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Court of Errors and Appeals.

Between HATTIE MACKNET, *Appellant,* *and* MARY H. MACKNET, *Respondent.*	*On Appeal from Decrees of Chancellor.*

BILL OF COMPLAINT.

[Filed February 20th, 1873.]

The bill was filed by the executors of the last will and testament of Charles S. Macknet, deceased, for a judicial construction of his will.

No questions of fact were in controversy, and the doubts as to the meaning of the will arose, mainly, from a relinquishment, by the testator's widow (the respondent), of the provisions thereof in her favor, and the acceptance of her dower instead.

The portions of the will, a construction of which was prayed for, ~~only~~ fully appear in the opinion of the Chancellor, which follows.

OPINION.

Charles S. Macknet, late of the City of Newark, in this State, by his last will and testament, dated December 4th, 1871, devised, bequeathed and directed, among other things, as follows:

First. I do order all my just debts and funeral expenses to be paid by my executors, hereinafter named, as soon as conveniently can be done after my decease.

Second. I give and bequeath unto my beloved wife Mary, the sum of five hundred dollars, the same to be paid to her by my executors, within a reasonable time after my decease for the benefit of herself and my daughter Hattie, to pay for mourning apparel, &c. I also give to my said wife Mary, the proceeds of a policy of insurance on my life, issued by the Newark Mutual Benefit Life Insurance Company, for two thousand dollars, which policy is numbered 19,499.

Third. I give and bequeath to my executors, hereinafter named, my houses and lots on the north side of East Kinney street, and now designated by the numbers 38 and 42; said land being part of the same conveyed to me, by deed recorded in Book F 10 of Deeds, for Essex county, pages 225, &c.; to have and to hold the same, in trust, to the following uses and purposes, to wit: 1st, to permit my said wife Mary, to use and occupy the said house and lot, No. 38; or if she does not wish to occupy the same, then to receive and enjoy the rents of the same, for and during the term of her natural life, or so long as she shall remain my widow, unmarried, and after her decease or marriage, to permit my daughter Hattie, to use and occupy or enjoy the rents of the same, for and during the term of her natural life; and at the death of my said daughter Hattie, to convey the said house and lot to her children; or if it shall be deemed more desirable by my executors, and for the interest of her said children, then to sell the said house and lot, and divide the proceeds thereof among said children, share and share alike; but if the said Hattie shall die without issue

her surviving, then I direct my said executors to sell the said house and lot and distribute the proceeds thereof among my heirs, according to laws of the State of New Jersey, respecting intestate estates. 2d, to permit my daughter Caroline, to use and occupy the house and lot designated by the number 42 East Kinney street; or should she not wish to occupy the same, then to have and enjoy the rents of the same, for and during the term of her natural life, and after her death, to convey the same to her children; or if it shall be deemed more desirable by my executors, and for the interest of said children, then to sell the said house and lot and divide the proceeds thereof among said children, share and share alike; but should the said Caroline die without issue her surviving, then I direct my said executors to sell and convey the said house and lot and distribute the proceeds thereof among my heirs, according to the laws of the State of New Jersey, respecting intestate estates.

Fourth. I direct and hereby empower my said executors to sell and convey my house and lot now designated as number 40 East Kinney street, being the middle house of the block of three owned by me, for the benefit of my estate, and for which purpose I hereby vest them with the fee of the same, the proceeds of which are to constitute a part of the residue of my estate.

Fifth. I give and bequeath unto my said executors, four thousand dollars, in bonds of the United States, bearing interest at the rate of six per cent. per annum, or in such other bonds as I may have at the time of my decease; also forty shares of the capital stock of the Morris and Essex Railroad Company; also twenty shares of the capital stock of the National State Bank of Newark, and also twenty shares of the capital stock of the Newark National Banking Company, to have and to hold the same in trust, for the use and purposes following, viz: 1st, to collect the interest, dividends and income from said bonds and stocks, and from the same to pay all expenses incident to the maintenance of the said house and lot, the use of which I have hereinbefore given to my wife Mary and daughter Hattie, such as taxes, assessments, insurance and repairs; and 2d, to pay the balance of said interest, dividends and income to

my said wife Mary, during her natural life, and after her death, to set off the said bonds and stocks, to my daughter Hattie, or to her heirs; if the said Hattie shall die without issue her surviving, or children of such issue, then said bonds and stocks shall revert to my estate, and be distributed among my heirs, in the manner provided by the laws of New Jersey, respecting intestate estates.

Sixth. I give and bequeath unto my said executors four thousand dollars in bonds of the United States, bearing interest at the rate of six per cent. per annum, or in such other bonds as I may have at the time of my decease; also, forty shares of the capital stock of the Morris and Essex Rail Road Company; also, twenty shares of the capital stock of the National State Bank of Newark, and twenty shares of the capital stock of the Newark National Banking Company, to have and to hold the same in trust to the uses and purposes following, viz.: 1st, to collect the interest, dividends and income from said bonds and stocks, and from the same to pay all expenses incident to the maintenance of the said house and lot the use of which I have hereinbefore given to my daughter Caroline, such as taxes, assessments, insurance and repairs; and second, to pay the balance of said interest, dividends and income to my said daughter Caroline during her natural life, and upon her separate individual receipt, and after her death to set off the said bonds and stocks to her children, or their heirs; if the said Caroline shall die without issue her surviving or children of such issue, then said bonds and stocks shall revert to my estate and be distributed among my heirs in the manner provided by the laws of the State of New Jersey respecting intestate estates.

Seventh. I give and bequeath to my wife Mary and my daughter Caroline household furniture in my possession to the value of six hundred dollars each, to be selected by them at an appraised value, as follows: My wife shall select one article of furniture and said daughter Caroline one article, and so on alternately until each shall have selected the full amount of six hundred dollars, which I give to them respectively absolutely.

Eighth. I give and bequeath to my said wife Mary five hundred dollars to be held in trust for the use of her son,

George Sherwood, the same to be paid to her within six months after my decease, and the interest of which I direct shall be paid by her for the support of her said son, George Sherwood, during his natural life, and after the death of the said George the said principal sum of five hundred dollars shall be paid to my daughter Hattie, or her heirs.

Ninth. All the provisions in this my will made for the benefit of my wife and her said son George are to be in lieu and satisfaction of her right of dower, and all other interest she may have in my estate, her acceptance of said provisions to be determined by a relinquishment by her to be made in writing of such dower and interest within three months after my decease.

Tenth. I give and bequeath to my daughter Caroline three hundred dollars in cash; also, the further sum of one hundred dollars in the place and in lieu of her piano-forte; also, one-half of the silver and one-half of the silver-plated ware I may have at the time of my decease. The remaining half of said silver and silver-plated ware, and also the said piano-forte formerly Caroline's, I give and bequeath to my daughter Hattie.

