

INDEX.

	PAGE
Bill of Complaint.....	1
Exhibit P-1—Will of Gustav Kutschinski....	5
Answer and Counterclaim.....	8
Answer.....	17
Order.....	18
^{ANSWER} Answer and Replication to Counterclaim....	19 ^{18 1/2}
Replication and Answer to Counterclaim....	24
Note Joining Issue on Answer to Counterclaim	32
Note Joining Issue on Answer to Counterclaim	33

TESTIMONY FOR COMPLAINANT.

Fred Luhr:	
Direct	35
Margaretha Kutschinski:	
Direct	43
Cross	47
Fred Kutschinski:	
Direct	57
Cross	63
Charles Schnable:	
Direct	73
William E. Hopper:	
Direct	75
Conclusions.....	78
Final Decree.....	82
Notice of Appeal.....	85
Petition of Appeal.....	87

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Bill of Complaint.

(Filed, June 26, 1929.)

IN CHANCERY IN NEW JERSEY.

To His Honor, EDWIN ROBERT WALKER, Chancellor 10
of the State of New Jersey.

The complainants, Margaretha H. Kutschinski, of the City of Union City, County of Hudson, and State of New Jersey, individually and as one of the executors of the last will and testament of Gustav M. Kutschinski, deceased, and Frederick W. Kutschinski and May L. Kutschinski, his wife, of the Township of North Bergen, County of Hudson and State of New Jersey, respectfully show that: 20

1. Gustav M. Kutschinski, late of the City of Union City, in the County of Hudson, and State of New Jersey, died on the 22nd day of June, A.D. 1927, leaving a last will and testament which was, on the 8th day of July, 1927, duly admitted to probate by the Surrogate of said County of Hudson, and letters testamentary thereon were duly issued to complainant, Margaretha H. Kutschinski and Fred Luhrs, the executors therein named, who have 30
taken upon themselves the burden of administering the said estate. A true copy of said will is hereto annexed and marked Exhibit "A" and made a part hereof.

2. Under the said last will and testament of said Gustav M. Kutschinski, deceased, the following provisions are made:

First, after my lawful debts are paid, I give, 40
devise and bequeath to My beloved Wife Mar-

Bill of Complaint.

garetha Kutschinski nee Meyer all My Estate and Property Real and personal Property Where Soever the Same May be and of Wat Soever kind it May consist of at the time of My *dead* forever.

10 Second, but in Case My Wife Margaretha H. Kutschinski gets *Merriad agani* then She Shall receive only one third ($\frac{1}{3}$) from My Estate left forever.

Third And after the decease of My Wife Margaretha H. Kutschinski all My Estate Shall be divided amongst our *Childern* or their respective heirs Share and Share alike the following Names of our *childern*

20 1 daughter Emilie A. Kutschinski now wife of Fred Luhrs

2 Son Gustav Adolph Kutschinski—Missing from Home since 1914

3 daughter Henrietta E. Kutschinski Now wife of Narman Sheffer

4 Son Frederick W. Kutschinski

30 5 Daughter Alwine Kutschinski now wife of Edward Newman

6 daughter Margaretha L. Kutschinski Now Wife of Ernst Grewe Jr.

7 Son Walter H. Kutschinski

40 Fourth but this *Childern* Whom receiver all *readdy* from their *pearants* by their Fathers life time a part for help from their Share each of them Shall receive So much less from their Share and the amount each one did receive by their Fathers life time Shall be Estimated and *deceded* by the Executors.

Bill of Complaint.

3. The said Gustav M. Kutschinski died seized of several parcels of real estate situate in the State of New Jersey, and died possessed of considerable personal property consisting of cash in bank, bonds and mortgages, and other personal property.

10

4. The terms of the aforesaid provisions of said will are ambigutory and contradictory, and complainants are unable to determine the proper construction thereof and just what interests the complainants and defendants hereinafter named are entitled in said estate.

5. Complainant, Margaretha H. Kutschinski, the widow of said Gustav M. Kutschinski, deceased, is of full age and unmarried.

20

6. The said Gustav M. Kutschinski left him surviving seven children as his only heirs and next of kin in addition to his widow as aforesaid, Margaretha H. Kutschinski, one of the complainants, and the only persons interested under his last will and testament are the following, to wit:

Emilie Luhr, Gustav A. Kutschinski, Henrietta E. Sheffer, Frederick W. Kutschinski, Alwine Newman, Margaretha L. Grew, and Walter H. Kutschinski.

30

7. The said Emilie Luhr is of full age, and is a married woman, and her husband's name is Fred Luhr, who is of full age.

8. The said Gustav A. Kutschinski is of full age and is unmarried.

9. The said Henrietta E. Sheffer is of full age, and is a married woman, and her husband's name

40

Bill of Complaint.

is Norman Sheffer. The said Norman Sheffer is of full age.

10 The said Frederick W. Kutschinski is of full age and is married, and his wife's name is May L. Kutschinski. The said May L. Kutschinski is of full age.

11. The said Alwine Newman is of full age and is a married woman, and her husband's name is Edward Newman.

20 12. The said Margaretha L. Grew is of full age and is a married woman, and her husband's name is Ernst Grew, Jr. The said Ernst Grew, Jr. is of full age.

13. The said Walter H. Kutschinski is unmarried and is of full age.

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

30 1. That Fred Luhr, individually and as one of the executors of the last will and testament of Gustav M. Kutschinski, deceased, Emilie Luhr, Gustav A. Kutschinski, Henrietta E. Sheffer, Norman Sheffer, Alwine Newman, Edward Newman, Margaretha L. Grew, Ernst Grew, Jr., and Walter H. Kutschinski, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

40 2. That this court may construe the said last will and testament of said Gustav M. Kutschinski, deceased, and declare and determine the rights and interests of complainants and the defendants thereunder.

Bill of Complaint.

3. That complainants may have such further and other relief in the premises as may be proper.

4. That a writ of subpoena may issue out of this honorable court commanding said defendants to answer this bill of complaint and to stand to and abide by such decree as this court may make in the premises. 10

CAREY & LANE,
Solicitors for and of Counsel
with Complainants.

Exhibit A.

IN THE NAME OF GOD, AMEN. 20

I, Gustav *Martin* Kutschinski, of the City of Union City in the County of Hudson State of New Jersey being of sound and disposing mind and memory, and considering the uncertainty of this life, do make publish and declare this to be my last will and Testament as follows, hereby revoking all other and former wills by me at any time made.

First, after my lawful debts are paid, I give, devise and bequeath to My beloved Wife Margaretha Kutschinski nee Meyer all My Estate and Property Real and personal Property Where Soever the Same May be and of *Wat* Soever kind it May consist of at the time of My *dead* forever. 30

Second, but in Case My Wife Margaretha H. Kutschinski gets *Marriad agani* then She Shall receive only one third ($\frac{1}{3}$) from My Estate left forever.

Third And after the decease of My Wife Margaretha H. Kutschinski all my Estate Shall be divided 40

Exhibit A—Will.

amongst our *Childern* or their respective heirs Share and Share alike the following Names of our *childern*

- 10 1 daughter Emilie A. Kutschinski now wife of Fred Luhrs
- 2 Son Gustav Adolph Kutschinski — Missing from Home since 1914
- 3 daughter Henrietta E. Kutschinski Now wife of Narman Sheffer
- 4 Son Frederick W. Kutschinski
- 5 daughter Alwine Kutschinski now wife of Edward Newman
- 6 daughter Margaretha L. Kutschinski Now Wife of Ernst Grewe Jr
- 20 7 Son Walter H. Kutschinski

Fourth but this *Childern* Whom receive all *readdy* from their *pearants* by their Fathers life time a part for help from their Share each of them Shall receive So much less from their Share and the amount each one did receive by their Fathers life time Shall be Estimated and *deceided* by the Executors.

- 30 Fifth And I order and direct in Case any one of My heirs is not Satisfied With My Will or Make a contest against My Will Shall *loose* his or their share in My Estate herein Stipulated and Shall receive *Notting* except that part Which *the* have *receivid* all *readdy* by their Fathers life time and this last Share or part of last Share if any one Should *loose* by being Not Satisfied or contesting My Will this Share or part of the Share shall be divided amongst the rest of my heirs herein Stipulated Likewide I make, constitute and apppoint My
- 40 Wife Margaretha H. Kutschinski and Fred Luhrs to be my executors of this, my last will and Testa-

Exhibit A—Will.

ment and that My Said Executors be not required to give Bonds for the *performents* of their Said duties.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, the 6th day of July 10
in the year of our Lord one thousand Nine hundred
and Twenty Five 1925

GUSTAV M. KUTSCHINSKI (SEAL)

WE, whose names are hereto subscribed, do certify that Gustav *Martin* Kutschinski the testator, subscribed his name to this instrument in our presence, and in the presence of each of us, and at the same time he declared in our presence and hearing 20
that the same was his last will and Testament, and
requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, and which we hereby do in the presence of the testator and of each other, this 6th day of July 1925, the day of the date of the said Will, and write opposite our names our respective places of residences.

ERICK KRAUSE residing at 3876 Boulevard West
Hoboken, N. J.

W. E. HOPPER residing at 301 Palisade Ave West 30
Hoboken, N. J.

GUSTAV M. KUTSCHINSKI

GUSTAV M. KUTSCHINSKI

Answer and Counterclaim.

