. William Poths.

Q. He died in 1897 or 1898? A. Yes.

Q. Did he leave any children? A. No.

20 Q. Now, when did Frederick Poths die? A. In 1908, in January.

Q. And when did George Fink die? A. October 3, 1926.

Q. Was George Fink your husband? A. He was my husband.

Q. Now, after the death of Frederick Poths who collected the rents of the real estate that Louisa Fink had owned? A. Mr. Fink did.

30 Q. And after Mr. Fink's death who collected the rent? A. My agent who had collected it formerly.

Q. And there are no suits pending against you regarding this property? A. No.

Q. There are no suits whatever against you in regard to this property? A. Only this one here.

The Court: Who is in possession of the property?

Q. You are in possession of this property now?
A. I claim to be.

40

Annie Fink, direct.

By the Court:

Q. What do you mean by that? A. Because my mother-in-law left this property to both.

Q. I am only asking you who is in actual possession of the property.

10

By Mr. Gough:

Q. You are in actual possession of the property, are you not? A. Yes.

Q. You have tenants in all of this property? A. Yes.

Q. And they all pay you rent? A. Yes.

By the Court:

Q. What does the property consist of? A. One house in Third Street and Newark Avenue, and two houses on Sussex Street, No. 134 and 142.

20

Q. No vacant lots? A. No.

Q. How old are you? A. Seventy years.

Q. How old was your husband when he died? A. Seventy-four.

Q. How old was Frederick Poths when he died? A. Seventy-seven.

Q. Well, you said some died in infancy; whom did you mean?

30

Mr. Gough: She said some children of Louisa Fink died in infancy.

I suppose you ought to have proof. In other words, what I am concerned about is whether there was anybody left after that.

Mr. Gough: There isn't any question about that.

The Court: Well, you had better get the proof.

40

Discussion on Behalf of the Defense.

By Mr. Gough:

Q. What do you know about the infant children of Louisa Fink who died? A. What do I know about the children who died? Oh, one little girl died when she was three years old.

10 Q. How do you know that? A. From Mrs. Louisa Fink.

Q. Your mother-in-law? A. Yes.

Q. Were there any children born to George Fink? A. No children.

Q. And you have not had any children? A. No.

Q. Had he ever been married to anybody else but you? A. No.

20 Mr. Gough: That is our case, if your Honor pleases, with the admissions.

The Court: I think you had better put in formal proof of the death of these people. You can get certificates from the Bureau of Vital Statistics.

Mr. Reeve: That is all admitted.

The Court: If it is admitted I am not concerned about it.

30 Mr. Gough: That is our case. I don't think of anything else.

THE DEFENSE.

Mr. Reeve: I'm not going to take very long because I think, in the final analysis, the matter is before your Honor for construction of the will. I desire to draw the Court's attention to the fact that the will of Louisa Fink was probated in 1901, and that no steps were taken for 29 years to secure a
40 construction of this will except that Mrs. Fink took

Discussion on Behalf of the Defense.

the profits from the real estate all during that time, apparently made no effort to conceal it, and my client during the interim believed, on the death of Mrs. Fink, that they would proceed. There was a proceeding pending which I would like to supply for the record, if Mr. Gough will have no objection. In 1908 there was an attempt made to create a trust in favor of the heirs of Louisa Fink and others, on the ground that this property, recited in the bill, was originally owned by Frederick Poths. Have you any objection, Mr. Gough, to my submitting that to the court? 10

Mr. Gough: This is all new to me. It isn't set up in any answer, and I don't know of any proceeding that would be relevant here. In what court was it? 20

Mr. Reeve: There were two proceedings, one a matter in the Surrogate's Court which is still pending there, and the other proceeding was a proceeding for the appraisement of the estate of George Poths, at which Mr. Gough appeared, and at which time affidavits were taken. I simply raise the question now whether Mr. Gough will consent to it.

The Court: Whether he will consent or not, you had better produce it, and then he may object to it if he wishes to and we will see what happens. 30

Mr. Gough: It is entirely new to me. There was some proceeding in regard to some question of tax,—

Mr. Reeve: In New Jersey?

Mr. Gough: Yes. As to any other proceeding, I don't know anything about it. I don't think this is set up in any way by Mr. Reeve's answer. I don't want to foreclose myself by any failure on his part to set up what he should set up. 40

Mr. Reeve: The reason for that is that we

Discussion on Behalf of the Defense.

stumbled across the proceeding at the time. I have a copy of the record here if Mr. Gough would like to see it. If he will consent to it I would like to submit it to the Court. If he objects, I will withdraw it for the present.

10 Mr. Gough: Well, you have handed me apparently two matters here, Mr. Reeve. I am familiar with the proceeding in the matter of the appraisal of the estate of Frederick Poths, deceased, and if you want to put that in I have no objection.

Mr. Reeve: All right; I would like to put that in.

20 Mr. Gough: Except, if your Honor pleases, I don't see its materiality or its relevancy in this situation. I don't know how I can concede that without having examined it; but, subject to my examination, I will concede that there were such proceedings in the matter of the appraisal of the estate of Frederick Poths, deceased, and this is the report of Mr. Kelley, the appraiser, and this is the testimony. I do want to have a chance to examine it. But here are presented some 35 pages which I have never seen from this angle. It was years ago, if your Honor please.

The Court: The purpose, I suppose, in offering it is, primarily, to obviate formal proof.

30 Mr. Gough: I object to it if it is to take the place of competent proof.

The Court: That is what it is offered for.

Mr. Reeve: It is to bring to the attention of the Court the fact that for 29 years, although there had been litigation, the question of the construction of this will had never been brought before the Court.

40 The Court: Sometimes the parties themselves practically construe the will. There is such a

Discussion on Behalf of the Defense.

thing as "practical construction" between the parties themselves.

Mr. Reeve: Yes, I think that is what happened here. All right; I will not press that.

The Court: Are you withdrawing the offer?

Mr. Reeve: Yes. Now, if your Honor please, 10
in this will attached to the bill of complaint—

Mr. Gough: Do I understand you are not introducing any proofs?

Mr. Reeve: That's right.

The Court: Not for that particular matter?

Mr. Reeve: No proofs at all.

The Court: Then you are closing your case now as it is?

Mr. Reeve: Yes, your Honor.

Mr. Gough: Save for the stipulation we made 20
at the beginning.

Mr. Reeve: The will provides that should Frederick Poths predecease George Fink, the entire share of whatever Frederick Poths took under this will would go to George Fink, and the actual fact is that Frederick Poths did predecease George Fink. The will further provides, in the second paragraph, that should George Fink predecease his wife Annie Fink, then his share, whatever the share might be, was to go to Annie Fink; 30
and that is exactly what did happen. George did predecease his wife Annie Fink. And the last part of paragraph 2nd of the will provides as follows: "But should both my son George Fink and his wife Annie Fink predecease my son Frederick Poths, then the whole of my estate will fall to my son Frederick Poths."

The Court: But that did not happen?

Mr. Reeve: No. "—and however the case may 40
be the last survivor of the above-named beneficia-

Discussion on Behalf of the Defense.

ries will hold the whole of the estate until his or her death," referring to Frederick Poths, George Fink and Annie Fink. Now, it is our contention that Annie Fink is the last survivor of the beneficiaries referred to in paragraph 2. She will hold this estate until her death.

10 The Court: You mean she holds it only for life?

Mr. Reeve: Her life. Now, it seems, in paragraph 3rd, she goes on to say: "From and after the death of my said sons Frederick Poths and George Fink and the said Annie Fink"—in other words, all the beneficiaries of the second paragraph—she disposes of the rest of the estate to the children of her son George Fink, if there be any, or their lawful issue. It seems to me that her heirs are entitled to take on the death of Annie Fink.

20 The Court: The law does not favor intestacy, so that it will have to be shown.

(Counsel then cite cases, and it winds up by Mr. Gough handing Mr. Reeve a letter containing the citations he relies upon. Mr. Reeve is to answer these in a brief to be submitted to the court. The case is then closed.)

30

Opinion of Vice-Chancellor Fallon.

(Filed May 14, 1931.)

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA K. HARDER, *et als.*,
Defendants.

79/167.

On Bill, etc.

On Final Hearing.
Conclusions.

10

1. Testatrix by her last will and testament provided:

20

“Second—I give, devise and bequeath to my sons Frederick Poths and George Fink all my estate, both real and personal and appoint my son George Fink as sole executor and trustee to collect the rents, issues and profits and income of all my estate, both real and personal and divide the same equally between my sons Frederick Poths and George Fink. Should my son Frederick Poths predecease my son George Fink then his entire share is to fall to my son George Fink but should my son George Fink predecease his wife, Annie Fink, then his share is to fall to the said Annie Fink, but should both my son George Fink and his wife Annie Fink, predecease my son Frederick Poths, then the whole of my estate will fall to my son Frederick Poths and however the case may be the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death.

30

40

Opinion of Vice-Chancellor Fallon.

10 “Third—From and after the death of my said sons Frederick Poths and George Fink and the said Annie Fink, I give and bequeath all the rest of my estate, both real and personal to the children of my son George Fink, if there be any, or their lawful issue.”

Frederick Poths died in January, 1908. George Fink died in October, 1926, leaving him surviving his widow, the complainant herein, who, since his death, has been in possession of the lands in question and has enjoyed the rents thereof without any of the parties in interest questioning her right thereto.

20 *Held*, complainant's claim of title in *fee* is untenable. Upon the facts established in the case *sub judice* complainant will be regarded as having a life estate in the lands in question.

2. Where parties in interest have practically construed a will, and have allowed a beneficiary named therein to possess and enjoy a devise, relying upon the devisee's assumed right thereto, the parties to such practical construction may be regarded as being estopped from asserting the contrary.

30 3. In construing a will the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it.

Mr. JOHN F. GOUGH, for complainant.
Mr. IRVING S. REEVE, for defendants.