Eleventh. I give and bequeath unto my son Theodore the use of my homestead, No. 993 Broad street, in the city of Newark, said use to commence in one year after the first day of April following my decease, my widow to have the privilege to occupy said homestead for one year following the first day of April after my decease if she shall so desire, said homestead comprising sixty-two feet on Broad street and ninety-two feet on Church street, with all the buildings on said land, said use of said homestead to my son Theodore to be for the term of his natural life, and subject to the following conditions and reservations, that is to say: That my said son Theodore shall permit his sister Caroline to reside with him, and to have the full use and enjoyment for her sole use, if she so desires, of the two South rooms on the second floor, free of expense for board or rent, so long as she remains unmarried or is a widow, and reserving the use of the back room to Mrs. Elizabeth Nutman just as she now uses the same, for and during her natural life. The said premises shall not at any time be liable or made subject to payment

of any debts or liabilities of my said son Theodore, and upon the death of my said son Theodore I do authorize and empower my surviving executor, or whoever may represent my estate, to sell and convey the said homestead premises, and to divide the proceeds of said sale or sales among my children and the children of my son Theodore, each to have an equal share or part thereof. If at any time it shall be deemed expedient by my executors, or the survivor of them, and for the interest of my estate, to sell so much of the said homestead property as fronts on Church street, and extending back in depth not more than one hundred and twenty-seven feet, I do authorize and empower them or him so to do, the proceeds of such sale or sales to go to and form a part of my residuary estate.

Twelfth. I give and bequeath unto my son Theodore a bond and mortgage for five thousand dollars upon the store and premises formerly No. 305 Broad street, now No. 796 Broad street, in the City of Newark. This bequest is upon the condition that he pay my part of a certain bond and mortgage, dated August 27, 1852, given by me and Orson Wilson to the Mutual Benefit Life Insurance Company upon the same premises, and saves my estate harmless and discharged from the payment of any part thereof, and all loss by reason thereof. I also give to him his note, which I now hold, dated January 1, 1856, for thirteen thousand and fifty dollars. I also give and bequeath to him twenty shares of the capital stock of the New Jersey Railroad and Transporration Company; twenty shares of the capital stock of the National State Bank, Newark; twenty shares of the capital stock of the Newark Banking Company; twenty shares of the capital stock of the Essex County National Bank, and twenty shares of the capital stock of the Morris and Essex Railroad Company. * * * *

Eighteenth. I give and bequeath to my executors the sum of four thousand dollars in bonds of the United States, or such other bonds as I may have at my decease, to be by them held in trust during the lifetime of Mrs. Elizabeth Nutman, my late wife's mother, the interest and income of which during said period, or so much thereof as may be necessary, I direct shall be appropriated to the com-

fortable support of said Elizabeth Nutman while she lives. My will is that the said Mrs. Nutman shall remain in and occupy the room in my house that she now does during her life, if she so desires. After the decease of the said Mrs. Nutman I direct the said bonds, or, upon a sale of them, the proceeds of the same to be distributed to my three children, Theodore, Caroline and Hattie, each to have equal part thereof; and should either of my said children just named have died at that time, leaving issue him or her surviving, the share of such decedent shall be distributed to such issue in equal parts. * * *

Twentieth. I give and bequeath my pew No. 94, old number, and now No. 101, in the North aisle of the First Presbyterian Church in the City of Newark, to my daughter Hattie and her heirs and assigns, reserving to her mother the privilege to occupy the same during her lifetime. * * *

Twenty-third. All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath as follows: One part thereof to my son Theodore, and to his heirs and assigns: one other part thereof to my daughter Hattie and to her heirs and assigns, and the other remaining part to my executors in trust to the use of my daughter Caroline during her natural life, the income of said part to be paid to my said daughter Caroline upon her separate individual receipt, and, after her death, the principal of said part is to be distributed among her children, if any shall her survive; if she shall leave no child or children surviving, or issue of such child or children, who shall likewise be entitled, then said part shall go to my son Theodore and daughter Hattie, their heirs and assigns, the said Theodore and his heirs to take one part thereof and said Hattie and her heirs to take the other part, and for the purpose of the distribution of said residue I do hereby authorize and empower my said executors, or the survivor of them, to sell and convey all or any part of the real estate of which I shall die seized or possessed, except such parts thereof as I have hereinbefore specifically devised in trust or otherwise, upon such terms and in such manner as they shall think best, and the receipt of said executors for the purchase money for said lands shall be a sufficient discharge to the purchaser or purchasers thereof.

Twenty-fourth. My will is and I do direct that during the minority of my daughter Hattie the income of the estate which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother, she remaining my widow, unmarried, for the support, maintenance and education of said daughter, and, in case of the death of her said mother or her marriage, then so much of said income as may be necessary for the liberal support and education of said daughter Hattie shall be paid by said executors, who in case of the death or marriage of my said wife Mary, I appoint to be the guardians of said Hattie. I also direct that the income of the stocks and bonds which I have directed to be paid to my wife and daughter Caroline shall be paid half yearly, as also the same directed to be paid for the support and education of my said daughter Hattie.

The bill is filed for a construction of the will, and to settle certain questions which have arisen by reason of the refusal of the widow to accept the provision made for her in lieu of her dower. And the parties ask the advice and direction of the Court accordingly, in the following particulars:

1. In respect to the disposal to be made by the complainants of the bequest of five hundred dollars directed by the second section of said will to be paid to the widow of said testator for the benefit of said widow and her daughter Hattie, and whether the whole or any part thereof, and if only a part, what part thereof, falls into the residue of the estate of said testator.

2. In respect to the use, rents and profits of said premises number 38 East Kinney street, prior to the death or re-marriage of the said Mary H. Macknet, and whether the same are, during that interval, to be had, received and enjoyed by the said Hattie or by the complainants, and if by the complainants, for what purpose, and upon what trusts, and what disposal they are to make thereof, and whether the same will fall into the residue of said estate.

3. In respect to the balance of said interest, dividends and income mentioned in section five of said will, and when they are to be paid, for what purpose applied, and how disposed of, during the natural life of the said Mary H. Macknet.

4. Whether, under the fifth and sixth clauses of said will, the complainants would be required to pay from the income therein provided for the expenses incident to the maintenance of such portion or portions of the premises therein referred to as might be assigned to the widow for dower, and while her estate in dower therein continued, that is to say, such expenses as taxes, assessments, insurance and repairs in said clauses or sections provided for.

5. Whether the bequest of five hundred dollars in the eighth section of said will mentioned is annulled and goes into the residue of the estate of said testator, by reason of the renunciation by the said Mary H. Macknet of the provisions of said will, and if the said bequest does not fall into the residue, to whom the interest thereof is to be paid prior to the death of said George Sherwood.

6. Whether or not, under the eleventh section of said will, the share of each of said Theodore Macknet's children is equal to the share of each of the said testator's children in the proceeds of the said homestead premises.

7. Whether, under the twenty-fourth section of said will, the entire income of the estate given to or for the use of Hattie is to be paid to the said Mary H. Macknet, or only such part thereof as may be needed for the support, maintenance and education of said Hattie, during the life or widowhood of the said Mary H. Macknet, and if the whole of said income is to be paid to said Mary H. Macknet during said period, for what or whose use the portion thereof unneeded or unapplied for such support, maintenance and education of said Hattie, is to be held by the said Mary H. Macknet, and what disposal thereof should be made by her, and if the complainants during that interval or period are to pay from said income only such portions thereof as may be needed for such support, maintenance and education of said Hattie, for what or whose use they are to hold the residue thereof, and how the same is to be disposed of by them.

8. Whether your orators are to hold the principal of Hattie's share in said estate during her minority.

The testator died January 29, 1872, leaving a widow, two children, a son and daughter, Theodore and Caroline, adults, the issue of a former marriage, and a daughter, Hattie, an infant of about seven years old by his last wife.

His estate is estimated at about half a million of dollars.