(Filed August 9, 1929.)

IN CHANCERY OF NEW JERSEY.

10	Between MARGARETHA H. KUTSCHINSKI, et al., Complainants, and FRED LUHR, et als., Defendants.	}	(74-110) On Bill, etc.
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20 The answer of the defendants, Henrietta E. Sheffer, Norman Sheffer, Alwine Newman (right name Alvina A. Neumann), Edward Newman (right name Edward Neumann), Margaretha L. Grew (right name Margaretha L. Grewe), Ernst Grew, Jr. (right name Ernest Grewe, Jr.), and Walter H. Kutschinski, and the counterclaim of Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski against the complainants,

30 Margaretha H. Kutschinski, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, Frederick W. Kutschinski and May L. Kutschinski, and the defendants, Fred Luhr, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, Emilie Luhr, and Gustav A. Kutschinski.

40 These defendants, Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann,

Answer and Counterclaim.

Margaretha L. Grewe, Ernst Grewe, Jr., and Walter H. Kutschinski, answering the bill of complaint, say that,

1. Paragraphs 1, 2 and 3 are admitted.

2. Paragraph 4 is denied. 10

3. Paragraph 5 is admitted.

4. The portion of paragraph 6 which avers that "The said Gustav M. Kutschinski left him surviving seven children as his only heirs and next of kin in addition to his widow as aforesaid, Margaretha H. Kutschinski, one of the complainants," is admitted, and the remaining portion of said paragraph 6 is denied. 20

5. Paragraphs 7 to 13, inclusive, are admitted.

6. By the terms of said will the real and personal estate of the said Gustav M. Kutschinski, deceased, is devised and bequeathed to the said Margaretha H. Kutschinski for and during her lifetime, in the event she does not remarry, and in the event of her remarriage, she is to have only one-third of said real and personal estate from the time of such remarriage until the day of her decease; and after the death of said Margaretha H. Kutschinski, the said estate, real and personal, is to be divided amongst the said children of the testator, or their respective heirs, share and share alike, with a deduction from such shares of any advancements made in the lifetime of the testator. 30

By way of counterclaim against the complainants Margaretha H. Kutschinski individually and as one of the executors of the estate of Gustav M. Kutsch- 40

Answer and Counterclaim.

inski, deceased, Frederick W. Kutschinski and May L. Kutschinski, and the defendants, Fred Luhr individually and as one of the executors of the estate of Gustav M. Kutschinski, deceased, Emilie Luhr, and Gustav A. Kutschinski; the defendants Hen-
10 rietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski say that :

1. Gustav M. Kutschinski, late of the City of Union City, in the County of Hudson and State of New Jersey, died on the 22nd day of June, A. D. 1927, leaving a last will and testament which was, on the 8th day of July, 1927, duly admitted to pro-
20 bate by the Surrogate of said County of Hudson, and letters testamentary thereon were duly issued to complainant Margaretha H. Kutschinski and Fred Luhrs, the executors therein named, who have taken upon themselves the burden of administering the said estate. A true copy of said will is hereto annexed and marked Schedule "A" and made a part hereof.

2. Said Gustav M. Kutschinski died seized of the
30 following real estate situated within the said County of Hudson, viz. :

(A) A plot of land situated in the City of Union City about 150 feet in length by about 55 feet in width at the corner formed by the intersection of the northeasterly side of the Hudson County Public Road or Boulevard and the northwesterly side of Twelfth Street, upon which are erected three four-
40 family frame apartment houses known as Nos. 3874, 3876 and 3878 Hudson County Boulevard, and a large one-story brick garage known as Nos. 3868, 3870 and 3872 Hudson County Boulevard.

Answer and Counterclaim.

(B) A lot situated in the City of Union City, on the northwesterly side of Central Avenue, 59.77 feet northeast of Hill Street, 25 feet wide by 100 feet deep, with a two-family house and stores erected thereon and known as No. 265 Central Avenue.

10

(C) A lot situated in the City of Union City, on the southwesterly side of Eleventh Street, 130.96 feet northwest of West Street, about 27 feet wide by 100 feet deep, with a four-family frame apartment house erected thereon and known as No. 611 Eleventh Street.

(D) A lot situated in the City of Union City, at the intersection of the southeasterly side of West Street with the northeasterly side of Fourteenth Street, 30 feet wide by 100 feet deep, with a two-family house and garages erected thereon and known as No. 280 West Street.

20

(E) A lot situated in the Town of West New York, on the southerly side of Fourteenth Street, 87.5 feet west of Palisade Avenue, 25 feet wide by 100 feet deep, with a six-family brick apartment house erected thereon and known as No. 409 Fourteenth Street.

30

(F) A lot situated in the Town of West New York, on the northerly side of Twelfth Street, 175 feet east of Madison Street, 25 feet wide by 100 feet deep, with a two-family brick house erected thereon and known as No. 510 Twelfth Street.

(G) A lot situated in the City of Hoboken, on the northerly side of Second Street, between Adams and Jefferson Streets, 25 feet wide by 75 feet deep, with a six-family apartment house erected thereon and known as No. 454 Second Street.

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Answer and Counterclaim.

(H) A lot situated in the City of Union City, on the northerly side of Thirty-sixth Street, 165.5 feet west of the Hudson County Boulevard, 30 feet wide by 77 feet deep, with a four-family frame apartment house erected thereon and known as No. 612 Thirty-sixth Street.

10

(I) A lot situated in the City of Union City, on the westerly side of New York Avenue, 50 feet north of Twenty-sixth Street, 25 feet wide by 100 feet deep, with a three-family brick apartment house erected thereon and known as No. 525 New York Avenue.

20

3. At the time of the death of said Gustav M. Kutschinski the said lands and premises were encumbered by the following mortgages, viz.:

\$ 5,300. on said 3868 to 3878 Hudson County Boulevard.

\$ 2,000. on said 265 Central Avenue.

\$ 2,000. on said 611 Eleventh Street.

\$ 8,000. on said 280 West Street.

\$12,000. on said 409 Fourteenth Street.

\$ 2,192. on said 454 Second Street.

\$ 5,000. on said 525 New York Avenue.

30

4. With the exception of a mortgage for \$1,800. on said 3878 Hudson County Boulevard, which was recently paid off by the executors of the estate of Gustav M. Kutschinski, deceased, all of the said mortgages remain a lien on the lands respectively covered by them.

40

5. At the time of the death of said Gustav M. Kutschinski, the buildings erected on said lands were in good condition and were in good repair and fully rented and insured against loss or damage by

Answer and Counterclaim.

fire, and the interest that had accrued on the said mortgages and the taxes and other municipal liens assessed against the said lands had been paid.

6. Immediately following the death of said Gustav M. Kutschinski, the said complainant Margaretha H. Kutschinski took possession of said lands and premises, as life tenant under his said will, and has collected and received all the rents, issues and profits therefrom down to the present time. 10

7. Since the decease of said Gustav M. Kutschinski, the said Margaretha H. Kutschinski has neglected to pay the taxes and water rents assessed against the said lands, and the taxes for the years 1928 and 1929 thereon, amounting, without interest, to \$8,399.43, remain unpaid, and the taxes for the year 1927 on one of said lots, amounting, without interest, to \$95.74, and a large amount of water rents on all of said lands remain unpaid. The total amount of said unpaid taxes and water rents, with the interest thereon, amount to over \$10,000., and there is grave danger that the said lands will be sold in the near future for these unpaid municipal liens. 20 30

8. Said Margaretha H. Kutschinski allowed the fire insurance on said buildings to expire without renewal, and at the present time there is no fire insurance covering said buildings or any of them.

9. Said Margaretha H. Kutschinski has defaulted in the payment of the interest on the said mortgages and there is grave danger that the said mortgages will be foreclosed in the near future and that the said lands will thereby be lost to the re- 40

Answer and Counterclaim.

10 maindermen, including these defendants. The said mortgage for \$1,800. on said premises No. 3878 Hudson County Boulevard, held by the Blauvelt Estate, was recently called in because of default in payment of the interest accruing thereon, and the ex-
10 cutors of the Estate of Gustav M. Kutschinski, deceased, were compelled to pay the said mortgage out of the personal estate to avoid a foreclosure.

20 10. It was the duty of the said Margaretha H. Kutschinski, as such life tenant, to protect the said lands and premises from waste and damage and to maintain the said buildings in a state of repair equivalent to that in which they were at the decease of the said Gustav M. Kutschinski, but she failed
20 so to do and permitted said buildings to be wasted by neglecting to repair them and to so deteriorate that they are being damaged and wasted by the elements in wanton disregard of the interests of the tenants in remainder, including these defend-
30 ants. By reason of the neglect of said Margaretha H. Kutschinski to make proper and necessary repairs to said buildings, they have greatly depreciated in value and are considerably less marketable and tenantable than they were at the decease of
30 said Gustav M. Kutschinski. Some of said buildings are partly without tenants while others are entirely vacant.

11. Said lands, at the time of the death of said Gustav M. Kutschinski, brought an annual gross rental of over \$15,000. a year.

