Court of Errors & Appeals, &c.

Between JOHN H. MANNING and EDWARD PAXTON, in their own right, and as Executors of AARON TINDALL, deceased, *Appellants,* *and* WILLIAM TINDALL, *Appellee.*	*Points for the Appellants.*

The sum of five thousand dollars, which the testator by his will gave to his wife Ann, and which lapsed by reason of her death before the death of the testator, was a part of the residuary estate of the testator, which passed to John H. Manning and Edward Paxton as residuary legatees, under the following clauses of the will:

"I give and bequeath whatever of my property shall remain after payment of the above and due settlement of all my business to my two friends, John H. Manning, to him, his heirs and assigns, and to Edward Paxton, to him, his heirs and assigns.

"I appoint my friend John H. Manning, and my nephew Edward Paxton, executors of this my last will and testament."

The testator survived his wife about two years.

I.

A will of personal property speaks as of the time of the testator's death.

1 Redfield on Wills, 379–380.
All Souls College *vs.* Coddington, 1 Peere Williams, 597.
"A Supplement to the Act entitled 'An Act Concerning Wills,'" approved March 12, 1851.
Nixon's Digest, 1032, pl. 24.

The testator by the power of sale and conversion given to his executors, intended that all his property should be treated as personal.

2 Story's Equity Juris., Sec. 790.

"In like manner, land articled or devised to be sold and turned into money is reputed as money."

See cases in note.

This peculiar stricture of the will clearly shows that the testator must have intended that any lapsed bequest would fall into the residuary estate.

II.

The residuary legatees were executors. The executor is entitled to the surplus undisposed of, unless some contrary intention appears on the face of the will.

3 Bacon's Abridgment, Executors and Administrators, p. 67, H. 5.

III.

It was clearly the intention of the testator not to die intestate with reference to any of his property, which intention can be gathered from the will, as a whole; and the lapsed bequest to the testator's wife Ann, passed, under the residuary clause in the will, to John H. Manning and Edward Paxton, executors of the testator and residuary legatees.

Roberts *vs.* Cooke, 16 Vesey, 451.
Leake *vs.* Robinson, 2 Merivale, 368.
Cambridge *vs.* Rous, 8 Vesey, 13.
Banks *vs.* Phelan, 5 Barb. Sup. Court Rep., 91.
King *vs.* Woodhull, 3 Edward Ch., 79.
Davie *vs.* King, 2 Iredell's N. C. Rep., Equity, 203.
Vicks, Exec. *vs.* M'Daniel, 3 Howard, Miss., 337.
Godard *vs.* Creagher, 1 Strobhart, Equity 1, S. Car. Rep.
Richards *vs.* Clarks, Exec., 3 C. E. Green, 327.
S. C. 6, C. E. Green, 362.
Executors of Vanness *vs.* Jacobus and others, 2 C. E. Green, 153, 154, 155.
Tuttle *vs.* Howell and others, 2 C. E. Green, 179.
2 Redfield on Wills, p. 448, sec. 10, p. 454, sec. 22.

W. S. Sharp, Printer, 23 East State street, Trenton, N. J.

Court of Errors & Appeals.

Between
WILLIAM TINDALL,
Complainant,
and
JOHN H. MANNING, et al., Executors of Aaron Tindall, deceased, et al.,
Defendants.
} Bill.

BILL OF COMPLAINT.

[Filed January 5, 1872.]

To his Honor, Abraham O. Zabriskie, Chancellor of the State of New Jersey.

Humbly complaining, showeth unto your Honor, your orator, William Tindall, of the borough of Hightstown, in the county of Mercer and state of New Jersey, who files this bill on his own behalf, and on behalf of such of the next of kin of Aaron Tindall, late of the county of Middlesex, in said state, deceased, as shall chose to come in and contribute to the the expenses of this suit; that the said Aaron Tindall, late of said county of Middlesex, deceased, being possessed of or well entitled to a considerable personal and real estate, duly made, executed, and published according to law, and with the solemnities required for disposing of real and personal estate, his last will and testa-

ment in writing, bearing date on the 8th day of November, 1865, which said last will and testament was of the tenor and effect set out in the schedule annexed to this bill, and made a part thereof, and marked *Schedule No.* 1, as in and by the said will, or the probate thereof, will appear; and that on or about the 1st day of November, 1869, said Aaron Tindall departed this life without altering or revoking his said will.