June 11, 1872, the widow filed in the Surrogate's Office of Essex County her dissent to receive any devise, bequest or legacy given to her by the will in satisfaction and bar of her dower, and did thereby refuse to receive the same. The provision made in the will for her in lieu of her dower has therefore failed because of her election not to receive it; or (to state it differently) because of her refusal to fulfill the condition precedent (that she should relinquish her dower within three months after his death), on which it was made.

In passing upon the questions submitted in this cause it is important to consider the provisions which the testator made for his two daughters.

To Caroline, he gave the use for her life, with remainder to her children, of the house and lot No. 42 East Kinney street, the benefit of the following securities: $4,000 in United States six per cent. bonds, or in such other bonds as he should have at his decease; forty shares of the stock of the Morris and Essex Railroad Company; twenty shares of the stock of the National State Bank at Newark, and twenty shares of the stock of the National Newark Banking Company; the interest, income and dividends to be applied so far as necessary, to keeping up the premises No. 42 East Kinney street, paying taxes, assessments, insurance, repairs, &c., &c., and the rest to her use for life, and the securities at her death to go to her children; household furniture to the value of six hundred dollars; three hundred dollars in cash, one hundred dollars in place of her piano-forte, given by the will to her sister Hattie; half of his silver, and half of his silver-plated ware; the right to reside in his son's family in the homestead, and to have two rooms on the second floor of the house, free of charge, for board or rent, so long as she remains unmarried, or may be a widow; an equal share with Hattie, in the proceeds (to be divided between them and Theodore's children), of the sale of the homestead, after Theodore's death; an equal share with Theodore and Hattie in the division of the $4,000, set apart for the benefit of Mrs. Nutman, during her life, and the use for life of an equal third of the residue of the estate, with remainder to her children.

To Hattie the will gives, after the death or re-marriage of her mother, the use for life, with remainder to her children, of the house and lot No. 38 East Kinney street; the interest, dividends and income, after her mother's death, of the following securities: $4,000 in six per cent. bonds of the United States, or such other bonds as the testator should have at his decease; forty shares of the stock of the Morris and Essex Railroad Company; twenty shares of the stock of the National State Bank at Newark; twenty shares of the stock of the National Newark Banking Company, the interest, income and dividends thereof to be applied so far as necessary, to the keeping up of the premises, No. 38 East Kinney street, paying taxes, assessments, insurance, repairs, &c., and the rest, after her mother's death, to be paid to Hattie for life, the securities at her death to go to her children; half of the testator's silver and silver-plated ware; the piano-forte above alluded to; an equal share with Caroline in the proceeds of the sale of the homestead after the death of Theodore; an equal share with Caroline and Theodore in the securities or proceeds of the sale thereof, set apart to the benefit of Mrs. Nutman, for her life; the sum of five hundred dollars, the interest of which is given to George Sherwood, for life; the testator's pew in the First Presbyterian Church, in Newark, reserving to her mother the privilege of occupying it during the latter's life; an equal share with Caroline and Theodore, in the residue of the estate, and an interest in the bequest of five hundred dollars to her mother, for mourning apparel.

From this statement of the provision made in the will for the two daughters, it will appear that the testator intended to give them equal shares, except that Hattie's share was to be subject to the interest given to her mother therein.

The direct provision made for the widow, on condition that she should relinquish her dower in the testator's real estate, is an interest in the bequest of five hundred dollars for mourning apparel, for herself and Hattie; a life policy of $2,000; the use while she should remain his widow, of the premises No. 38 East Kinney street; so much of the interest, income and dividends for her life, of the bonds and stocks, last above mentioned, as should not be needed for

maintaining those premises; household furniture to the value of six hundred dollars, and the use for life, of the pew.

The testator, it will be perceived, in effect charged upon Hattie's share of his estate, all of the provision made for his widow, except her interest in the bequest for mourning apparel, the bequest of the life policy, and the bequest of household furniture. And I think it was his intention to do so.

The widow having elected not to receive the provision made for her in lieu of her dower, and that provision having therefore failed, Hattie is entitled to the benefit of the failure.

These devises and bequests to Hattie were at the death of testator all vested. It seems to me clear that he intended they should vest in possession in case of the refusal of his widow to relinquish her dower; for he makes no disposition whatever over of the interest he has given his widow in his estate in the event of her electing not to receive such provision in the terms of the will.

To hold that these interests fall into the residue of the estate would be to create an inequality in the provision made for the daughters, which there is no evidence the testator intended, and to give to the son an advantage out of Hattie's share, which in my opinion the testator never contemplated. Caroline enters at once into the enjoyment of the provision made for her. It does not appear that it was not the intention of the testator that Hattie should enjoy her share in possession in case of her mother's refusal to relinquish her dower, unless such a conclusion can be drawn from the fact that the gift to Hattie is, as to part of her share, of the estate in remainder.

The circumstances of the parties are of much importance in the consideration of this part of the subject. Here were a mother and her infant daughter. It was not only natural but eminently desirable that they should reside together. The mother was the proper person to take charge of the daughter, and to that end to have charge of her income. The testator's object and design were obviously, to my mind, to provide for the mother and daughter together, by means of the share of the latter in his estate. They were to reside together, and to a certain extent their interest would be

identical. The arrangement would be for their mutual benefit, and also for the advantage of his two children by the first marriage, for it enabled him by this method of providing in part for his wife, by assigning to her an interest in her daughter's share of his estate, and so to make their interests in his estate greater than he could have done had he made an equal provision for his wife, independent of her daughter's share.

To construe the will so as to defer Hattie's enjoyment of her interest in the estate until, as to the house and lot No. 38 East Kinney street, her mother shall have died or remarried, and as to the income, interest and dividends of the bonds until the death of her mother, and to give to the residue of the estate the benefit of those provisions in the meantime for the equal benefit of her sister, her brother and herself would, I am satisfied, be contrary to the intention of the testator. No rule of law or of construction demands it.

It is perfectly settled, that if an estate is devised, charged with legacies, and the legacies fail,—no matter how—the devisee shall have the benefit of it and take the estate.

Lord Alvanley, M. R., in *Kennell* vs. *Abbott*, 4 Vesey, 802–811.

See also *King* vs. *Dennison*, 1 Vesey & Beames, 260.

And it is laid down as a rule, that, whether the failure of an intervening estate in the case of a devise is to go for the benefit of the heir or of the devisee of the residue of the estate, is to be determined with reference to the intention of the testator,—whether the intervening estate was regarded as an exception to the general devise of the residue or as a charge upon the estate.

2 *Redfield on Wills*, 503.

Cooke vs. *The Stationer's Company*, 3 M. & K., 262–264.

Sidney vs. *Shelley*, 19 Ves., 352.

I am satisfied that it was not the testator's intention to except from the devise and bequest to Hattie, the estate and interest given to her mother.

The devise of the house and lot is to the executors in trust, for the benefit of the widow so long as she shall

remain unmarried, and then for the benefit of Hattie. The bequest is to the executors for the benefit of the widow for life, and then for the benefit of Hattie. The necessity for the trust for the benefit of the widow has not arisen, and never will arise, and I think the case is within the ruling in *Sidney* vs. *Shelley*, where there was a devise to trustees for ninety-nine years upon trusts to be expressed, and from and after the expiration or sooner determination of the term in strict settlement. It was decreed, upon the apparent intention to devise immediate estates, subject to the term (not future estates expectant on its determination) that the term, no trust having been declared, should attend the inheritance according to the limitations of the will, and that there was no resulting trust for the heir. Lord Eldon said : "If a term for ninety-nine years being created, the intention appeared clear on the will that those who were to take after that term should not take in any mode until after the expiration of that term, the Court must act upon that intention ; but if upon the whole contents of the will, and from the nature of the dispositions, it appears that the testator intended to give estates of inheritance, subject to the term upon trusts to be satisfied, and if there are none, subject to such enjoyment as this Court will give where the trusts are satisfied, there is no rule that prevents this Court from saying this was the intention."

