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Bill of Complaint.

In Chancery of New Jersey

TO THE HONORABLE EDWIN ROBERT WALKER, CHAN- 10
CELLOR OF THE STATE OF NEW JERSEY :

The complainants, Elvina Peer (formerly Elvina Van Dine) and Eugene Peer, her husband, of the Township of Boonton, in the County of Morris and State of New Jersey, respectfully shows :

1. That Peter Van Dine, late of the Village of Midvale, in the Township of Pompton (now the Borough of Wanaque), in the County of Passaic 20 and State of New Jersey, was at the time of his death, seized, in fee, in certain land and premises, situate, lying and being in the then Township of Pompton, now the Borough of Wanaque, and part in the Borough of Ringwood, County of Passaic and State of New Jersey, bounded and described as follows :

FIRST TRACT: BEGINNING at a point in the west- 30
erly line of Greenwood Lake Turnpike, also known as Wanaque Avenue, said point being at an iron pipe driven in the ground in the line of lands conveyed to Charles R. Dondero and Victoria Dondero, his wife, by said William Jenkins, by deed recorded in Book B-30 of deeds, for Passaic County, on pages 214 &c.; thence along the lands of the said Donderos', north $57^{\circ} 35''$ west 125.27' to an iron pipe at the corner of their said land; thence south $33^{\circ} 3''$ west 100' to an iron pipe in their land and 40

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lands of Melvin Stevens; thence along said Steven's land north $57^{\circ} 35''$ west 310.20' to an iron pipe at the corner of said Stevens land; thence along said Stevens land south $33^{\circ} 3''$ west 100 feet to a stake; thence south $57^{\circ} 35''$ east 435.47' to an iron pipe in the westerly line of Wanaque Avenue aforesaid; thence along the same south $33^{\circ} 3''$ west 28' to
 10 another iron pipe in line of Wanaque Avenue, and in a corner of lands of Elbert Vandine; thence along said Elbert Vandine's land north $57^{\circ} 35''$ west 150', more or less, to an iron pipe at the northwest corner of the same; thence south $32^{\circ} 42''$ west along a board fence running along the rear line of said Elbert Vandine's land and others 349.75' to another iron pipe; thence along a board fence north $57^{\circ} 12''$ west 174.35' to a corner; thence
 20 along a board fence south $31^{\circ} 29''$ west 89' to a corner; thence along a wire fence and lands now or formerly of Anna Rinesmith's north $76^{\circ} 15''$ west 234.3'; thence along the same north $50^{\circ} 30''$ west 158.4'; thence along the same north 60° west 116' to a stone heap; thence along the line of lands of Ringwood Company and along an old wire fence and in line with trees blazed north $19^{\circ} 35''$ east 1023.6' to a monument in the land of Josiah Ricker; thence along his said land south $69^{\circ} 25''$ east
 30 655.43' to a monument; thence along lands of Hercules Label Company south $89^{\circ} 8''$ east 528' to a cross on rock at corner of lands of one Conklin; thence along last mentioned lands south $28^{\circ} 13''$ west 72' to an iron pipe; thence along said last mentioned lands south $53^{\circ} 12''$ east 118' to an iron pipe in the westerly line of Wanaque Avenue; thence along the westerly line of Wanaque Avenue, south $33^{\circ} 3''$ west 582.6', more or less, to point or
 40 place of beginning.

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SECOND TRACT: Situate in the Borough of Wanaque.

BEGINNING at a post in the fence in the first line of a lot conveyed by Ann Vandine, *et als.* to Stephen B. Ricker by deed dated Sep. 19, 1900, said post being the 4th corner of a lot conveyed by Ann Vandine *et al.* to Martha Ricker by deed dated May 23, 1905, and from said post running
 10 along a part of the fourth line of the last mentioned lot, thence (1) northerly 76.5 feet to an iron pipe for a corner (2) north $59^{\circ} 15'$ west 174.2 feet to an iron pipe for a corner (3) south $29^{\circ} 30'$ west, 89 feet to a stake in the fence the second corner of the first lot mentioned above (4) south $63^{\circ} 18'$ east along a part of the second line, reversed, of said lot 173.9 feet to the place of beginning.

THIRD TRACT: Situate in the Borough of Wanaque. BEGINNING on the easterly side of the public road leading from Pompton to Ringwood at the northwest corner of Albert Degraw and Edward Weirs and running thence (1) easterly along Degraw's line, 195 feet, more or less, to the westerly line of the Erie Railroad Company, (2) northerly along said Erie Railroad Company line, 75 feet, more or less, to a point where a line running
 20 parallel with said first course and 75 feet distant therefrom intersects said line running along the line of the Erie Railroad Company; thence (3) westerly 195 feet, more or less, to the westerly side of said road; thence (4) southerly 75 feet, more or less, to the point or place of beginning.

FOURTH TRACT: Situate in the Borough of Wanaque. BEGINNING on the easterly side of the Greenwood Lake Turnpike and public road leading from
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Bill of Complaint.

Pompton to Ringwood in the northwest corner of the tract conveyed by William Jenkins, *et als.* to Serafino Mangini by deed recorded in Book W-28, of deeds for Passaic County, page 450 &c. and running thence (1) north along said Turnpike $29^{\circ} 45'$ east, 316.7 feet; thence (2) south $54^{\circ} 25'$ east, 147.8 feet; thence (3) south $22^{\circ} 37'$ west, 308.4
10 feet; thence (4) north $59^{\circ} 8'$ west 195 feet along Serafino Manfini to the point or place of beginning.

FIFTH TRACT: Situate in the Borough of Wanaque. BEGINNING at a point in the westerly line of the Greenwood Lake Turnpike distant 128 feet northerly from the northeast corner of lands of Elbert VanDine (formerly Merritt) and running thence (1) north $72^{\circ} 25'$ west 125 feet; thence (2)
20 north 18° east, 100 feet; thence (3) south $72^{\circ} 25'$ east, 125 feet to the said westerly line of the Greenwood Lake Turnpike; (4) along the line of said Turnpike south 18° west, 100 feet to the point or place of beginning.