FALLON, V. C.:

40 The complainant's suit is to quiet title to real estate situate in Jersey City, and involves the construction of a will dated June 10, 1897, which was

Opinion of Vice-Chancellor Fallon.

probated in 1901. Testatrix, a widow, died June 4, 1901, leaving two children her surviving, Frederick Poths and George Fink. Poths died in January, 1908, leaving a last will and testament wherein he bequeathed and devised his estate to one Charlotte Kall, now deceased, who left a last will and testament devising her estate to her children, Olga Kall Harder, William F. Kall, George Kall, Henry Kall, Frank Kall and Frederick Kall, defendants herein. George Fink died in October, 1926, leaving a last will and testament wherein he devised his estate to the complainant, his widow. The jurisdictional requisites of a suit to quiet title are manifest in the case *sub judice*. The aforesaid will *inter alia* provides:

“Second—I give, devise and bequeath to my sons Frederick Poths and George Fink all my estate, both real and personal and appoint my son George Fink as sole executor and trustee to collect the rents, issues and profits and income of all my estate, both real and personal and divide the same equally between my sons Frederick Poths and George Fink. Should my son Frederick Poths predecease my son George Fink then his entire share is to fall to my son George Fink but should my son George Fink predecease his wife, Annie Fink, then his share is to fall to the said Annie Fink, but should both my son George Fink and his wife Annie Fink, predecease my son Frederick Poths, then the whole of my estate will fall to my son Frederick Poths and however the case may be the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death.

Opinion of Vice-Chancellor Fallon.

10 “Third—From and after the death of my said sons Frederick Poths and George Fink and the said Annie Fink, I give and bequeath all the rest of my estate, both real and personal to the children of my son George Fink, if there be any, or their lawful issue.”

20 No children were born to George Fink, and consequently the third paragraph of testatrix's will is inoperative as to the residue and remainder of the estate of testatrix. Since the death of George Fink the complainant has been in possession of the lands in question, claiming title thereto in *fee*, and has received and appropriated to her own use the rents therefrom. Complainant is seventy years of age. Her husband was seventy-four years of age at the time of his death. Frederick Poths was seventy-seven years of age at the time of his death. The complainant's claim of title in *fee* is untenable. Her right to a life estate is conceded by paragraph 7 of the answer of defendants. By having allowed complainant to remain in possession of the lands in question, and to enjoy the rents thereof since the death of her husband, without questioning her right thereto, and by their answer filed herein have

30 conceded to her a life estate, defendants practically construed the will of testatrix as entitling complainant to such life estate, and I therefore deem it unnecessary to determine herein whether such part of the language of the will which reads—“but should my son George Fink predecease his wife Annie Fink,” relates to the event of the death of George Fink in the lifetime of the testatrix, or otherwise. Where, as in the case *sub judice*, parties in interest have practically construed a will,

40 and allowed a beneficiary named therein to possess and enjoy a devise, relying upon the devisee's as-

Opinion of Vice-Chancellor Fallon.

sumed right thereto, the parties to such practical construction may be regarded as being estopped from asserting the contrary. *In re Marx*, 103 N. Y. Supp. 446. Although the second paragraph of the aforesaid will is not artistically phrased so as to create what appears to me to have been the intention of testatrix, that is, a life estate only to the several beneficiaries named therein, that she contemplated nothing more than such an estate to either of such beneficiaries is manifested, in my judgment, by the concluding words of said paragraph—"however the case may be the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death," and, by the third paragraph of the will, wherein she undertook to dispose of the residue and remainder of her estate from and after the death of the beneficiaries named in the second paragraph aforesaid. Although by emphasizing some parts of the will to the exclusion of others a different conclusion might be reached, the court cannot do so; it must read the will as a whole. See *West Side Trust Co. v. Giuliano*, 106 N. J. Eq. 475; *Jones' Exr's. v. Stites*, 19 N. J. Eq. 326. In *Johnson v. Haldane*, 95 N. J. Eq. 404, at p. 406, the court says—"In construing a will the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it."

I will advise a decree in accordance with the conclusions hereinabove expressed.

Dated, Hoboken, N. J., May 14, 1931.

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Final Decree.

(Filed September 21, 1931.)

IN CHANCERY OF NEW JERSEY.

10

Between

ANNIE FINK,

Complainant,

and

OLGA KALL HARDER, *et als.,**Defendants.*

D 79-167

On Bill &c.

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This cause coming on to be heard in the presence of John Francis Gough, Solicitor of the complainant, Annie Fink, and Irving S. Reeve, Solicitor of the defendants, Olga Kall Harder, Julius Harder, individually and as executor of the last will and testament of Charlotte Kall, deceased, William F. Kall, Mrs. William F. Kall, George Kall, Mrs. George Kall, Henry Kall, Mrs. Henry Kall, Frank Kall, Elizabeth Kall, Frank Muller, Mrs. Frank Muller, and the bill, answer, replication, proofs and exhibits, having been read and considered and the arguments of the respective counsel having been heard and considered, and it appearing that the complainant, Annie Fink, claims to own the title to the premises described in the bill of complaint in fee simple; that the complainant's suit herein was one to quiet title to certain lands and premises situate in Jersey City, New Jersey, and involved the construction of the last will and testament of Louisa Fink, dated June 10, 1897 and probated in 1901, that the testatrix, Louisa Fink, a widow, died June 4, 1901, leaving two children her surviving, Frederick Poths and George Fink, that the said Frederick

Final Decree.

Poths died in January, 1908, leaving a last will and testament wherein he bequeathed and devised his estate to one, Charlotte Kall now deceased, who died leaving a last will and testament, devising all her estate to her children, Olga Kall Harder, William F. Kall, George Kall, Henry Kall, Frank Kall and Frederick Kall, defendants herein, and that George Fink died in October, 1926, leaving a last will and testament wherein he devised his estate to the complainant, his widow, and that the jurisdictional requisites of a suit to quiet title are manifest herein. 10

And, it further appearing that the complainant's claim of title in fee simple was disputed by the defendants herein, who, in their answer filed herein, conceded complainant's right to a life estate in and to said lands and premises. 20

And it further appearing that the claim of the complainant of title in fee simple in and to said lands and premises is untenable; and that upon the proofs in this cause complainant is entitled to and will be regarded as having a life estate in the aforesaid lands and premises;

It is on this 21st day of September, 1931, ORDERED, ADJUDGED and DECREED, upon motion of Irving S. Reeve, Solicitor for and of counsel with the defendants, that the complainant Annie Fink is not entitled in fee simple to the lands and premises mentioned in the complainant's bill of complaint, hereinafter described, and that complainant's claim thereto is untenable; 30

It is further ORDERED, ADJUDGED and DECREED, that the complainant is entitled to an estate for and during the term of her natural life in and to all of the lands and premises described in said bill of complaint, to wit: 40

Final Decree.

10 FIRST TRACT: All that certain lot, tract
or parcel of land and premises, hereinafter
particularly described, situate, lying and
being in the City of Jersey City, in the
County of Hudson and State of New Jer-
sey, in Block number two hundred and
forty-seven (247) as said block is laid down
on a certain map made by Joseph F. Man-
gin entitled "A Map of that part of the town
of Jersey, commonly called Aharsimus",
filed in the Clerk's office of the county of
Bergen, A. D. 1804 which said lot is known
as number twelve (12) in said Block and
described as follows: BEGINNING at the
20 northerly side of South Sixth (now Third)
Street at a point distant one hundred and
seventy-five (175) feet westerly from the
northwesterly corner of said street and
Monmouth Street, thence running north-
erly and parallel with Monmouth Street
one hundred (100) feet; thence westerly
and parallel with Third Street twenty-five
(25) feet; thence southerly parallel with
Monmouth Street one hundred (100) feet to
30 the northerly side of Third Street; thence
easterly along the northerly side of Third
Street, twenty-five (25) feet to the place of
beginning. The said Premises are now
known as lot number 10 in City Block 387
in the City of Jersey City aforesaid and by
the street numbering as 340 Third Street.

40 SECOND TRACT: All that certain piece or
parcel of land and premises, situate, lying
and being in the City of Jersey City,
County of Hudson, and State of New Jer-

Final Decree.

sey, bounded and described as follows, to wit: BEGINNING at a point on the northerly side of Sussex Street, distant one hundred and sixty-six (166) feet and eight (8) inches westerly from the corner formed by the intersection of the westerly line of Warren Street with the northerly line of Sussex Street; thence northerly parallel with Warren Street, one hundred (100) feet to the center of the block, thence westerly, parallel with Sussex Street, sixteen (16) feet and eight (8) inches; thence southerly, parallel with Warren Street, one hundred feet to the northerly line of Sussex Street; thence easterly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the point or place of beginning. The northerly and southerly courses run partly through the centre of party walls. The said premises are now known as lot L, in City Block 133, in Jersey City, aforesaid, and by the street numbering as 134 Sussex Street.

THIRD TRACT: All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, with the dwelling house thereon erected, formerly known as street number 10 Henderson Place, being the tenth house in the row on the northerly side of Sussex Street easterly from the northeasterly corner of Sussex and Van Vorst Streets, and more particularly described as follows, to wit: BEGINNING at a point on the northerly

Final Decree.

10 side of Sussex Street distant one hundred
and fifty (150) feet and four (4) inches
easterly from the northeasterly corner of
Sussex and Van Vorst Streets, thence run-
ning northerly to, through and beyond a
party wall standing partly on the premises
hereby conveyed and partly on the prem-
ises next adjoining westerly thereto, one
hundred (100) feet; thence easterly, par-
allel with Sussex Street sixteen (16) feet
and eight (8) inches; thence southerly to,
through and beyond a party wall standing
partly on the premises hereby conveyed
and partly on the premises next adjoining
easterly thereto one hundred (100) feet to
20 the northerly line of Sussex Street; thence
westerly along the northerly line of Sussex
Street sixteen (16) feet and eight (8) inches
to the place of beginning. The said prem-
ises are now known as lot P, in City Block
133, in Jersey City aforesaid, and by the
street numbering as 142 Sussex Street", and
complainant's right, title and interest in
and to said lands and premises is hereby
determined, fixed, settled, adjudged and
30 decreed accordingly.

It is ORDERED, ADJUDGED and DECREED that the
complainant pay to the defendants their costs of
this suit to be taxed, including therein the sum
of Two hundred fifty (\$250.00) dollars as Counsel
fee which is hereby allowed to said defendants to
be paid by the complainant and to the defendants
within 10 days after service upon the complainant
or her solicitor, of a true but uncertified copy of
40 this decree and of said taxed costs; and that in
default of such payment execution issue therefor

Notice of Appeal to Court of Errors and Appeals.

according to the practice of this Court against the goods, chattels, rents, lands, tenements, hereditaments and real estate of the said complainant.