And your orator further shows, that in and by said will
10 the said Aaron Tindall, deceased, appointed John H. Manning and Edward Paxton the executors thereof, and that the said John H. Manning and Edward Paxton, on or about the 16th day of November, 1869, duly proved the said will before the surrogate of the said county of Middlesex, and received letters testamentary upon the said estate from the said surrogate, and that they undertook the executorship of the said estate, and possessed themselves of the estate and effects of the said testator, to a very considerable amount, and more than sufficient to discharge his just debts, funeral
20 expenses, and legacies.

And your orator further shows, that the said John H. Manning and Edward Paxton, as executors as aforesaid, have filed in the office of the said surrogate their account of the administration of the estate of said testator, and that the same has been allowed by the Orphans Court of said county of Middlesex; and that, as appears by the said account, after payment of the just debts and funeral expenses of said testator, and also after the payment of legacies to the amount of $3574, the said executors retain in their
30 hands, of the proceeds of the estate of the said testator which had come to their hands, the sum of $17,307.90.

And your orator further shows, that in and by said will the said Aaron Tindall, deceased, gave and bequeathed to his wife, Ann Tindall, in lieu of her right of dower at common law, $5000, to be disposed of as she might think fit, as by the said will, or a copy thereof, will appear.

And your orator further shows, that the said Ann Tindall, wife of said Aaron Tindall, the testator, departed this life before the death of said testator, and sometime in the year
40 1867, and that said legacy to said Ann Tindall, by her de-

cease in the lifetime of the testator, lapsed and fell into the estate of said testator.

And your orator further shows, that in and by the said will no disposition was made by the said testator of the said sum of $5000, given to his wife as aforesaid, in case of the death of his said wife in his lifetime, and of the lapsing of the same, as in and by the same will appear.

And your orator charges and insists, as matter of law and equity, that inasmuch as the said sum of $5000 remains undisposed of by said will, the said testator as to that sum died 10 intestate, and the next of kin of said testator are entitled to the same, and that the same is now held by said John H. Manning and Edward Paxton, executors as aforesaid, in trust for the next of kin of the said testator, and that they are entitled to receive the same from the said executors, in such shares and proportions as they are respectively entitled to.

And your orator further shows, that at the time of his death the said Aaron Tindall left no wife, children, or issue of children, him surviving, and left him surviving as his next of kin, your orator, the only living brother of said deceased, Chris- 20 tiana, widow of David Hutchinson, a half-sister, who is still living, and the children of six deceased brothers and sisters, said brothers and sisters being respectively named Amos Tindall, John Tindall, Elizabeth Hutchinson, wife of John B. Hutchinson, Theodosia, wife of John Paxton, Elijah Tindall, and Israel Tindall, all of whom departed this life many years before the death of the said testator. And your orator further shows, that the children of the said deceased brothers and sisters are very numerous; that a great many of them reside out of the jurisdiction of this court; that 30 your orator, after diligent search and inquiry, has not been able to ascertain the names and residences of all of them, and that your orator has not been able to procure the consent of all those of the next of kin living in this state to making them complainants in this suit; that said Edward Paxton, one of the defendants to this suit, is one of the said next of kin, and that for these and other reasons it would be highly inconvenient and onerous to your orator to make all of the said next of kin (or so many of them as might consent to join with your orator) parties complainant to this bill. 40

And your orator is advised and charges, that the rights and interests of the defendants will be in no degree prejudiced, because all of the said next of kin are not made parties to this suit, but that their rights will be protected by this honorable court, and that the questions desired to be decided in this suit can be raised and decided by the court, upon this bill filed by your orator, as one of the said next of kin, on his own behalf and on behalf of such of the next of kin as may choose to come in under the same.

10 And your orator further shows, that as the only living brother of said deceased, he is entitled to the one-eighth part of the said sum of $5000, with interest thereon.

And your orator further shows, that the said John H. Manning and Edward Paxton, as executors as aforesaid, have received from said estate of the said testator more than sufficient to pay the debts and funeral expenses of said deceased, the legacies given and bequeathed by said will, the expenses of settling the said estate, and the said lapsed legacy of $5000.