SIXTH TRACT: Situate in the Borough of Wanaque. BEGINNING at a point in the westerly line of the Greenwood Lake Turnpike, distant 28 feet, northerly from the northeast corner of lots of
30 Elbert Vandine (formerly Merritt) and running thence (1) north $72^{\circ} 25'$ west, 435.60 feet; thence (2) north 18° east, 100 feet; thence (3) south $72^{\circ} 25'$ east, 435.60 feet to said westerly line of the Greenwood Lake Turnpike; thence (4) along the line of said Turnpike 18° west 100 feet, to the point or place of beginning. All as shown on a survey made for Wm. Jenkins, Midvale, N. J. Sep. 1, 1922 by G. Waldo Rude, and not on file.

40 Together with a right of way over the lane 28

Bill of Complaint.

feet in width belonging to said Wm. Jenkins, between the property above described and the lands of Albert Vandine.

SEVENTH TRACT: Situate in the Borough of Wanaque. BEGINNING on the west side of the public road leading through Midvale and southeast
10 corner of lands of Josiah Ricker, known as Cooper Place and following west sides of said public road southerly 160 feet to a stone heap; thence (2) westerly, one hundred and twenty feet to a point 70 feet from the south line of said Ricker (3) northerly and parallel to said public road, seventy feet to said Ricker's south line (4) easterly and following the said Ricker's south line about 150 feet
20 to the place of beginning.

EIGHTH TRACT: Situate in the Borough of Ringwood. Situated in the mountains at the place called Indian Ridge being a wood lot beginning at a heap of stones the north corner of a wood lot belonging to John W. Mounks thence running along his line (1) north 56° west 8 chains and 10 links to a stone heap at the corner of Cook's land (2) along his line north 10° east 17 chains and 40 links to a large white wood tree for a corner; thence (3) south
30 53° east 14 chains and 18 links to a stone heap; thence (4) south $30\frac{1}{2}^{\circ}$ west 15 chains to the place of beginning. Containing 17 acres, more or less, and being the 3d tract described in deed from Peter Mead Beam to William B. Howard.

2. And being so seized, the said Peter Van Dine, on or about March 2, 1911, died, leaving a last Will and Testament, bearing date May 15, 1909.

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3. A copy of said Will is as follows:

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

Item: I give and bequeath to my wife Elvina Vandine Eight hundred dollars in cash and right
10 of dower of Two hundred dollars.

Item: I give and bequeath to my daughter Emily Jane Vandine the sum of Fifteen hundred dollars and my household furniture.

Item: I do order that all of my personal property (not including my household furniture, bonds, mortgages and Bank accounts) be advertised and sold by my Executor here-in-after named, and the proceeds of the sale to be equally divided between
20 my wife Elvina Vandine and my daughter Emily Jane Vandine each to pay one-half of my funeral expenses and doctor bills and provide what my Executor would think a suitable grave stone.

Item: All the residue of my personal property shall be equally divided between my wife Elvina Vandine and my daughter Emily Jane Vandine, and if they can not agree on the division they shall submit to a division made by my Executor.

Item: I hereby give my wife Elvina Vandine one-
30 third of all the profits that are received for the use of my real estate as long as she remains my widow and my daughter Emily Jane Vandine two-thirds of all the profits that are received for the use of my real estate, each paying one-half of the taxes, insurance and expenses of the same.

Item: I hereby give my wife Elvina Vandine and my daughter Emily Jane Vandine the privilege of selling my real estate, or any part of it at any
40 time and my wife to receive one-third of the profits

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and my daughter Emily Jane Vandine two-thirds of the profits.

Lastly: I hereby appoint Edward J. Brown Executor of this my last Will and testament.

(Signed) PETER VANDINE (SEAL)

Signed, published and declared by the said Peter Vandine to be his last will in the presence of us, 10 who were present and subscribed our names as witnesses in the presence of the testator—May 15th—1909.

(Signed) PETER VANDINE (SEAL)

Witnesses,

W. CARRINGTON CABELL
SUSAN A. DOTY.

That the said Will was duly admitted to probate 20 by the Surrogate of Passaic County.

4. That said Peter Vandine left him surviving next of kin and heirs at law, the following persons:

Elvina VanDine, his widow, and
Emily Jane VanDine, his daughter,
as his only child.

5. That after the death of the said Peter Vandine, the said Emily Van Dine intermarried with 30 one William Jenkins.

6. That after the death of the said Peter Van Dine, his widow, the said Elvina Van Dine, intermarried with one Eugene Peer.

7. On or about February 21, 1920, the said Emily Jane Jenkins died leaving a last Will and Testament, bearing date May 29, 1919, which Will was
40 duly admitted to probate by the Surrogate of Pas-

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saic County. That by the Second Item of said last Will and Testament, she did "give, devise and bequeath all my real estate, both real and personal, whatsoever the same may be and whatsoever the same may consist of, to my husband, William Jenkins, to him, absolutely", and appointed her said husband Executor thereof.

10 8. That by the death of the said Peter Van Dine, aforesaid, the premises above described descended to said Elvina Van Dine (now Peer), and to the said Emily Jane Van Dine, as tenants in common, in fee simple.

9. Complainants are informed that one Emil Alvoni or Emil Navoni and Mamie, his wife, are in possession of the First Tract above described, and by reason thereof, they claim some right or
20 interest in said First Tract.

Any interest the said Emil Alvoni or Emil Navoni, and Mamie, his wife, may have in said First Tract is subject to Complainants' interest.

10. That on or about July 3, 1918, said Emily Jane Jenkins and William Jenkins, her husband, conveyed to Stephen B. Ricker the Second Tract above described.

30 Any interest the said Stephen B. Ricker may have in the Second Tract is subject to the interest of the Complainant.

11. That on or about April 8, 1921, the said William Jenkins and Martha Sloat and John H. Sloat, her husband, conveyed to Serafino Mangini the Third Tract above described.

Any interest the said Serafino Mangini may have in the Third Tract is subject to the interest of the
40 Complainants.

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12. That on or about May 16, 1922, said William Jenkins conveyed to Midvale Wanaque Bus Company the Fourth Tract above described.

