INDEX

BILL OF COMPLAINT.

(Filed July 2, 1925.)

IN CHANCERY OF NEW JERSEY.

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

Complainants, John Murphy, of Valley Falls, Rhode Island; Hattie E. Moore and Hannah Devlin, of Trainer, Delaware County, Pennsylvania; Mary Biddle, Catherine Quick, of Providence, Rhode Island; Jean Rue and Susan Ash, of Chester, Pennsylvania; Jeanette Booth, David Murphy, Jr., Murray Murphy and Dorothy Murphy, of Marcus Hook, Pennsylvania, respectfully show that:

1. Sarah E. Markis, late of Atlantic City, New Jersey, departed this life on or about the 14th day of September, 1923, unmarried and without issue, leaving her surviving next of kin as follows:

John Murphy, brother; Hattie P. Moore, sister; Hannah Devlin, sister; Mary Biddle, sister; Catherine Quick, sister; Jean Rue, sister; Susan Ash, sister; Jeanette Booth, sister; David Murphy, Jr., nephew (child of deceased brother, David Murphy); Murray Murphy, nephew (child of deceased brother, David Murphy); and Dorothy Murphy, grandniece (child of Sarah Murphy, deceased, daughter of David Murphy).

2. On September 19, 1899, said Sarah Markis, whose maiden name was Sarah Murphy, married one William Henry Markis.

3. That on or about April 13, 1909, while still the wife of said William Henry Markis, said Sarah Markis made, published and declared her last will and testament, a true copy of which is hereto made a part hereof and marked Exhibit "A."

4. Said will contained the following:

"THIRD. I give, devise and bequeath unto my beloved husband, William Henry Markis, all the remainder and residue of my estate, real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or monies that my death may produce."

And

"FIFTH. I hereby constitute and appoint my beloved husband, William Henry Markis, sole executor, without bond, of this my last will and testament."

5. After the making of said will said Sarah Markis filed her petition in this court against her said husband, William Henry Markis, praying a dissolution of their said marriage on the ground of adultery, and such proceedings were had thereon that by the final decree of this Court, bearing date the 8th day of November, 1916, said Sarah Markis and William Henry Markis were divorced from the bonds of matrimony for said cause and the said marriage dissolved and each freed and discharged from the obligations thereof.

6. That after the death of said Sarah Markis, said William Henry Markis produced before the Surrogate of Atlantic County said last will and testament, and a petition for probate thereof, which has been duly probated and the said William Henry Markis appointed executor, who has qualified and has taken

upon himself the burden of the administration of the estate of said Sarah Markis.

7. Said William Henry Markis gives out and pretends that by virtue of the third clause of said will herein quoted he is entitled to all the remainder and residue of the estate of the said Sarah Markis, real, personal and mixed, absolutely, of whatsoever kind and character and wheresoever situate, including all insurance money that the death of the said Sarah Markis produced.

8. The said Sarah Markis died possessed of real estate and personal property comprehended by the provisions in the said third clause of said will, and that said real estate is described as follows:

In Atlantic City, New Jersey, beginning at the intersection of the North line of Baltic Avenue with the East line of Missouri Avenue and extending thence (1) North along the Easterly line of Missouri Avenue, 75 feet; (2) Eastwardly at right angles with Missouri Avenue and parallel with Baltic Avenue, 35 feet; (3) southwardly, parallel with the first course, 75 feet to the North line of Baltic Avenue; (4) Westwardly along the North line of Baltic Avenue 35 feet to the place of beginning.

In Atlantic City, New Jersey, BEGINNING in the West line of Missouri Avenue at a point distant 150 feet North from the North line of Baltic Avenue and said point being in the middle line of a certain alley (1) Westwardly in the center line of said alley parallel with Baltic Avenue 50 feet; (2) Southwardly parallel with Missouri Avenue, 55 feet; (3) Eastwardly parallel with Baltic Avenue, 50 feet to the West line of Missouri Avenue; (4) Northwardly in said line of Missouri Avenue, 55 feet to the place of beginning.

Also:

BEGINNING at the intersection of the North line of Baltic Avenue with the West line of Missouri Avenue and runs thence; (1) Westwardly, in the North line of Baltic Avenue 25 feet to a point; (2) Northwardly parallel with Missouri Avenue 95 feet to a point; (3) Eastwardly parallel with Baltic Avenue, 25 feet to the West line of Missouri Avenue; (4) Southwardly in said West line of Missouri Avenue 95 feet to the place of beginning.

Also:

BEGINNING at a point in the North line of Fairmount (formerly Baltic Avenue) 25 feet West of the West line of Missouri Avenue, and extending thence (1) Westwardly parallel with Fairmount Avenue 25 feet to a point; (2) North parallel with Missouri Avenue 95 feet to a point; (3) Eastwardly parallel with Fairmount Avenue 25 feet to a point; (4) Southwardly parallel with Missouri Avenue 95 feet to the place of beginning.

9. Complainants aver that the will of the said Sarah Markis did not take effect except upon her death, at which time the said William Henry Markis was not her beloved husband for the reason that she had divorced him because of his criminal conduct and never thereafter remarried him or lived with him, but to the contrary refused to do so, and was hostile toward him because of his improper treatment of her.

10. By reason of the premises said William Henry Markis is not entitled to any of the estate of the said Sarah Markis under the terms of her will, nor is he entitled to be the executor thereof.

11. Complainants are informed and believe, and therefore aver that said William Henry Markis intends to dispose of all the estate of the said Sarah Markis, and that unless restrained from so doing the same may be transferred, assigned and set over by him to those who are ignorant of the facts herein set forth, against whom no relief could be sought or maintained by complainants.

Complainants are without adequate remedy in the courts of law, and therefore pray:

(1) That said William Henry Markis, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

(2) That the rights, status and legal relation of the said William Henry Markis to the said Sarah Markis and to have, hold, transfer, assign and set over any of her estate by virtue of the provisions of her will be settled and determined by this Honorable Court.

(3) That it be considered and determined by this Honorable Court that the said William Henry Markis took no interest whatever in the estate of the said Sarah Markis by virtue of her will, and that he is not entitled to be the executor thereof, and that he be removed as such and an administrator with the will annexed be appointed.

(4) That an injunction issue against the said William Henry Markis restraining him from transferring, assigning and setting over any of the property of which the said Sarah Markis died seized; that he be restrained from further administration of the estate of the said Sarah Markis and that it be declared that complainants as heirs at law of

the said Sarah Markis, are entitled to all of the estate of the said Sarah Markis which said William Henry Markis would have taken under the will of the said Sarah Markis had he been the beloved husband of the said Sarah Markis at the time of her death; and that complainants may have such other and further relief as may be agreeable to equity.

(5) That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and abide by such decree as this Court shall make in the premises.

COLE & COLE,
Solicitors for Complainants.
C. L. COLE,
Of Counsel.