" It is clear," says Jarman (*Treatise on Wills*, 2d vol., p. 517), " that where a term for years is created for particular purposes, and the land subject thereto is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee." See also 2 *Powell on Devises*, 56.

The early cases in which it was held that an estate in reversion vests immediately upon the determination of the life estate upon which it is limited by the death of the tenant for life, or by the surrender or forfeiture of his estate, or his refusal or his disqualification to take it, 1 *Jarman on Wills*, 514, *Sheppard's Touchstone*, 435, have been followed in this country in cases such as the present.

In *Yeaton* vs. *Roberts*, 8 Fost. N. H., 459, it was held that

if the person to whom property is given for life decline to accept it, it vests in possession in those to whom it is limited in remainder, and the heirs of the testator have no right to the possession during the life of the first devisee.

In *Adams* vs. *Gillespie*, 2 Jones' Eq. (N. C. 1855), 244, the testator gave to his wife certain real and personal property for life, and then to his daughter for life, and then to his daughter's surviving children. The widow dissented from the will, electing to take the provision which the law made for her. It was held that her dissent removed her life estate from all the property given to her by the will and which she did not take independently of it, and that the effect of it was to hasten the enjoyment of the life estate given to the testator's daughter. See to the same effect, *Holderby* vs. *Walker*, 3 Jones' Eq. (N. C. 1856), 46.

As to the question, whether the provision made in the fifth and sixth sections for maintaining the houses and lots therein mentioned is affected by the refusal of the widow to relinquish her dower.

Under the opinion I have expressed on the preceding question, that Hattie's interest in the house and lot, the use of which is given to her by the will, vested immediately in possession in her, this question must be answered in the negative, for there is no such change made in the devises of the houses and lots numbers 38 and 42 East Kinney street, by the refusal of the widow to relinquish her dower, as to affect the construction which otherwise would have been put on the provisions in the fifth and sixth sections for maintaining those premises. The fact that dower may be assigned to the widow out of part of these premises will not affect the right of the beneficial owners under the will to the benefit of the provision. They may not need it just as much as if no such assignment were made. The tenant in dower has no claim to the benefit of these provisions, or either of them. The executors in disbursing money under them will do so with a view to the interest of the *cestui que trusts*, and to that end will discriminate, so far as may be practicable, consistently with the interest of the beneficial owners of the property, in their expenditures between the portions of the premises assigned to the widow and the residue.

Another of the questions propounded is, whether in the division of the proceeds of the sale of the homestead after the death of Theodore, his children take *per stirpes* or *per capita.*

The direction is, to divide those proceeds "among" the testator's "children and the children of his son Theodore, each to have an equal share or part thereof."

It is a rule that under a devise or bequest to one, and the children of another, *prima facie* the persons all take *per capita* and not *per stirpes. Hawkins on Wills*, 113; *Rutter* vs. *Stratton*, 3 Bro. C. C. 367; *Fisher* vs. *Skillman's Executors*, 3 C. E. G., 229, 231, 232. Nor am I able to find either in the expressions of the will or in its provisions, any evidence of an intention that the children of Theodore should in this case take *per stirpes.*

In two other parts of the will, the sixteenth and eighteenth sections, the testator indicates his intention, that a division among children of a legatee shall be *per stirpes* and not *per capita*, in apt and explicit language.

In the sixteenth section, the language is: "And in case either of said children be dead at the time of my decease, leaving issue him surviving, then the legacies herein given to such decedent shall go to his issue, to be equally divided between them." In the eighteenth, after providing for a distribution of certain lands or the proceeds thereof to his three children, each to have an equal part thereof, he adds, "and should either of my said children just named have died at that time, leaving issue him or her surviving, the share of such decedent shall be distributed to such issue, in equal parts."

It is insisted that the widow, by her refusal to accept the provision made for her by the will, has forfeited all right to receive the income, which by the twenty-fourth section is directed to be paid to her for the support, maintenance and education of her daughter.

By that section she is constituted guardian of her daughter. This is apparent from the whole language. The testator directs that during the minority of Hattie, the income of the estate which he has therein before bequeathed to her and to her use be paid to her mother, she remaining his

widow, for the support, maintenance and education of Hattie; and he provides for the support and education of Hattie by the executors in case of the death or re-marriage of her mother, and on the happening by either of these events, he appoints the executors guardians of Hattie.

No particular form of language is necessary to the appointment of a guardian by testament. The manifestation of the intention of the testator by the will, is all that is required. An assignment which confers expressly, or by implication, a power extensive enough to include "custody and tuition," the statutory words is enough.—*Swinburne on Wills*, Pt. 3, § 12. In *Leonard*, Pt. 2, p. 221, under a provision by which the profits of land devised to a boy by his father, were given to the boy's mother till his full age, for his maintenance and education, it was said by Justices Wray and Southcote, that nothing was devised to the mother "but a confidence," and that she was "as guardian or bailiff to keep the infant." In *Bridges* vs. *Hales*, Mosely, 108, a devise that the son should be under the "care and direction" of two persons, designated in the will, was held to constitute them testamentary guardians. In *Mendes* vs. *Mendes*, 3 Atkyn, 624, Lord Hardwicke thought that language by which a testator gave to his wife a certain annual sum for the maintenance and education of his children whilst they should continue to live with their mother and at her charge, amounted to a "devise of the guardianship" to the mother. In *Miller* vs. *Harris*, 14 Simons, p. 540, where the testator directed the trustees of his will to procure a suitable house for the residence of his children (who were infants), and to engage a proper person for the purpose of taking the management and care of the house and of his children during their minorities; and he requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself, it was held, that the testator had thus appointed his wife's sister guardian of his children.

It seems clear that the testator in the case under consideration intended to appoint his widow guardian of her daughter during the minority of the latter, so long during the widow's life as she should remain his widow, and after her death his executors are to be the guardians.

Although the widow may incidentally reap some advantage from her guardianship, the provision is rather to be regarded as made for the benefit of Hattie, than for the benefit of her mother.

I see no evidence that the testator intended that his widow, by her refusal to accept the provision he made for her, should forfeit her right to the guardianship. As testamentary guardian, she must give security.—*Nix. Dig.*, 371.

The income which, under the twenty-fourth section is to be paid to her, must be limited to the estate which the testator by the will expressly and directly gives to Hattie. He contemplated no more. His language is, "the estate which *I have hereinbefore* bequeathed to her and her use." It did not include that which he had given to her mother, and which by reason of her mother's refusal to accept it, has fallen to Hattie. That is not within the language or the purview of the provision. The income of that portion, unless needed for Hattie's support or education, must be collected by the executors, and accumulated in trust for Hattie.

As to the bequest to the widow of five hundred dollars for mourning apparel for herself and her daughter, I do not see how the conclusion is to be avoided that this, so far as regards the widow, falls within the provision of the ninth section. The five hundred dollars are given to her in trust for herself and her daughter to answer a certain purpose, the purchase of mourning apparel.