Any interest the said Midvale Wanaque Bus Company may have in the Fourth Tract is subject to the interest of the Complainants.

13. That on or about September 5, 1922, the said 10 William Jenkins conveyed to Charles R. Dondero and Victoria Dondero, his wife, the Fifth Tract above described.

Any interest the said Charles R. Dondero and Victoria Dondero, his wife, may have in said Fifth Tract is subject to the interest of the Complainants.

14. That on or about October 10, 1922, said William Jenkins conveyed to Melvin Stephens the 20 Sixth Tract above described.

Any interest the said Melvin Stephens may have in the Sixth Tract is subject to the interest of the Complainants.

15. On or about January 17, 1920, said Emily Jenkins and William Jenkins, her husband, conveyed to Harry Conklin the Seventh Tract above described.

Any interest which said Harry Conklin may have 30 in said Seventh Tract is subject to the interest of the Complainants.

16. That on or about June 29, 1921, the said William Jenkins conveyed to Melvin Stephens the Eighth Tract above described.

Any interest which said Melvin Stephens has in said Eighth Tract is subject to the interest of the Complainants.

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17. On or about March 5, 1919, said Emily Jane Jenkins and William Jenkins, her husband, executed a mortgage to Edwin W. Wheeler, to secure the payment of Four Hundred Dollars, covering the following described premises.

Being the homestead in former years of Conrad Beam, and later belonging to William Howard; and on Apr. 30, 1878 deeded by Edward Wchtman of New York City, N. Y. to Wm. T. Vandine of Pompton Township, Passaic County, N. J. afterwards willed to Peter Vandine, son of Wm. T. Vandine; afterwards willed to Emily J. Vandine by her father Peter Vandine before her marriage.

This mortgage covers all of the homestead mentioned, lying on the west side of the public road leading from Wanaque to Erskine, excepting thereout all tracts of land lying on the west side of the public road that had been sold prior to the death of said Peter Van Dine and subsequent to his death by his heirs and prior to the date of this mortgage.

18. The complainants are informed and believe that this mortgage covers all the above premises, except the Second Tract and Eighth Tract above described.

Any interest which said Edwin W. Wheeler may have in said premises is subject to Complainants mortgage.

19. The complainants are seized of and entitled to an undivided one-third part of the land and premises above described.

20. That the Defendant, William Jenkins, is seized of and entitled to an equal undivided two-

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thirds interest in the First Tract, subject to the inchoate right of dower of his wife, Grace Jenkins.

21. That the Defendant, Stephen B. Ricker is seized of and entitled to an equal undivided two-thirds part of the Second Tract, subject to the inchoate right of dower of his wife, Katherine Ricker.

22. That the Defendant Serafino Mangini is seized of and entitled to an equal undivided two-thirds part of the Third Tract, subject to the inchoate right of dower of his wife, Annie T. Mangini.

23. That the Midvale Wanaque Bus Company is seized of and entitled to an equal undivided two-thirds part of the Fourth Tract.

24. That the Defendant Charles R. Dondero and Victoria Dondero, his wife, are seized of and entitled to an equal undivided two-thirds part of the Fifth Tract.

25. That the Defendant, Melvin Stephens, is seized of and entitled to an equal undivided two-thirds part of the Sixth Tract, and the Eighth Tract, subject to the inchoate right of dower of his wife, Katherine Stephens.

26. That the Defendant, Harry Conklin, is seized of and entitled to an equal undivided two-thirds part of the Seventh Tract, subject to the inchoate right of dower of his wife, Maggie Conklin.

27. That complainants are desirous that a partition or division of the said tracts of land and prem-

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ises should be made between the complainants and the several parties seized of and entitled thereto, according to their respective rights, estate, shares and interests therein, or in case (as complainants believe and aver the fact to be) that the said tracts of land and premises cannot be divided among the owners thereof without great prejudice to their in-
 10 terests, then that the same may be sold, and the proceeds thereof divided among the complainants and the other parties entitled thereto as aforesaid according to their respective rights and interests.

28. Complainants are advised that no valid partition or division of said premises can be effected without the aid and interposition of some competent court, and that this Honorable Court has full and complete jurisdiction in the premises.

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

1. That the defendants in this suit may answer this Bill of Complaint, without oath and each statement made therein.

2. That a fair partition and division of the above described premises may be made according to the course and practice of this Court, if the same be practicable and consistent with the rights of all
 30 the parties interested therein, among Complainants and the other parties entitled to shares of the said premises according to their respective rights and interests thereto.

(a) That the liens, if any, on the undivided estate or interest of any of the parties hereto, be decreed to be a charge only on the share assigned to such part, such share to be first charged with its just proportion of the cost of these proceedings in
 40 preference to any such lien.

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3. That in case such partition and division in fact of the said premises shall be found to be impracticable, or if it should appear that the same cannot be made without great prejudice to the owners of said premises, then that the said tracts of land and premises may be decreed by the Court to be sold, including the inchoate right of dower of Katherine Ricker, wife of Stephen B. Ricker,
 10 Annie T. Mangini, wife of Serafino Mangini, Katherine Stephens, wife of Melvin Stephens, Maggie Conklin, wife of Harry Conklin and Grace Jenkins, wife of William Jenkins, and the inchoate right of curtesy of the complainant, Eugene Peer, if any.

4. That the proceeds thereof, after paying the costs and charges of this suit, and the aforesaid mortgage he divided among the complainants and the several parties interested therein, according to
 20 their respective rights, shares and interests; that the portion of the moneys arising from such sale of the estate, share or interest, of any part against whom there are existing any liens or encumbrances held by any creditors of such party who is a party defendant be brought into this Court by the Master or Commissioner, as the case may be, who shall make sale of said premises, after deducting the costs, charges and expenses to which it shall be
 30 liable to the end, that the Chancellor may make such Order therefor as the circumstances may require, and that the complainants may have such order or other relief, as the nature and circumstances of the case may require, agreeable to equity.