E. R. WALKER,
C. 10

JOHN J. FALLON,
V.C.

Notice of Appeal to Court of Errors and Appeals.

(Filed September 30, 1931.)

IN CHANCERY OF NEW JERSEY.

Between

ANNIE FINK,
Complainant,

and

OLGA KALL HARDER, *et als.,*
Defendants.

D 79-167

On Bill to Quiet
Title.

Notice of Appeal
of Complainant
from Final Decree,
Advised by the Honorable
John J. Fallon,
Vice Chancellor.

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The complainant, Annie Fink, hereby appeals from all and every part of the decree made and advised by the Honorable John J. Fallon, Vice-Chancellor, in this Court in the above stated cause, on the twenty-first day of September, 1931, by which it is ORDERED, ADJUDGED and DECREED, as follows:

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1. That the complainant, Annie Fink, is not entitled in fee simple to the lands and premises mentioned in the complainant's bill of complaint,

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Notice of Appeal to Court of Errors and Appeals.

hereinafter described, and that complainant's claim thereto is untenable;

- 10 2. That the complainant is entitled to an estate for and during the term of her natural life, in and to all the lands and premises described in the said bill of complaint, to wit:

20 FIRST TRACT: ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, in Block number two hundred and forty-seven (247) as said block is laid down on a certain map made by Joseph F. Mangin entitled "A Map of that part of the town of Jersey, commonly called Aharsimus", filed in the Clerk's office of the County of Bergen, A. D. 1804 which said lot is known as number twelve (12) in said Block and described as follows: BEGIN-
 30 NING at the northerly side of South Sixth (now Third) Street at a point distant one hundred and seventy-five (175) feet westerly from the northwesterly corner of said street and Monmouth Street, thence running northerly and parallel with Monmouth Street, one hundred (100) feet; thence westerly and parallel with Third Street twenty-five (25) feet; thence southerly parallel with Monmouth Street one hundred (100) feet to the northerly side of Third Street; thence easterly along the northerly side of Third Street, twenty-five (25) feet to the place of beginning. The said premises are now
 40 known as lot number 10 in City Block 387

Notice of Appeal to Court of Errors and Appeals.

in the City of Jersey City aforesaid and by the street numbering as 340 Third Street.

SECOND TRACT: ALL that certain piece or parcel of land and premises, situate, lying and being in the City of Jersey City, County of Hudson, and State of New Jersey, bounded and described as follows, to wit: BEGINNING at a point on the northerly side of Sussex Street, distant one hundred and sixty-six (166) feet and eight (8) inches westerly from the corner formed by the intersection of the westerly line of Warren Street with the northerly line of Sussex Street; thence northerly parallel with Warren Street, one hundred (100) feet to the center of the block, thence westerly, parallel with Sussex Street, sixteen (16) feet and eight (8) inches; thence southerly, parallel with Warren Street, one hundred feet to the northerly line of Sussex Street; thence easterly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the point or place of beginning. The northerly and southerly courses run partly through the centre of party walls. The said premises are now known as lot L, in City Block 133, in Jersey City, aforesaid, and by the street numbering as 134 Sussex Street.

THIRD TRACT: ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, with the dwelling house thereon erected, formerly

Notice of Appeal to Court of Errors and Appeals.

known as street number 10 Henderson Place, being the tenth house in the row on the northerly side of Sussex Street easterly from the northeasterly corner of Sussex and Van Vorst Streets, and more particularly described as follows, to wit: BEGINNING at a point on the northerly side of Sussex Street distant one hundred and fifty (150) feet and four (4) inches easterly from the northeasterly corner of Sussex and Van Vorst Streets, thence running northerly to, through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining westerly thereto, one hundred (100) feet; thence easterly, parallel with Sussex Street sixteen (16) feet and eight (8) inches; thence southerly to, through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining easterly thereto one hundred (100) feet to the northerly line of Sussex Street; thence westerly along the northerly line of Sussex Street sixteen (16) feet and eight (8) inches to the place of beginning. The said premises are now known as lot P, in City Block 133, in Jersey City aforesaid, and by the street numbering as 142 Sussex Street, and complainant's right, title and interest in and to said lands and premises is hereby determined, fixed, settled, adjudged and decreed accordingly.

3. That the complainant pay to the defendants their costs of this suit to be taxed, including therein the sum of Two Hundred Fifty (\$250.00) Dollars

Notice of Appeal to Court of Errors and Appeals.

as counsel fee which is hereby allowed to said defendants to be paid by the complainant and to the defendants within 10 days after service upon the complainant and her solicitor of a true but uncertified copy of this decree and of said taxed costs; and that in default of such payment execution issue therefor according to the practice of this Court against the goods, chattels, rents, lands, tenements, hereditaments and real estate of the said complainant, to the Court of Errors and Appeals in the last resort in all causes. 10

JOHN FRANCIS GOUGH,
Solicitor of Complainant.

I conceive there is good cause of appeal in the above stated cause. 20

Dated, September 29, 1931.

JOHN FRANCIS GOUGH,
Of Counsel with Complainant.

Service of the foregoing notice of appeal is hereby acknowledged this 3rd day of October, 1931.

IRVING S. REEVE,
Solicitor for and of Counsel 30
with all the Defendants.

Petition of Appeal.

(Filed October 7, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between

ANNIE FINK,
Complainant-Appellant,

and

OLGA KALL HARDER, *et als.*,
Defendants-Respondents.

} On Bill, etc.

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The humble petition of Annie Fink, appellant,
in the above stated cause, respectfully shows that:

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Your petitioner finds herself aggrieved by a final
decree made in the Court of Chancery, by His
Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, on the advice of Honorable
John J. Fallon, a Vice Chancellor, bearing date
the twenty-first day of September, nineteen hun-
dred and thirty-one, in a cause wherein the said
Annie Fink is complainant and Olga Kall Harder
and others respondents herein, are defendants, in
these respects, to wit:

40

1. The said decree ORDERED, ADJUDGED and
DECREED that this appellant is not entitled in fee
simple to the lands and premises described in
the said decree, and that her claim thereto is un-
tenable, but that she is entitled to an estate for
and during the term of her natural life, in and
to all the lands and premises, and her title and
interest in and to said lands and premises has
therefore been determined, fixed, settled, adjudged
and decreed accordingly; and

Petition of Appeal.

2. The said decree also ORDERED, ADJUDGED and DECREED that this appellant should pay to the respondents herein their costs of the said suit to be taxed, including therein the sum of two hundred and fifty dollars (\$250.00) as counsel fee, which was allowed to said respondents, and ordered to be paid by the appellant to the respondents, within ten days after service upon the appellant or her solicitor, of a true but uncertified copy of said decree and of said taxed costs, and that in default of such payment execution should issue therefor according to the practice of the Court of Chancery against the goods, chattels, rents, lands, tenements, hereditaments and real estate of the said appellant.

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And your petitioner humbly appeals from the said decree of the Chancellor upon the ground that the same is erroneous, for that in and by said decree it should have been ORDERED, ADJUDGED and DECREED, that the appellant, Annie Fink, is seized and entitled to an estate in fee simple, in all of the said lands and premises mentioned and described in said decree, and that respondents are entitled to no right, title, estate or interest in said lands and premises, or that the appellant, Annie Fink, is seized in fee simple of an equal undivided one-half interest in the said lands and premises, and the respondents are seized, in common, in fee simple, to the remaining undivided equal one-half part of said premises, subject to the right of the appellant, Annie Fink, to enjoy the whole of said lands and premises for and during the term of her natural life;

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And also for that in and by said decree it should not have been ORDERED, ADJUDGED and DECREED that

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Petition of Appeal.

the appellant, ANNIE FINK, should pay to the respondents their costs of said suit to be taxed, including the sum of two hundred and fifty dollars (\$250.00) as counsel fee, to be paid in the manner hereinabove set forth.

10 Your petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden; and your petitioner may have such relief in the premises as to this honorable court shall seem meet.

JOHN FRANCIS GOUGH,
Solicitor of the Complainant-Appellant.

JOHN FRANCIS GOUGH,
Of Counsel with Complainant-Appellant.

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Service was acknowledged October 15, 1931, by
Solicitor of Defendants.

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69 MAY.T.1932

New Jersey Court of Errors and Appeals

JANUARY TERM, 1932, No. 172.

MAY TERM, 1932, No. .

Between

ANNIE FINK,
Complainant-Appellant,

and

OLGA KALL HARDER, *et al.*,
Defendants-Respondents.

On Appeal from a
Decree Advised
by Vice Chan-
cellor FALLON,

BRIEF FOR ANNIE FINK, COMPLAINANT- APPELLANT.

Statement.

The bill of complaint (p. 1) sets forth that the complainant is in the peaceable possession of the lands described in the first paragraph, of which Louisa Fink died seized, on June 1, 1901, leaving a will of which a copy is annexed to the bill of complaint (p. 10), and that Louisa Fink's son, George Fink, and another son, Frederick Poths, both named in the will survived her, but that Frederick Poths predeceased the said George Fink, who died on October 3, 1926 (p. 4, lines 10-20). It also sets forth that Frederick Poths, according to the information and belief of the complainant, left a last will and testament by which he devised his estate to Charlotte Kall (p. 4, lines 15-20). It sets forth, too, that George Fink left a last will and

testament by which he devised his estate to the complainant, Annie Fink, who, since the death of George Fink, has been in the peaceable possession of the land and claims to own the same in fee simple (p. 4, lines 20-40). It then sets forth to the best of complainant's knowledge, information and belief that Charlotte Kall is deceased, and left a last will and testament whereby she devised her estate to her children, one of whom has died (p. 4, line 40, to p. 5, line 28). It sets forth, too, that the title in fee simple of the complainant is denied and disputed by the heirs, devisees and personal representatives of Frederick Poths, and the heirs, devisees and personal representatives of Charlotte Kall, and the heirs, devisees and personal representative of Frederick Kall, a deceased son of Charlotte Kall, and by the named defendants; that no suit or action is pending to enforce or test the validity of such title or claim of the defendants, and the unknown heirs, devisees or representatives, whose claims are utterly without foundation, unjust and vexatious, and that the title in fee simple of the complainant is denied and disputed by them, but that no suit or action of any kind whatsoever is pending to enforce or test the validity of the claim of said heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, but that they and the individual defendants deny and dispute the title of the complainant, who asks for an answer by the individual defendants and the unknown heirs, devisees and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall, setting forth particularly what title or claim they make (pp. 6-7-8). The complainant asks (Paragraph 2 of the prayer for relief, pp. 8-9) that by the determination and the final decree of this Court the rights of all the parties may be fixed and settled; that the complainant may be decreed to have a

perfect title, and the defendants, including the unknown heirs, devisees, etc., to have no estate in the lands that their claims decreed to be unjust, vexatious and void, and that the complainant may have other and further relief pursuant to the statutes.