STATE OF PENNSYLVANIA, }
COUNTY OF DELAWARE, } *ss.*

HATTIE E. MOORE, of full age, being first duly sworn according to law, upon her oath says:

I am one of the complainants within named. The statements and facts therein set out are true; particularly is it true that said Sarah Markis died leaving a last will and testament as alleged; that the same has been probated by the Surrogate of Atlantic County, New Jersey; that after making the said last will and testament the said Sarah Markis filed her petition for divorce in the Court of Chancery of New Jersey, against the said William Henry Markis, charging him with adultery, and that thereafter a final decree was entered dissolving their marriage relation upon the said charge; that said William Henry Markis has been appointed executor of

the estate of Sarah Markis and gives out and pretends that by virtue of the provisions of said will he is entitled to the estate of the said Sarah Markis as therein provided, and that said Sarah Markis died seized of real estate and personal property.

HATTIE E. MOORE.

Sworn and subscribed to before me this 26th day of June, 1925.

ALICE V. KERNS,
(Seal) *Notary Public in and for the Commonwealth of Pennsylvania.*

My commission expires 3-7-1929.

EXHIBIT "A."

IN THE NAME OF GOD, AMEN. I, Sarah Markis, of Atlantic City, Atlantic County, New Jersey, being of sound mind, memory and understanding, do make and publish this my last will and testament, in the manner following, that is to say:

FIRST. It is my will and I do hereby order that all my just debts and funeral expenses be paid as soon as may be reasonable after my decease.

SECOND. I give, devise and bequeath unto my beloved father, David Murphy, absolutely, of Trainer, Delaware County, Pennsylvania, Two thousand dollars. I also give, devise and bequeath unto my beloved mother, Kate Murphy, of Trainer, Delaware County, Pennsylvania, Two thousand dollars, absolutely. Should either my father or my mother die before I do, the surviving parent is to receive the share of the one departed; or, in other words, Four thousand dollars. Should I survive

both my father and my mother, then the Four thousand dollars, bequeathed to my parents is to be divided equally between my brothers and sisters, namely, to wit:—Mary Biddle, Sister, of Providence, Rhode Island; Jennie Rue, Sister, of Chester, Pennsylvania; Katie Quick, Sister, of Providence, Rhode Island; Hannah Murphy, Sister, of Trainer, Delaware County, Pennsylvania; David Murphy, Brother, of Trainer, Delaware County, Pennsylvania; Susan Ash, Sister, of Trainer, Delaware County, Pennsylvania; John Murphy, Brother, of Fall River, Mass., formerly of Trainer, Delaware County, Pennsylvania; Hattie Moore, Sister, of Trainer, Delaware County, Pennsylvania; Jeannette Murphy, Sister, of Trainer, Delaware County, Pennsylvania.

THIRD. I give, devise and bequeath unto my beloved husband, William Henry Markis, all the remainder and residue of my estate, real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or monies that my death may procure.

FOURTH. This will shall stand in full force, notwithstanding children of our marriage which shall hereafter be born.

FIFTH. I hereby constitute and appoint my beloved husband, William Henry Markis, sole executor, without bond, for this my last will and testament.

IN WITNESS WHEREOF, I have hereunto set my hand and and seal this thirteenth day of April, one thousand nine hundred and nine. Interlineation between eighth and ninth line made before signing

Sarah Markis

Signed, sealed, published and declared by the above named Sarah Markis, to be her last will and

testament, in the presence of us, who were present at the same time, and at the request of the testator hereunto subscribed our names, in the presence of the testator and of each other.

Joseph A. McNamee
Delancey Place & Ventnor Ave.,
Atlantic City, N. J.
Gerard McNamee
Delancey & Ventnor Av.
Atlantic City, N. J.

ANSWER.

(Filed July 7, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN MURPHY, *et al.*,
Complainants,
and
WILLIAM HENRY MARKIS,
Defendant.

On Bill, &c.
Answer.

Defendant, William Henry Markis, answering complainants' bill filed in the above stated cause, says:

1. He admits the allegations contained in paragraph 1.

2. He admits the allegations contained in paragraph 2.

3. He admits the allegations contained in paragraph 3.

4. He admits the allegations contained in paragraph 4.

5. He admits that the said Sarah Markis and this defendant were divorced during the year 1916.

6. He admits the allegations contained in paragraph 6.

7. He denies that he pretends that he is entitled to the remainder and residue of the estate of the said Sarah Markis, and says that he is in fact entitled to it, both real and personal property, including the insurance moneys which became payable upon the death of the said Sarah Markis.

8. He admits the allegations contained in paragraph 8.

9. He admits, as a matter of law, that the will of the said Sarah Markis did not take effect until her death, and admits that at that time this defendant was not her husband; and admits that they were not remarried; but denies that the decedent refused to marry defendant; denies that she was hostile towards him; and avers that after said divorce decedent and defendant were frequently together, and the subject of remarriage had been discussed and contemplated between them.

10. He denies the allegations contained in paragraph 10.

11. He denies the allegations contained in paragraph 11.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendant.

REPLY.

(Filed July 15, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN MURPHY, *et al.*,
Complainants,
and
WILLIAM HENRY MARKIS,
Defendant.

On Bill, &c.
Reply.

Complainants join issue on the answer of the defendant.

COLE & COLE,
Solicitors for Complainants.

AMENDED ANSWER AND COUNTER-CLAIM.

(Filed July 25, 1925.)

IN CHANCERY OF NEW JERSEY.

Between JOHN MURPHY, *et al.*, *Complainants*, and WILLIAM HENRY MARKIS, *Defendant*.	On Bill, &c. Amended Answer and Counter-Claim.

Defendant, William Henry Markis, answering complainants' bill filed in the above stated cause, says:

1. He admits the allegations contained in paragraph 1.

2. He admits the allegations contained in paragraph 2.

3. He admits the allegations contained in paragraph 3.

4. He admits the allegations contained in paragraph 4.

5. He admits that the said Sarah Markis and this defendant were divorced during the year 1916.

6. He admits the allegations contained in paragraph 6.

7. He denies that he pretends that he is entitled to the remainder and residue of the estate of the said Sarah Markis, and says that he is in fact entitled to it, both real and personal property, including the insurance moneys which became payable upon the death of the said Sarah Markis.

8. He admits the allegations contained in paragraph 8.

9. He admits as a matter of law that the will of the said Sarah Markis did not take effect until her death; and admits that at that time his defendant was not her husband; and admits that they were not remarried; but denies that the decedent refused to marry defendant; and denies that she was hostile towards him; and avers that after said divorce decedent and defendant were frequently together, and the subject of remarriage had been discussed and contemplated between them.