5. That a writ of subpoena may issue, commanding the said defendants, William Jenkins and Grace Jenkins, his wife, Stephen B. Ricker and Katherine Ricker, his wife, Serafino Mangini and Annie T.
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Mangini, his wife, Charles R. Dondero and Victoria Dondero, his wife, Melvin Stephens and Katherine Stephens, his wife, Harry Conklin and Maggie Conklin, his wife, Midvale Wanaque Bus Company, Emil Alvoni, sometimes called Emil Navoni, and Mamie Alvoni, sometimes called Mamie Navoni, his wife, and Edwin W. Wheeler, to answer this Bill of Complaint, and to abide by such decree as this Court may make in the premisses.

JAMES V. BEAM
Solicitor of Complainant

HAROLD A. PRICE
of Counsel

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**Answer of William Jenkins
and
Grace Jenkins, his wife.**

Filed Sept. 10th, 1924

IN CHANCERY OF NEW JERSEY.

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Between

ELVINA PEER and EUGENE PEER,
her husband,
Complainants,
and

WILLIAM JENKINS and GRACE
JENKINS, his wife, EMIL AL-
VONI or EMIL NAVONI, and
MAMIE, his wife, STEPHEN B.
RICKER and KATHERINE
RICKER, his wife, SERAFINO
MAGINI and ANNIE T. MA-
GINI, his wife, MIDVALE
WANAQUE BUS COMPANY,
CHARLES R. DONDERO and
VICTORIA DONDERO, his wife,
and EDWIN W. WHEELER,
Defendants.

On Bill, &c.

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The answer of William Jenkins and Grace Jen-
kins, his wife of Bloomingdale, Passaic County,
New Jersey, to the bill of complaint, say that:

1. Paragraphs 1, 2, and 3 are admitted.
2. Paragraph 4 of the bill of complaint is ad-
mitted as far as the statements relates to Elvina

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Answer of William Jenkins and Grace Jenkins,
his wife.

Van Dine being the widow and Emily Jane Van Dine being the daughter of Peter Van Dine, deceased, but denies the other allegations relative to the said Elvina Van Dine.

10 3. Paragraphs 5, 6, and 7 of the bill of complaint are admitted.

4. Paragraph 8 of the bill is denied.

5. As to statements contained in paragraphs 9 to 18 inclusive are denied, as to the allegations of any interest of Elvina Peer and Eugene Peer her husband

20 6. Paragraph 19 of the bill of complaint is denied.

7. As to the statements contained in paragraph 27 of the bill of complaint, these defendants say that the complainants are not entitled to any of the relief, privileges indicated in said paragraph; that whatever estate, interest or right, relative to the lands and premises set forth in the bill ceased
30 and determined before the commencement of this suit.

8. These defendants say that the statements contained in paragraphs 9 to 26 of the bill of complaint, both being inclusive, in which the complainants assert an interest in the different conveyances, are denied. And these defendants say that at the times of the conveyances made as set forth in the
40 bill of complaint, the complainants, nor, neither of

Notice of Motion to Strike Out.

them had, or were legally entitled to any estate or interest in the said lands and premises.

JACOB VAN DER CLOCK
Solicitor of Defendants William
Jenkins and Grace Jenkins. 10

Notice of Motion to Strike Out.

IN CHANCERY OF NEW JERSEY.

ELVINA PEER, *et al*,
Complainants,

vs.

WILLIAM JENKINS, *et als*,
Defendant.

On Bill for
Partition.

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To the complainants, Elvina Peer and Eugene Peer, her husband: Take notice, that on Monday, Oct. 30
6, 1924, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Paterson, I shall apply to the Chancellor for an order striking out the bill of complaint filed by you in the above entitled cause, for the following reason:

That said bill of complaint discloses no cause of action in that by the will of Peter Van Dine, de- 40

Notice of Motion to Strike Out.

ceased, under which the complainant, Elvina Peer, claims some interest in the premises sought to be partitioned, any interest which the said Elvina Peer acquired thereunder ceased upon her marriage with Eugene Peer, one of the complainants; and she has now no interest in said premises.

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FREDERIC BEGGS

Solicitor for the Defendants.
Serafino Mangini, Annie T. Mangini, his wife, Charles R. Dondero, Victoria Dondero, his wife, Melvin Stephens, Katherine Stephens, his wife, Harry Conklin, Maggie Conklin, his wife, Midvale Wanaque Bus Co., Emil Alvoni, sometimes called Emil Navoni, Mamie Alvoni, his wife, sometimes called Nami Navoni, and Edwin W. Wheeler.

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Service of a copy of the within Notice on Motion to Strike Out, is hereby acknowledged, this 12th day of September, 1924

JAMES V. BEAM
Solr. for Complainants,
Elvina Peer and Eugene Peer

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Decree Dismissing Bill.

Filed January 28th, 1927.

IN CHANCERY OF NEW JERSEY

Between

ELVINA PEER, *et al.*,
Complainants,
and
WILLIAM JENKINS, *et al.*
Defendants.

On Bill for Parti-10
tion.
On Motion to strike
out Bill of Com-
plaint

This matter being opened to the Court by Frederic Beggs, Solicitor of the defendants and in the presence of James V. Beam, Solicitor of the Complainants; and it appearing that notice of motion to strike out the bill of complaint has been given by the defendants to the complainants and the Court having heard argument thereon and being of the opinion that such motion should prevail,

It is on this 28th day of January 1927, ORDERED, ADJUDGED AND DECREED that the motion to strike out the bill of complaint filed by the complainants be and the same is hereby granted and the bill is hereby dismissed, without costs.

E. R. WALKER
C.

Respectfully advised
JOHN BENTLEY
V. C.

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Decree Dismissing Bill.

I consent to the ending of the foregoing decree as to form.

JAMES V. BEAM
Solicitor of Complainants
by KING & VOGT of Counsel

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FREDERIC BEGGS
Solicitor of Defendants.
Midvale-Wanaque Bus Co.
Emil Alvoni, (Navoni) *et ux.*
Edwin W. Wheeler.

Serafino Mangini, *et ux.*
Charles R. Dondero, " "
Melvin Stephens, " "
Harry Conklin, " "

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Notice of Appeal.

Filed April 28th, 1927.

IN CHANCERY OF NEW JERSEY

56/342

Between

ELVINA PEER, *et al.*,
Complainants,

and

WILLIAM JENKINS, *et als*,
Defendants.