If a distinction could be made in favor of the widow's interest in this bequest, it must be on the ground that the legacy may be considered as given to defray what may be considered part of the funeral expenses. But the cost of mourning apparel for the widow is not regarded as part of such expenses. *Johnston* vs. *Baker*, 2 Carr. & P., 207.

In my judgment, one-half of the amount should be assigned to the daughter, who will therefore be entitled to receive under this bequest two hundred and fifty dollars accordingly. The other half falls into the residue of the estate.

By force of the ninth section of the will neither the widow nor her son George can have the benefit of the bequest of five hundred dollars to her to be held in trust for George for his life. For the reasons hereinbefore given in a like con-

nection, I am of opinion that this legacy vested in possession immediately in Hattie.

The result therefore is: The widow is not entitled to the benefit of the bequest of five hundred dollars for mourning apparel. Hattie is entitled to half of that amount, to be held and accumulated in trust for her by the executors. The other half falls into the residue of the estate.

Hattie is entitled to the use, rents and profits of the premises No. 38 East Kinney street, from the death of the testator, instead of from the death or re-marriage of her mother, and the executors will be decreed to hold those premises in trust accordingly, subject, of course, to any assignment which may be made of the premises, or any part thereof, to the widow as part of her dower.

Hattie is now entitled to the bonds and stocks mentioned in the fifth section of the will, and the executors will be decreed to hold the same for her on the trust declared in reference thereto in that section of the will, and to pay out of the interest, income and dividends thereof, the expenses mentioned in that section of maintaining the premises No. 38 East Kinney street, if, and so far as it may be for her interest so to do, with reference to the assignment of the premises or part thereof in dower to the widow, and to hold and accumulate the balance in trust for her.

The executors will be directed to pay the expenses of maintaining the premises No. 42 East Kinney street out of the interest, income and dividends of the stocks and bonds in the sixth section of the will mentioned, if, and so far as it will be for the interest of Caroline so to do, with reference to the assignment of the premises or part thereof to the widow in dower.

Hattie is entitled to the five hundred dollars in the eighth section of the will mentioned, and the executors will be decreed to hold and accumulate the same in trust for her accordingly.

Each of the children of Theodore Macknet will be entitled to an equal share with testator's daughters, Caroline and Hattie, in the proceeds of the sale of the homestead to be made at the death of Theodore.

The widow is, under the twenty-fourth section, entitled to

receive the income of the share of Hattie, except so much of that share as has fallen to the latter through her mother's refusal to accept the provisions made by the will for her. The income of the excepted portion of Hattie's share will be held and accumulated by the executors in trust for her accordingly.

The parties to this suit will be at liberty to apply to this Court from time to time, as occasion may require, for further directions.

DECREE.

[Filed March 20, 1874.]

This cause coming on to be heard at the last regular term of the Court of Chancery, held at the State House, in the City of Trenton, before the Chancellor, in the presence of JOHN W. TAYLOR, Esq., of counsel with the complainants, and CALEB S. TITSWORTH, Esq., of counsel with the defendants, and the Bill and Answer being read and the arguments of the respective counsel heard thereon, the Chancellor took time to consider the same.

And it appearing that Charles S. Macknet, deceased, late of the City of Newark, by his last will and testament, dated December fourth, eighteen hundred and seventy-one, did give, devise and bequeath his estate, both real and personal, in the manner and as in the pleadings in this cause mentioned, and make certain disposition of a portion or portions thereof to his said wife Mary, in lieu of her dower in his said estate, and by the ninth clause of his said will did provide as follows:

"*Ninth.* All the provisions in this my will, made for the benefit of my wife and her said son George, are to be in lieu and satisfaction of her right of dower and all other interest she may have in my estate, her acceptance of said provisions to be determined by a relinquishment by her to be made in writing of such dower and interest within three months after my decease."

And it appearing that the said widow has refused to accept the provisions made for her in lieu of her dower,

And the complainants being the executors of the will of the said Charles S. Macknet, deceased, having applied to this Court for a construction of the said will and for the direction of the Court in the following particulars, viz:

1. In respect to the disposal to be made by the complainants of the bequest of five hundred dollars, directed by the second section of said will to be paid to the widow of said testator for the benefit of said widow and her daughter Hattie; and whether the whole or any part thereof, and if only a part, what part thereof falls into the residue of the estate of said testator.

2. In respect to the use, rents and profits of said premises No. 38 East Kinney street, prior to the death or re-marriage of the said Mary H. Macknet, and whether the same are during that interval to be had, received and enjoyed by the the said Hattie or by the complainants, and if by the complainants, for what purpose and upon what trusts and what disposal they are to make thereof, and whether the same will fall into the residue of said estate.

3. In respect to the balance of said interest, dividends and income mentioned in section five of said will, and when they are to be paid, for what purpose applied, and how disposed of during the natural life of the said Mary H. Macknet.

4. Whether, under the fifth and sixth clauses of said will, the complainants would be required to pay from the income therein provided for the expenses incident to the maintenance of such portion or portions of the premises therein referred to as might be assigned to the widow for dower, and while her estate in dower therein continued—that is to say, such expenses as taxes, assessments, insurance and repairs in said clauses or sections provided for.

5. Whether the bequest of five hundred dollars in the eighth section of said will mentioned is annulled, and goes into the residue of the estate of said testator by reason of the renunciation by the said Mary H. Macknet of the provisions of said will, and if the said bequest does not fall into the residue, to whom the interest thereof is to be paid prior to the death of said George Sherwood.

6. Whether or not, under the eleventh section of said will, the share of each of said Theodore Macknet's children is equal to the share of each of the said testator's children in the proceeds of the said homestead premises.

7. Whether under the twenty-fourth section of said will the entire income of the estate given to or for the use of Hattie is to be paid to the said Mary H. Macknet, or only such part thereof as may be needed for the support, maintenance and education of said Hattie during the life or widowhood of the said Mary H. Macknet, and if the whole of said income is to be paid to the said Mary H. Macknet during said period, for what or whose use the portion thereof unneeded or unapplied for such support, maintenance and

education of said Hattie, is to be held by the said Mary H. Macknet, and what disposal thereof should be made by her, and if the complainants during that interval or period are to pay from said income only such portion thereof as may be needed for such support, maintenance and education of said Hattie, for what or whose use they are to hold the residue thereof, and how the same is to be disposed of by them.

8. Whether the complainants are to hold the principal of Hattie's share in said estate during her minority.

Now, on the tenth day of March, in the year of our Lord one thousand eight hundred and seventy-four, the Chancellor doth find and declare, adjudge and decree, as follows, viz:

That the said Mary H. Macknet, widow of the testator, Charles S. Macknet, deceased, is not entitled to the benefit of the bequest of five hundred dollars for mourning apparel in said will mentioned.

That Hattie, the infant daughter of the said testator, is entitled to half of said sum of five hundred dollars, to be held and accumulated in trust for her by the executors, and that the other half thereof falls into the residue of the estate.

That the said Hattie is entitled to the use, rents and profits of the premises No. 38 East Kinney street, from the death of the testator instead of from the death or re-marriage of her mother; and it is hereby adjudged and decreed that the said executors of the said Charles S. Macknet, deceased, do hold those premises in trust accordingly, subject to any assignment which may be made of the premises, or any part thereof, to the said widow as part of her dower.