20 And your orator further shows, that said John H. Manning and Edward Paxton give out and pretend that, under and by virtue of said will, the said lapsed legacy of $5000 belongs to and was devised to them, and that they are entitled to retain the same in their individual capacities as the residuary legatees under said will, under the following clause thereof:

"I give and bequeath whatever of my property shall remain after payment of the above and due settlement of all my business, to my two friends, John H. Manning, to him, 30 his heirs and assigns, and to Edward Paxton, him, his heirs and assigns."

And your orator charges and insists, as matter of law and equity, that the said testator, by said clause, gave and bequeathed to said John H. Manning and Edward Paxton, only whatever of his property should remain after payment of his just debts, funeral expenses, the legacies given by his will) including the said lapsed legacy of $5000), and due settlement of all his business; that the said residuary bequest is in law and equity, a specific bequest, and cannot be held to in- 40 clude, for any reason whatever, the said legacy of $5000,

which was expressly excluded therefrom; and that in case of the lapsing of said legacy, the same not being otherwise disposed of by said will, would not go to the said John H. Manning and Edward Paxton by virtue of the above gift and bequest, but would be held by them as executors in trust for the next of kin of said deceased.

And your orator further shows, that he has frequently and in a friendly manner applied to the said John H. Manning and Edward Paxton, as executors as aforesaid, for the payment to him of that share or proportion of the said lapsed legacy of $5000, to which your orator is entitled as above stated, but they have wholly failed, neglected, and refused to pay the same; and in reply to such application of your orator, have insisted and charged that your orator was not entitled to any portion of said money, but that they were entitled to retain the same in their individual capacities as legatees, and although a long time has elapsed since the testator's death, and since they received notice of your orator's claim, they have not taken, and do not propose to take any proceedings in this court or elsewhere, to determine upon the proper construction of said will, and to whom the said lapsed legacy, in law and in equity, belonged; but they have retained the same, claiming it to belong to themselves, although notified of the claim made by your orator and others of the next of kin thereto, and have imposed upon your orator the expense of filing this bill, in order to determine the true construction of said will, and they have refused to pay unto your orator any part or portion of the said sum of $5000.

All of which actings, doings, pretences, and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in a court of equity, where matters of this kind are properly cognizable and relievable—to the end, therefore, that the said John H. Manning and Edward Paxton, and the said John H. Manning and Edward Paxton, as executors of the said Aaron Tindall, deceased, may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information, and

belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and each of them distinctly interrogated thereto, and that an account may be taken to ascertain how much of the estate of said deceased has come to the possession of, and remains in the hands of said executors, after payment of the debts, legacies, funeral expenses, and expenses of settling the estate of said deceased, and that the right of the next of kin to the
10 said lapsed legacy of $5000, with interest thereon, may be established and decreed by this court, and that the names and residences of the said next of kin may be ascertained under the order and direction of this court; and that said John H. Manning and Edward Paxton, as executors as aforesaid, may be directed and decreed to pay unto your orator, the share or proportion of said sum to which he claims to be entitled, as above set out, together with the costs of this suit, and to pay to such of the next of kin of said deceased, as may chose to come in under this suit, their respective
20 shares and proportions of the said sum of $5000 and interest; and that such further and other relief may be granted to your orator and such of the said next of kin as may come in under this suit, as to your Honor shall seem meet.

May it please your Honor, the premises considered, to grant unto your orator the writ of subpœna of the state of New Jersey, to be directed to said John H. Manning and Edward Paxton, as executors of said Aaron Tindall, deceased, and to said John H. Manning and Edward Paxton, therein and thereby commanding them and each of them, on
30 a certain day and under a certain penalty therein to be inscribed, to be and appear before your Honor in this honorable court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator, as in duty bound, will ever pray, &c.

RICHEY & EMERY,
Solicitors, and
JOHN R. EMERY,
40 *Of counsel with complainant.*

SCHEDULE No. 1,

Mentioned and referred to in the foregoing bill.