40 12. Without the consent of these defendants or that of any other of the said remaindermen, said Margaretha H. Kutschinski caused material alterations to be made in the said brick garage known

Answer and Counterclaim.

as 3868 to 3872 Hudson County Boulevard, and tore down the front and the side walls and roof thereof to a considerable depth and replaced same with a front and side walls and roof inferior in quality and appearance to what they were prior to said alterations. The said work of alteration was completed on or about March 1, 1929, but the claims of the material men who supplied materials and the mechanics who did the work in the making of said alterations have not been paid and they are pressing said Margaretha H. Kutschinski for payments.

10

13. The personal estate left by said Gustav M. Kutschinski deceased, consists of bonds secured by mortgages on real estate, money in bank, choses in action and household effects and the income therefrom is being paid by the executors of his estate to the said Margaretha H. Kutschinski.

20

14. These defendants made demand on the said Margaretha H. Kutschinski to pay said taxes and water rents and the interest on said mortgages, and to take out fire insurance on said lands and repair the said buildings, and she refused to comply with said demand.

30

These defendants therefore pray :

1. That said complainants, Margaretha H. Kutschinski, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, Frederick W. Kutschinski and May L. Kutschinski, and the defendants, Fred Luhr, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, Emilie Luhr, and Gustav A. Kutschinski, may answer this counterclaim and each statement herein made.

40

Answer and Counterclaim.

2. That the said Margaretha H. Kutschinski be required to account to these defendants for the waste and depreciation of the said lands caused by her failure to keep and maintain the buildings thereon in as good repair as they were when she
10 took possession thereof, and for the damage caused to these defendants by the making of said alterations of the garage.

3. That a receiver be appointed to collect the rents, issues and profits of all the real estate of which the said Gustav M. Kutschinski, deceased, died seized, and the income accruing on the personal estate of which said Gustav M. Kutschinski, deceased, died seized, and that the said receiver be
20 directed by this Court to make the necessary repairs to said buildings, and to pay the taxes and water rents assessed against the said lands which have accrued, and the interest on the mortgages covering said lands, and to take out proper fire insurance against loss or damage by fire to the said buildings, and to pay for said repairs, taxes, water rents, interest and insurance out of the said rents, issues, profits and income until such time as the receipts
30 from said rents, issues, profits and income shall be sufficient to pay for the said repairs, taxes, water rents, interest and insurance.

KELSEY & LUDWIG,

Solicitors for and of counsel with the defendants and counter-claimants, Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H.
40 Kutschinski.

**Answer of Defendants Fred Luhr, Individually
and as One of the Executors of the Last
Will and Testament of Gustav M. Kutschin-
ski, Deceased, and Emilie Luhr.**

(Filed August 6, 1929.)

IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;">Between</p> <p style="text-align: center;">MARGARETHA H. KUTSCHINSKI, et al., Complainants, and FRED LUHR, et al., Defendants.</p>	}	<p>10</p> <p>On Bill, etc.</p>
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These defendants, answering the bill of complaint filed herein, state as follows: 20

1. They admit paragraphs One, Two and Three.
2. These defendants deny paragraph Four, and state that the complainants have always recognized and construed said will as giving Margaretha H. Kutschinski, the widow of the said late Gustav M. Kutschinski, a life interest in said premises, and the remainder to be divided equally between the children of the said Gustav M. Kutschinski, deceased, as named in said will. 30

3. These defendants admit paragraphs Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve and Thirteen.

4. These defendants therefore pray that the bill of complaint filed herein be dismissed.

BAUER & RANKER,
Solicitors of defendants, Fred Luhr,
individually and as one of the ex- 40
ecutors of the last will and testa-
ment of Gustav M. Kutschinski, and
Emilie Luhr.

Order.

(Filed March 10, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between MARGARETHA H. KUTSCHINSKI, et als., Complainants, and FRED LUHR, et als., Defendants.	}	74-110. On Bill, etc.
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20 This matter being opened to the Court by Maurice A. Silver, substituted solicitor of Frederick W. Kutschinski and May L. Kutschinski, and noting the appended consent of Carey & Lane, solicitors of the complainants;

It is on this 10th day of March, 1930, ORDERED that Frederick W. Kutschinski and May L. Kutschinski be substituted as parties defendant instead of parties complainant in the above entitled cause.

And it is further ORDERED that the said Frederick W. Kutschinski and May L. Kutschinski be and hereby are allowed twenty days in which to file an answer and replication to the counterclaim.

30

Respectfully advised,

JNO. J. FALLON,
V. C.

We hereby consent to the entry of the within order.

CAREY & LANE,
Solicitors of the complainants.

40

ANSWER.

(Filed April 28, 1930.)

Answer and Replication to Counterclaim.

IN CHANCERY OF NEW JERSEY.

(Filed March 25, 1930.)

Between		
MARGARETHA H. KUTSCHINSKI, et al., Complainants, et al., and Complainants,	}	On Bill, etc.
FRED LUHR, et als., Defendants.	}	ANSWER.

The joint answer of Gustav A. Kutschinski, a lunatic, by Samuel Kalisch, Jr., his guardian, and the said Samuel Kalisch, Jr. to the bill of complaint of Margaretha H. Kutschinski, Frederick W. Kutschinski and May L. Kutschinski complainants.

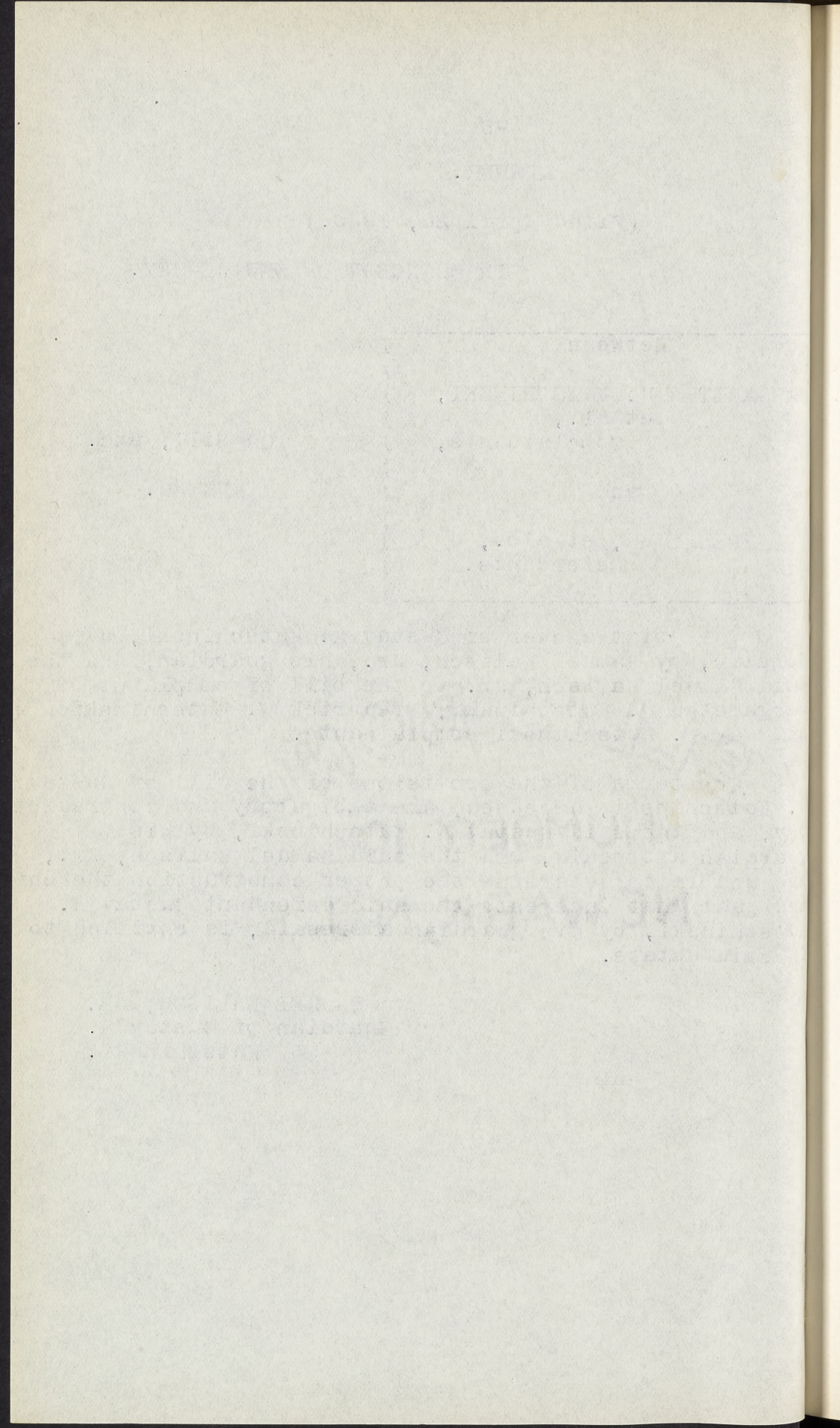
The terms of the provisions of the will of Gustav M. Kutschinski, deceased, are ambigutory and contradictory, and the said Gustav A. Kutschinski, by his guardian aforesaid, and the said Samuel Kalisch, Jr., are unable to determine the proper construction thereof and just what interests the said defendant Gustav A. Kutschinski, by his guardian aforesaid, is entitled to in said estate.

SAMUEL KALISCH, JR.
Guardian of Gustav A.
Kutschinski.

They admit paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13.

These defendants, Frederick W. Kutschinski and May L. Kutschinski, pray that the bill of complaint may be dismissed.