And the Chancellor doth further find and declare that the said infant Hattie is now entitled to the bonds and stocks mentioned in the fifth section of said will, and it is hereby adjudged and decreed that the said executors hold the same for her on the trust declared in reference thereto in that section of said will, and do pay out of the interest, income and dividends thereof the expenses mentioned in that section, of maintaining the premises No. 38 East Kinney street, if, and so far as it may be for her interest so to do, with reference to the assignment of the premises or part thereof in dower to the widow, and also hold and accumulate the balance in trust for her.

It is hereby further adjudged and decreed that the said executors pay the expenses of maintaining the premises No. 42 East Kinney street out of the interest, income and dividends of the stocks and bonds in the sixth section of the will mentioned, if, and so far as it will be for the interest of Caroline, a daughter of the said testator, so to do with reference to the asssignment of the premises or part thereof to the said widow of the testator in dower.

It is further declared that the said Hattie is entitled to the five hundred dollars in the eighth section of the said will mentioned, and it is hereby adjudged and decreed that the said executors hold and accumulate the same in trust for her accordingly.

It is further declared that each of the children of Theodore Macknet will be entitled to an equal share with the testator's daughters, Caroline and Hattie, in the proceeds of the homestead, to be made at the death of Theodore.

That the said Mary H. Macknet, widow of the testator, is, under the twenty-fourth section of said will, entitled to receive the income of the share of Hattie, except so much of that share as has fallen to the latter through her mother's refusal to acccept the provision made by the will for her.

And it is hereby adjudged and decreed that the income of the excepted portion of said Hattie's share be held and accumulated by the said executors in trust for her accordingly; and that the principal of said Hattie's share be held by said executors during her minority.

And it is further ordered, adjudged and decreed that the costs of the complainants and defendants in this suit, to be taxed by the clerk, be paid by the executors out of the said estate, and that the sum of five hundred dollars each be paid to the solicitors of the complainants and defendants as counsel fee, said payments also to be made by said executors out of said estate.

And it is further ordered, adjudged and decreed that the complainants may be at liberty to apply to this Court for further directions as occasion may require.

THEODORE RUNYON, *C.*

Petition of Hattie Macknet.

[Filed May 14, 1874.]

To the Honorable THEODORE RUNYON, Chancellor of the State of New Jersey:

The petition of Hattie Macknet, an infant defendant in this cause, of the age of seven years, by Theodore Macknet, her next friend, respectfully shows as follows:

That since the decree made in this cause, whereby it was ordered and decreed that application might be made to your Honor for further directions from time to time, as occasion might require, it has been ascertained that the income of the share to which your petitioner is entitled under the will, in the bill and decree in said cause mentioned, amounts to a sum not less than ten thousand dollars.

That as your petitioner has been informed and believes, the liberal support, maintenance and education of your petitioner, does not now and will not for many years to come, if ever, require more than than one-fifth part of said annual income, leaving an annual surplus, for investment and accumulation of at least eight thousand dollars.

That your petitioner's mother, Mary H. Macknet, one of the defendants in this cause, and the testamentary guardian of your petitioner under said will, claims the right to demand and receive the whole of said annual income from said executors, under the twenty-fourth section of said will, and to appropriate to her own use, all in excess of the amount so required for the support, maintenance and education of your petitioner.

That her said guardian has given official bond to the ordinary, in the penal sum of only twenty thousand dollars, adequate only to one year's income from your petitioner's said share.

That as your petitioner has been informed and believes, her said guardian has already received from said executors, on account of said income, the sum of ten thousand dollars, which, or the greater part thereof, she has appropriated to her own private use, in the purchase of real estate in her

own name, and claims the right so to do, and insists that the said executors in consideration and for the protection of your petitioner's interests, cannot legally withhold from her any part of said income, whether needed or not for the maintenance, support and education of your petitioner, and notwithstanding her avowed intention to appropriate the greater part thereof to her own private use, under such claim of right, which claim or right your petitioner and the said executors deny.

Your petitioner therefore prays the aid and direction of your Honor in the premises, and that the said questions of doubt and dispute, under said will, and especially the said twenty-fourth section thereof, as to the rights of your petitioner on the one hand, and the duties of the said guardian and executors, respectively, on the other, may be settled and determined by the decree of your Honor, in like manner and to the same effect as if the same had originally been submitted for decision in and by the said bill of complaint; that is to say, that it may be ascertained and determined:

1. What is a reasonable allowance out of said income for the fair and liberal support, maintenance and education of your petitioner, under the provisions of the said will?

2. Whether the surplus or residue of said income, after deducting such allowance, is the property of your petitioner or of the said Mary H. Macknet.

3. Whether or not, (if the said surplus or residue is not the property of the said Mary H, Macknet) the said executors are bound to pay the same to her.

4. If they are bound to pay the same to said guardian, whether or not it is her duty to invest the same, and see to the accumulation thereof, for the benefit of your petitioner.

5. If the said executors are not bound to pay said surplus to said guardian, whether or not they are to invest and see to the accumulation of the same, for the benefit of your petitioner.

And that your petitioner may have such further and other relief as may be equitable and just in the premises.

And your petitioner will ever pray, &c.

THEODORE MACKNET, *next friend.*

NEW JERSEY, *ss.*

Theodore Macknet, next friend of the petitioner in the foregoing petition named, being duly sworn, on his oath says, that the allegations in said petition contained, are true to the best of his knowledge and belief.

Sworn and subscribed this 14th day of May, A. D. 1874, before me, } THEODORE MACKNET.

FREDERIC ADAMS, *Master in Chancery of N. J.*

A true copy: 10

H. S. LITTLE, *Clerk.*

OPINION.

THE CHANCELLOR:

The petitioner is the infant child (now about seven years of age) of the late Charles S. Macknet, and is his only child by the respondent, Mary H. Macknet, who is his widow. The petition is designed to obtain a declaration of the rights of the widow under a provision in the twenty-fourth section of the will of Mr. Macknet. That provision is as follows: "My will is, and I do direct that during the minority of my daughter Hattie, the income of the estate which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother (she remaining my widow, unmarried), for the support, maintenance and education of said daughter; and in case of the death of her said mother, or her marriage, then so much of said income as may be necessary for the liberal support and education of said daughter Hattie, shall be paid by said executors, whom in case of the death or marriage of my said wife Mary, I appoint to be the guardians of said Hattie."

It is alleged in the petition that the income of Hattie's share of the estate is far in excess of what is required for her proper support, maintenance and education. The question presented, is whether the widow is entitled to receive the income of Hattie's share, and if so, whether she can be called to account for the excess over what can be shown to be the amount required for the proper support, maintenance and education of Hattie, according to her condition in life. The first branch of this question was considered and disposed of in the opinion heretofore delivered in this cause, (See *Macknet's Executors* vs. *Macknet*, 9 C. E. G., 294, 295, 296,) in which it was held that the widow was entitled to receive so long, during the minority of Hattie, as she should remain the testator's widow, the income of the share of the estate which is by the will expressly and directly given to her daughter. The bequest is a gift of the income to the widow, charged with the proper support, maintenance and

education of her daughter. Nor will she, so long as she faithfully discharges the obligation thereby devolved upon her, be required to account. *Perry on Trusts*, §§ 117, 118, *and cases there cited.* The intention of the testator to give the income of the share which he had expressly and directly given to Hattie to her mother, so long, during the minority of the former as the latter should live and continue to be his widow, is clearly expressed; and that he intended that all of that income should be paid to his widow without reserve and without regard to the amount which might be required for the purposes indicated and without account, is further evident from the provision made for the same objects in the event of the death or re-marriage of his widow during the minority of the child, in which case the guardianship is to devolve on the executors. In that case the expenditure is to be limited to so much only of the income as may be necessary for the liberal support and education of the child. The executors will be directed to pay over to the widow so long, during the minority of Hattie, as she shall remain the testator's widow, the entire income of the share expressly and directly given to Hattie by the will.