The answer of the defendants (pp. 25-26-28-29) in effect, admits all the allegations in the bill of complaint, except the claim of ownership of the complainant. The defendants deny and dispute the title of the complainant to the lands, as the heir, devisee and personal representative of Frederick Poths, now deceased (p. 26, lines 1-6), and they allege that the complainant is entitled only to a life estate and that the premises descend to the heirs of Frederick Poths, because Louisa Fink died intestate as to her entire estate, subject to the life estate of Annie Fink (p. 26, lines 7-30). The defendants further set up that they are the only living heirs of the said Louisa Fink, by reason of the fact that George Fink left no issue, and allege that Frederick Poths left him surviving a daughter, Charlotte Kall, who has since died, leaving her surviving the defendants, as the heirs at law of Louisa Fink, to the lands in suit, subject, however, to the life estate of the complainant (p. 29, lines 15-30).

A formal replication was filed (p. 30).

The appellant produced proofs (pp. 31-32), but the defendants produced no proofs at all (p. 37, lines 10-20).

The appellant's proof was that Louisa Fink, the testatrix, died in the fall of 1901, leaving only two children, George Fink and Frederick Poths, surviving her; others had died in infancy, except William, who died childless in 1897, apparently before the execution of the will of his mother; Frederick Poths died in January, 1908, at the age of seventy-

seven, and George Fink on October 3, 1926, at the age of seventy-four; the latter was the appellant's husband; no suits are pending, except this, and she has been in the possession of the property since her husband's death; it consists of three old houses in lower Jersey City; appellant is seventy years old; no children were born either to George Fink or to her, and George Fink had not been married to anybody but her (pp. 31-32-33-34). The appellant, the only witness in the case, gave no testimony concerning any marriage of Frederick Poths; nor was she cross examined in behalf of the respondents on any aspect of their claim.

As the proofs show that Frederick Poths was seventy-seven years old when he died in 1908, he was accordingly sixty-seven years old when the will of Louisa Fink was executed in 1898, and seventy years old when she died in 1901. Similarly, George Fink, the younger brother, who died in 1926 at the age of seventy-four, was, therefore, forty-six years old in 1898, when her will was executed, and forty-nine years old in 1901, when his mother died, and the difference between the ages of these two brothers was, therefore, twenty-one years.

The answer of the defendants (p. 25) admits, as already stated, paragraphs one to five of the bill of complaint. And though it sets up that the defendants have no knowledge or information to form a belief as to any claim of ownership of the complainant, yet these admissions concede (1) the complainant's peaceable possession of the premises; (2) the fact of the last will and testament of Louisa Fink; (3) its admission to probate; (4) that George Fink and Frederick Poths were the surviving sons of Louisa Fink; (5) that George Fink left a will devising his estate to the complainant, who since his death has been in peaceable possession

of the premises in suit, whereof Louisa Fink died seized, and (6), that to the best of the complainant's knowledge, information and belief, Charlotte Kall left a will devising her estate to her children, as the complainant believes (pp. 1, 2, 3, 4 and 5 for the Allegations in the Bill; and p. 25 for the Admissions in the Answer).

The case, as already indicated, is devoid of any proof that Frederick Poths either left any children or was married, although the answer sets up (p. 29, lines 13 to 21) that "the defendants are the only living heirs of the said Louisa Fink by reason of the fact that the said George Fink left no issue as hereinbefore stated, but that the said Frederick Poths died leaving him surviving a daughter, Charlotte Kall, who has since died, leaving her surviving the defendants herein named." In the ninth paragraph of the answer (p. 29) defendants claim the land in suit, as heirs-at-law of Louisa Fink, subject to the life estate of Annie Fink, the appellant. They, too, thus tendered the issue started by the complainant.

The state of the case carries (pp. 11 to 25) the affidavits, proofs of publication, etc., requisite for a decree against unknown heirs, devisees, and personal representatives of Frederick Poths, Charlotte Kall and Frederick Kall. If the defendants had not answered, or if they have no rights in the lands, the complainant would be entitled to a decree which would not be subject to attack, pursuant to the decision of this Court, in *Realty Company v. Burghardt*, 91 N. J. Eq. 120. There this Court overruled the case of *Hill v. Henry*, 66 N. J. Eq. 150, and held, in effect, that due process of law was secured to unknown defendants claiming lands in New Jersey, if notice, such as by the publication and the mailing indicated by the proofs herein, were given.

The appellant makes these points:

1. It was the duty of the Vice Chancellor to settle all the rights of all the parties to the suit.

2. The appellant was entitled to a decree in fee simple, for:

(A) Where the jurisdictional facts are conceded or established, the burden of proof is on the defendants, who set up a hostile claim, to establish it by proof which, in this case, they did not; and

(B) By the proper construction of the will of Louisa Fink, her fee simple estate passed finally to her son, George Fink, who devised it to the appellant.

3. In any event, the appellant is entitled to an undivided one-half interest in the lands, in addition to her life estate.

4. The appellant should not have to pay costs and counsel fees to the respondents, but, on the contrary, respondents should be assessed for costs and counsel fees, in favor of the appellant.

1.

It was the duty of the Vice Chancellor to settle the rights of the parties to the suit.

The bill of complaint contains the statutory allegations necessary in a bill filed under "An act to compel the determination of claims to real estate in certain cases, and to quiet title to the same" (4 Compiled Statutes, p. 5399; Supplement to Compiled Statutes [1930], p. 1870). Paragraph nine of the defendants' answer sets up a claim to the lands, by the defendants (p. 29).

Section 5 of this act (4 Compiled Statutes, p. 5402) provides that if an issue of law is not requested, "the Court of Chancery shall proceed to inquire into and determine such (either party's) claims, interest, and estate, according to the course and practice of that court; and shall, upon the finding of such issue, or upon such inquiry and determination, finally settle and adjudge whether the defendant has any estate, interest or right in, or incumbrance upon said lands, or any part thereof, and what such interest, estate, right or incumbrance is, and in or upon what part of said lands the same exists."

Section 6 of this act (p. 5402, amended by Chapter 43 of P. L. 1927, p. 93; Supplement to Compiled Statutes [1930], p. 1871) provides, again, that the final determination and decree in the suit shall fix and settle the rights of the parties in the lands; and the same shall be binding and conclusive on all parties to the suit.

The Vice Chancellor, however, advised a decree which defines (p. 44) only the present undisputed life estate of the appellant.

This Court in *Welitoff v. Kohl*, 105 N. J. Eq. 185, unanimously held that Section 6 of the similar act,

concerning restrictions (4 Compiled Statutes, p. 5406) "is obviously mandatory," and the Court of Chancery has repeatedly in cases of this nature, made decrees fixing the rights of all parties. Early instances are

Carter v. Gray, 58 N. J. Eq. 411 (GREY, V. C., 1899);

Feit v. Richards, 64 N. J. Eq. 16 (MAGIE, V. C., 1902);

Kellers v. Kellers, 79 N. J. Eq. 412 (GARRISON, V. C., 1911).

As the language *mutatis mutandis* of both acts just mentioned is to the same effect, it is respectfully submitted that it was the manifest duty of the Court below to have determined, upon the record, what were all the rights of all the present litigants in this suit, according to the proofs.

Moreover, forty-five years ago, Justice DEPUE, in *Blatchford v. Conover*, 40 N. J. Eq., page 218 (Court of Errors and Appeals, June Term, 1885), said:

"The complainant's bill having been filed under the act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same, the decree in this suit must fix and settle the rights of the parties in the premises. Rev. 1190, §6."

Again, in *Jones v. Davenport*, 45 N. J. Eq., page 82, Vice Chancellor VAN FLEET (1889) said:

"The great purpose intended to be accomplished by a final decree in an equity suit is to settle and determine, justly and finally, the rights of all persons having a material interest in the subject-matter put forward by the complainant in his bill of complaint as the foundation of his right to relief, and for this reason it is a leading rule of equity procedure that all persons materially interested, either legally

or beneficially, in the object of the suit, shall be made parties to it, to the end that full and complete justice may be done to all, in respect to the particular subject-matter of the litigation, and that all further litigation concerning such subject-matter may be prevented. It is the constant aim of courts of equity, says Judge Story, to do complete justice by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented."

This view is adopted by Chancellor WALKER, who, in *Beall v. New York & New Jersey Water Co.*, 87 N. J. Eq., page 393 (1917), said:

"The purpose to be accomplished by a decree in equity is to finally settle and determine the rights of all persons interested in the subject-matter of the suit. See the remarks of Vice Chancellor Van Fleet in *Jones v. Davenport*, 45 N. J. Eq. 77 (reversed 46 N. J. Eq. 237, but not on this point). On final hearing but one decree is entered, no matter how numerous the parties or the issues."

It was, therefore, erroneous, it is respectfully contended, for the Court of Chancery to have limited the decree to the present undisputed life estate of the appellant, who is seventy years old, and who, it may be presumed, has knowledge of facts that will pass away with her and thus leave the defendants in a position again to vex, for instance, the heirs or devisees of the appellant. The evident purpose of the legislative act was to meet situations of this kind, before time has closed forever the lips of witnesses who know the facts. What would be known of the family history by a younger generation to which a person might devise his rights? On the other hand, would the

successors of the defendants know more than the defendants? By the decree in this case, the very remedy set up by the act is thus denied to the appellant; and the respondents are free again to litigate an issue which their own pleadings raised, but which they supported by no proofs. It seems to me that as courts exist only to adjudicate, if a party claims a right before a court, he should prove it. If he can come in and go out of court at will, courts will lose their usefulness and other ways of obtaining justice be set up. The defendants should not have been indulged until the appellant's mouth is sealed by death.