In the name of God, amen. I, Aaron Tindall, of the county of Middlesex, and state of New Jersey, being of sound mind, memory, and understanding, do make and publish this, my last will and testament, in manner and form following, to wit—

First. It is my will, and I do order, that all my just debts and funeral expenses be duly paid as soon as conveniently can be after my decease. 10

Second. I do order and direct my executors, hereinafter named, to sell and dispose of all real and personal property that I may have at the time of my decease, and to collect all moneys due me on mortgage, bonds, notes, and otherwise, as soon as convenient after my decease, and after deducting therefrom the amount of my just debts and funeral expenses, to be disposed of in the following manner:

Third. I do give and bequeath to my beloved wife Ann, in lieu of her right of dower at common law, $5000, to be disposed of by her as she may think proper. 20

Fourth. I give and bequeath to the three daughters of my brother, Amos Tindall (deceased), to Mary Farmer $500, to Elizabeth Phillips $500, to Rebecca Ann Cook $500, to them, their heirs and assigns forever.

Fifth. I give and bequeath to Aaron Tindall Cassler, my namesake, son of John P. Cassler, $1000, to him, his heirs and assigns, with this proviso: it shall remain in the hands of my executors until he is twenty-one years of age.

Sixth. I give and bequeath to the consistory of the Reformed Dutch Church of Spottswood, N. J., the sum of $500, 30 to be used by them for the best interest of said church.

Seventh. I give and bequeath to my sister, Theodosia Paxton, the sum of $50, to her, her heirs and assigns forever.

Eighth. I give and bequeath to my brother, William Tindall, $400, to him, his heirs and assigns forever.

Ninth. I give and bequeath to my nephew, James Paxton,

living at Hightstown, N. J., the sum of $300, to him, his heirs and assigns forever.

I direct my executors, hereinafter named, to appropriate and use of $30, for the purpose of erecting headstones at the graves of my brother, Israel Tindall and his wife.

It is my will, and I do hereby order and direct my executors hereinafter named, to give a just and lawful deed to my sister-in-law, Lydia Rue, wife of Peter Rue, for the property *wh* I own, on which she, with her husband, now re-
10 sides; provided, and only on condition, that she shall agree to sign off the one-third right in the property *wh* I have deeded, and four acres *wh* I may agree to deed, to David Compton.

I give and bequeath whatever of my property shall remain after payment of the above and due settlement of all my business, to my two friends, John H. Manning, to him, his heirs and assigns, and to Edward Paxton, to him, his heirs and assigns.

I appoint my friend John H. Manning, and my nephew
20 Edward Paxton, executors of this, my last will and testament.

I do hereby revoke all former and other wills by me at any time heretofore made.

In witness whereof, I have hereunto set my hand and seal, this the 8th day of November, in the year of our Lord, 1865.

AARON TINDALL.

The above instrument was now here subscribed by Aaron Tindall, the testator, in the presence of each of us, and was, at the same time, acknowledged and declared by him to be
30 his last will and testament, and we, at his request, signed our names hereto as attesting witnesses.

DANIEL B. CONOVER,
ORLANDO PERRINE,
THOMAS F. NICHOLS.

ANSWER.

[Filed May 13, 1872.]

The joint and several answer of John H. Manning and Edward Paxton, defendants to the bill of complaint of William Tindall, complainant.

These defendants, now and at all times hereafter, saving and reserving to themselves all, and all manner of benefit and advantage of exception to the many errors, uncertainties and insufficiencies in the said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say—

They admit that Aaron Tindall was possessed of real and personal estate, and that he made his will as charged, and that he died at the time mentioned, without altering or revoking said will.

To avoid all doubt, these defendants beg leave to produce the said will, or a duly authenticated copy thereof, before this honorable court.

They admit the appointment of these defendants as executors by his said will, and the probate of the said will, as charged in the said bill; the granting of letters testamentary to these defendants, and that these defendants, as such executors, became possessed of the estate and effects of the said testator, to a considerable amount, and more than sufficient to discharge the said testator's debts, funeral expenses, and legacies.

These defendants admit the filing of the account of their administration as charged, and the allowance of the same by the Orphans Court of the county of Middlesex; they admit the payment of debts, expenses, and legacies as charged, and they admit the account of the estate after such payments as charged.

They admit the bequest to the wife of the said testator, Ann Tindall.

They admit the death of the said Ann Tindall, at the time stated, and that the bequest to her lapsed, but expressly

charge, that when it so lapsed it fell into and became a part of the residuary estate of the said testator, and passed under the residuary clause of the said will, and that as to the said sum of $5000, the testator did not die intestate.