10. He denies the allegations contained in paragraph 10.

11. He denies the allegations contained in paragraph 11.

12. Defendant prays that said complaint be dismissed.

By way of counter-claim, this defendant says:

1. That he is in the peaceable possession of all those tracts and parcels of land, situate in the City

of Atlantic City, County of Atlantic and State of New Jersey, particularly described as follows:

(1) BEGINNING at the intersection of the North line of Baltic Avenue with the East line of Missouri Avenue and extending thence (1) North along the Easterly line of Missouri Avenue, 75 feet; (2) Eastwardly at right angles with Missouri Avenue and parallel with Baltic Avenue, 35 feet; (3) Southwardly, parallel with the first course, 75 feet to the North line of Baltic Avenue; (4) Westwardly along the North line of Baltic Avenue 35 feet to the place of beginning.

(2) BEGINNING in the West line of Missouri Avenue at a point distant 150 feet North from the North line of Baltic Avenue and said point being in the middle line of a certain alley (1) Westwardly in the center line of said alley parallel with Baltic Avenue 50 feet; (2) Southwardly parallel with Missouri Avenue, 55 feet; (3) Eastwardly parallel with Baltic Avenue, 50 feet to the West line of Missouri Avenue; (4) Northwardly in said line of Missouri Avenue, 55 feet to the place of beginning.

(3) BEGINNING at the intersection of the North line of Baltic Avenue with the West line of Missouri Avenue and runs thence (1) Westwardly, in the North line of Baltic Avenue 25 feet to a point; (2) Northwardly parallel with Missouri Avenue 95 feet to a point; (3) Eastwardly parallel with Baltic Avenue, 25 feet to the West line of Missouri Avenue; (4) Southwardly in said West line of Missouri Avenue 95 feet to the place of beginning.

(4) BEGINNING at a point in the North line of Fairmount (formerly Baltic Avenue) 25 feet West of the West line of Missouri Avenue, and

extending thence (1) Westwardly parallel with Fairmount Avenue 25 feet to a point; (2) North parallel with Missouri Avenue 95 feet to a point; (3) Eastwardly parallel with Fairmount Avenue 25 feet to a point; (4) Southwardly parallel with Missouri Avenue 95 feet to the place of beginning.

claiming to own the same.

2. That defendant's title thereto is denied and disputed by complainants, John Murphy, Hattie P. Moore, Hannah Devlin, Mary Biddle, Catherine Quick, Jean Rue, Susan Ash, Jeanette Booth, David Murphy, Jr., Murray Murphy and Dorothy Murphy.

3. That no suit is pending to enforce or test the validity of such title and claim.

4. That by reason of such claim, defendant's property in said lands is greatly affected, and they cannot be sold or dealt with as they otherwise could.

In consideration whereof, and forasmuch as defendant is relievable only in a court of equity, where matters of this sort are properly, and according to the statutes of this State in such case made and provided, cognizable and relievable, defendant prays:

That a writ of subpoena issue out of this Court, directed to the said complainants, John Murphy, Hattie P. Moore, Hannah Devlin, Mary Biddle, Catherine Quick, Jean Rue, Susan Ash, Jeanette Booth, David Murphy, Jr., Murray Murphy and Dorothy Murphy, commanding them, and each and every of them to answer this counter-claim and each and every allegation therein contained, upon their several and respective oaths or affirmations, to the best of their respective knowledge, information and

belief, full, true, direct and perfect answer make to all and singular the matters and things aforesaid, and more particularly that they, and each and every of them, may in manner aforesaid answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how and by what instrument such title or claim is derived or was created; and that by the determination and final decree of this Court, the rights of all the parties to this suit in and to the lands hereinabove set forth, and every part thereof, may be fixed and settled; and that defendant may be decreed to have a perfect title thereto, and the complainants to have no estate, interest in, or encumbrance on said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void; and that defendant may have such other and further relief in the premises as the nature of the case may require, and as he shall be entitled to, pursuant to the statutes in such case made and provided.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendant.

[ENDORSED]

We consent to the filing of the within amended answer and counter-claim.
Cole & Cole,
Solicitors for Complainants.

REPLY TO AMENDED ANSWER.

(Filed July 28, 1925.)

IN CHANCERY OF NEW JERSEY.

Between JOHN MURPHY, *et al.*, *Complainants,* and WILLIAM HENRY MARKIS, *Defendant.*	On Bill, &c. Reply to Amended Answer.

Complainants join issue on the amended answer of the defendant.

AS TO COUNTER-CLAIM:

1. Complainants deny the averments in paragraph 1.

2. The averments in paragraph 2 are admitted.

3. The averment in paragraph 3 is denied. The bill entitled as above is to test the validity of defendant's claim.

4. Complainants are without information concerning the averments in paragraph 4 save by the averments and they therefore can neither affirm nor deny.

Answering the prayer of the counter-claim as to complainants title and claim to the lands and premises involved, they say that Sarah Markis named in the bill and amended answer, died seized of the fee simple, unencumbered title, and they, complainants, are her said sole heirs and next of kin.

COLE & COLE,
Solicitors for Complainant.

STIPULATION.

IN CHANCERY OF NEW JERSEY.

Between JOHN MURPHY, *et al.*, *Complainants,* and WILLIAM HENRY MARKIS, *Defendant.*	On Bill, &c., Final Hearing.

Atlantic City, N. J., September 29, 1925.

TESTIMONY

Before HON. R. H. INGERSOLL, Vice-Chancellor.

APPEARANCES:
For complainants, MESSRS. COLE & COLE.
For the defendant, MESSRS. BOURGEOIS & COULOMB.

Mr. Cole: For the purpose of the decision of the question in this case, it is stipulated as follows:

Sarah Markis divorced the defendant on the

ground of adultery as charged in the petition referred to in the bill. They never thereafter lived together and he thereafter remarried and his second wife is now living. There was real estate and some personal property. The defendant is now in the peaceable possession of the real estate described in the bill. Sarah Markis died at the time named in the bill and what purports to be her will was probated by the Surrogate of the County of Atlantic about the time named in the bill.

The allegation touching the dates of the will, the divorce, the death and probate of the will are correctly stated.

The Court: That is chronologically the will, the divorce and, of course, the death, the will prior to the divorce?

Mr. Cole: Oh, yes. That appears in the bill.

Mr. Bourgeois: There is one phase you haven't gotten in there, I think. You want an admission that at the time the will was executed Sarah Markis and William Markis were husband and wife living together.

Mr. Cole: Yes. That appears in the bill itself because it wasn't until after that that the divorce was obtained.

Mr. Bourgeois: I want it to appear.

Mr. Cole: At the time the will was executed Sarah Markis and the defendant were husband and wife living together and sustaining that relation.

Mr. Bourgeois: This stipulation goes to both the bill and the counter-claim. Then, why don't you stipulate further that Markis is in possession of this property claiming ownership?

Mr. Cole: Markis is in the peaceable possession as stated, claiming to own the same, and there is no proceeding other than this to test his right.

CONCLUSIONS.