Essentially, the decree, in view of the statute, is a denial of the right of the complainant to a full adjudication. If the Court of Chancery does not, by virtue of the act, settle the rights of parties in peaceable possession, the Legislature may just as well repeal the act, and thus leave, in cases of this sort, no available remedy for persons in possession of real estate, against whom no suits are pending.

Moreover, as the appellant confidently, but mistakenly, relied in the Court below, upon the express particular mandatory provisions of Sections 5 and 6 of the act to quiet titles (*supra*, p. 7) in support of her right to have the Court settle and determine the asserted claims of herself and of the defendants, she thought it unnecessary to call the attention of the Vice Chancellor to the two other cognate statutes, by which the Court of Chancery is also completely invested with the plenary jurisdiction (which she contends) it should have exercised in view of the pleadings and proofs.

These are (1) the Uniform Declaratory Judgments Act (P. L. 1924, c. 140, p. 312; 1911-1924 Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2834; notes thereon, 1930 Cumulative Supp. to same, p. 1453), and (2) The Chancery Act of

1915 (P. L. 1915, c. 116, p. 184; 1911-1924 Cumulative Supplement to Compiled Statutes, Vol. 1, p. 270; notes thereon, 1930 Cumulative Supp. to same, p. 180).

The first of these cognate statutes, the Uniform Declaratory Judgments Act, has these sections:

"SECTION 1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

"SECTION 2. Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

This statute has been applied in numerous cases, both at law and in equity; and has had the sanction of this Court in *Smith v. Hayes*, 104 N. J. Eq., page 146 (Opinion by Mr. Justice CAMPBELL); and in *McCrory Stores Corp. v. S. M. Braunstein*, 102 N. J. L., page 590 (Opinion by Chief Justice GUMMERE).

Similarly, the Chancery Act of 1915 provides:

"7. Decree to Declare Rights. Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the

determination of any question of construction thereof, in so far as the same affects such rights, and for a declaration of the rights of the persons interested."

Since all the parties here claimed rights cognizable in a court of equity, there again seems to have been no reason why the Court of Chancery should not have made a decree settling the rights of all the litigants.

Chancellor WALKER (then Vice Chancellor) in *re Ungaro*, 88 N. J. Eq., page 28 (1917), pointed out that this was a remedial statute to provide for those cases in which, before 1915, no immediate right to relief existed in Chancery.

Vice Chancellor BACKES gave effect to this act in *Snyder v. Taylor*, 88 N. J. Eq. 513; Vice Chancellor LANE in *Renwick v. Hay*, 90 N. J. Eq. 148; Vice Chancellor FOSTER in *Sternberger v. Tunison*, 92 N. J. Eq. 159; and Vice Chancellor FALLON in *Kutschinski v. Bourginynon*, 102 N. J. Eq. 89.

Again, Vice Chancellor BACKES held it applicable, in proper cases, in *Semenowich v. Melnyk*, 93 N. J. Eq. 67; *Paterson v. Currier*, 98 N. J. Eq. 48; *Potter v. Watkins*, 99 N. J. Eq. 538; and Vice Chancellor BUCHANAN likewise in *Naugle v. Baumann*, 96 N. J. Eq. 183. Vice Chancellor BERRY in *Johnson v. Talman*, 99 N. J. Eq. 762, said the petitioners had a right to a declaratory decree under both the Declaratory Judgments Act and the Chancery Act.

It is, therefore, respectfully submitted that the failure of the Court of Chancery to obey the statutory mandates to settle the rights of all the litigant parties was an error, which requires rectification by this Court.

2.

The appellant was entitled to a decree in fee simple, for (A) where the jurisdictional facts are conceded or established, the burden of proof is on the defendants, who set up a hostile claim, to establish it by proof, which, in this case, they did not; and (B), by the proper construction of the will of Louisa Fink, her fee simple estate passed finally to her son, George Fink, who devised it to the appellant.

(A) Where the jurisdictional facts are conceded or established, the burden of proof is on the defendants, who set up a hostile claim, to establish it by proof which, in this case, they did not.

It is difficult to comprehend the theory upon which Vice Chancellor FALLON, in view of the respondent's testimony, advised the present decree. The peaceable possession of the complainant, as above related, was both conceded and proved. She was not cross examined for the defendants, who, moreover, adduced no proofs of the rights in the premises which they had asserted by their answer. This posture of the proofs was quite disregarded by the Vice Chancellor who (p. 41) makes it appear both by his opinion and the decree (p. 44) that the proofs showed that Frederick Poths left a last will and testament, wherein he devised and bequeathed his estate to one Charlotte Kall, now deceased, who in turn left a last will and testament by which she devised her estate to her children, defendants herein. There are no admissions nor proofs, to sustain such a finding, in the bill of complaint, unless the appellant's statement in paragraph 5 of the bill of complaint (p. 4) made "to the

best of her knowledge, information and belief," may be regarded as an admission to that effect. It is to be noted, however, that the Vice Chancellor did not (as he was bound to) predicate any decree upon these findings. The appellant's replication put into clear issue any claim asserted by the respondents.

This Court, in *Moore Security Company v. Schaffer*, 97 N. J. Eq., page 296, held that the rule, in suits of this nature, is that where the jurisdictional facts are conceded or established, the burden of proof is on the persons setting up the hostile claim to establish it by proof.

Excerpts from the cases cited in *Moore Security Company v. Schaffer*, 97 N. J. Eq. 296, follow:

Ocean View Land Co. v. Loudenslager, 78 Eq. 574, decided by this Court in 1911:

"The purpose of the act is to relieve, not persons who have the power to test the hostile claim by a direct proceeding in the usual mode, but to aid persons whose situation affords them no such opportunity. *Jersey City v. Lembeck*, 31 N. J. Eq. (4 Stew.), 255, 272. It lends its aid to one in peaceable possession under claim of ownership *to compel an adverse claimant to establish his claim; he may do so in equity or at law, but in either case he is asserting a hostile claim against one in peaceable possession, which he must proceed to establish or abandon.*

"In our opinion where the complainant has established to the satisfaction of the court of chancery, that he is in peaceable possession of the land described in a bill to quiet title, claiming to own the same, and that his title thereto is denied or disputed, and that no suit is pending to test the validity of such hostile claim, *the burden of establishing the validity of such claim is upon the person setting it up*, and that in such case the Court of Chancery may lawfully order that, in a feigned issue at law,

framed to test the legality of the claim adverse to complainant, the defendant assume the burden and sustain the issue as plaintiff."

Graves v. Fancher, 81 N. J. Eq., pages 407, 517, decided by this Court in 1913:

"Upon a bill to quiet title, when the jurisdictional facts are shown, as we think they are in this case, it is for the defendant to establish his claim (*Ocean View Land Co. v. Loudenslager*, 78 N. J. Eq. [8 Buch.] 571), and this has not been done."

Lambert v. Vare, 88 N. J. Eq. 81 (Vice Chancellor LEAMING) affirmed *per curiam*, 89 N. J. Eq. 211. There Vice Chancellor LEAMING said, 88 N. J. Eq. 87:

"In suits to quiet title, the complainant, who must be adjudged to be in peaceable possession before jurisdiction over the issue of title can be assumed, is given the benefit of his peaceable possession, and defendant then assumes the burden of the affirmative of the issue of title and carries the burden of establishing a title in conformity with the specifications of title which the statute requires such defendant to set forth in his answer. Accordingly, at the hearing defendant assumed the burden of establishing that the line of ordinary high tide of the Atlantic Ocean was shoreward of two hundred and seventy-five feet from Atlantic avenue at the point shown as lot 14 on the Kelley map when the title passed from Mrs. Kelley to Hilton."

The appellant contends, therefore, that upon the failure of the respondents to support, by evidence of the devolution of title, their asserted right of succession (Paragraph 9 of Answer, p. 25) to the lands of which Louisa Fink died seized, the appellant was entitled to a decree that she was seized in fee simple.

This contention of the appellant is good, too, it is respectfully submitted, whether the defendants claim directly as heirs-at-law of Louisa Fink (their Answer, p. 29, lines 15-20) through Frederick Poths, or as successors to any asserted interest which Frederick Poths may have transmitted (as asserted in the Answer) by will to Charlotte Kall. In other words, the defendants were called upon to prove their claim, and since they adduced no proofs to support it, they should be adjudged to have no rights in the premises. Otherwise litigation would be interminable; and all courts would face the mischiefs and evils indicated by the late Mr. Justice Kalish speaking for this Court in *Walter v. Kneuthe*, 98 N. J. Law 823, where a defendant, who failed to file an answer in the Supreme Court, sought a review here.

(B) By the proper construction of the will of Louisa Fink (p. 10) her fee simple estate passed finally to her son, George Fink, who devised it to the appellant.

"The cardinal rule in the construction of wills is that the testator's intention shall prevail. * * * And every will should be interpreted, as far as possible, from the stand-point occupied by the testator, and attendant circumstances such as the condition of his family * * * may and ought to be taken into consideration * * * and the testator's intention ought at least to control any arbitrary rule, however ancient, which is unreasonable or not well established or doubtful in its immediate application. * * * Where provisions admit of more than one interpretation, the court will put itself into the situation of the testator in reference to the property, the relative claims of testator's family and the circumstances which surround him."

The foregoing statements are essentially *Sections 466 and 467 of Schouler on Wills* (Fifth Edition), Volume 1.

This Court has repeatedly expressed itself to the same effect. Thus, in *McDonald v. Clermont*, 107 N. J. Eq. 585 (1931), it affirmed Vice Chancellor BUCHANAN who said (586):

"The first step in construction is the ascertaining of the intent of the testator, as expressed in the instrument."

In *Peer v. Jenkins*, 102 N. J. Eq. 237 (1927), this Court in affirming a decree, advised by Vice Chancellor BENTLEY, said, through Justice TRENCARD (237):

"In construing a will the object to be attained is to determine the intent of the testator as gathered from the whole document as applied to the testator's situation."

In *Coyle v. Donaldson*, 91 N. J. Eq. 138 (1919), this Court, reversing a decree advised by Vice Chancellor GRIFFIN, said, through Justice BLACK (139):

“The testator’s meaning and intention must be determined not by fixing the attention on single words, but by considering the entire will and the surroundings of the testator when he executed the will, and by ascribing to him, so far as his language permits, the common impulses of our nature.”