And these defendants deny, that in and by the said will, no disposition was made by the said testator of the said sum of $5000, in case of the death of his wife, in his lifetime, and expressly charge that the same passed under the residuary clause of the said will, and that such clearly was the intention of the said testator as he made the said will, on the 8th day of November, 1865, and his said wife Ann departed this life on the 12th day of January, 1867, and the said Aaron Tindall, the testator, departed this life on the 28th day of October, 1869, and the said testator did not change, alter, or revoke the said will, and thus clearly indicated his purpose, that the said sum of $5000 should pass under the residuary clause in the said will.

These defendants, therefore, under the advice of counsel, deny the legal conclusion charged in the said bill, that as to the said sum of $5000 the said testator died intestate, and they deny that the said sum of $5000 is held by these defendants in trust for the next of kin of the testator, as charged.

These defendants admit that at the time of his death the said Aaron Tindall left no wife, children, or issue of children him surviving.

These defendants admit that the complainant is the only living brother of the said testator, and that the said Christiana was a half-sister of the said Aaron Tindall, and these defendants believe it to be true that the said testator left children of six deceased brothers and sisters him surviving; and these defendants believe that the said deceased brothers and sisters are correctly named, excepting that the name of John B. Hutchinson should be Jonathan D. Hutchinson.

These defendants are not accurately informed who are the children of all the said deceased brothers and sisters of the said testator; these defendants, however, insist that due proof should be made of the said brothers and sisters, and of their deaths and issue or children, and that the said complainant should have stated such issue or children, their names and residence.

These defendante expressly charge that the said bill is defective for want of parties, and that these defendants cannot be made subject to the continuous and protracted litigation incident to ascertaining who are the next of kin of the said testator, and that for such want of parties the said bill of complaint should be dismissed.

And these defendants deny, that the said complainant is entitled to one-eighth of the said sum of $5000, or any other part thereof.

These defendants admit, that they have received from the 10 estate of the testator more than sufficient to pay his debts and funeral expenses, legacies, and expenses of settling the said estate, and as much as $5000 remains after such payments.

And these defendants do claim, that what surplus is in their hands after the payment of debts, funeral expenses, legacies not lapsed, and the expenses of the administration of the said estate, belong to these defendants under the said residuary clause referred to; and these defendants do claim, that under the true construction of the said will, the said 20 lapsed bequest became a part of the residuary estate, and which passed under the said residuary clause.

These defendants say, that it is clear that the said testator intended that he should not die intestate, with reference to any part of his property.

He gave power to his executors to sell all his real and personal property, and he gave no specific property by name to any devisee or legatee, except in the directions to give a deed to his sister-in-law, Lydia Rue, wife of Peter Rue, for the property which he, the testator, owned, and on which 30 she, with her husband, resided, on the conditions in said will set forth.

The complainant has no cause of complaint, as by the said will the testator clearly indicated his purpose, that the said complainant, who was named in the said will, should have the sum of $400, and no more, which sum of $400 has been paid to the said complainant.

And these defendants say, that John H. Manning, one of these defendants, was the friend of the said testator, and the said testator desired and designed to make some provision 40

for him as he, the said testator, left no children nor issue of any deceased child him surviving, and that such intention was carried out by the said residuary clause in the said will.

And these defendants say, that Edward Paxton, the other executor named in the said will, was a nephew of the said testator, who for some years before the death of the said testator, had assisted the testator in the management of his affairs without charge, and the testator designed and intended not only to show his confidence in the said Edward Paxton, by naming him executor, but also proposed that the said Edward Paxton should derive such beneficial interest from his said estate as would pass, as expressed in the said will, under the residuary clause therein stated.

And these defendants are advised by counsel, and humbly insist that the complainant having no estate or interest under the said will, except by the legacy of $400, which has been paid to him, and has been accepted by the complainant, the complainant cannot exhibit his said bill in this honorable court, claiming any equity whatever.