(Filed Oct. 30, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN MURPHY, *et al.*, *Complainants*,
and
WILLIAM HENRY MARKIS, *Defendant*.

On Bill, &c.
On Final Hearing.
Conclusions.

MESSRS. COLE & COLE, for the complainants.
MESSRS. BOURGEOIS & COULOMB, for the defendant.

INGERSOLL, V. C.:

On September 19th, 1899, the defendant, William Henry Markis, married one Sarah Murphy.

On April 13th, 1909, the said Sarah Markis, the wife of said defendant, made, published and de-

clared her last will and testament, which will contained the following:

"Third. I give, devise and bequeath unto my beloved husband, William Henry Markis, all the remainder and residue of my estate real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or monies that my death may produce."

"And, Fifth, I hereby constitute and appoint my beloved husband, William Henry Markis, sole executor, without bond, of this my last will and testament."

A number of years after the making of said will, Sarah Markis filed her petition in this court against her husband praying a dissolution of their said marriage, on the ground of adultery, and a final decree was entered in said cause, bearing date November 8th, 1916, by which the said parties were divorced from the bonds of matrimony for said cause, and the said marriage was dissolved.

On September 14th, 1923, the said Sarah E. Markis departed this life unmarried and without issue, but leaving her surviving the complainants, her sisters, nephews and a grandniece, respectively.

After the death of Sarah Markis, said William Markis produced before the Surrogate of Atlantic County said last will and testament, which was duly probated and the said William Henry Markis qualified as executor, and has taken upon himself the burden of the administration of the estate of the said Sarah Markis.

The only questions for determination are: Does William Henry Markis take under the provisions of Section 3 of said will, and is he appointed executor thereof under Clause 5?

In some jurisdictions, facts such as are here presented are sufficient upon which to presume an im-

plied revocation of the will. Re McGraw, Mich. 1924; 199 N. W. 686, 37 A. L. R. 308.

This question is quite thoroughly annotated in 25 A. L. R., on page 49. This annotation carefully distinguishes the cases of revocation of the will, or of the legacy or devise, or the lapse of the legacy or devise.

In this State, however, "no devise or bequest in writing * * * or any clause thereof shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself or in his presence, and by his direction and consent; but all devises and bequests * * * shall remain and continue in force until the same be burnt, canceled, torn or obliterated as aforesaid, or by some other will, codicil or other writing duly executed." 4 Comp. Stat. 5861-5870.

No claim is made that the will was revoked.

Chancellor Vroom, in Bullock v. Zilley, 1 N. J. Eq. 489, said: "The only question that can be raised is this: whether the words "his wife," as applied to the complainant in the bequest, are to be taken as mere words of description: if so taken, the rights of the complainant are not affected by the divorce; but if the person taking must necessarily be the wife or Thomas Bullock, and take in that capacity, then her interest is at an end."

This has been the law for nearly a century. Stern v. Stern, 68 N. J. Eq. 472; Bell v. Smalley, 45 N. J. Eq. 478.

The Chancellor, in Bullock v. Zilley, supra, further said: "Upon what grounds the parties were divorced, or which complained of the other, I am not informed. The bill simply alleges the fact of the divorce. The demurrer admits it as stated, and the Court can look no further than the pleadings.

I am not aware, however, that any development of facts can change the legal rights of the parties. Considering the case, then, simply upon the intention of the testator, as collected from the will itself, my conclusion is, for the reasons above stated, that the complainant is entitled to relief."

In Van Syckel v. Van Syckel, 51 N. J. Eq. 194: "A devise to A, and at his death to his wife, applies only to the person who was his wife at the date of the execution of the will, and does not extend to a wife taken subsequently thereto." Vice-Chancellor Green distinguishes this case from the cases therein cited and Swallow v. Swallow, 27 N. J. Eq. 278.

In Jones Estate, 211 Pa. 364, the opinions of the auditing Judge, and of the Judge on exceptions and of the opinion of Mr. Justice Potter are very illuminating.

The Court said, "What is there in the facts of this case to support the claim that the legacy has lapsed? The person named as legatee did not die in the lifetime of the testator, nor did any other event occur in the lifetime of the testator, which under the language of the will, would render the testamentary gift inoperative. The donee survived the testator, and is alive, and has both capacity and willingness to take under the will, but it is suggested in the argument that, while not physically dead, the donee, by her own act in obtaining the decree of divorce, ended the marital relations as absolutely as death would have done.

This consequence did follow the divorce, insofar as the duties, rights and claims accruing to her by reason of the marriage are concerned. * * * What the law gave it took away, nothing more. The beneficiary * * * is here only as a legatee, and is asking for that only which the testator gave to her of his free grace, and as a matter of bounty. That which

he gave to her in his will was his own, to give or to withhold as he saw fit. A bequest needs no consideration to support it. As a legatee she stands upon the same footing as any other individual, and her relation to the testator has nothing to do with the case, unless he chose to make it an element, in the bestowal of the gift. * * * The testator intended the gift for the individual, Mary Brown Jones, who was at that time his wife, and identified by him as such. We think the bequest is unrestricted, and that the words 'my wife' are, as we said above, only descriptive, and do not import a condition that the beneficiary shall remain his wife. Nor do we doubt that as to the object of the legacy the will speaks from its date."

Mr. Justice Potter stated the law to be:

"The mere fact that a gift is made to a named legatee in certain character, as, for instance, to my wife A, does not avoid the legacy, if the legatee does not happen to fill the character.

The relationship, however, could not have been the sole motive, since the gift is to the individual by name, and not to him simply as husband, nor is there as in Bell v. Smalley, 45 N. J. Eq. 478, the evidence offered by the restriction of the bounty to the time during which the beneficiary remains unmarried. We have no right to say that the gift was subject to the condition that the donee should, at the time it took effect, be the husband of the daughter.

In Brown v. A. O. U. W., 208 P. 101, where a certificate was payable at the death of John Brown to his wife, Mattie Brown, we held that it was for the individual, Mattie Brown, without regard to the fact of her continuing to be the wife of the member, and subsequent divorce did not forfeit her right. The husband there had the power to change the beneficiary at any time, and we held that the fact

that he did not do so, during a period of eight years between the divorce and his death, made evident his intention not to deprive his first wife of the benefit of the policy. "Where a man retains a revocable instrument with full opportunity of revoking it, and does not revoke it, there is a strong presumption that he wishes it to stand." Tilghman, C. J., in Irish v. Smith, 8 S. & R. 573."

In the Brown case he had, after his divorce, married Anna Z. Whealer, who survived him as his widow.

Mrs. Markis lived nearly seven years after the divorce was granted. She did not, during these years, cancel or revoke her will, nor did she attempt to make any other testamentary disposition of her property. This situation must be considered as a strong presumption that she desired no revocation or change in her will.

An analysis of the cases in the courts of this State indicates clearly that the law is as before stated, and that that rule always held unless there is contained in the will other qualifications or statements indicating that the gift was not to the person, but conditioned they should take in the character designated.