The answer of the defendants Frederick W. Kutschinski and May L. Kutschinski to the counterclaim of the defendants Henrietta E. Sheffer.



Answer and Replication to Counterclaim.

(Filed March 25, 1930.)

IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;">Between</p> <p>MARGARETHA H. KUTSCHINSKI, et al., Complainants,</p> <p style="text-align: center;">and</p> <p>FRED LUHR, et als., Defendants.</p>	}	<p>10</p> <p>On Bill, etc.</p>
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The answer of the defendants Frederick W. Kutschinski and May L. Kutschinski.

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These defendants, Frederick W. Kutschinski and May L. Kutschinski, answering the bill of complaint, say that:

1. They admit the allegations contained in paragraphs 1, 2 and 3.

2. They deny the allegations contained in paragraph 4 of the bill of complaint, and further state that there is no ambiguity in the Last Will and Testament of Gustav M. Kutschinski, deceased.

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3. They admit paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13.

These defendants, Frederick W. Kutschinski and May L. Kutschinski, pray that the bill of complaint may be dismissed.

The answer of the defendants Frederick W. Kutschinski and May L. Kutschinski to the counterclaim of the defendants Henrietta E. Sheffer,

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Answer and Replication to Counterclaim.

Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski.

10 These defendants, Frederick W. Kutschinski and May L. Kutschinski, answering to the counterclaim, say that:

1. They admit paragraphs 1, 2, 3 and 4.

20 2. They admit paragraph 5, but deny that the properties of which Gustav M. Kutschinski died seized were fully insured against loss or damage by fire. And further say that the said properties were only insured up to the amount of mortgages placed upon the respective properties, and that the properties not encumbered by mortgages were not insured.

3. They admit the allegation contained in paragraph 6, but deny that Margaretha H. Kutschinski, the widow, took possession of the said premises merely as a life tenant.

30 4. They admit allegations in paragraph 7, but deny that municipal liens for the year 1927 were unpaid. They further state that the failure to pay the municipal liens for the years 1928 and 1929 is not due to any dereliction of duty on the part of Margaretha H. Kutschinski, but that the said failure to pay is due to the fact that Fred Luhr, co-executor under the Last Will and Testament of Gustav M. Kutschinski, deceased, refused and still refuses to sign or countersign any checks drawn on the funds of the estate for the purpose of such payment; that the conduct of the said Fred Luhr is for the purpose of embarrassing the estate, and

40

Answer and Replication to Counterclaim.

believe that his intention was to lay a foundation for the application by the defendants for a receiver or the ouster of the said Margaretha H. Kutschinski as co-executrix.

5. As to paragraph 8, these defendants admit that the fire insurance policies have expired, but have since been renewed and that the properties are fully covered by insurance against loss by fire. 10

6. As to paragraph 9, these defendants deny that there is or at any time was a mortgage encumbering premises known as 3878 Hudson County Boulevard, but admit that there are interests due on mortgages on other properties, which is now due on said mortgages; that the failure to pay such interest is due to the failure and refusal of Fred Luhr to sign or countersign checks drawn for that purpose, and verily believe that this failure to sign the checks was part of the purpose of the said Fred Luhr to embarrass the estate. 20

7. As to paragraph 10, the defendants deny that Margaretha H. Kutschinski is a life tenant in the premises of which Gustav M. Kutschinski died seized, and is therefore not answerable to the defendants Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski for failure to repair the said premises. These defendants, however, deny that the said Margaretha H. Kutschinski is guilty of waste or failure to protect the premises against the elements; that the income of the estate has been employed to repair such of the apartments on which repairs were made necessary by the removal of tenants and the requirements of new tenants for the usual alterations; that 30 40

Answer and Replication to Counterclaim.

few vacancies now exist and that present economic depression and that lack of modern improvements in some of the properties is the cause of such vacancies that do exist.

10 8. These defendants deny paragraph 11.

20 9. As to paragraph 12, these defendants admit that alterations were made on the garage located on premises known as 3868-3872 Hudson County Boulevard, but deny that any consent was necessary to be procured from the defendants Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, and further deny that the material men and mechanics are pressing for moneys due them.

10. As to paragraph 13, these defendants admit that the widow, Margaretha H. Kutschinski, receives an income from the real property.

30 11. As to all of the allegations in the counterclaim of the defendants Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, these defendants say that the said counterclaim contains no cause of action, because Margaretha H. Kutschinski was seized of fee simple of all the properties of which her husband, Gustav M. Kutschinski, died seized.

40 12. The said defendant Fred Luhr, co-executor under the Last Will and Testament of Gustav M. Kutschinski, deceased, has no further duties to perform as such co-executor.

Answer and Replication to Counterclaim.

These defendants, Frederick W. Kutschinski and May L. Kutschinski, pray that :

1. The counterclaim may be dismissed with costs.

2. That it be decreed that the said Fred Luhr turn over to the said Margaretha H. Kutschinski all properties, funds and other assets of the Estate of Gustav M. Kutschinski, deceased, which he holds or over which he has control. 10

3. That it further be decreed that the said Fred Luhr has no further interest in the said estate as co-executor.

MAURICE A. SILVER, 20
Solicitor for Frederick W. Kutschinski
and May L. Kutschinski.

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Replication and Answer to Counterclaim.

(Filed September 18, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between MARGARETHA H. KUTSCHINSKI, et als., Complainants, and FRED LUHR, et als., Defendants.	}	On Bill, etc. 74-110.
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20 The replication of the complainants, Margaretha H. Kutschinski, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, Frederick W. Kutschinski and May L. Kutschinski, to the answer of the defendants, Henrietta E. Sheffer, Norman Sheffer, Alwine Newman (right name Alvina A. Neumann), Edward Newman (right name Edward Neumann), Margaretha L. Grew (right name Margaretha L. Grewe), Ernst Grew, Jr. (right name Ernest Grewe, Jr.), and Walter H. Kutschinski, and the answer of the complainants to the counterclaim of the said defendants.

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Complainants join issue on the answer of the said defendants and further refer to the original will for certainty as to its contents.

ANSWER TO COUNTERCLAIM.

40 1. Complainants admit the allegations of paragraph One, but refer to the original will when produced for certainty as to its contents and terms.

Replication and Answer to Counterclaim.

2. Complainants admit the allegations of paragraph Two, excepting there are no stores in property subdivision "B," also, the properties under subdivisions "C," "H" and "I" had been sold by the testator on an installment contract. The purchasers could not pay the installments or taxes on same and the estate was compelled to take the property back with the acquiescence and consent of Mr. Luhr, the other executor. 10

3. Complainants admit the allegations of paragraph Three.

4. Complainants admit the allegations of paragraph Four. 20

5. Complainants deny the allegations of paragraph Five. They say that the said buildings at the time of the death of the said Gustav M. Kutschinski were in a very bad state of repair. They deny that the said premises were fully rented. They deny that the said buildings were fully insured against loss or damage by fire. They deny that all taxes and other municipal liens against the said lands had been paid, and say that at the time of the death of the said Gustav M. Kutschinski there were a large number of debts against the said estate. 30

6. Complainants deny that the said Margaretha H. Kutschinski took possession of said lands and premises as life tenant under the said will of Gustav M. Kutschinski. She says that her possession is that to which she is entitled under the will and contends that under the will she is entitled to full and complete possession of said lands and premises, as hereinafter set forth. 40

Replication and Answer to Counterclaim.

7. Complainants admit that taxes and municipal liens remain unpaid on said lands, but say that the reason for this is because there has not been enough revenue from the property to pay the said taxes and assessments.

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8. Complainants deny the allegations of paragraph Eight. As a matter of fact, complainant Margaretha H. Kutschinski has put additional insurance on said buildings than were on at the time of the death of said Gustav M. Kutschinski.

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9. Complainant Margaretha H. Kutschinski denies the allegations of paragraph Nine, except that complainant says that it is true that some interest is due on some of the mortgages, but that this will be taken care of from the rents as they are paid in. She denies that any threats of foreclosure on any of these mortgages have been made. She denies that the mortgage for \$1,800 referred to in paragraph Nine was recently called in because of default in payment of the interest accruing thereon. She says that the said mortgage was an open mortgage for over twenty years and that the mortgagees stated that they wanted their money and that she thereupon caused the said mortgage to be paid. That in addition she also caused a mortgage for \$3,500, held by the Highland Trust Company, on the Boulevard property, to be paid, and the said property is now free and clear. That this property is the most valuable property of the whole estate and is free and clear of all mortgage lien.

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10. Complainants deny the allegations of paragraph Ten. Complainant Margaretha H. Kutschinski says that while she has endeavored to do every-

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Replication and Answer to Counterclaim.

thing possible to keep the properties in good repair and to pay up all accruing liens thereon, that until this honorable Court may determine as to what her rights in said property are she cannot tell just what her interest therein is and her hands have been tied. That the only source of income that she has had to take care of this property is from the rents from the property and the interest from the mortgages as hereinafter referred to. She denies that she has permitted the buildings to be wasted by neglecting to repair them, and to so deteriorate that they are being damaged and wasted by the elements, in wanton disregard of the interest of anybody. She denies that the said buildings have greatly depreciated in value and are considerably less marketable and tenantable than they were at the decease of said Gustav M. Kutschinski. She says that there are vacancies in the buildings, but not caused by any fault of hers.