And these defendants say, that they have fully administered the estate of the said testator under the said will; they have paid all the debts of the said testator, and all the legacies and bequests therein named, as required by the said will, excepting the legacy of $50 to Theodocia Paxton, who died before the testator, and have paid to the complainant his legacy, which he has received, and they, these defendants, as they are advised, have a just and lawful right to the surplus which remains, and neither the complainant nor any other person has any claim thereto, save these defendants.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without that, that there is any other matter or thing in the said complainant's bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed or avoided, traversed or denied, is true, to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasona-

ble costs and charges in this behalf most wrongfully sustained.

E. T. PAXTON,
Sol. of defendants.

State of New York, county of Kings, *ss.*—Before me personally appeared John H. Manning, who by me being duly sworn according to law, deposeth and says—that the matters, facts, and things in the foregoing answer stated and set forth, so far as the same relate to the acts and deeds of this deponent, are true of his knowledge, and so far as the same 10 relate to the acts and deeds of any other person or persons, this deponent believes them to be true; this deponent says he is one of the defendants in the foregoing answer named.

JOHN H. MANNING.

Subscribed and sworn, before me, at Brooklyn, this 7th day of May, 1872.

ROBERT B. KINNEY,
Com. of Deeds for Kings county.

State of New Jersey, county, *ss.*—Before me personally appeared Edward Paxton, who being by me duly 20 sworn according to law, on his oath deposes and says—that this deponent is one of the defendants in the foregoing answer named; that the matters, facts, and things in the foregoing answer stated and set forth, so far as the same relate to the acts and deeds of this deponent, are true of his knowledge, and so far as the same relate to the acts and deeds of any other person or persons, this deponent believes the same to be true.

EDW'D PAXTON.

Subscribed and sworn, before me, at Hoboken, this 6th 30 day of May, 1872.

WM. T. HOFFMAN, *M. C. C.*

DECREE.

[Filed December 31, 1872.]

This cause having been duly noticed for hearing upon bill and answer at the May Term, 1872, of this court, and coming on to be heard at said term before Hon. Abraham O. Zabriskie, Chancellor, in the presence of John R. Emery, of counsel with complainant, and I. W. Scudder, Esq., of counsel with defendants, and the court having heard, read, and considered the pleadings in the cause, and the arguments of
10 counsel thereon, and considered the same, and it appearing to the court that Aaron Tindall, late of the county of Middlesex, and mentioned in said bill, departed this life on or about the time mentioned therein, having first made, executed and published, according to law, his last will and testament, of the tenor and effect mentioned and set out in said bill, and appointed the defendants the executors thereof, and that the said defendants duly proved the said will and took out letters testamentary thereon and undertook the executorship of said estate and possessed themselves of said estate, and that
20 the said executors have filed in the office of the surrogate of the county of Middlesex, their final account of the administration of said estate, and that the same has been allowed by the Orphans Court of said county, and that after payment of the debts, funeral expenses, legacies, and expenses of settlement, the said executors retained in their hands of the proceeds of said estate, the sum of $17,307.90; and it further appearing that in and by said will the said testator gave and bequeathed to his wife, Ann Tindall, in lieu of her right of dower at common law, $5000, to be disposed of by her as
30 she might think fit, and that said Ann Tindall departed this life in the lifetime of said testator; and it further appearing that said testator left him surviving no children or issue of children, but that he left him surviving as his next of kin the said complainant his brother, Christiana, wife of David Hutchinson and a half sister of the testator, and the children of six deceased brothers and sisters, named respectively, Amos Tindall, John Tindall, Elizabeth Hutchinson, wife of Jonathan D. Hutchinson, Theodosia, wife of John Paxson, Elijah Tindall and Israel Tindall, and that the children of
40 said deceased brothers and sisters are numerous, that some of them are out of the jurisdiction of this court, and that the

names and residences of all of them are not known to the complainant or defendants, that said Elijah Paxson, one of the defendants, is one of the next of kin; and the court being of opinion that the said legacy to the said Ann Tindall is a lapsed legacy, and that no disposition of the same was made by the said testator in case of the death of his said wife in his lifetime and of the lapsing of the same, and that as to said sum of $5000, the said testator died intestate, and that the next of kin of said Aaron Tindall are entitled to the same, and that the said complainant as one of the said next of 10 kin is entitled to the one-eighth part thereof, with interest after one year from the death of said testator, and that it is proper that an inquiry should be made as to the next of kin of said Aaron Tindall, and that such of them as can be ascertained, and desire to come in under this suit, should be admitted to the benefit of this suit.