In *Coffin v. Watson*, 79 N. J. Eq. 643 (1911), this Court affirmed *per curiam* a decree, advised by Vice Chancellor EMERY who said, 78 N. J. Eq. 312:

“The question in each will is the intention of the testator as gathered from the whole document, as applied to the situation of the testator, whose use of the words is in question.”

In *Howell v. Steelman*, 77 N. J. Eq. 586 (1911), this Court affirmed *per curiam* a decree advised by Vice Chancellor GARRISON who said, 76 N. J. Eq. 425:

“We must search, therefore, his (testator’s) intention in the light of such facts as we have, placing ourselves as nearly as we can in his position, so as to get his point of view, as nearly as possible.”

In *Torrey v. Torrey*, 70 N. J. Law 673 (1904), Justice DIXON speaking for this Court, said:

“The testator’s meaning must be determined not by fixing the attention on single words, but by considering the entire will and the surroundings of the testator when he executed it, and by ascribing to him, so far as his language permits, the common impulses of our nature.

In attempting to interpret any will, the first suggestion naturally arising is that the testator intended to dispose thereby of all his property."

In *Hewitt v. Green*, 77 N. J. Eq. 349 (1910), Vice Chancellor STEVENSON said:

"In endeavoring to determine the precise thing which the testator actually intended to have done and the legality or illegality thereof, it is of great importance in this case that all the circumstances and conditions which he had in view when he made his will and also some of the conditions as they existed at the time of his decease should be exhibited to the Court and be carefully considered."

And in *Wiggins v. Wiggins*, 65 N. J. Eq. 419 (1903), Vice Chancellor PRITNEY said:

"The well established fundamental rule in construing wills is to ascertain the intention of the testator—first, by carefully considering the force of every word of the language he has used, and second, in cases of difficulty or ambiguity, by considering therewith his pecuniary circumstances and his family and social relations."

That the testatrix, Louisa Fink, intended to dispose of all her estate by her will (p. 10) is manifest by her "sound and disposing mind" in the first clause, and by the second and third clauses. The first disposing words are:

"I give, devise and bequeath to my sons Frederick Poths and George Fink *all my estate*, both real and personal, and appoint my son, George Fink, as sole executor and trustee to collect the rents, issues and profits and income of all my estate both real and personal, and to divide the same equally between my sons Frederick Poths and George Fink."

Were this devise the only devise in this will, it would be undoubtedly an estate in fee simple between the sons, as tenants in common. With that in mind, the testatrix, however, continues "should my son, Frederick Poths predecease my son George Fink, then his entire share is to fall to my son, George Fink." This is not inconsistent with the first sentence of the second clause, nor does it reduce the fee to a life estate. It simply makes the estate a joint tenancy, as far as Frederick Poths is concerned, instead of a tenancy in common. The proof is that Frederick Poths did predecease George Fink, and, accordingly, this condition, stated by the testatrix, having been satisfied, her will was that George Fink should have the whole of her estate. On the other hand, for Frederick Poths she provided (p. 10, lines 30-35) that should both George Fink and his wife, Annie Fink, the present appellant, predecease Frederick Poths "then the whole of my estate will fall to my son Frederick Poths." This latter situation did not arise.

At the end of the second clause (p. 10, lines 33-35) the testatrix was careful enough to provide "however the case may be, the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death." That provision, it will be noted, is the only provision in the will, as to a life estate, in any person, and it only necessarily creates a life estate in Annie Fink, and then by implication.

Now, the will of Louisa Fink either transferred her whole estate, or it did not.

If the will carried her whole estate, it must be construed in a manner different from that in which it would be construed, had she died partially intestate.

Regarded as a total disposition of her entire estate, it is evident that upon the death of Frederick Poths his share in the decedent's estate went to George Fink, who survived him, and thus met the expressed condition of the will. It will be noted that whatever Frederick Poths' share is, under this will, it goes to George Fink because George Fink survived him. If Frederick Poths survived George Fink, then from the point of view of a testatrix who was devising her whole estate, Frederick Poths would have had the whole estate, subject only to the implied life estate of Annie Fink, in one-half of the share originally devised to her husband, George Fink.

Furthermore, in any event, from the point of view of a testatrix who was devising her whole estate, it is apparent that whatever may have been the order of death of the first takers, her sons, ultimately the estate would go to George Fink's children and their issue. As this contingency did not eventuate, the gift over failed, for no title can be made to an estate upon a contingency, without showing such contingency, and that it has actually come to pass. (*Nelson v. Combs*, 18 N. J. Law 27; Justice FORD's expression.) It follows that the contingent gift to the children of George Fink quite failed, as he had none.

As this gift over might fail, from the viewpoint of a testatrix disposing of her whole estate, the effective disposing clause of the will then remains the first disposing clause which put the whole estate into (1) the two sons as joint tenants, and, (2) into the survivor of them, and if the survivor happened to have been Frederick Poths, then and then only would there be left for Annie Fink, a life estate, and that only to the extent of one-half of the whole property.

Viewing this will as a total disposition of the estate of the testatrix, it is highly significant that there is no provision in it, which in the light of the fact that Frederick Poths predeceased George Fink, may be regarded as a benefit for any heir of Frederick Poths, except George Fink, for none is indicated. This feature of the will, upon a construction of it, must, of course, exclude anybody who (like the defendants) claims succession under Frederick Poths, except, of course, George Fink, his brother. And still viewing this will as a total disposition of the property of the testatrix, it is respectfully submitted that it is not helpful to consider what would have been the proper construction of the will had George Fink predeceased Frederick Poths, for that, again, is a contingency that did not eventuate. Then, if, from this point of view (that of a total disposition), George Fink finally came to the ownership of the whole estate of the decedent by reason of the fact that he survived Frederick Poths, the present complainant, Annie Fink, the wife of George Fink, is, of course, entitled to the whole estate, by virtue of the devise to her in the will of her husband, and therefore the decree should have been that she is the owner of the lands in fee simple.

The following are general statements of the applicable law:

40 Cyc., p. 1593 (Wills):

"A qualified or defeasible fee may be created so as to be determinable upon birth or birth and survivorship of issue, as by a limitation over to the issue of the first devisee, or to the issue of some other person in case there should be such issue."

40 Cyc., p. 1594 (Wills):

"In the case of a qualified or defeasible fee, the estate becomes absolute whenever the con-

tingency by which it may be defeated becomes impossible as * * * by the death of the first devisee prior to the happening of the condition or contingency by which alone his estate can be defeated."

40 *Cyc.*, p. 1955 (Wills):

"Where the first taker under the will is given an absolute estate qualified only by a limitation over, a failure of the limitation over vests the fee in the first taker * * *. But the failure of the subsequent estate cannot affect the nature or the validity of the prior estate, and where the intention of the testator was clearly that the first taker should not have more than estate for life or years, a failure of the remainder will not give him an absolute title, but on the determination of the particular estate, the property belongs to the heirs at law or distributees as in case of intestacy."

Lafoy v. Campbell (Chancellor RUNYON), 42 N. J. Eq. p. 34 (37), cited at 40 *Cyc.*, p. 1593, is concerned with a fee simple estate which is defeasible.

This Court has repeatedly held that where there is an estate in fee liable to be defeated on a condition subsequent, and that condition has become impossible to be performed, the defeasible estate is made absolute, for if the estate is made liable to be defeated by a gift over, which does not take effect, the primary gift is the same as if there were no provision for its defeasance.

This subject was fully discussed by Justice BERGEN, speaking for this Court in *Michael v. Minchin*, 90 N. J. Law 609. In *Rogers v. Bailey*, 76 N. J. Eq. 30, Vice Chancellor STEVENS (1910), affirmed by this Court *per curiam* 78 N. J. Eq. 589 (1911), upon his opinion, set forth the decision in this State as far back as *Den v. Snitcher*, 14 N. J. Law, page 53. He said (76 N. J. Eq. 31):

"If the statute (now 4 Compiled Statutes, page 5873, Section 36, concerning devises of lands in which the word 'heirs and assigns' are omitted) may operate where an undivided portion is given over, I do not see why it may not operate where a contingent estate—an estate that may never take effect—is the only interest so given. Such a gift presupposes a *residuum* of interest that may, in the event, be entirely undisposed of. Why may not the statute operate upon such *residuum*? Why should the testator contrary to his evident intent be held to have died intestate, so far as the fee is concerned? It seems difficult to resist the conviction that the statute was passed to meet just such a case. The remedy would not, otherwise, have met the evil mentioned in the preamble of the act. As I read the decision in *Den v. Snitcher*, this was the view of Chief Justice HORNBLLOWER."

The preamble to which Vice Chancellor STEVENS referred is found in Section 32 of the Wills Act, 4 Compiled Statutes, 5873, and is in these words:

"WHEREAS it frequently happens, that, in making wills and testaments, the words heirs and assigns, in devises of land or other real estate are omitted, through the ignorance or inattention of the writer, though the testator meant and intended to grant an absolute estate in the devised premises; and devises are sometimes made in tail, without limitation of time, whereby the heirs are put to great expense, in suing out recoveries, in order to dock such entails," etc.

In *Michael v. Minchin*, *supra*, in which this Court reversed the Essex County Circuit Court, Justice BERGEN said (90 N. J. L., p. 605):

"It (the limitation over) should be so construed as to give effect to the intent of the testator ascertainable from his will."

He dealt with *Patterson v. Madden*, 54 N. J. Eq. 714-723, in which the present Chief Justice considered, among other things, an executory devise after the death of the original devisee, without issue. Then Justice BERGEN dealt with *Den v. Schenck*, 8 N. J. Law 29, and the effect given in that case to the above cited statute. Justice BERGEN says (p. 609):

“the rule laid down in that case (*Den v. Schenck*, 8 N. J. Law 29) is that where there is a gift over and it becomes impossible of performance through the death of its object, nothing more being present, the estate of the first taker becomes absolute.”

He said (p. 609):

“that case was decided in 1824 and has been uniformly recognized by our Courts as establishing in this State the legal rule that where there is a gift to one and then over to another, if the first taker dies without issue the executory devisee must be alive to take at the termination of the prior estate, and in default of the existence of the object of the gift over, the prior estate becomes absolute. *Groves v. Cox*, 40 N. J. Law 40-45.”

It will be noted that in the present case there is no provision in the will that George Fink or Frederick Poths might have only a life estate; the provision is that “however the case may be” they should have the estate as long as they live. Nor is there a gift over, if there are no children born to George Fink.