In Bell v. Smalley, *supra*, the Court held that the use of the words "during her widowhood" made it perfectly clear that the testatrix meant that Hannah should only take while she remained the widow of Francis, and that having been divorced, she never became the widow of Francis and therefore, she could not take. Vice-Chancellor Van Fleet, however, repeats the law and cites Bullock v. Zilley, *supra*.

The reporter, in a footnote to Bell v. Smalley, annotates many cases, in all of which, where the question arises, the same distinction is noted.

In Steen v. Steen, 68 N. J. Eq. 472, Vice-Chancellor Bergen cites Bullock v. Zilley, supra, as expressing the law, but said, "My construction of the devise under consideration is that the words used by the testatrix were intended to describe the character or capacity in which the legatee should take."

Vice-Chancellor Berger, in Collard v. Collard, 67 Atl. Rep. 190, where the will read, "to my said wife, Emily M. Collard, for the term of her natural life, or so long as she remains my widow," said: "the testator uses the words 'for the term of her natural life so long as she remains my widow.' At the death of the testator, when the will became effective, the devisee of the prior estate was not, and could not be, his widow, for she had never been his lawful wife, and the estate given was void because the conditions upon which it rested did not and could not exist. There was no wife, nor one who could be his widow. * * * Again, the gift to the supposed wife was void because the gift was not to her as a person. She could only take in the character of the wife of the testator. * * * The words 'my wife,' as used here, are not words of description to designate the legatee, but rather, to indicate the character or capacity in which alone she could take, and, failing to answer that description at the time the will took effect, the gift to her failed."

There can be no question but that at the time of the making of the will the testatrix meant to and did devise and bequeath unto William Henry Markis all the remainder and residue of her estate, and appointed him executor of the will.

The words "my beloved husband" were clearly mere words of description. Nothing appears in the will to indicate the contrary. No case has been presented to me, nor have I been able to find one, which indicates that the use of such words, without

other limitations or qualifications, make void such a bequest.

As this will has never been revoked or cancelled, and no new will or codicil has been executed changing its terms, I will advise a decree that William Henry Markis, the defendant, is entitled to "receive" all the remainder and residue of the estate of said Sarah Markis, and that he is the executor under the provisions of said will.

FINAL DECREE.

(Filed Nov. 5, 1925.)

IN CHANCERY OF NEW JERSEY.

Between JOHN MURPHY, *et al.*, *Complainants,* and WILLIAM HENRY MARKIS, *Defendant.*	On Bill, &c. Final Decree.

This cause coming on to be heard in the presence of Cole & Cole, Esquires, solicitors of complainants, John Murphy, Hattie P. Moore, Hannah Devlin, Mary Biddle, Catherine Quick, Jean Rue, Susan Ash, Jeanette Booth, David Murphy, Jr., Murray Murphy and Dorothy Murphy; and Bourgeois & Coulomb, solicitors of William Henry Markis, defendant, and the Court having examined the plead-

ings, and having taken proofs orally in court, and considered the arguments of counsel thereon; and it appearing that the sections of the will of Sarah Markis to be construed are as follows:

> "THIRD: I give, devise and bequeath unto my beloved husband, William Henry Markis, all the remainder and residue of my estate, real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or monies that my death may produce."

and

> "FIFTH: I hereby constitute and appoint my beloved husband, William Henry Markis, sole executor, without bond, of this my last will and testament."

and it appearing to the Court that after the making and executing of said will by the said Sarah Markis, and before her death, the said Sarah Markis and the said defendant, William Henry Markis, were divorced, and that said will remained until the time of her death unrevoked and uncanceled, and that the terms thereof had not been changed by a codicil thereto or a new will; and that the said William Henry Markis was, prior to the filing of the bill of complaint in this cause, appointed executor of the estate of the said Sarah Markis by the Surrogate of Atlantic County; and that by the true construction of said third and fifth paragraphs of said will and testament of the said Sarah Markis, deceased, late of the City of Atlantic City, County of Atlantic and State of New Jersey, the said complainants are not entitled to the relief prayed for by them; and that the said defendant, William Henry Markis, by virtue of the provisions of said last will and

testament of the said Sarah Markis, is entitled to all the residue of the estate of the said Sarah Markis, real, personal and mixed, absolutely, including all insurance moneys that her death produced, and is entitled to the sole executorship of said estate;

It is, thereupon, on this fifth day of November, 1925, ordered, adjudged and decreed that under the provisions of the third and fifth paragraphs of the will of said Sarah Markis, deceased, the said William Henry Markis is entitled to exercise sole executorship, pursuant to said probate, of the estate of the said Sarah Markis, deceased, and to have and receive all the residuary estate mentioned in said will, including insurance moneys produced by her death; and that the title of the said William Henry Markis to the real estate described in complainants' bill of complaint is hereby declared to be good, and that the complainants have no right, title or interest therein.

E. R. WALKER,
C.

Respectfully advised:
R. H. INGERSOLL,
Vice-Chancellor.

NOTICE OF APPEAL.

(Filed Dec. 1, 1925.)

IN CHANCERY OF NEW JERSEY.

Between JOHN MURPHY, *et al.*, *Complainants,* and WILLIAM HENRY MARKIS, *Defendant.*	On Bill, &c. Notice of Appeal.

To Bourgeois & Coulomb, Esqs., Solicitors of Defendant:

The complainants hereby appeal from the whole and every part of the final decree made in this court in the above stated cause on the 31st day of October, nineteen hundred and twenty-five, to the Court of Errors and Appeals in the last resort in all causes. Dated November 27, 1925.

COLE & COLE,
Solicitors for Complainants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN MURPHY, *et al.*, *Complainants-Appellants,* and WILLIAM HENRY MARKIS, *Defendant-Respondent.*	On Appeal from Chancery. Petition of Appeal.

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

The petition of John Murphy, Hattie E. Moore, Hannah Devlin, Mary Biddle, Catherine Quick, Jean Rue and Susan Ash, Jeanette Booth, David Murphy, Jr., Murray Murphy and Dorothy Murphy, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 31st day of October, 1925, wherein the said petitioners were complainants and William Henry Markis was defendant, and from the whole and every part thereof, to wit; that said decree denies to com-

plainants the relief prayed for in the bill when it should have granted such relief. And your petitioners humbly appeal from every part of said decree of the said Chancellor upon the ground that the same is erroneous. Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

COLE & COLE,
Solicitors and Counsel with Appellants.

ANSWER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
JOHN MURPHY, *et al.*,
Complainants-Appellants,
and
WILLIAM HENRY MARKIS,
Defendant-Respondent.

On Appeal.
Answer.

The answer of the above named respondent to the petition of appeal of the above named appellants:

This respondent, not acknowledging all or any of the matters, which in said petition of appeal are contained, to be true, for answer thereto, neverthe-

less says and admits that a decree was, on the 31st day of October, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced; and this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Respondent.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
JOHN MURPHY, *et al.*,
Complainants-Appellants,
and
WILLIAM HENRY MARKIS,
Defendant-Respondent.