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On Bill for Parti-
tion

On Decree Dismiss-
ing Bill

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The Complainants hereby appeal from the Final Decree made in this Court, by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Honorable John Bentley, the Vice-Chancellor, to whom this matter was referred, in the above stated cause, by which it was declared that the Bill of Complaint of the Complainants did not set forth a cause of action, and that it should be dismissed, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 27, 1927.

JAMES V. BEAM
Solicitor of Complainants

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

CARL V. VOGT,
Of Counsel with Complainants

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Petition of Appeal.

Filed May 10th, 1927.

NEW JERSEY COURT OF ERRORS AND
APPEAL

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Between

ELVINA PEER, *et als.*,
Complainants-Appellants

and

WILLIAM JENKINS, *et als.*,
Defendants-Respondents

On Bill for Parti-
tion

On Decree Dismiss-
ing Bill

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TO THE HONORABLE THE COURT OF ERRORS AND
APPEALS in the last resort in all cases:

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The petition of Elvina Peer and Eugene Peer, 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 January 28, 1927, wherein the said Elvina Peer, and Eugene Peer, were defendants, in this respect, to wit, that the said Decree adjudges that the Bill of Complaint of the Complainants sets forth no cause of action, and that it should be dismissed.

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And your petitioners humbly appeal from the Decree of said Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that the said Bill of Complaint does set forth

Petition of Appeal.

a cause of action, the said Complainants are entitled to have the property partitioned and to have their share therein awarded to them and the said Bill should not be dismissed.

Your petitioners therefore pray that said Decree of the said Chancellor aforesaid may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

JAMES V. BEAM
Solicitor of Appellants

CARL V. VOGT
Of Counsel with Appellants

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Answer to Petition of Appeal.

Filed May 12th, 1927.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	ELVINA PEER, <i>et al.</i> , Complainants-Appellants, vs. WILLIAM JENKINS, <i>et als.</i> , Defendants-Respondents.	} On Appeal from Court of Chancery. } Answer to Petition of Appeal.
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The answer of Serafino Mangini, Annie T. Man-
 20 gini, his wife, Charles R. Dondero, Victoria Don-
 dero, his wife, Melvin Stephens, Katherine Ste-
 phens, his wife, Harry Conklin, Maggie Conklin, his
 wife, Midvale-Wanaque Bus Co., Emil Alvoni, some-
 times called Emil Navoni, Mamie Alvoni, his wife,
 sometimes called Mamie Navoni, and Edwin W.
 Wheeler, respondents to the petition of appeal of
 Elvina Peer and Eugene Peer, her husband, the
 above named appellants.

30 These respondents, not admitting the truth of all
 or any of the matters in the said petition contained,
 for answer thereto nevertheless admit that a decree
 was on the Twenty-eighth day of January, 1927,
 made and entered in the Court of Chancery of New
 Jersey, in the above entitled cause, for the purposes
 in said petition mentioned and as therein set forth;
 but as to the substance and form of said decree,
 these respondents take leave to refer thereto when
 40 the same shall be produced.

Answer to Petition of Appeal.

These respondents are advised and believe that
 the said decree is agreeable to equity; and they pray
 that the same may be confirmed with costs to be
 taxed in favor of these respondents.

FREDERIC BEGGS

Solicitor for and of Counsel with ¹⁰
 Serafino Mangini, Annie T.
 Mangini, his wife, Chas. R.
 Dondero, Victoria Dondero, his
 wife, Melvin Stephens, Kather-
 ine Stephens, his wife, Harry
 Conklin, Maggie Conklin, his
 wife, Midvale-Wanaque Bus
 Co., Emil Alvoni, sometimes
 called Emil Navoni, Mamie Al-
 voni, his wife, sometimes called ²⁰
 Mamie Navoni, and Edwin W.
 Wheeler.

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Answer to Petition of Appeal.

Filed May 25th, 1927.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	ELVINA PEER, <i>et al.</i> , Complainants-Appellants, vs. WILLIAM JENKINS <i>et als.</i> , Defendants-Respondents.	}	On Appeal from Court of Chancery.
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The answer of William Jenkins and Grace Jenkins, respondents, to the Petition of Appeal of Elvina Peer and Eugene Peer, her husband, the above named appellants.

These respondents not admitting the truth of all or any of the matters in the said petition of appeal
 20 contained for answer thereto nevertheless admit that a decree was on the 28th day of January, 1927, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said decree is agreeable to equity; and they pray
 30 that the same may be affirmed with costs to be taxed in favor of these respondents.

JACOB VAN DER CLOCK
 Solicitor for William Jenkins
 and Grace Jenkins, Defendants-Respondents.

WILLIAM EVERETT, JR.,
 Of counsel with William Jenkins and Grace Jenkins, Defendants-Respondents.

24 OCT. 1. 1927

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

New Jersey Court of Errors and Appeals.

Between	ELVINA PEER, <i>et al.</i> , Complainants-Appellants	}	On Bill for Partition. On Final Decree.
And	WILLIAM JENKINS, <i>et als.</i> , Defendants-Respondents	}	On Appeal from the Court of Chancery.

**BRIEF ON BEHALF OF COMPLAINANTS-
APPELLANTS.****Facts.**

Peter VanDine died on March 2, 1911, seized of property located in Pompton Township and in the Borough of Ringwood, Passaic County, New Jersey. He left a last Will and Testament which provided, in part, as follows:

"Item: All the residue of my personal property shall be equally divided between my wife Elvina VanDine and my daughter, Emily Jane Vandine, and if they cannot agree on the division, they shall submit to a division made by my Executor.

Item: I hereby give my wife, Elvina Vandine one-third of all the profits that are received for the use of my real estate as long as she remains my widow and my daughter Emily Jane Vandine two-thirds of all the profits that are received for the use of my real estate, each

paying one-half of the taxes, insurance and expenses of the same.

Item: I hereby give my wife Elvina Vandine and my daughter Emily Jane Vandine the privilege of selling my real estate, or any part of it *AT ANY TIME and my wife to receive one-third of the PROFITS and my daughter Emily Jane Vandine two-thirds of the profits*" (italics ours).