11. Complainant Margaretha H. Kutschinski says that the only rental of the property for the year July 1st, 1927, to July 1st, 1928, was \$14,470.

12. Complainant Margaretha H. Kutschinski says, with reference to the property known as Nos. 3868 to 3872 Hudson County Boulevard, that there was erected on said property two buildings. The front building had been used as individual garages. A tenant who had been put into the property by the said Gustav M. Kutschinski had taken out the partition walls and the building was in such condition that it was liable to fall at any moment and could not be rented or utilized in any way when the tenant moved out of the property. That the condition was so dangerous that it was liable to

Replication and Answer to Counterclaim.

fall and cause great damage. That it was necessary for something to be done with this building or it would collapse. That thereupon, in order to protect the property, complainant did cause certain improvements to be made in the building, at a cost of approximately \$6,000. That the main building on said land was the rear building, which was about forty feet wide, with the small building in front about eighteen feet wide. That the improvements consisted of taking down the front part of the front building, which was in such condition that it was ready to fall down, the beams holding the roof up were rotted and the roof itself was in such condition that repairs were out of the question, requiring practically an entirely new roof. The old building was strengthened with steel columns, steel girders and steel lintels; the heating plant, which had never really been in working condition, had to be taken down and reconstructed, and the plumbing had to be reconstructed. In addition, the sidewalk was cemented and the front and side of the building stuccoed. The result is that there is now standing on the property a good, substantial building which can be used for garage, automobile salesroom and service station, whereas, before the property had become vacant and was of no use whatever. The property has increased in value greatly in excess of the moneys spent for the repairing. Complainant Margaretha H. Kutschinski further says that although the said defendants knew that the said repairs and alterations were being made from the time that they were started in December, 1928, that they stood by and permitted the said repairs to be made and took no action in court or otherwise to prevent the repairs, except the writing of a letter by Mr. Bower, attorney for Fred Luhr,

Replication and Answer to Counterclaim.

one of the executors. That, however, no further action was taken, and while the repairs were in progress of being made from December, 1928, to April, 1929, the said Fred Luhr on numerous occasions went to the property and inspected the repairs being made and approved of it and stated that as long as the value of the property was not being depreciated he was perfectly satisfied. Complainant has contributed some of her personal funds toward the making of these improvements. 10

13. In answer to the allegations of paragraph Thirteen, complainant Margaretha H. Kut̄schinski says that she has kept a separate and distinct account of all moneys received from the estate and that deposited in this account are all interest moneys received on any mortgages, bonds, etc., as well as rents received by her from any of the property, and that she has used these moneys with discretion in paying bills of the estate and treated it as an estate account, except that she has from time to time drawn moneys from said account for her own personal support, all of which will be shown by the account kept by her of said account. 20

14. Complainants deny the allegations of paragraph Fourteen. 30

15. Complainant Margaretha H. Kutschinski, further answering, says that at the time of the death of her husband there were no cash moneys and complainant could not draw any moneys from the accounts in the bank. She has not received personally any of the moneys from any bank accounts from her husband. All moneys which she has received in any wise from the estate have been deposited in the account in the Highland Trust Com- 40

Replication and Answer to Counterclaim.

pany hereinafter referred to. As a matter of fact, she has kept two separate accounts; one for any mortgages that have been paid, and the other for interest and rents from the properties. At the time of the death of her husband there were debts owing
10 by him, as well as taxes for the year 1927, and some bills for repairs which had been ordered by him, and complainant within six months after his death paid these debts out of income from rents from the property and interest from mortgages, etc. That these debts were properly chargeable against the principal of the estate. That they amounted to \$3,101.89.

16. Complainant Margaretha H. Kutschinski,
20 further answering, says that she had been married to her husband for over forty years. That at the time of his death all of the properties were in the name of her husband, including the house in which they were living. That she was absolutely dependent upon her husband for support and had no source of income whatever, except that at the time of his death she had a mortgage of \$1,000 which, in order to pay some of the bills for the repairs of the Boulevard property, she sold for \$900, and used
30 this money for that purpose. That all of the children are now of full age and able to support themselves. That she is seventy-one years of age. That unless it be determined that either complainant is the sole owner of the assets of the estate of her husband under the first clause of the will, or unless it be determined that she is entitled to use so much of the estate as may be necessary for her support during her lifetime, subject only to not being permitted to devise upon her death, that she will be
40 left absolutely without any means of support. She

Replication and Answer to Counterclaim.

charges that this was not the intent of her husband at the time that he made his will, and further charges that at the time he drew his will himself in his own handwriting without the aid of legal advice.

17. Complainant Margaretha H. Kutschinski, further answering, says that during the twenty-six months since the death of her husband she has only actually received for herself from the income of the estate approximately \$4,000.

18. Complainants therefore pray that the will of the said Gustav M. Kutschinski may be construed by this Honorable Court and their rights in the said property may be determined, and that in the event that a receiver be appointed for said estate, that an order may be made, pending the determination of this suit, directing the receiver to pay to the complainant Margaretha H. Kutschinski a sum sufficient for her support and maintenance, and that she may have such other relief as may be proper.

CAREY & LANE,
Solicitors for Complainants.

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Note Joining Issue on Answer.

(Filed September 19, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between MARGARETHA H. KUTSCHINSKI, et als., Complainants, and FRED LUHR, et als., Defendants.	}	(74-110) On Bill, etc.
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20 These defendants, Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, join issue on the answer of the defendants Frederick W. Kutschinski and May L. Kutschinski to the counterclaim of these defendants.

30 **KELSEY & LUDWIG,**
 Solicitors for and of counsel with the defendants Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski.

Note Joining Issue on Answer.

(Filed September 19, 1930.)

IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;">Between</p> <p>MARGARETHA H. KUTSCHINSKI, et als., Complainants,</p> <p style="text-align: center;">and</p> <p>FRED LUHR, et als., Defendants.</p>	}	<p>10</p> <p>(74-110) On Bill, etc.</p>
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These defendants, Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Erward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, join issue on the answer of the complainants, Margaretha H. Kutschinski, individually and as one of the executors of the Estate of Gustav M. Kutschinski, deceased, and Frederick W. Kutschinski and May L. Kutschinski, to the counterclaim of these defendants. 20

KELSEY & LUDWIG,
Solicitors for and of counsel with the
defendants Henrietta E. Sheffer,
Norman Sheffer, Alvina A. Neumann,
Edward Neumann, Margaretha L. Grewe,
Ernest Grewe, Jr.,
and Walter H. Kutschinski. 30

Testimony.

IN CHANCERY OF NEW JERSEY.

	Between MARGARETHA, KUTSCHINSKI, et al., Complainants, and FRED LUHR, et al., Defendants.	} (74-110) } On Bill, &c.
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20 TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY
 taken on final hearing in above stated cause, Octo-
 ber 2, 1930, at Chancery Chambers, Jersey City,
 before his Honor James F. Fielder, Vice Chan-
 cellor.

APPEARANCES :

- HON. ROBERT CAREY, as solicitor of record for com-
 plainant.
- HON. CHARLES S. SIMPSON, representing the widow,
 Margaretha Kutschinski, individually.
- 30 HON. WILLIAM GEORGE, representing Margaretha
 Kutschinski individually and also the defend-
 ant Fred Kutschinski.
- CLARENCE KELSEY, Esq., for the defendants Henri-
 etta Sheffer, Norman Sheffer, Alvina H. Neu-
 mann, Edward Neumann, Margaretha L.
 Grewe, Ernest Grewe, Jr., and Walter Kuts-
 chinski.
- 40 JOSEPH RANKER, Esq., for the defendant Fred
 Luhr, as executor and individually and his
 wife Emilie Luhr.

Fred Luhr—For Complainants—Direct.

COMPLAINANTS' CASE.

Mr. Carey: I offer in evidence certified copy of the will of Gustav Martin Kutschinski.

(Marked Exhibit C-1; same as copy annexed to bill of complaint.)

The Court: Is it admitted by everybody that the will was admitted to probate on July 8, 1927, as the bill alleges? 10

Mr. Kelsey: Yes, sir.

The Court: And that letters testamentary were granted to the executors therein named?

Mr. Kelsey: Yes, sir.

FRED LUHR, one of the defendants, sworn as a witness on the part of the complainants, testifies as follows: 20

Direct examination by Mr. Carey.

Q. Where do you reside? A. Summit, New Jersey.

Q. You are one of the executors of the will of Gustav Martin Kutschinski? A. Yes.

Q. You are the son— A. Son-in-law. 30

Q. You married which daughter? A. Emilie.

Q. How many children did he leave? A. Seven.

Q. What are their names? A. Emilie Luhr, Henrietta E. Sheffer, Alvina Neumann, Fred Kutschinski, Margaretha Grewe, Walter Kutschinski and Gustav Kutschinski, who is out west.

Q. They are all over twenty-one years of age? A. Yes.

Q. One of them is insane? A. Yes.

Q. Where is the one who is insane? A. In Wisconsin. 40

Fred Luhr—For Complainants—Direct.