It is thereupon ordered, directed, and decreed, that the legacy of $5000, given and bequeathed by said Aaron Tindall in his said will, to his wife, Ann Tindall, is a lapse legacy, and that as to said sum the said Aaron Tindall died intes- 20 tate, and that the said defendants hold the said sum in trust for the next of kin of said intestate, and that the said complainant is entitled to the one-eighth part of said sum, (being the sum of $625) with interest from November 1st, 1870, being one year from the death of said testator, and that the said defendants do pay him the same upon his tendering a proper refunding bond; and it is further ordered and directed, that the other next of kin of said deceased have leave to come in under this suit upon contributing to the expenses thereof and that for the purpose of ascertaining 30 the said next of kin, it be referred to James S. Aitkin, Esq., one of the masters of this court, to inquire who are the next of kin of said deceased, and entitled to a distributive share of said sum, and that such next of kin be allowed to come in before said master, and that such of them as shall not come in before said master shall be excluded from the benefit of a decree in this suit, and all further equity is reserved until the coming in of said report.

A. O. ZABRISKIE, *C.*

Dated December 31st, 1872. 40

PETITION OF APPEAL.

[Filed March 28, 1873.]

Between

John H. Manning and Edward Paxton, in their own right, and as executors of Aaron Tindall, deceased,
Appellants,
and
William Tindall,
10 Appellee.

On Bill, Answer, &c.

To the Honorable the Court of Appeals in the last resort in all causes.

The humble petition of John H. Manning and Edward Paxton, in their own right, and as executors of Aaron Tindall, deceased, respectfully shows—

That your petitioners find themselves aggrieved by a decree made in the Court of Chancery, by his Honor, Abraham O. Zabriskie, Chancellor, bearing date December 31st, 1872, made in a certain cause, wherein William Tin-
20 dall is complainant, and John H. Manning and Edward Paxton are defendants, in this respect: that the said decree adjudges, that as to the legacy of $5000, given and bequeathed by said Aaron Tindall, in his said will, to his wife, Ann Tindall, the said Aaron Tindall died intestate, and that the said defendants, John H. Manning and Edward Paxton, hold the said sum in trust for the next of kin of said intestate. And to so much of the said decree as adjudges that the said complainant, William Tindall, is entitled to the one-eighth part of said sum (being the sum of $625),
30 with the interest from November 1st, 1870, and that said defendants pay him the same upon his tendering a proper refunding bond.

And to so much of the said decree as adjudges that the other next of kin of said Aaron Tindall, deceased, have leave to come in under said suit, upon contributing to the expense thereof, in the manner set forth in the said decree.

And your petitioners humbly appeal from the parts of the decree of the Chancellor, which decree as aforesaid, upon the ground that the same is erroneous, (for that, as to the said sum of $5000, the said Aaron Tindall did not die intestate; but, on the contrary, the said sum passed, under the residuary clause of the said will, to the said John H. Manning and Edward Paxton, and became vested in them.

Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden. 10

And that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

E. T. PAXTON,
Solicitor of appellants.

I. W. SCUDDER,
Of counsel with appellants.

ANSWER TO PETITION OF APPEAL.

[Filed May 23, 1873.]

The answer of William Tindall to the petition of appeal of John H. Manning and Edward Paxton, executors of Aaron Tindall, deceased. 20

This respondent, not confessing or acknowledging all or any of the matters or things to be true in the said petition of appeal contained and set forth, for answer thereto say, that he believes it to be true that such order and decree as is complained of by the appellants, was made in the Court of Chancery, by the Honorable Abraham O. Zabriskie, Chancellor of the state of New Jersey, but as to the date, substance, and contents thereof, this respondent humbly craves leave to refer thereto when the same shall be produced. 30

And this respondent is advised and believes that the said order and decree is agreeable to equity, and he therefore

humbly prays that the same may be affirmed, and that the said petition of appeal may be dismissed by this honorable court, with costs to be adjudged to this respondent.

RICHEY & EMERY,
Solicitors, and
JOHN R. EMERY,
Counsel for William Tindall.

OPINION.