The will was probated by the Surrogate of Passaic County. Peter VanDine was survived by a widow, Elvina VanDine and a daughter, Emily Jane VanDine. The widow subsequently married Eugene Peer and the daughter, Emily Jane VanDine married William Jenkins.

On February 21, 1920, Emily Jane Jenkins, (the daughter of Peter VanDine) died leaving a Last Will and Testament which was probated by the Surrogate of Passaic County, in and by which she devised all her property to William Jenkins, appointing him Executor of her Will.

Following these events conveyances were made by William Jenkins and Emily Jenkins in her lifetime, and numerous conveyances of portions of the property which the said Peter VanDine had formerly owned were made by William Jenkins, the conveyances purporting to convey interest in fee in the various tracts. The present action is a bill for partition by which the complainant, Elvina Peer, claims to be the owner of an undivided one-third interest in the property of which Peter VanDine died seized; basing her contention upon the Will of Peter VanDine.

The defendants, in support of their motion to dismiss the bill of complaint, contend that the complainant, Elvina Peer, took an estate in said property which was terminated by her re-marriage; that it was a "devise during widowhood" and that following her marriage, Mr. and Mrs. Jenkins were

free to convey the property without any claim being successfully asserted by the complainant, Elvina Peer.

Defendants in the Court below relied upon the doctrine of *Downey vs. Borden*, 36 N. J. L. 460 to defeat this bill. That case is clearly inapplicable and the facts different from the case at bar.

There, the question was whether the devisee took a life estate or an estate in fee and the doctrine which is now the settled law of this State is that if the devise in the first instance is indeterminate as to quantity and there follows an unlimited power of disposition, then the law is that the devisee takes a fee but if the initial devise is limited either by a statement that it is for life or widowhood, then the subsequent power to convey is held to be a mere power not enlarging the initial estate, and the gift over is effective.

The case of *Downey vs. Borden* and similar cases are to be distinguished from the instant case in the following particulars.

A.

In the case at bar the testator made no other provision for the disposition of the one-third of his real estate after widowhood of complainant, except as it be construed that he gave the one-third to his widow. In all of the cases, of which *Downey vs. Borden* is an example, there was a devise over, which in the event of the failure to find a fee in the first taker, would be deemed valid.

B.

The power of sale in the third clause of the will does not run co-extensively with the period of the estate restricted to widowhood in the second clause of the Will.

C.

There is a distinct provision in said third clause for the payment of the proceeds of sale or sales to the widow to the extent of one-third, a clause entirely absent from the cases cited by defendant.

Upon this state of facts we urge the following points, in support of this appeal:

FIRST.

It is to be assumed that the testator intended to dispose of all of his property, and not die intestate as to any part of it.

SECOND.

Force and effect must, if practicable and in the absence of repugnancy, be given to every word in the Will.

THIRD.

The appellant, Elvina Peer, is entitled (a) to partition and (b) under the general prayer to an adjudication by this Court as to her right to convey the lands still remaining.

FOURTH.

The testator's intention controls.

FIFTH.

Under the Will of the decedent, VanDine, the appellant, Elvina Peer, is given power of sale, unlimited as to time, and which power of sale survived her widowhood.

SIXTH.

Under the Will of the said Peter VanDine, the power of sale given to the widow, the appellant, survived to her solely after the death of Emily Jane VanDine and by virtue thereof she possessed and still possesses the sole right to convey all of the property still remaining in said estate, and the deeds made since the death of Peter VanDine, without her joinder therein, were ineffective to pass title.

SEVENTH.

Under the Will in question the appellant, Elvina Peer, is entitled to an estate in fee in one-third of all of the land of which the decedent, VanDine, died seized.

ARGUMENT.

FIRST.

It is to be assumed that the testator intended to dispose of all of his property, and not die intestate as to any part of it.

Johnson vs. Bowen, 85 N. J. E. 76;
Carter vs. Gray, 58 N. J. E. 411, at 415.

SECOND.

Force and effect must, if practicable and in the absence of repugnancy, be given to every word in the Will.

Bryan vs. Bryan, 61 N. J. E. 45, at 49.

THIRD and FOURTH.

The appellant, Elvina Peer, is entitled (a) to partition and (b) under the general prayer to an adjudication by this Court as to her right to convey the lands still remaining.

The testator's intention controls.

In ascertaining the testator's intention we observe that he separated his estate into three distinct classifications: (a) by the first quoted item he disposed of his personal property; (b) by the second quoted item he divided the income between his wife and daughter, limiting the wife's right to receive income to her widowhood; (c) he provided

for the ultimate disposal of his real estate by sale and the disposition of the proceeds thereof.

It is at once apparent that the word "profits" employed by the testator, in the second item above quoted, was there used to mean *income*, because he burdens the recipients of that income with the carrying charges of the property.

It is equally apparent that the word "profits" used in the third clause means *proceeds of sale* of the fee.

It is clear therefore that the testator felt that if his wife remarried she would have other means of support and not be dependent on income from the property, but he also apparently had no intention of depriving his wife of a share in the fee of his estate and therefore made provision for sale and the payment of one-third to her.

Conclusive proof of the testator's intention that complainant should *have one-third of the fee is shown by his failure to make any alternative disposition of the fee in the event of her remarriage*. The doctrine of *Downey vs. Borden* does not militate against our interpretation of the testator's intention. Since there is no gift over in the case at bar the repugnancy present in that class of cases does not exist.

Equally significant is the fact, referred to above, that he did not limit her right to convey the land to the period of her widowhood, but said that this right could be exercised *at any time*. It can reasonably be argued that the testator felt that, on the possible remarriage of his widow, the natural disposition would be the sale of the real estate.

The third quoted clause is complete unto itself. It provides for unlimited sale, conveyance, and disposition of the proceeds. It is a unit distinct from the second clause. The testator approaches the disposition of the fee unhampered by the restrictions of the second clause. He provides the

method of disposition, with no restriction as to the time of the exercise thereof, and provides definitely as to the distribution of the proceeds.