Q. In an asylum? A. Yes.

Q. How long has he been there? A. I think about two years.

Q. What is he called? A. Gustav.

Q. Mr. Kutschinski left a widow? A. He left a
10 widow; yes.

Q. Her name is Margaretha Kutschinski? A.
Yes, sir.

Q. Is she here in court? A. Yes.

Q. Do you remember when Mr. Kutschinski died?
A. Yes, sir.

Q. What was the date? A. June 22, 1927.

Q. Where did he die? A. He died at his home
in Central Avenue, Union City.

Q. Hudson County? A. Hudson County.

20 Q. You are familiar with his estate? A. Yes.

Q. What he left? A. Yes, sir.

Q. What estate did he leave? A. Real estate
principally, some cash in the bank and mortgages.

Q. What was the amount of the personal prop-
erty? A. I haven't the figures with me this morn-
ing.

Q. You have a record of it? A. I have; yes.

Q. Here? A. No, sir.

30 Q. Did you give it to your counsel? A. My
counsel probably has it.

By the Court.

Q. Did you file an inventory? A. An inventory
has been filed.

Q. With the Surrogate? A. Yes, sir.

The Court: Has anyone a copy of the in-
ventory?

40 Mr. Simpson: I believe I have one. It is
unsigned.

*Fred Luhr—For Complainants—Direct.**By Mr. Carey.*

Q. I show you a paper and ask you what this is?

A. This is an inventory. I do not know whether it is the true inventory or not. There were some corrections made on the first one after we made it. I do not know whether this is the true one or not. 10

Q. Have you ever checked up the inventory as an executor? A. Yes.

Q. You had charge of this estate, didn't you? A. Yes.

Q. Personally? A. Yes, sir, to the best of my ability, I checked it up.

Q. Have you the personal property in your possession now as executor? A. Money in the bank.

Q. Have you it in your control? A. Not the real estate—just cash in the bank. 20

Q. What cash is there in the bank? A. I cannot say offhand. It must be around \$6,000 or around \$7,000.

By the Court.

Q. You said something about mortgages? A. Most of the mortgages are paid up. I believe they are practically all paid up.

Q. Who got the money? A. It was put in the bank. We paid money out for different things. 30

Q. When the mortgages were paid off, what was done with the money? A. It was put to the credit of the estate of Kutschinski in the bank, in the Highland Trust Company.

By Mr. Carey.

Q. Practically all the proceeds of these mortgages have been used to pay debts of the estate?

A. Yes. 40

Fred Luhr—For Complainants—Direct.

Q. Do you know what the debts of the estate were at the time of his death? A. No; I could not tell you that offhand.

Q. Can you tell even in round figures? A. No; I cannot.

10 Q. You say that there is \$6,000 or thereabouts in the bank. As a matter of fact, that amount in bank is only \$4,000? A. \$4,000 in the estate's account. Then there was his personal account. I think he had about \$1,400 in the checking account. Then there was another account of \$5,000, against which some has been used; I do not know exactly the amount that has been used against that account.

20 Q. Have you collected all the mortgages that constituted the personal estate? A. All the mortgages that have been collected have been deposited in the Highland Trust Company to the account of the estate—all the mortgages that I have collected.

Q. Is there any personal estate now left outside of the moneys that are deposited in this bank? A. There is money coming from Manzo of Hackensack.

30 Q. Who is that? A. He had bought a piece of property. He had bought the property from Mr. Kutschinski. He had paid a certain amount and he was to get his deed, leaving a mortgage, I think, of \$1,000 or \$1,200.

By the Court.

Q. In other words, he is buying on contract made by Kutschinski in his lifetime? A. Yes.

By Mr. Carey.

40 Q. Outside of the money in the bank and the proceeds that you say are due on that contract,

Fred Luhr—For Complainants—Direct.

there is no other personal estate, is there? A. Not to my knowledge; no, sir.

Q. It has all been used to pay the debts? A. Yes.

By the Court.

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Q. I understood you to say that there is only \$4,000 in bank? A. \$4,000 against this one account. There are three different accounts.

Q. I do not care whether there are forty-five accounts. I want to know the total amount of money in bank. A. The total amount of money must be around \$6,000 to \$7,000.

Q. Who knows definitely? A. I have not got these figures. I did not think these figures would be called for to-day.

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By Mr. Carey.

Q. Outside of the personal property, the estate consisted of real estate only? A. Real estate; yes, sir.

Q. Can you give us a list of the real estate? A. Not offhand. If you have the inventory there, I can figure from that.

Q. Does this inventory list, which you looked at a few moments ago, contain in the best form a statement of all the real estate that constitutes this estate? A. Since that time there has been two houses taken over by the estate.

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Q. Will you enumerate what pieces of real estate are owned by the estate? A. 409 14th Street, West New York; 512 12th Street, West New York; 280 West Street, Union City; 265 Central Avenue, Union City; 3868 to 3878 Boulevard, Union City; 525 New York Avenue, Union City; 454 2nd Street,

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Fred Luhr—For Complainants—Direct.

Hoboken; and there is a property in 11th Street, Union City; the people could not keep up their payments and we had to take that over.

10 Q. As executors you had all that property appraised, didn't you? A. We took the assessed value.

Q. What was the assessed value? A. We took the assessed value, plus 25 per cent.

Q. What was the assessed value? A. Well, the totals given here, less the 75 per cent.—that would be less than 75 per cent.

Q. What was the value you fixed in excess of the assessed value? A. We took the tax rate, plus 25 per cent.

20 *By the Court.*

Q. Have you got the total amount that you fixed as the value of the property? A. Yes; the total value is here.

Q. What is it? A. 14th Street is——

Q. Have you not got the total of the whole thing? A. \$98,150.

By Mr. Carey.

30 Q. Are there mortgage liens against the property? A. Yes, sir.

Q. What is the amount of the mortgage lien against this property now? A. At the time of his death there was \$34,492 mortgages against the property. Since that time, we have paid one of the mortgages off.

Q. How much? A. I will have to look at my records, which are home now.

40 Q. Do you know what the amount of mortgages now open as liens against the property is? A. Probably \$30,000—about \$30,000.

Fred Luhr—For Complainants—Direct.

Q. Some of these mortgages are in process of foreclosure? A. Yes.

Q. How many? A. Four or five.

Q. Affecting which property?

The Court: What has that to do with what the will says? 10

Mr. Carey: I am trying to show the status of the estate. I want to show that there has been no income available for the use of the widow as bearing on the intent of the testator to provide a living for the widow.

The Court: I cannot see what that has to do with what his intent was at the time he executed the will.

Q. Do you know what the rental value of the property was at the time of the death of Mr. Kutschinski? 20

The Court: Gross?

Mr. Carey: Yes, sir.

A. About \$1,100 a month.

Q. The amount of rental at that time received?

A. Around \$1,100 a month.

Q. You collected that, did you? A. No. 30

Q. Who did? A. Mrs. Kutschinski.

Q. Do you know what the annual tax lien was against the property at that time, or don't you know? A. No; I don't know.

Q. Do you know what the average repair bill at that time was against the property? A. No, sir.

Q. Do you know what the condition of the property was at that time? A. No, sir.

Q. You examined it, didn't you? A. No.

Q. As executor? A. As executor, I was not familiar; I had nothing to do with the real estate. 40

Fred Luhr—For Complainants—Direct.

Q. You said your wife was a daughter of Mr. Kutschinski? A. A daughter of Mrs. Kutschinski.

Q. Your wife was not a daughter of Mr. Kutschinski? A. No, sir.

10 *By the Court.*

Q. A daughter of Mrs. Kutschinski by another marriage? A. Yes.

By Mr. Ranker.

Q. When you gave the estimated value of \$98,150, that did not include the two pieces of real estate acquired since Mr. Kutschinski's death? A. No, sir.

20 Q. Now, the real estate sold on contract, there is a memorandum of \$1,050. That money was collected by whom? A. Which item is that?

Q. Near the bottom of the page. A. Carmine Manzo?

Q. Yes. A. I understand it was collected by Mrs. Kutschinski.

Q. You knew nothing about that until you heard about it later? A. No, sir.

30 Q. She never consulted you about it in the least? A. No, sir.

By Mr. Kelsey.

Q. The inventory shows the testator held mortgages at the time of his death on certain real estate, does it not? A. Yes.

Q. Amounting to \$25,000? A. About that, I guess.

40 Q. Who collected those mortgages since his death? A. Mrs. Kutschinski and I, except the Manzo item.

Fred Luhr—For Complainants—Direct.
Margaretha Kutschinski—Complainant—Direct.

Q. Did you take part in the collection of all the mortgages that have been paid off? A. Yes, previous to the Manzo collection.

Q. How much has been paid off on those mortgages? A. I think they are practically all paid now. 10

Q. What became of that \$25,000?

The Court: What has this to do with the meaning of the will?

Mr. Kelsey: They have gone into it. I do not want to let anything stand without explanation.

The Court: Judge Carey said he was trying to prove the amount of his estate and its condition as to any rentals, I suppose as throwing some light on the testator's intention. What mortgages have been paid off and who collected the mortgages since he died, cannot have much to do with the testator's intention at the time he made the will. 20

Mr. Kelsey: I won't press it.

MARGARETHA KUTSCHINSKI, the complainant, 30
 sworn as a witness in her own behalf, testifies as follows:

Direct examination by Mr. George.

Q. You are the complainant in this suit; you started these proceedings? A. Yes.

Q. You are the widow of the late Gustav Martin Kutschinski? A. Yes.

Q. How old are you? A. Seventy-two. 40

Q. Where do you live now? A. 265 Central Avenue.

Margaretha Kutschinski—Complainant—Direct.