The suit is brought by William Tindall against the ex-
10 ecutors of the last will of his deceased brother, Aaron Tindall, for one-eighth part of the sum of $5000, bequeathed by the testator to his wife, who died before him.

The testator, after the above bequest to his wife and several other legacies, bequeathed as follows: "I give and bequeath whatever of my property shall remain after payment of the above and due settlement of all my business, to my two friends, John H. Manning and Edward Paxton." He appointed Manning and Paxton executors.

The testator left no issue, but had eight brothers and sis-
20 ters, two of these (of whom the complainant is one) survived him. The other six died before him; all left children living at the death of the testator; the defendant, Paxton, is one of these children.

The complainant claims that the testator died intestate as to the lapsed legacy of $5000, given to his wife. That the gift of "what shall remain after payment of the above" is a circumscribed, and not an absolute residuary legacy, and must be construed only to include what is given by the words; that is, such estate as remains or would remain after
30 payment of this $5000, and the other legacies. And that as one of the next of kin of the testator he is entitled to one-eighth of this sum, which was not disposed of by the will. This is the main question in the cause.

The rule of law is well settled both in the English and American courts, that a general or absolute gift of the residue

of an estate will carry with it all legacies which have lapsed by the death of the legatee in the life of the testator. This rule was established because in most cases it carries into effect the intention of the testator though it cannot be doubted that there are many cases in which it defeats it. It was necessary that some general rule of construction should be established, and this is the rule established. It is not for judges now to reason or discuss whether it was wisely established, or whether some better rule could not be adopted. I am of opinion that on the whole it is the best 10 rule and more generally carries into effect the intention of the testator.

But like all other general rules for the construction of wills, it is limited to cases where the testator has not shown a different intention, and where the testator has limited or circumscribed the residuary bequest or devise; it does not prevail unless the terms by which it is limited include lapsed legacies.

Mr. Williams, in his treatise on the Law of Executors, *Vol.* II., *p.* 1315, states that the direction, that the residuary 20 legatee shall have what remains after the payment of legacies, is such circumscription of the bequest, and narrows the title of the residuary legatee so as to exclude him from lapsed legacies.

The same rule is substantiallylaid down in *Roper on Legacies*, *Vol.* II *p.* 1679 and 1682.

The case of the *Attorney-General* v. *Johnston*, *Amb.* 577, decided in 1769 by Lord Chancellor Camden, is a direct authority on this point. A gift of £20,000 to a charity was void by the Mortmain act. The residuary gift was, "if my 30 personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed," I give the remainder, &c. It was held that this would not include the void legacy which is spoken of as a lapsed legacy. Lord Camden says: "The rule is very true in general that the residue takes in lapsed legacies. But then the general legatee must be a general legatee to take in everything that does not pass by will. If the testator has circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, becomes a specific legatee. If the testator had 40

said none of the legacies shall on any account fall into the residue, it would have excluded the charities from taking the lapsed legacies. His intention appears strong in this case to confine the residue to what should remain of his money after the other legacies paid."

In the will before me the intention is yet more clearly shown, for the very words are used in which Lord Camden states the intention of the testator as deduced from his will, "whatever shall remain after payment of the above." I cannot imagine that the testator, in using this language, could have intended that, in any event, the legacy of $5000 given to his wife, should go to his executors as residuary legatees.

The rule laid down by Lord Camden is recognized and adopted in many cases since that time, which are referred to in *Roper on Legacies*, and *Williams on Executors*, in the passage above referred to.

As to this $5000, I must hold that the testator died intestate, and that the complainant is entitled to recover one-eighth of it, with interest from the expiration of one year after the death of the testator, upon giving the proper refunding bond.

An objection was made at the hearing, for want of proper parties. The other next of kin have not been made parties. This is not necessary in a case like this, where no account is called for, and where the complainant demands a certain aliquot part of a specific sum in which the other next of kin have no interest. Each has a like right to a different aliquot part of the same sum. The suit is brought for the complainant and such of the next of kin as may choose to join with him. This is at most all that is necessary. *Brown* v. *Ricketts*, 3 *J. C. R.* 553; *Wiser* v. *Blackly*, 1 *J. C. R.* 438; *Pritchard* v. *Hicks*, 1 *Paige* 270; *Story's Eq. Pl.*, § 207 and 212.