Under the general prayer for relief and as a necessary adjunct to the final disposition of the matter now before the court, the complainant requests that the court interpret the will of decedent and adjudicate upon the power of sale as given to complainant thereunder.

FIFTH and SIXTH.

Under the Will of the decedent, VanDine, the appellant, Elvina Peer, is given power of sale, unlimited as to time and which power of sale survived her widowhood.

Under the Will of the said Peter VanDine, the power of sale given to the widow, the appellant, survived to her solely after the death of Emily Jane VanDine and by virtue thereof she possessed and still possesses the sole right to convey all of the property still remaining in said estate, and the deeds made since the death of Peter VanDine, without her joinder therein, were ineffective to pass title.

By his will, the testator conveyed an interest in his estate to each of the persons to whom he gave the power of sale. Bearing in mind that the intention of the testator controls as to the duration of the power (*Foley vs. Devine*, 123 Atl. Rep. pp. 248 and 249), it is our contention that the accomplishment of the matters connected with the admin-

istration of the estate had not been completed at the time of the death of Emily Jane Vandine, and survived to complainant.

“Where it is apparent that there remains undone something which the testator intended the trustee should or might do, and in aid of which he intended the power of sale should or might be exercised, the power is still alive, and may be validly exercised, except in those cases where the only person or persons intended to be benefited by such exercise elect the contrary.”

Foley vs. Devine (ante), at page 250.

This case is to be distinguished from the general rule applicable to the duration of a *naked power* when granted to individuals *by name*, where it is held that in such case the power does not survive the death of one of the recipients thereof. *Weimar v. Fath*, 43 N. J. L. 1.

SEVENTH.

Under the Will in question the appellant, Elvina Peer, is entitled to an estate in fee in one-third of all of the land of which the decedent, VanDine, died seized.

The intention of the testator as construed in this brief was that his widow should have one-third of the fee.

We respectfully request this court to reverse the decree of the Court of Chancery.

JAMES V. BEAM,
Solicitor of Complainants.

HAROLD A. PRICE,
Of Counsel.

24 OCT. 1. 1927

New Jersey Court of Errors and Appeals

Between

ELVINA PEER, et al.,
Complainants-Appellants

And

WILLIAM JENKINS, et als.,
Defendants-Respondents

On Bill for Partition.
On Final Decree.
On Appeal from the
Court of Chancery.

**BRIEF ON BEHALF OF THE DEFENDANTS-
RESPONDENTS,
MIDVALE-WANAQUE BUS COMPANY, ET ALS.**

Facts

The facts as set forth in the brief of Appellants are correct, but it is the belief of these Defendants that the entire Will of Peter Van Dine, deceased, should be set forth for the guidance of the Court, and it follows:

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

Item: I give and bequeath to my wife Elvina Vandine Eight hundred dollars in cash and right of dower of Two hundred dollars.

Item: I give and bequeath to my daughter Emily Jane Vandine the sum of Fifteen hundred dollars and my household furniture.

Item: I do order that all of my personal property (not including my household furniture, bonds, mortgages and Bank accounts) be advertised and sold by my Executor here-in-after

named, and the proceeds of the sale to be equally divided between my wife Elvina Vandine and my daughter Emily Jane Vandine, each to pay one-half of my funeral expenses and doctor bills and provide what my Executor would think a suitable grave stone.

Item: All the residue of my personal property shall be equally divided between my wife Elvina Vandine and my daughter Emily Jane Vandine, and if they cannot agree on the division they shall submit to a division made by my Executor.

Item: I hereby give my wife Elvina Vandine one-third of all the profits that are received for the use of my real estate as long as she remains my widow and my daughter Emily Jane Vandine two-thirds of all the profits that are received for the use of my real estate, each paying one-half of the taxes, insurance and expenses of the same.

Item: I hereby give my wife Elvina Vandine and my daughter Emily Jane Vandine the privilege of selling my real estate, or any part of it at any time and my wife to receive one-third of the profits and my daughter Emily Jane Vandine two-thirds of the profits.

Lastly: I hereby appoint Edward J. Brown Executor of this my last Will and testament.

(Signed) PETER VANDINE. (Seal)

Signed, published and declared by the said Peter Vandine to be his last will in the presence of us, who were present and subscribed our names as witnesses in the presence of the testator May 15th, 1909.

(Signed) PETER VANDINE. (Seal)

Witnesses:

W. CARRINGTON CABELL

SUSAN A. DOTY.

Upon the stated facts we urge the following points in support of the decision of Vice Chancellor Bentley in the Court of Chancery:

FIRST

Testator's intention controls.

(a) It was the intention of this testator to limit the estate of his widow, in his realty, to a life estate to be terminated by her re-marriage.

(b) The word "profits" as used in the sixth "item" of the will means **income**, and it must be held to have been used in the same sense in the seventh "item".

(c) The words used in item seven "at any time" mean **at any time during widowhood**.

SECOND

The Appellant, Elvina Peer, lost all interest in the estate of her deceased husband upon her re-marriage.

THIRD

The power of sale given to the widow terminated upon her re-marriage.

FOURTH

The bill of complaint was properly dismissed because Elvina Peer, one of the complainants therein, has no interest in the property sought to be partitioned.

ARGUMENT

FIRST and SECOND

Testator's Intention Controls

The question of every will as to what was the intention of the testator is derived from the language used and the surrounding circumstances.

This testator was survived by a widow and one child, who are the only persons provided for in his will. At the time of the making of the will, and at testator's death, this child, who survived him, was unmarried.

The will was undoubtedly drawn by one unfamiliar with legal terms. In the very first item the expression, "right of dower," is incorrectly used, and there are many other indications of its being the work of one not fully conversant with legal phraseology.

"The fundamental rule in the construction of wills is the ascertainment of the intention of the testator—first, by carefully considering the force of every word of the language used by him, and second, in case of difficulty and ambiguity, by considering therewith his pecuniary circumstances and his family and social relations."

Wiggins v. Wiggins, 65 N. J. E. 417.

"The court in construing a will must search for testator's intention in the light of the facts, placing itself as nearly as possible in his position."

Howell v. Steelman, 76 N. J. E. 423.