By the Court.

Q. When were you seventy-two? A. Last January 2.

By Mr. George.

10 Q. You live at 265 Central Avenue, Union City?
A. Union City; yes, sir.

Q. When did your husband die? A. In 1927, the 22nd of June.

Q. Were you living with your husband up to the time of his death? A. Yes, sir.

Q. How many children were born of the marriage between you and your husband? A. Seven.

20 Q. Between you and Mr. Kutschinski? A. Yes; seven.

Q. You had another child by a former marriage? A. Yes.

Q. That is, the wife of Mr. Luhr? A. Yes.

Q. Is that right? A. That is right.

Q. Where were you living at the time of your husband's death? A. The same place, 265 Central Avenue, Union City.

Q. Have you any business of any kind? A. No, except my husband.

30 Q. I beg your pardon? A. No; nothing else.

Q. What was the source of your income for living purposes at the time of your husband's death?

Mr. Kelsey: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Like my husband, collecting the rent and what had to be paid at the same time.

40 Q. You are one of the executors of your husband's will? A. Yes.

Margaretha Kutschinski—Complainant—Direct.

Q. You collect the rents from the property at this time? A. I do, and when it was not paid to me, why, I sent my son Fred Kutschinski.

Q. The rents were collected either by you or by somebody on your behalf? A. Yes.

Q. Were there bills paid out for repairs or taxes or interest or mortgages? 10

The Court: What are you trying to show?

Mr. George: To show that the sum total of the estate was insufficient to make proper provision for her maintenance, as bearing on the testator's intention.

Mr. Kelsey: I object to the question.

The Court: Objection overruled. 20

A. For interest all the time. Interest had to be paid and repairing.

Q. And after the collection of the rent, or such rent as you have collected from the properties of this estate, after the payment of the taxes, the interest on mortgages and other proper charges against the property, did you have any money left for yourself to live on?

Mr. Kelsey: I object to that as incompetent, irrelevant and immaterial. 30

The Court: I will sustain the objection.

Q. Have you kept a record of the rents collected by you? A. Yes; I have.

Q. Have you that record here? A. Yes.

By the Court.

Q. Here in court? A. No; I haven't got it here.

Q. Where is it? A. My son has it. He takes it. 40

Margaretha Kutschinski—Complainant—Direct.

By Mr. George.

Q. Where is it—at home? A. Yes.

Q. Have you kept a record of all the moneys that you paid out? A. Yes.

10 Q. Will you produce it here, if requested? Well, would that record which you say you have at home, show every cent you have collected and every cent you have paid out in connection with the estate? A. Yes. We have produced it once already in court by Judge Fallon.

The Court: There were affidavits filed on the application for the appointment of a receiver. That is probably what the witness is referring to.

20 Mr. George: We can have that in about three-quarters of an hour and I ask leave to discontinue the examination along this line in the meanwhile.

Q. How long were you married to Mr. Kutschinski? A. About forty-two years.

Q. Did you live with him all during that time? A. Yes. One time I was away about three-quarters of a year.

30 *By the Court.*

Q. That was on a visit, was it? A. No; it was not a visit. It was some trouble in the family and we made up again.

Q. When was it that you were separated? A. That was about twelve years ago.

40 Mr. Kelsey: That is a matter in which we represented Mr. Kutschinski. That was a suit for maintenance.

M. Kutschinski—Complainant—Direct—Cross.

Q. At the time of your husband's death, were all of his children being supported by him, or any of them? A. Well, they were all married, except one.

Q. The question is: Were any of his children being supported by him at the time of his death? A. No; there was one child that was home yes, that is home now. 10

By Mr. George.

Q. Which one is that? A. Walter Kutschinski.

Q. How old is he? A. He will be twenty-seven; he is twenty-six.

Q. Is he married? A. No.

Q. Was Walter working at that time? A. No; not working.

Q. Did he pay board? A. No. 20

By the Court.

Q. How long had this son been living with your husband at the time of your husband's death? A. He lived there all the time; he was never away from home.

Q. How long had he been out of work? A. He don't work much any way.

Q. He didn't do much work any time, is that it? 30
A. He had once a job. My husband paid for it. He neglected it—civil service.

Cross-examination by Mr. Kelsey.

Q. You have sufficient from these rents and income from this property to enable you to live?

Mr. George: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained as to the form of the question. 40

Margaretha Kutschinski—Complainant—Cross.

Q. How have you been supporting yourself since your husband's death? A. Well, from the rent. I have to live from the rent.

Q. What do you do with these rents? I mean, outside of paying the expenses of your living. A. Well, I had so much expense to pay that there is nothing left—not even enough.

Q. You deposited some of these rents in banks in New York, did you not? A. No. Who told you that?

Q. What? A. No.

Q. Did somebody deposit them there for you? A. No.

Q. How much of these rents have you given or turned over to your son Frederick?

20 Mr. Simpson: I object to that. That is irrelevant to the question here.

The Court: Objection overruled.

A. Nothing has been turned over to my son Frederick, except what his fees were when he did work for me, except the work he did.

Q. The money that you have given or paid to Fred, or allowed him to retain, was in payment to him for his work? A. Yes. He has got paid for his work, certainly.

Q. He has been charging you \$500 a month for his work? A. No.

Q. How much was it? A. It was \$75 a week.

By the Court.

Q. How long has he been doing that? A. Since he has been attending to everything for me.

Q. Since when? A. Since he tended the books for me.

40

Margaretha Kutschinski—Complainant—Cross.

Q. When was that? I do not know when he commenced to attend the books for you. A. He has all the books——

Q. Don't you know how long you have been paying him \$75 a week? Was it right after your husband's death? A. Well, part of the time, yes. 10

Q. What does he do? A. He attends to everything. He paints. When something has to be fixed, he attends to the property and attends to the workingmen.

Q. He looks after repairs? A. And does repairs what he can himself and what is paid for and the workingmen and taking care of the books.

By Mr. Kelsey.

Q. He has his own business, has he not? He has this gasoline service station up on the Boulevard, has he not? A. No; he has not. 20

Q. What? A. He has not.

Q. Has he not been there all the time running that business? A. He is working there.

Q. For whom? A. Mr. Browner.

Q. What salary does he receive up there? A. I don't know if he does receive much salary or not. First it didn't do so good. 30

Q. Is it not a fact, that out of about \$35,000 rents that have been collected—I mean, the gross rents that have been collected from the real estate of your late husband since his death, your son Fred Kutschinski has had over \$25,000 and retained it and used it for himself?

Mr. Simpson: I object to that question upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. 40

A. No, sir. Without the rents there was——

Margaretha Kutschinski—Complainant—Cross.

By the Court.

10 Q. The question that is asked you is: Is it not a fact, that out of \$35,000 rents that have been collected since your husband's death, your son Frederick has received and retained \$25,000? A. There was not that rent collected. Rents went down. I had to let the rents go down to keep the tenants.

Q. Do you mean to say that you have not collected \$35,000 in rents since your husband's death? A. We had to leave the rents down. We did not get it.

20 Q. Won't you tell me the answer to that question? Have you collected \$35,000 in rents since your husband's death? A. Well, I cannot say that now. We have it all in figures. We have it all down in a book.

Q. From memory, you don't know—is that it? A. I don't know.

Q. Is it a fact, that your son has received and retained \$25,000? A. Not so much as that—not during that time. He helped me out during that time—

30 Q. What do you say he has received and retained? A. First off, he had nothing and then when he helped me, then he got paid for it.

Q. That is, \$75 a week that you talk about? Has he received anything more than that? A. No; not from me.

Q. Did you have any property of your own at your husband's death? A. No.

Q. You did not own anything at all? A. I had mortgages where I got the interest.

40 Q. You had a mortgage? A. There are two mortgages standing out yet where we get the interest. I collect that.

Margaretha Kutschinski—Complainant—Cross.

Q. If you will please answer my question, we will get along quicker, I want to know what property you owned at the time of your husband's death. A. Well, nothing special alone for myself; it was me and my husband.

Q. Did you have any mortgages of your own? 10
A. Yes. I got one mortgage of my own.

Q. Did you own that mortgage in 1925? A. 1926, I believe.

Q. Your husband's will is dated in July, 1925?
A. Yes.

Q. What property did you own then? A. When he died I owned \$1,000 on a lot—

Q. I did not ask you when he died. I asked you what you owned when he made the will in July, 1925. A. It was in 1925—yes, it was before 1925. 20
I think it was I had a mortgage.

Q. How much? A. \$1,000.

Q. Did you own any real estate then? A. No. That is all—nothing else.

By Mr. Kelsey.

Q. Out of these rents that you collected, you have not paid any of the taxes on the real estate since your husband's death? A. No; there was nothing left for it. 30

Q. You have not paid any water rents? A. First off I did, but not the last one, it did not come in for me.

Q. You have not paid any interest on the mortgages? A. I have to pay always the interest, except since—since July.

Q. You paid the interest down until last July?
A. Not this July, the July before, that property in West New York. 40

Margaretha Kutschinski—Complainant—Cross.

Q. A year ago? A. Yes.

Q. And there are now five pieces of property under foreclosure, are there not? A. There are three mortgages—I had to pay \$180 on property in West New York.