ON APPEAL FROM CHANCERY.

APPELLANTS' BRIEF.

STATEMENT.

Sarah E. Markis, deceased, and respondent, were husband and wife. On or about April 13, 1909, she made a last will and testament in which, among other things it is provided as follows:

> "THIRD. I give, devise and bequeath *unto my beloved husband,* William Henry Markis, all the remainder and residue of my estate, real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or moneys that my death may produce."

And

> "FIFTH. I hereby constitute and appoint *my beloved husband,* William Henry Markis, sole executor, without bond, of this my last will and testament."

Thereafter she filed a petition in the Court of Chancery of this State against respondent, charging him with adultery, and procured a divorce from him upon that ground. Thereafter he married another and they were still married and were living together as husband and wife at the time of the death of Sarah Markis.

After her death said will was produced and probated and he claims the benefit of the will. This bill was filed praying a decree to establish his rights, if any, and for an injunction, &c. The answer by amendment sets up a counter-claim in the nature of a bill to quiet title relying upon provisions in the will. Issue having been joined the cause came on to be heard before Vice-Chancellor Ingersoll on the pleadings and stipulation. He determined that the bequest and devise to the respondent are valid and enforceable, and from the decree advised by him an appeal was taken.

The single point involved is, does the existence of the facts recited impliedly revoke the will so far as respondent is concerned or putting it differently, could he take in the capacity stated in the will?

ARGUMENT.

THE ADMITTED FACTS CREATE A REVOCATION BY IMPLICATION; OR RESPONDENT WAS INCAPABLE OF TAKING IN THE CAPACITY OF "MY BELOVED HUSBAND."

The legal test seems to be this, are the words "my beloved husband" merely descriptive or do they create a status? If they are merely descriptive, the cases seem to force us to concede that the fact of divorce and the subsequent marriage of respondent to another whose wife was living at the time of the death of the testatrix, do not deprive him of the benefits of the will. It is our contention that the words "my beloved husband" are not descriptive and were intended to create a status. Our investigation discloses no case in this court where the precise question has been considered or decided. There are numerous cases in England and in this country and there is not entire harmony among them. As we perceive it, this Court is free to blaze its own path.

Before referring to a few cases which touch the subject, we inquire as to the common sense of the matter. While it can be conceived that Sarah Markis might have been willing that the respondent should take all her property after her death in spite of the fact that she divorced him for his immorality and the further fact that he had married another, who was living at the time of the existence of the will, and her death, the natural presumption is quite to the contrary. The average man or woman would instantly declare that she never intended the will should operate in favor of the husband after the

admitted events. She and the respondent never lived together after the divorce, and there is nothing in the case to indicate they were ever reconciled. The estate devised was hers and so far as the case shows, he did not participate in the creation or increase of it. It would run contrary to the course of nature to presume an intent on her part to permit him to take the benefit of the will after his outrageous conduct. We therefore approach the discussion of the matter with the burden naturally upon the respondent to show a right to take under the will. This we say upon the assumption that there is no legal barrier in the way. At bottom, the question is one of intent. The will took effect only at the death of the testatrix. The question involved is first treated by Chancellor Vroom in *Bullock v. Zilley,* 1 N. J. Eq. page 489. It will be noted that he treats the matter as one of intention. At page 492, he says:

> "In cases of this description, the intention of the testator must govern: the difficulty is to arrive at it with a sufficient degree of certainty to satisfy the mind. From the best consideration I have been able to give this case, I incline to the opinion that the testator intended that Rebecca, the wife of Thomas Bullock, should have a personal and individual interest in this bequest, and not simply an interest in it as the wife of Thomas Bullock, or a member of the family."

He then proceeds to discuss the circumstances to justify the conclusion reached by him. He concludes by saying:

> "Considering the case, then, simply upon the intention of the testator, as collected from the will itself," &c.

In that case there was a divorce but as he states, that single fact only appears. The case is helpful to the instant case because it decides that in the final analysis the question is one of intention, and that there is no inflexible rule. The significant circumstance in that case not present in the instant case is, that the divorce did not occur until after the death of the testator. The divorce was granted in February, 1829, and the testator died sometime previous to 1821. In the case before us the divorce took place during the lifetime of the testatrix.

A case more apposite is *Steen v. Steen,* 68 Equity 472. Vice-Chancellor Bergen clearly marks the distinction between mere description in a will and the creation of a status, and at the same time disposes of the question as one of intention. He cites *Bullock v. Zilley, supra,* in which Chancellor Vroom says:

> "If the words 'his wife' were used simply as words of description to designate the legatee, she would be entitled to take; but if they were used to indicate the *capacity* or *character* in which alone she could take, then, inasmuch as she had ceased to be the wife, she would not be entitled to take."

Vice-Chancellor Bergen himself says in the case then before him:

> "I am fully persuaded that it was not the intention of this testatrix to devise this property to Margueritte J. Irwin as distinct from her status as the wife of John A. Steen, and the legatee, not answering that description at the time the will took effect, the gift failed."

In the instant case the words are "*my beloved husband.*" Certainly, in the light of the admitted

facts, these words ought to be given effect. It would be doing no violence to the language of the will to say that the testatrix intended that the respondent should answer to the description of "my beloved husband" at the time the will took effect. He was not her husband, and surely not her beloved husband; on the contrary it was the husband of another. The average lay mind would rebel at the thought of a Court ignoring the words "my beloved husband" and concluding that the gift was to William Markis. Cases in other jurisdictions that have treated the subject say that under like facts there is an implied revocation. While we are content to accept this view, we think the better way of expressing it is that the named beneficiary does not answer to the status created, nor is he able to take in the capacity or character stated in the will.

While not exactly in point, help may be had from *Bell v. Smalley,* 45 Eq. 478. At page 481, Vice-Chancellor Van Fleet says:

> "If the gift is made to her as an individual regardless of her matrimonial status or character, the testatrix meaning that she should take the subject of the gift even if she never became the widow of Francis, then it is clear that the fund must be held for her benefit, and she must be paid one-half of its income. But if, on the contrary, the gift is conditional, the meaning of the testatrix being that Hannah should have no right to the subject of the gift unless she became the widow of Francis, then it is equally clear that she has no right to any part of the fund in question."

In that case there was a decree of divorce which made it impossible for the beneficiary to be the widow of Francis. Again, the matter is treated as a matter of intention.

See also *Cellard v. Cellard,* 67 Atl. Rep. 190.

So far as our investigation has gone, we have found no case where the Court has sustained the will in favor of the named beneficiary where divorce followed where he or she were the guilty party. Had the testatrix intended that the respondent should receive the benefits of the will irrespective of the status or capacity, she could have made it clear by naming him and omitting the words "my beloved husband." Was the gift personal to him or to him as beloved husband?