DECREE.

[Filed September 28, 1875.]

This matter coming on to be heard before the Chancellor, on the petition of Hattie Macknet, an infant, by her next friend, in the presence of JOHN W. TAYLOR of counsel with the petitioner, and C. S. TITSWORTH of counsel for Mary H. Macknet;

And the said petition having been read, and the arguments of the respective counsel thereon having been heard and considered, and the Chancellor being of opinion that under the provisions of the twenty-fourth section of the will of said Charles S. Macknet, deceased, the bequest of the share of the estate of the said testator, which he had given to his daughter Hattie, is a gift of the income thereof to his widow, Mary H. Macknet, charged with the proper support, maintenance and education of her said daughter, and that so long as she faithfully discharges the obligation thereby devolved upon her, she will not be required to account for the excess over what can be shown to be the amount required for the proper support, maintenance and education of her said daughter.

It is thereupon, on this twenty-eighth day of September, eighteen hundred and seventy-five, on motion of C. S. Titsworth, Esq., of counsel with said Mary H. Macknet, ordered, adjudged and decreed, that the executors of the said Charles S. Macknet, deceased, pay over accordingly to the said Mary H. Macknet, so long, during the minority of her said daughter Hattie, as she shall remain the said testator's widow, the entire income of the share expressly and directly given to Hattie by the said will, without liability on her part to account.

THEODORE RUNYON, *C.*

A true copy:

H. S. LITTLE, *Clerk.*

NOTICE OF APPEAL.

[Filed October 28th, 1875.]

Hattie Macknet, an infant defendant in this cause, by Theodore Macknet, her next friend, hereby appeals to the Court of Errors and Appeals from so much of the decree made in this cause,—that is to say, the final decree originally made therein, on or about the tenth day of March, in the year eighteen hundred and seventy-four, and the final decree made therein, on the petition of the said Hattie Macknet, on or about the twenty-eighth day of September, in the year eighteen hundred and seventy-five,—as orders, adjudges and decrees that the complainants pay over to the defendant, Mary H. Macknet, so long (during the minority of the said Hattie Macknet) as the said Mary H. Macknet shall remain the widow of the said Charles S. Macknet, deceased, the entire income of the share expressly and directly given to the said Hattie Macknet by the will of the said Charles S. Macknet, and without liability on her part to account therefor.

THEODORE MACKNET, *next friend.*

JOHN W. TAYLOR,

Of Counsel with the defendant, HATTIE MACKNET.

Dated October 26, 1875.

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

JOHN W. TAYLOR,

Of Counsel with HATTIE MACKNET.

Petition of Appeal.

To the Honorable the Court of Errors and Appeals of the State of New Jersey:

The humble petition of Hattie Macknet (an infant, by Theodore Macknet, her next friend), the appellant in the above-stated cause, respectfully shows: that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery, by his Honor, Theodore Runyon, Chancellor of the State of New Jersey, bearing date the tenth day of March, in the year eighteen hundred and seventy-four, in a cause wherein Theodore Macknet and George F. Tuttle, executors of the last will and testament of Charles S. Macknet, deceased, were complainants, and Mary H. Macknet and your petitioner and others, were defendants; and also by another final decree, made in the same cause, by the same Chancellor, bearing date the twenty-eighth day of September, in the year eighteen hundred and seventy-five, in the respects following, to wit: that the said first-mentioned decree orders, adjudges, and decrees that the said Mary H. Macknet, under the twenty-fourth section of said will, is entitled to receive the income of the share given to your petitioner, in and by that section, excepting so much of that share as has fallen to your petitioner, through the refusal of the said Mary H. Macknet to accept the provisions made for her in and by said will; and that the said last-mentioned decree orders, adjudges and decrees that the said complainants pay over to the said Mary H. Macknet, so long (during the minority of your petitioner) as the said Mary H. Macknet shall remain the widow of the said Charles S. Macknet, deceased, the entire income of the share expressly and directly given to your petitioner by the said will, and without liability on her part to account therefor.

And your petitioner humbly appeals from those parts of the said decrees, which respectively order, adjudge and decree as aforesaid, upon the ground that the same in the respects aforesaid, are erroneous, and ought to be reversed.

Your petitioner therefore prays that the said decrees may be, in the particulars aforesaid, reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

Dated October 26, 1875.

THEODORE MACKNET, *next friend.*

JOHN W. TAYLOR,
Of Counsel with Appellants.

A true copy: 10

HENRY C. KELSEY, *Clerk.*

9

ANSWER.

The Answer of Mary H. Macknet to the petition of appeal of Hattie Macknet, an infant, by Theodore Macknet, her next friend, the appellant.

The respondent, not confessing or acknowledging all or any of the matters and things, in the said petition and appeal mentioned, to be true, as the same are therein set forth, and reserving to herself all benefit and advantage of exception to the errors, defects and imperfections in the said appeal contained, for answer thereunto saith, she admits that the Court of Chancery, of the State of New Jersey, did make said two decrees, as in said petition and appeal are mentioned and complained of, but as to the dates and contents of said two decrees, the respondent for greater certainty refers to the said two decrees when the same shall be produced, but the respondent is advised and humbly apprehends that the said parts of said two decrees complained of are not erroneous, and are in all things agreeable to equity and justice, and therefore humbly hopes and prays that said two decrees may be in all things affirmed, and the appeal dismissed with costs.

C. S. TITSWORTH

Sol. and of Counsel with Respondent.

Court of Errors and Appeals.

Between

HATTIE MACKNET,

Appellant,

and

MARY H. MACKNET,

Respondent.

On Appeal.

POINTS FOR APPELLANT.

I.

If, according to the intention of the testator, and by construction of law, as held by the Chancellor, the provision in Section 24 of the will, for the payment of the income to the respondent, amounted to "*a gift of the income to the widow*, charged with the proper support, maintenance and education of her daughter," it was a "provision" not only *for her benefit*, but far more for her benefit than any other provision in the will, and is therefore included in the term "provisions" in section 9 of the will.

See Sec. 9 of Will, CASE, p. 5

As to the value of the gift to her, see Petition, CASE, p. 25.

II.

To the extent that the provision in question was for her benefit, it failed like all other provisions for her benefit, by her non-compliance with the condition precedent on which it was intended to take effect.

The respondent, in full view of all the consequences, had her option to accept either the *dower* given her by law, or the *benefits* conferred on her by the will. She voluntarily took her dower in the valuable real estate left by the testator, and deliberately repudiated the benefits conferred by the will; and she cannot now hold her dower, and *at the same time cling to the most valuable provision of the will, which she had repudiated.*

Notice in the second item, in which he commences to make provision for his wife, the very language of this ninth item, "*for the benefit of herself.*"

Then he continues making provision for his wife's benefit up to the ninth item, and if we except the privilege of using the church pew, made no other provision for his wife's benefit.

Her election was made with reference to the provisions made expressly for her benefit, and without any reference to the provisions made for the benefit of his daughter, in the twenty-fourth item.