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

Coffin v. Watson et al., 78 N. J. E. 307.

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

Coyle et al. v. Donaldson et al., 91 N. J. E. 138.

"In construing a will the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it. A clear gift in one clause cannot be taken away or cut down by doubtful expressions in another clause, but only by express words or by clear implication."

Johnson v. Haldane et al., 95 N. J. E. 404.

THE WORD "PROFITS" MEANS INCOME

The two paragraphs that refer to the disposition of the real estate must be read together.

In both paragraphs the word "profits" is used. In the first paragraph the testator has clearly shown what he had in mind by the use of this word.

There can be no question but that he means INCOME, and to this the Appellants agree in their Brief.

The Appellants, however, attempt to place an entirely different meaning on the word "profits" as used by the testator in the succeeding paragraph (item seven). Without giving any reason they make the arbitrary statement "It is clearly apparent that the word 'profits' used in the third clause means proceeds of sale of the fee." (The third clause and the seventh item are the same.) We do not agree. We claim that the word "profits" is to be interpreted as having the same meaning as it is given in the preceding paragraph, and that it means INCOME.

If the word "income" had been used in each paragraph instead of "profits" there could have been no dispute.

The Appellants have adopted a very curious and inconsistent stand in this respect, which they are obliged to do to give them the semblance of a case. How is it "apparent" that the word "profits" used in the third clause means "proceeds of sale"? On this point the Appellants are silent, advancing no argument whatever, but simply making an assertion to suit their case.

Is it reasonable to suppose, as claimed, that in the event of the widow's re-marriage her husband desired to give her a greater estate? This is manifestly not the scheme of this testator.

It is logical to infer from all the circumstances that the testator felt that his wife would be amply provided for if she re-married and so limited her interest in the real estate to widowhood. This is a common provision in wills of married men. His daughter was unmarried, and his only heir at law, and we have a right to assume that the testator knew that in the event of his wife's re-marriage his daughter would take the fee.

"Words occurring more than once in a will must be presumed to be used in all cases in the same sense unless a contrary intention appears in the context or they are applied to a different subject."

Stewart v. Stewart, 61 N. J. E. 25.

"When the testator used the word 'issue' in any particular sense in one part of the will, he must be held to have used the same word in the same sense in all other parts of the will."

Dennis v. Dennis, 86 N. J. E. 423, at 428.

"The same words in different parts of a will, used to express a common purpose, are presumed to have been used in the same sense."

Traverso v. Traverso, 99 N. J. E. 514.

The words "at any time" mean at any time during widowhood.

If we used the word "income" instead of "profits", in the paragraph providing for sale, there would be no trouble in ascertaining the testator's intention, but for the use of the words "at any time".

It is unreasonable to think that the testator had in mind the giving of this power after the widow's interest had ceased.

It is reasonable to interpret this clause as being effective only during widowhood, during which time the widow retained her interest.

"If the word "profits" in this paragraph is held to be synonymous with income as we contend, the testator must have meant that the power of sale be limited to widowhood. He undoubtedly realized that a sale might be necessary or desirable, and that if such a sale was made it would create a new status. He knew that the proceeds could be invested and bring "profits" or "income," but if the widow re-married there could be no reason for her exercising the power, as her estate was ended.

The words mean, when coupled with the preceding paragraph, and we claim the two paragraphs should be read together, at any time while the widow retains an interest in the property, and any other construction would be opposed to testator's intention.

"Courts, in construing a will, may depart from its strict words and read a word or phrase in a sense different from that which is ordinarily attributed to it, when such a departure is necessary to give effect to what appears, on a full view of the whole will, to have been the intention of the testator."

Marshall's Exrs. v. Hadley, 50 N. J. E. 547 at 548.

THIRD

The power of sale given to the widow in conjunction with the testator's daughter terminated on the re-marriage of the widow.

If the construction that we claim should be placed upon this will is adopted, that is that the power of sale is limited to "at any time during widowhood," then there can be no question but that the power is terminated.

But even though our interpretation is not followed, this power has terminated on account of the death of the daughter of the testator, Emily Jane Jenkins (formerly Vandine).

In *Weimar v. Fath*, 43 N. J. L. 1, at 4, Chief Justice Beasley says: "Thus, if an authority were given to A and B, nominatim, to sell designated lands, and they should also be appointed executors in the will containing the authority, if either should refuse to take the office, or should die, it has been almost uniformly adjudged that the other executor could not validly execute such power. In such expressions it has been deemed that the purpose appears to be to put a confidence in the INDIVIDUALS who are thus named."

FOURTH

Upon the construction that we have urged, which if adopted by the Court, Elvina Peer has no interest in the property, and having no interest, obviously she cannot bring a suit to have it partitioned.

We therefore respectfully request the Court to affirm the decision of the Court of Chancery.

FREDERIC BEGGS,

Solicitor and of Counsel with
the Defendants.

Midvale-Wanaque Bus Co.
Emil Alvoni (Navoni), et ux.
Edwin W. Wheeler
Serafino Mangini, et ux.
Charles R. Dondero, et ux.
Melvin Stephens, et ux.
Harry Conklin, et ux.

THIRD

The power of sale given to the widow in conjunction with the testator's devise, is limited to the extent of the widow's life, and not to the life of the testator.

If the construction that we have given to the will is correct, it is not necessary to say that the power of sale is limited to the life of the testator, but that the power is limited to the life of the widow.

But even if the construction is not followed, the power has been limited to the life of the testator, and the language of the will, taken in connection with the facts, is not inconsistent with this view.

The language of the will, taken in connection with the facts, is not inconsistent with this view. The testator has given to the widow a power of sale, and has limited it to the life of the testator. It is not necessary to say that the power is limited to the life of the testator, but that the power is limited to the life of the widow.

FOURTH

Upon the construction that we have given to the will, it is not necessary to say that the power is limited to the life of the testator, but that the power is limited to the life of the widow.

We therefore respectfully request that you will give to the decision of the Court of Chancery the same effect as to the facts of this case.

Very respectfully,
John W. Whelan,
Counsel for the Plaintiff.

John W. Whelan,
Counsel for the Plaintiff.