To work the result reached by the Vice-Chancellor we are required to ignore not only the word "husband" but also the word "beloved." It cannot be said with any show of reason that the word "beloved" was idly inserted and that it had no meaning to the testatrix. It is inconceivable that she could have thought that the will would be operative in respondent's favor after his conduct and after she divorced him and refused to live with him and after she knew he had married another and was living with her. Such a thought is repellant to any fair and just mind.

The Vice-Chancellor cites the case in *re Jones Estate,* 211 Penna. 264. The case was decided in the Orphans' Court of Pennsylvania, and the President Judge dissented. On appeal the Chief Justice concurred in the dissent. It is a significant fact that in this case the will was made two months after the separation which afforded a reason for the presumption at least that the testator intended the gift to the person rather than to the relationship. We respectfully submit that the dissenting opinion is more reasonable and logical. In that case, however, the word "beloved" was not used and the beneficiary procured the divorce. This is a sub-

stantial and worth-while distinction. The majority opinion, however, uses significant language. It says:

> "We think the bequest is unrestricted, and that the words 'my wife' are, as we said above, only descriptive, and do not impart a condition that the beneficiary shall remain his wife."

Again, the case turned upon intention.

Did Mrs. Markis intend that respondent should remain "my beloved husband?" To ask this question is to answer it.

It will add no strength to the brief by quoting from the dissenting opinion but we urge its reading by the Court that it may receive the benefit of what we think is unanswerable logic and reasoning.

In *re McGraw,* 95 Michigan; 199 (N. W. 686), 37 A. L. R. 308, is directly in point and decides that there is an implied revocation of the will where the beneficiary does not answer to the description at the time of the death of the testator. *Garratt v. Niblock,* 1 Russell & Mylne 629, 39 English Reports, full reprint page 241, is helpful. There the bequest was to his "beloved wife." It was held that the wife living at the time of the death of the testator, his wife who was living at the time of making the will having died, did not answer the description of "beloved wife."

However the question is approached, this always persists, did the respondent answer to the description of "my beloved husband" at the death of the testatrix and could he take in that character and capacity? We submit that he cannot and that we are doing no violence to the will to extract the intention on the part of the testatrix that he should receive the benefit only in the event that he answered to the description. This will be in accord with common sense and the instincts of justice, and

be consistent with the cases, all of which put the conclusion upon the basic ground of intention.

It is respectfully submitted that the decree should be reversed and a decree entered in favor of the complainants.

COLE & COLE,
Solicitors of Appellants,
HON. ALBERT DUTTON MacDADE,
of the Pennsylvania Bar,
Of Counsel, and
C. L. COLE,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN MURPHY, *et al.*,
Complainants-Appellants,

and

WILLIAM HENRY MARKIS,
Defendant-Respondent.

ON APPEAL.

RESPONDENT'S BRIEF.

STATEMENT.

Sarah Markis, the decedent, and William Henry Markis were formerly husband and wife, and on the 13th day of April, 1909, Mrs. Markis was seized of certain lands in Atlantic City. She had, at that time, a father and mother, certain brothers and sisters, and her husband, William Henry Markis, living. There is no evidence in the case from which it appears whether the property, of which she was then possessed, was the result of her effort, her then husband's effort, or the combined effort of the two of them.

On the 9th day of April, 1909, she executed a will, and after making bequests to her father, mother, brothers and sisters, she bequeathed her residuary estate to her husband, William Henry Markis, in words as follows:

> "THIRD. I give, devise and bequeath unto my beloved husband, William Henry Markis, all the remainder and residue of my estate, real, personal and mixed, absolutely, of whatsoever kind and wheresoever situate, including all insurance money or moneys that my death may produce."

In 1916, she and her husband were divorced.

In September, 1923, she died.

There is no evidence in the case showing that before her death she became possessed of any estate other than that of which she was possessed at the time of making the will in 1909.

There is no evidence in the case touching the relationship between her and her former husband after the granting of the divorce.

The allegation of the complaint (p. 4, l. 25) is that:

> "William Henry Markis was not her beloved husband for the reason that she had divorced him because of his criminal conduct and never thereafter remarried him or lived with him, but to the contrary refused to do so, and was hostile towards him because of his improper treatment of her."

The answer to that allegation was (p. 10, l. 28):

> "He admits that they were not remarried; but denies that the decedent refused to marry defendant; denies that she was hostile towards him; and avers that after said divorce decedent

and defendant were frequently together, and the subject of remarriage had been discussed and contemplated between them."

No testimony was offered to support the allegation either in the complaint or in the answer; it probably being assumed that the construction of the will would be determined from the language of the will itself.

It sufficiently appears, however, that after the divorce, decedent retained her marriage name; that she lived for a period of seven (7) years; that she had provided in the will for all of her near relatives; that she permitted her will to remain unaltered with respect to both her relatives and her former husband after the divorce; in fact, from its execution until her death; that she had ample time to change or annul her will, had she changed her intention.

ARGUMENT.

It is conceded that the will will be construed so as to carry into effect the intention of the testatrix. That it was the intention of the testatrix at the time of the execution of the will to devise the residuary estate to her husband, William Henry Markis, is not questioned. The precise point made by appellants is that by reason of the divorce between these parties, after the execution of the will, and after the death of the testatrix, she not having changed her intention or will, the Court should decree that the testatrix had changed her intention, and by decree of the Court alter the will. The appellant does not give the Court the benefit of his notion as to whether the testatrix changed her mind

as to the other provisions of the will, so as to create a total intestacy, or whether her intention is to be changed by the Court to the extent of creating only a partial intestacy.

The Vice-Chancellor, in his conclusions, quotes the statute to the effect that:

> "No devise or bequest in writing * * * or any clause thereof shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same or by burning, cancelling, tearing or obliterating the same by the testator, himself, or in his presence by his direction and consent, but all devises and bequests shall remain and continue in force until the same be burned, cancelled, torn or obliterated, as aforesaid, or by some other will, codicil or other writing duly executed. 4 Comp. Statutes 5861 and 5870" (p. 22, l. 9).

The Vice-Chancellor concluded that that statute precluded the Court from altering or nullifying that will by its decree, in view of the fact that the will was preserved and had been duly probated, and in view of the fact that seven (7) years had elapsed after the divorce and before her death. It does seem as though if she had changed her intention, she would herself have changed her will.

This section became a part of our law in the revision of 1795.

That our Court of Chancery considered this Act as binding upon the Court is shown by the case of *Mundy v. Mundy* (15 Eq. 290); and that our Supreme Court, [redacted], considered it as binding upon the Court is shown by the case of *Boylan v. Meeker* (28 L. 274).

The question involved in this case was passed upon by Chancellor Peter D. Vroom in the case of

Bullock v. Zilley (1 Saxton, p. 489), in the year 1832, and that case has remained the law of this State for nearly one hundred (100) years.