The final words of Justice BERGEN are (p. 613):

“The result of the views above expressed is that the defendant’s death without issue is referable to his death in the lifetime of the life tenant, and if he survived her his title became absolute, and also that the gift over failed by the death of Emma, in the lifetime of her

brother Harry, because the object of the gift over, being removed, the executory devise became impossible of performance, and the prior estate became absolute, and in either event the defendant became seized of an indefeasible estate, and, therefore, there was no breach of the covenant, contained in his deed to the plaintiff, that he was seized of a fee-simple estate. This requires a reversal of the judgment under review and the awarding of a *venire de novo*, and it is so ordered."

In *Hampton v. Newkirk*, 93 N. J. Eq. 272, Vice Chancellor LEAMING reviewed the cases and thus stated the rule:

"The more logical and the accepted view in this State at this time is that where land is devised to a person in fee, and a subsequent clause in the will limits such land over to a designated person or persons in case of the death of the first taker without issue, and there is no other event expressed in the will to which the limitation over can be fairly referred, the event of death without issue will be understood to refer to the death of the first taker at any time, and not to his death before the death of testator, *and in such devise the first taker enjoys at the death of the testator a vested fee which becomes divested at his death without issue and vests in the person or persons in esse to whom the estate is thus limited over.* *Patterson v. Madden*, 54 N. J. Eq. 714; *Rogers v. Bailey*, 76 N. J. Eq. 29, affirmed on opinion below, 78 N. J. Eq. 589; *Ripley v. Freeholders*, 40 N. J. Law 45. The difference between a gift over in case of the death of the first taker and a gift over in case of the death of the first taker without issue is apparent; the logic of the essential difference is tersely expressed in *Rogers v. Bailey*, *supra*, at page 32 of the opinion." * * * "It will be noted that the devise of the Stokes property in the fourth paragraph of the will is without words of inheritance. It is suggested that Section 36 of our statute of

wills, which section removes the necessity of words of inheritance to create a fee (4 Compiled Statutes, p. 5873), is inapplicable because of the 'further devise' contained in the seventh paragraph of the will. *Den v. Allaire*, 20 N. J. Law 6; *Den v. Snitcher*, 14 N. J. Law 53, and *Rogers v. Bailey*, 76 N. J. Eq. 29; affirmed 78 N. J. Eq. 589, appear to adequately dispose of that contention."

Chancellor RUNYON (1875), in *Drummond v. Drummond*, 26 N. J. Eq. 234 (237), said:

"The testator did not provide that Jane should have a life estate, merely, and that, after her death, the property should go to her children, if she should leave any, but he gives the property to her without qualification in the gift. The principle of the rule, that where there is an estate in fee liable to be defeated on a condition subsequent has become impossible to be performed, the defeasible estate is made absolute (Co. Litt. 206 a), applies to this case, for the estate was made liable to be defeated by a gift over, which could never, by possibility, take effect, and the primary gift, therefore, is the same as if there were no provision for its defeasance. It was so held in *Den ex dem. Van Middlesworth v. Schenck*, 3 Halst. R. 29. There the devise was to the testator's son and daughters in fee, with provision that if any of them should die without issue, at his or her death, the estate of such decedent should go to the survivors. The daughters died in the son's lifetime. He died without leaving issue. It was held, that the death of the daughters made it impossible that the estate should be defeated by going over to the survivors, when there were none, and that, from that time, it became an absolute fee simple in the son. So, too, in *Jackson v. Noble*, 2 Keen 590, where a testator gave real and personal estate to his daughter and two others in trust, to permit her to receive the rents and interest for life, and, after her de-

cease, to convey to her heirs, executors, &c., with provision that, in case she should marry and have no children, then the property was to belong to his son, or, in case of the son's decease before her death, then to the son's children, it was held by Lord Langdale, M. R., that the daughter took an absolute equitable estate, with an executory gift over to the son and his children; and the son having died in the lifetime of the daughter, leaving no child, it was further held that the contingent executory gift could not take effect, and that the estate already vested in the daughter could not be divested. See, also, 1 Jarman on Wills 783. 'The general rule,' says Redfield, 'that, where the devise over fails, the estate remains in the former taker, seems to be recognized as a general principle, where the terms of the first devise are sufficient to carry the whole interest, and there is nothing in the circumstances indicating that such could not have been the intention of the testator.' 2 Redfield on Wills 647."

Another analogous case is *Den ex dem. Howell v. Howell*, 20 N. J. Law, page 419 (Supreme Court), in which Justice CARPENTER said:

"Starting them on the principle that the primary devise to Isaac and Joseph is clearly a fee simple defeasible, let us examine whether this remainder be in fee or in tail. First then there is no limitation over in default of issue of such survivor. Independent of the incongruity of a devise in fee to Joseph of one moiety, with a remainder over to him in tail in the other moiety in case of the death of Isaac without issue; unless this remainder be construed to be in fee, there would be a plain possibility of the testator dying intestate as to a portion of this estate, which in the introductory clause, he had declared his intention to dispose of. Such result cannot be supposed to have been intended by the testator. It is his estate that he intended to dispose of; it is

his *estate* in the premises that he first devises to Isaac and Joseph, and it is the part of Isaac in *that estate*, that on his death without issue, he gives by way of executory devise over to the survivor. Such construction will, if possible, be given as will prevent such intestacy. This intention of the testator, if ascertained, is to be carried into effect, although he might have been ignorant of technical language, and have used it improperly, if such construction be possible within the rule of the law. I see no such impossibility in the present case. The order in which words stand in a will, is not material, provided the intention be ascertained. Now the *habendum* clause, as it may be called, I suppose to have been used by the testator, *reddendo singula singulis*, as applicable to each of the successive estates of inheritance in this devise—first to the sons—then in case of either dying without issue, to the survivor—as a formula to more clearly designate the estate in fee simple successively devised. But, if intended to apply only to the last clause in favour of the survivor and to designate the estate given by that clause, it imports an estate in fee, and that estate, perfectly consistent with the general intention of the testator, by the operation of the rule already adverted to, is vested in the first taker under this clause. Any inconsistent expressions, by which an estate for life might be inferred or construed, must give way to the rules of law, and such estate for life be turned into an estate of inheritance; in this case, an estate in fee simple. I am of opinion, therefore, under the rules of construction adopted in this state, that the remainder over, as well as the primary devise, must be construed a fee simple.”

Groves v. Cox, 40 N. J. Law, page 45 (Supreme Court), is also to similar effect. Chief Justice DEPUE there said:

"On a devise of a fee simple conditional, with an executory devise over to another, the whole estate goes out of the devisor, in the first instance, to the complete disherison of the heir. 2 Washb. on Real Prop., p. 344, §8, p. 345, §10; 2 Powell on Devises, 241. And if there be no one to take under the executory devise, the estate will not revert to the right heirs of the testator. *Jackson v. Staats*, 11 Johns. 339.

"In the event of there being no one surviving at the death of James, competent to take under the designation of 'the surviving heirs,' his estate was a fee simple absolute, and passed to the devisee under his will. *Den v. Schenck*, *supra*; *Drummond v. Drummond*, 11 C. E. Green 234. On the other hand, if there was, at the death of James, some one surviving who might take under the designation of 'the surviving heirs,' his estate ended at his death without issue. The state of the case is somewhat obscure on this subject, and the second of the inquiries of the Circuit Court, therefore is not answered categorically."

Steward v. Knight, 62 N. J. Eq., p. 232 (V. C. GREY), carries this syllabus:

"1. If a devise is expressed in indeterminate terms, yet if, from the whole will, it can be collected that the testator intended to give a fee, the devise will be construed to pass that estate.

"2. Where a testator has a fee-simple, and devises his whole estate, though by words not technically descriptive of a fee-simple interest, they will be held to convey that estate. The devise extends to pass not only the whole quantity of the testator's property, but also the whole of his interest therein.

"3. Where there is a primary gift of property in fee with a gift over of the same property to other persons, to take effect upon the happening of a definite event, the first devise

will be held to pass a fee-simple, subject to be defeated by the happening of the named event, and the second gift to be an executory devise taking effect upon the happening of the named event."

In the light of these cases, though in none of them is the will exactly like the present, it is respectfully submitted that the appellant should have been decreed to be seized in fee simple of the lands described in the bill of complaint.

3.

In any event, the appellant is entitled to an undivided one-half interest in the lands, in addition to her life estate.

If this will be considered as *not* carrying all of the estate of Louisa Fink, the question arises, what part of her estate did it carry?

It seems apparent that if there be an element of intestacy, the extent of that intestacy is the remainder of the estate after the deaths of Frederick Poths, George Fink and Annie Fink. The theory apparently would be that upon a proper construction of this will Frederick Poths and George Fink each took only a life estate in one-half of the property, and that since Frederick died before George, the latter succeeded to the estate of Frederick for life in one-half, and thereby came to own the whole for life, which, in turn, upon the death of George, came by virtue of the will of Louisa Fink, to the present complainant, Annie Fink, for her life.

In support of this theory of partial intestacy, of course the contingent gift over to the possible children of George Fink did not become effective, and, still from this point of view of partial intestacy, upon the death of Annie Fink, the present complainant, the remainder of the estate of the decedent, Louisa Fink, must be held, at her death to have vested, by the law of descent, in Frederick Poths and George Fink, as tenants in common, as they were her only surviving children. There is no proof of other living descendants at the time of her death, although the answer sets up that Charlotte Kall was a daughter of Frederick Poths.

This analysis of the situation, then, results in this: Annie Fink, the present complainant, in

addition to her life estate, in the whole of the property created by the will of Louisa Fink, is entitled, as devisee of George Fink, one of the two heirs at law of Louisa Fink, his mother, to at least an undivided one-half remainder in the estate.

The only question then remaining is, who succeeded to the similar right of Frederick Poths in the property of which his mother, Louisa Fink, died intestate? Since there is no proof of any marriage of Frederick Poths and no proof that there were any descendants left by him, nor any proofs that he left a will, it follows that George Fink by surviving Frederick Poths, acquired, as his only brother and his heir at law, whatever rights Frederick Poths had as an heir at law of their mother, Louisa Fink. Accordingly, again, from this point of view (partial intestacy) the complainant, Annie Fink, as sole devisee of George Fink, acquired this share of Frederick Poths, of which he died intestate, and to which share his brother, George Fink, succeeded.