2 Scribner on Dower, 484.

The provisions of this 24th item are very explicit, and pertain to another subject matter—viz: the "*support, maintenance and education of his daughter.*"

It reads as follows: (Case, p. 8.)

"My will is, and I do direct, that during the minority of my daughter Hattie, the income of the estate, which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother, she remaining my widow, unmarried, *for the support, maintenance and education* of said daughter, and, in *case of the death of her said mother or her marriage*, then, *so much of said income as may be necessary* for the liberal support and education of said daughter Hattie shall be paid by said executors, who, *in case of the death or marriage* of my said wife Mary, I appoint to be the guardians of said Hattie; I also direct that the income of the stocks and bonds which I have directed to *be paid to my wife* and daughter Caroline, shall be paid half yearly, as also the same directed to *be paid for the support and education of my said daughter Hattie.*"

Is it not manifiest, that the testator had in mind the condition of his daughter Hattie, then about six years of age? He is providing for her a home, with all the advantages that his daughter should have during the years of her growth to womanhood, according to his ability and her proper station.

He directs the income of the estate which he had bequeathed to her and to her use be paid to her mother. What for? The mother's benefit? He declares the purpose—"*for the support, maintenance and education of said daughter.*"

The only condition upon which this payment to the mother, during the child's minority, shall cease, is plainly stated,—the death or marriage of the mother. Her declining to accept dower provisions, not even intimated.

It is to be paid so long as the mother remains my widow. As if he said, as an inducement for her not to marry, so that all her tender care and warm affection may be bestowed for Hattie's benefit, and as a consideration therefor, and to provide for all the expenses of a suitable home, I appoint my wife guardian of Hattie, and direct her income during her minority, to be paid to her mother.

Not a part, but the whole of the share bequeathed to Hattie.

But if my wife marries and takes to herself other cares and forms other attachments, *then so much only of said income as is necessary for her "liberal support and education,"* shall be paid by my executors.

I don't provide *a home* in that case—"*maintenance*" not included in that case.

Whether widow takes provision made for her benefit, in lieu of dower or not, this income is directed to be paid to the mother, upon the conditions expressed.

If he had meant to make the payment of this income conditional upon her accepting provisions for dower, he would have so said.

Can a testator make his intent plainer by written words?

The plain, unambiguous language of the will must prevail. 1 Red. on Wills, p. 419, Sec. 4.

The general intent overrides all mere technical and grammatical rules of construction.—1 Red. on Wills, p. 433.

In view of these considerations, when he directed in the 9th item, that her acceptance of the provisions "*made for his wife's benefit*" in lieu of dower, should be determined by a relinquishment by her to be made in writing of such dower, within three months, can it be fairly urged that he had any reference to this provision, in the twenty-fourth item, made for his daughter's support, maintenance and education?

In other words, did the widow, by not relinquishing as therein provided, forfeit her right of guardianship of Hattie as provided for in this 24th item.

I submit respectfully the testator did not so intend; if he had, he would have so said. His plain language and intent is, that this whole income should be paid as he directed to the mother.

Second. Upon the second question, is the widow liable to account?

My point is, that this income is given *upon an implied trust*, and in such case the ~~trustee~~ Pay ee is not bound to account. The law is well settled, and only requires the ~~trustee~~ Pay ee to fairly fulfill the trust without raising any inquiry as to the expenditures.

The income vests absolutely in the mother, and the expression of the testator is held merely descriptive of his motive in making the provision.

1 Red. on Wills, p. 711–712, and case cited in note.

This learned author holds, "That in general where the gift is to one for the accomplishment of a particular purpose as to others, the donee will hold the fund beyond any control of the Courts, so long as the duty specified shall be faithfully performed."

In Perry on Trusts, chap. 4, Implied Trusts—see particularly sec. 117—the law is declared as follows:

"There is another variety of cases where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent or other person standing in relation of parent, and some directions or expressions are used in regard to the maintenance of children."

And in sec. 118.—"Where a trust for the maintenance of children is implied, so long as he discharges the trust imposed upon him he is entitled to the surplus for his benefit, nor is he obliged to account for the past application of the fund; and the future application is very much according to his discretion, provided he educates and supports the children reasonably, according to their position in the world and the intention of the testator."

In O'Hara on Construction of Wills, p. 224, it is held that income, if directed to be applied for maintenance at the discretion of trustee, does not pass to the assignee in bankruptcy of *cestui que trust*. The discretion of the trustee will not be controlled by the Court.

The testator intended, and the true construction of the language of the will is,

That the whole income should be paid to the mother during her widowhood, without her being required to account for the amount or manner of expenditure, the only requirement being that she shall properly support, maintain and educate the daughter.

That is the trust.

The Court will only require that trust be discharged. Nothing more can be asked by Hattie or any one in her behalf.

The following cases fully support this proposition :

Jodrell vs. *Jodrell*, 14 Beav., 411.
Hora vs. *Hora*, 33 Beav., 88.
Hadow vs. *Hadow*, 9 Sim., 438.
Leach vs. *Leach*, 13 Sim., 304.
Brown vs. *Paull*, 1 Sim., (N. S.) 92.

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In *Jodrell* vs. *Jodrell*, it is held, "The Court of Equity have always held that the money is paid to the dispensing hand, coupled with an obligation duly to perform the condition on which the annuity is paid, and that provided the condition is duly performed, the Court requires no account of what (if any) surplus remains after the proper performance of it."

And in this case, the reasons of the law being as thus stated, are quite fully expressed.

Who could tell the expense in supporting a comfortable home; how much for the elegance—for the luxuries—for the amusements—for the attendance—for the instruction—and such like, is incurred in the case of a mother who has the care and education of an infant daughter, until she reaches maturity?

They say she is using this income to buy real estate! So she has, for the purposes of a pleasant residence in which she may provide her daughter with such a home as the testator would have given her if he was in life—no more than that. Could she do less?

The Court will not fail to consider that the testator directed this income to be paid to his widow (not to a stran-

ger), to one who had his confidence, to whom he felt under obligation—the mother of his last born, for whom he was providing. He had a right to provide liberally for the child, intending thereby to provide a home under her mother's care and direction. Considering his means, his estate, he could not do less.

The Court will not say he does not mean just what he says in his will—O'Hara on Construction of Wills, 224, 227.

"My will is, and I do direct that during the minority of my daughter Hattie, the income of the estate which I have hereinbefore bequeathed to her and to her nse, shall be paid to her mother, she remaining my widow, unmarried, *for the support, maintenance and education of said daughter, and in case of the death of her said mother, or her marriage, then so much as may be necessary for the liberal support and education shall be paid, &c.*"

In *Leach* vs. *Leach*, the Vice-Chancellor said: "I admit that so long as the father properly maintains his children, they are not entitled to call upon him for an account."

In *Hora* vs. *Hora*, Master of Rolls, said: "If it appears that the children have been maintained, educated and supported, I can direct no such account."

In that case the fund was given to *apply the proceeds* to the maintenance, education and support of all his children. The proceeds being largely in excess of what was used for that purpose, one of the children asked for an account of the income from 1843 to 1861.

And especial attention is asked to the case of *Brown* vs. *Paule*, 1 Sim. (N. S.) Not only because it is a late case, but because it fully sustains the cases before cited, and declares the law to be well settled, that no such accounting can be asked.

I submit, therefore, in all confidence, that this appeal is not well taken, and that the parts of the decree called in question, are just and right; and well sustained by the law.