In that case, Bullock made a will devising property to Rebecca, his wife, mentioning her by name, and also mentioning that she was his wife. Later, they were divorced, and he died. It was contended there, as here, that the divorce had worked a revocation of the will. The Court held against that contention, and the reasoning adopted by the Chancellor in that case is entirely applicable to the case at hand. It was argued there, as here, that when she ceased to be his wife, that the will was revoked, and the Chancellor remarked that if that were true, then in the event that Bullock had predeceased his wife, his death would have revoked his will, because she was no longer his wife.

In the case of *Bell v. Smalley* (45 Eq. 478), testatrix devised her estate to her executors as follows:

> "To pay the interest and income thereof from time to time, as the same shall be received, to my son, Francis E., during his lifetime, and in case his wife, Hannah E., should survive him, then to her, during her widowhood, in like manner, one-half of the said interest and income; the remaining one-half to be put at interest and kept invested at interest, with the interest thereon from time to time accruing, and at the decease of my said son Francis, or in case his wife should survive him, at her remarriage or decease, then to pay said principal, with the increase thereof, and all arrears of interest or income remaining unexpended, to my other surviving children, &c."

Subsequent to the death of the testatrix, Hannah E., the wife of Francis E. Bell, secured a divorce from him. Later, Francis E. Bell died.

The bill was filed by the personal representative of the testatrix to have the above provisions of the will construed.

Held: That Hannah was not entitled to anything under the will. Although Hannah survived Francis E., she was not his wife when he died, but a *feme sole,* and consequently did not become a widow by his death, and is not now and can never be in the state or condition which, by the terms of the will, she must be in to qualify her to take the gift. Vice-Chancellor Van Fleet stated that this view conformed to *Bullock v. Zilley.*

Comment: In this case, the wife was not mentioned by name, and the words "during her widowhood" limit the term in which the payments shall be made.

In the case of *Steen v. Steen* (68 N. J. 2 Robb., 472), testatrix, knowing that her son was engaged to be married to one Margueritte J. Irwin, made a devise, "to my daughter, Margueritte J. Irwin Steen, wife of my son, John A. Steen, all of my estate, real, personal and mixed, during the lifetime of my said daughter." At the time of the execution of the will, John A. Steen was not married, either to said Margueritte or to any other person, nor did he ever marry said Margueritte.

Held: That Margueritte J. Irwin took nothing under the devise. There was not, at the time of the making of the will nor at the death of the testatrix, any person in *esse* answering to the name and description in the devise.

In the case of *Collard v. Collard* (67 Atl. 190—N. J. Prerg. 1907), where testator made a devise "to my said wife, Emily M. Collard, for the term

of her natural life, or so long as she remains my widow," and at the time of the marriage of the testator, his wife, Emily M. Collard, had a husband living:

Held: That the given was void, because the conditions upon which it rested did not and could not exist, there being no wife, nor one who could be his widow.

Outside of the State of New Jersey, we find:

In the case of *Card v. Alexander* (48 Conn. 492), testator made the following bequest to his wife:

> "I give to my wife, Amelia F. Alexander, the sum of $400 annually out of the income of my estate during her natural life, to be in lieu and in full discharge of all right of dower; and if she shall refuse to accept the same in lieu of dower then she shall be entitled to have only her right of dower in my estate."

A year and a half after the execution of the will, the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, leaving a large estate.

Held: (1) That the bequest was not to be regarded as conditioned upon her remaining the wife of the testator.

(2) That the provision with regard to her not taking the bequest unless she relinquished her dower, was not to be regarded as a condition that she should be entitled to dower and so be able to relinquish it.

(3) That the divorce did not, as a matter of law, make the bequest void or operate as a revocation of it.

The words, "my wife" are descriptive of the person, and do not import a condition that if she survives him she shall remain his wife until his death.

In the case of *In re*: *Jones' Estate* (211 Pa. 364), testator provided:

> "I direct that my funeral expenses and all my debts be promptly paid, and that my estate be divided as follows: One third to my wife, Mary Brown Jones, and the balance to my son, Thomas Mifflin Jones."

Subsequent to the making of the will, the testator's wife obtained a divorce from him. Still later, the testator died, without changing the terms of his will. Testator's wife did not remarry during his lifetime, but did so shortly after his death.

Held: (1) That the legacy did not lapse when the wife, subsequent to the date of the will, obtained a divorce.

(2) That the bequest was not revoked by implication by reason of the divorce.

> "We are clear that the will indicates that the testator intended the gift for the individual, Mary Brown Jones, who was at that time his wife, and identified by him as such. We think the bequest is unrestricted, and that the words 'my wife' are, as we said above, only descriptive, and do not import a condition that the beneficiary shall remain his wife."

In the case of *Charlton v. Miller* (27 Ohio State, 298), J. B., being about to marry E. J., made his will as follows:

> "I give and bequest to my intended wife, E. J., the sum of $1,000, to be paid to her within one year after my decease."

and directed the residue of his property to be equally divided among his children. Soon after the marriage, the wife abandoned her husband, who, for that reason, in due time procured a divorce.

Held: That the will being positive and unconditional, the wife, E. J., after the death of the testator, without a revocation of the will, was entitled to the legacy according to the terms of the will.

In the case of *Boddington v. Clariat* (22 Ch. Div. 597) (Affd. 25 CH. Div. 685), testator devised property "on trust to pay to my wife, Emily Caroline Boddington, within one month after my decease, a legacy of £200, and in addition thereto to pay my said wife, so long as she shall continue my widow and unmarried, one annuity of £300 by equal quarterly instalments, commencing from the date of my decease."

Subsequently, the wife secured a divorce from the testator; still later the testator died.

Held: That the wife was entitled to the legacy, but that she could not claim the annuity.

In the case of *In re*: *Brown's Estate* (117 N. W. 260—Ia.), testator's divorced wife was entitled to take under a will executed prior to the divorce, under a description devising his property to her as "my wife Ida."

> "At common law, the revocation of a will could be shown by the verbal or written declarations of the testator or by acts proving a design to deprive the will of validity, or to disaffirm its existence as a subsisting and operating instrument." *Colligan v. Burns* (57 Me. 449-454).

Appellant stresses the case of *McGraw v. McGraw* (37 A. L. R. 308), but apparently overlooked the distinction between the statute law of that State and our own statute. The Michigan statute is somewhat similar to ours, but contains the following exception, which is not found in our Act:

> "Excepting only that nothing contained in this section shall prevent the revocation im-

plied by law from subsequent changes in the condition or circumstances of the testator."

The Court saying:

"The italicized portion (exception) of the statute quoted is the material part to this issue."

It is submitted that the Michigan case is not an authority in the present issue.

It is respectfully submitted that the decree should be affirmed.

BOURGEOIS & COULOMB,
Solicitors for Respondent.