And so, on this phase of the case it is respectfully submitted the appellant was entitled to a decree that she owns all the lands in fee simple; or if not all, half of them, at least, as devisee of George Fink, her husband.

4.

The appellant should not have to pay costs and counsel fees, but, on the contrary, respondents should be assessed for costs and counsel fees, in favor of the appellant.

This contention is based, first, upon the supposition that the decree should have been that the estate of the appellant is a fee simple estate, and that as a successful litigant, the usual practice should have been followed.

Secondly, as the defendants did not establish any right in themselves by the decree, the result was that they should not have been allowed costs or counsel fees.

Thirdly, if the appellant is successful in this Court, the appropriate direction will be given.

Cases on the general subject-matter are collated by Vice Chancellor BACKES *In re Walsh*, 93 N. J. Eq. 303 (305); and, in a case of bills to quiet title, Vice Chancellor LEAMING, in *Sparks v. Ross*, 82 N. J. Eq. 121, points out that to an unsuccessful defendant, no counsel fee may be allowed. Here the defendants, by decree, have not sustained their claim. Why should they be regarded as successful? Surely not because they conceded the undisputed life-estate of the appellant, who, on the other hand, may be regarded as successful because, to the defendants, who claimed an estate, none is decreed.

It is respectfully submitted that the decree should be reversed.

JOHN FRANCIS GOUGH,
*Solicitor for and of Counsel with the
Complainant-Appellant, Annie Fink.*

New Jersey Court of Errors and Appeals

Between

ANNIE FINK,
Complainant-Appellant,

AND

OLGA KALL HARDER, *et al*,
Defendants-Respondents.

Brief for all
Defendants-Respondents.

Statement of Facts.

This is an appeal by Annie Fink from a final decree of the Court of Chancery, advised by Vice-Chancellor Fallon, which adjudged and decreed that the said Annie Fink was not entitled in fee simple to the lands and premises mentioned in the complainant's bill of complaint and described fully in complainant-appellant's state of case but was entitled only to an estate for and during the term of her natural life in said lands and premises.

The answer admits that the complainant was in peaceable possession of the lands and premises described in the bill of complaint; that Louisa Fink died seized of the same; that Louisa Fink left a last will and testament, a true copy of which was attached to said bill of complaint and that she left her surviving two sons to wit: George Fink and Frederick Poths and that Frederick Poths, predeceased the said George Fink; that both George Fink and Frederick Poths left wills, George Fink leaving his entire estate to his wife, Annie Fink, and Frederick Poths, leaving his entire estate to Charlotte Kall and further that Charlotte Kall died

leaving a will in which she devised her estate to her children, Olga Kall Harder, William F. Kall, Frank Kall, Frederick Kall.

The bill of complaint also alleges that the title to said lands is denied and disputed by the heirs, devisees, and personal representatives of Frederick Poths, and their or some of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest by the heirs, devisees and personal representatives of Charlotte Kall and their or some of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest and mentioning them further by name and reciting (pp. 5 and 6, State of Case) "*all of whom are the defendants in this suit and who claim or reputed to own the afore-said lands and premises or some part therein*" to which allegation defendants admitted that they denied and disputed the title of the complainant to the "said lands as the heir, devisee and personal representative of Frederick Poths, now deceased" (p. 26, PP. 6, State of Case).

The defendants' answer (p. 26, PP. 7, State of Case) sets forth the title and claim of the defendants.

The defendants are the surviving heirs of Louisa Fink.

The appellant contends that the case is devoid of any proof that Frederick Poths either left any children or was married in which respect appellant over-looked the fact that the bill of complaint makes the admission that the defendants are the heirs, devisees and personal representatives of Frederick Poths (pp. 5 and 6, State of Case) and which was admitted by answer (p. 26, PP. 6, State of Case), and except further that the appellant agreed not to raise the issue of the legitimacy of Charlotte Kall, unless Vice-Chancellor Fallon, desired proof (p. 31, PP. 30, State of Case).

Reply to Appellant's Point 1.

The decree contains a complete determination of the matters which were submitted to the Court for determination, namely: The nature of the estate of the complainant and which the Vice-Chancellor held to be a life estate only. As her estate could by such determination never become any greater the Court evidently did not consider it necessary to define the estate of the defendants who as admitted heirs at law of Frederick Poths and Charlotte Kall became, by operation of law, as the surviving heirs of Louisa Fink, deceased, entitled to the title in fee to such lands and premises, subject to the life estate of Annie Fink, the said George Fink having died leaving no issue.

Reply to Appellant's Point 2.

The appellant was not entitled to a decree in fee simple. This suit involved the court's construction of the last will and testament of Louisa Fink, which after an almost complete agreement as to the facts as shown by the allegations of the bill of complaint and admitted by the answer, the Court after construing the will of Louisa Fink, denied the claim of fee simple asserted by the complainant. *The appellant having admitted the quality of the relationship of the defendants to Louisa Fink, the testatrix (see bill of complaint, p. 5, PP. 6, p. 6, PP. 6, State of Case), line 15, referring to all of the defendants having confirmed this relationship, no further proof on the part of the defendants was necessary and the formal replication (p. 30, State of Case) could not place into issue something already alleged by the appellant and admitted by the answer (p. 6, PP. 6, State of Case).* Both appellant

and respondents by the pleadings admitted their status with respect to their legal relationship to Louisa Fink and the entire matter was submitted to the learned Vice-Chancellor for the proper construction of her will only.

Reply to Appellant's Point 3.

The defendants are, as is alleged in the bill of complaint (p. 6, line 15 and p. 5, lines 30-40, State of Case) the heirs of Frederick Poths and Charlotte Kall and upon failure of issue of George Fink, the defendants, as such heirs and as surviving heirs of Louisa Fink became entitled to such lands and premises, the testatrix, Louisa Fink, having died intestate as to her entire estate, subject to the life estate of complainant.

Under the terms of the last will and testament of Louisa Fink, deceased (pp. 10 and 11, State of Case) the said Frederick Poths having predeceased the said George Fink and the said George Fink having predeceased the said Annie Fink, became entitled to the issues, rent and income of the entire estate of the said Louisa Fink, deceased, including the property described in the bill of complaint, for her life only, and under the terms of said will the said lands and premises descended to the heirs of the said Frederick Poths, who are the defendants herein, by reason of the fact that the said George Fink died without lawful issue who could take the estate as provided by paragraph "third" of said will.

For the reasons aforesaid *Louisa Fink, died intestate as to her entire estate after the life estate of Annie Fink.*

In order to ascertain testator's intention as expressed in his will, the whole will, as far as it in anywise relates to the question must be read together.

The question is not what the testator supposed he has done or intended to do aside from the language of the will, it is the duty of the Court to construe the will in the light of the terms used and give to them their legal and natural import.

In the will of Louisa Fink (p. 10, State of Case) paragraph "second" makes deposition of her estate and after mention of the legatees the following clause appears: "And however the case may be, the last survivor of the above named beneficiaries will hold the whole of the estate until his or her death". From this clause read in connection with the entire will, it can be concluded that the testatrix intentions precluded any other thought than granting a life estate to the last survivor of those beneficiaries named.

The will fails to make an ultimate disposal of the estate after the death of the last survivor named in the said paragraph.

"It can make no difference whether the testator through ignorance or inadvertence, fail to dispose of all of his estate, the Court cannot supply the omission. The province of the Court is to construe, not to make wills." *Kempson vs. Kempson*, 89 N. J. Equity, p. 205, at p. 207.

The heir-at-law will not be disinherited or forfeiture of an estate decreed excepting upon words free from doubt." *Graydon's Executors vs. Graydon*, 25 N. J. Equity, 561.

"Where a testator devises certain lands for life to his wife and made no disposition of the remainder, undisposed part of the estate descends to his heirs-at-law." *Dorsett vs. Vought*, 89 N. J. Law, 303.

The words in a will must be taken in a natural meaning.

The heirs are not to be disinherited by a will unless a clear intent appears by its language to that effect.

"If possible a will must be construed as to disposition of all of the testator's estate; but the Court to prevent intestacy may not disregard unambiguity and clear language producing intestacy." *Woodruff vs. White*, 78 N. J. Equity 410. Affirmed 79 N. J. Equity, 225.

"The Court leans towards a construction of a will which will prevent intestacy, but the will must furnish the basis of such construction and if the testator through ignorance or inadvertence fails to dispose of all his estate, the Court cannot supply the omission." *Tyndale vs. McLaughlin*, 84 N. J. Equity, 652.

Reply to Appellant's Point 4.

The language of the will without question covered the entire estate of Louisa Fink and after the termination of the life estate of Annie Fink, should go to the heirs of Frederick Poths or their descendants by reason of the death of George Fink without issue.

Reply to Appellant's Point 5.

In view of the fact that the Court has determined that the complainant's right, title and interest in and to the property in question to be but a life estate, which was conceded by the defendants by their answer and the defendants having been obliged, thereafter, to defend the suit, costs and counsel fees should be awarded.

The decree of the Court of Chancery should be affirmed.

Respectfully submitted,

IRVING S. REEVE

Solicitor for and of Counsel
with Defendants-Respondents.

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"If possible a will must be construed as to disposition of all of the testator's estate, but the Court to prevent intestacy may not disregard unambiguity and clear language producing intestacy." *Woodruff vs. White*, 76 N. J. Equity 419. Affirmed 76 N. J. Equity, 225.

"The Court leans towards a construction of a will which will prevent intestacy, but the will must furnish the basis of such construction and if the testator through ignorance or inadvertence fails to dispose of all his estate, the Court cannot supply the omission." *Tyndale vs. McLaughlin*, 84 N. J. Equity, 432.

Reply to Appellant's Point 4.

The language of the will without question covered the entire estate of Louise Pink and after the termination of the life estate of Annie Pink, should go to the heirs of Frederick Pink or their descendants by reason of the death of George Pink without issue.

Reply to Appellant's Point 5.

In view of the fact that the Court has determined that the complainant's right, title and interest in and to the property in question is to be left a life estate which was conceded by the defendants in their answer and the defendants having been advised, thereafter, to defend the will, costs and counsel fees should be awarded.

The decree of the Court of Chancery should be affirmed.

Respectfully submitted,

LEWIS S. RAYZ

Solicitor for and of Counsel
and Defendants Respondents