10 Q. You did not spend any money— A. Yes; I did. I had to make the floors; I had to make repairs.

Q. You spent money for repairs? A. Yes, and everything else that had to be paid.

Q. How much have you paid out of your rents for repairs to this property? A. I have it on the books.

20 Q. Approximately how much have you paid? Have you paid \$2,000 for repairs since your husband died? A. I have not got the books here; I cannot say it.

By the Court.

Q. You do not know whether it is \$2,000 or less or more? A. It is more I paid.

Q. More than \$2,000 for repairs? A. Yes.

By Mr. Kelsey.

30 Q. You paid your son Frederick \$75 a week?

The Court: Yes; that has been testified to.

Q. And out of these rents, how much have you had for yourself, for your own use? A. Just what I need.

Q. How much is that? A. I do not take the exact amount out—just what I needed.

40 Q. About how much have you had? A. (No answer.)

Margaretha Kutschinski—Complainant—Cross.

Q. Have you been able to save any money? A. No.

Q. Have you any money in bank? A. I could not save any money from that.

Q. Where has it all gone to; who got that money? A. It is all there; it is all counted up.

10

Q. How much has your son Frederick got out of it? A. It is all in the books. It was written before in the court.

Q. Do your books show how much your son Fred got? A. The books show it. He read it all off in Judge Fallon's court. You ought to know. You all heard it.

Q. This place where the gasoline station is located on the Boulevard, that real estate belonged to your husband's estate, did it not? A. Yes.

20

Q. And this company that your son Fred owns there and runs there, this corporation runs that place?

Mr. George: That is objected to as having no relevancy here.

The Court: Objection sustained.

Q. After your husband's death, you and your son had alterations made in that property, did you not? A. Yes.

30

Q. So gasoline could be sold there? A. To make use of it because it was empty.

Q. And that alteration and change there cost about \$7,000, did it not? A. We had a lot to fix. We put a new front in. We had to do something.

Q. It cost about \$7,000? A. The beams were rotten and everything had to be done.

Q. You had an entire new brick front there? A. We had to do that.

40

Margaretha Kutschinski—Complainant—Cross.

Q. It cost about \$7,000, did it? A. The amount is all down in the book.

Q. But it cost about \$7,000, whether it is in the book or not? A. I cannot answer, because it is all down in the book. I cannot keep everything in my
10 head.

By the Court.

Q. Mr. Kelsey is asking you if it is your recollection and you must give him an answer to his question. If you don't know how much it cost tell him so, but it is no answer to say that it is in the book. A. I mean, I have it all down in a book.

Q. Can you tell him whether it cost \$7,000? A. I say, I don't know.
20

By Mr. Kelsey.

Q. Tell me this: Is it not a fact, that unpaid claims for that alteration amount to more than \$7,000; is that a fact? A. I don't know.

Q. Have you not been sued for those unpaid claims for that alteration? A. Yes; they brought the bill in; they were to get paid—

Q. How much was that? A. I put my own
30 money into the property—my own money personally what I had—I paid that.

Q. How much? A. \$1,000, and from the rents what belongs to me, to collect for myself, for the widow, I put all of that into the property.

Q. Whom did you pay that money to? A. I should not pay it to anybody—the people, some of those who did the work.

Q. Did you not turn that money over to Fred, that money that you put in there? A. I did not
40 turn nothing.

Margaretha Kutschinski—Complainant—Cross.

Q. Is it not a fact, that Fred got out of the rents and from you \$7,000, with which to pay for these alterations, and he has not paid a penny of it—isn't that a fact? A. He paid everything what I had to pay.

10

By the Court.

Q. Please answer Mr. Kelsey's question. It is in two parts. First, did you give your son Fred \$7,000 with which to pay for these repairs? A. I did not give it to him, but when I had the money there from collecting, I paid what I could.

Q. You did not give the money to Fred to pay for you. Did you give the money to Fred to pay for you for these repairs? A. Yes; part of it.

Q. Did you give him as much as \$7,000? A. I don't know; I could not say.

20

Q. This money that you gave him to pay for the repairs, has he used it to pay for the repairs? A. He has, yes. So far as the money was there, he paid. If it did not reach, it was not paid. Some could not be paid. We had no money.

By Mr. Kelsey.

Q. Fred received advances in his father's lifetime of nearly \$40,000?

30

Mr. Simpson: Objected to.

The Court: Objection sustained.

By Mr. Ranker.

Q. I show you a yellow paper, and ask you if this sheet is in the handwriting of Fred, with the exception of these two last lines? A. I ain't got my glasses.

40

Q. Can you read these figures at all? A. No.

Margaretha Kutschinski—Complainant—Cross.

Q. Do they look like Fred's handwriting? A. I don't know. I cannot say, because I have not got my glasses.

By the Court.

10 Q. Where are your glasses? A. Home.

Q. Your books, eyeglasses and everything else are home? A. I cannot see to read and write without glasses.

By Mr. Ranker.

20 Q. You know whether or not you have received \$34,636.50 rent up to May 1, 1930, that is, beginning July 1, 1927, and ending May 1—that is, including only the rent for April, 1930—would you say you received that much money? A. I don't know. I cannot say without the books.

Q. You relied entirely upon your son Fred, did you not, in these transactions?

The Court: We are talking about the construction of the will and not the question of accounting.

30 Mr. Ranker: They have gone into this apparently to show that she relied on her son Fred and put confidence in him.

The Court: That is not the purpose at all, but to show that the rents were not sufficient for her support.

Fred Kutschinski—For Complainants—Direct.

FRED KUTSCHINSKI, one of the defendants, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. George.

Q. You are a son of the late Gustav Kutschinski? A. I am. 10

Q. At the time of your father's death were you living at home? A. No, sir; I was living in my own home.

Q. How many of your brothers and sisters were living at home at the time of your father's death?

A. My youngest brother, Walter, was living home at the time of my father's death.

Q. Was he married at that time? A. Not that I know of. 20

Q. Was he paying board? A. No, sir; he refused to pay board.

Q. Was he working? A. He very seldom worked; he was not working at that time.

Q. After your father's death and after your mother commenced collecting rents of the property of the estate, did you have anything to do with the collection of rents? A. I did.

Q. At whose instance? A. At the instance of my mother and the suggestion of her counsel. 30

Q. And then you did collect the rents? A. Yes.

Q. Did you do anything else besides collect the rent? A. I took care of the books of the business of my mother in connection with the estate; I made various repairs, such as carpenter work, mason work, plaster work, electric work, painting, and I supervised the work that I couldn't do myself.

Q. What compensation, if any, did you receive for the work that you did? A. \$75 a week. 40

Fred Kutschinski—For Complainants—Direct.

Q. Did you ever receive anything more than \$75 a week? A. Once in a while I did, when I took various other contracts.

10 Q. What do you mean by that? A. If I couldn't get a contractor to do the work cheap enough, I would take the job myself and take \$75 a week and get extra compensation for the extra work and I would get the materials.

Q. You heard the question Mr. Kelsey asked your mother concerning the collection of about \$35,000 in rent and that you had received from that rent \$25,000. Did you ever receive anything more than \$75 a week other than the compensation you received for extra work? A. I did not.

20 Q. Did you receive \$25,000 out of the estate? A. I did not.

Q. Where does your mother live? A. My mother lives at 265 Central Avenue, Union City.

Q. Do you see her frequently? A. I see her almost every day.

Q. You keep the books showing the collection of rents and the payment of expenses? A. Yes.

30 Q. Can you tell the Court what is the present balance remaining from the collection of all of the rents after the payment of all of the fixed and necessary charges for the maintenance of the property?

Mr. Ranker: I object. I think we ought to have the books. We are interested in those books.

Mr. George: The question is: Can you tell?

The Court: Objection overruled.

40 A. I can.

Fred Kutschinski—For Complainants—Direct.

Q. Is there any balance? A. There is no balance. There is a shortage—not sufficient money to pay the debts.

Q. Is there sufficient money to provide for your mother's maintenance now? A. There is not. I have been supporting her myself, ever since the receiver has been on the job. 10

Q. In connection with the expenditure of about \$7,000 for the improvement of the premises in which you now work, the gas service station, your mother testified that she put some of her own money in that improvement. Is that a fact? A. It is a fact.

Q. About how much? A. She put a \$1,000 mortgage in and the money she had saved from her living expenses from the preceding three years. She also put that in, and many times she did without foodstuff in the house in order to pay various bills that came due. 20

Q. Did your mother have any money of her own at the time of your father's death? A. Probably not more than a hundred dollars. She didn't have a hundred dollars in her check book.

By the Court.

Q. How about that thousand dollar mortgage? A. That thousand dollar mortgage she sold at a discount of 10 per cent. 30

By Mr. George.

Q. Whose mortgage was it? A. Her own mortgage.

Q. At the time of your father's death? A. Yes.

Q. She owned that mortgage? A. Yes; she owned it outright. 40

Fred Kutschinski—For Complainants—Direct.

Q. That was sold and she received the proceeds?
A. Yes.

Q. Did she put that thousand dollars into this improvement? A. She did.

10 Q. Has she any money now? A. She hasn't got a cent now.

Q. By the way, some of the mortgages owned by the estate have been paid off, have they? A. Yes.

Q. What happened to the money? A. Why, those mortgages have been used to pay off the other existing mortgages on the estate—used to pay off the indebtedness on another estate in which our estate was interested, namely, the Prosser Estate, and various other details of the estate.

20 Q. You saw your father's will, the original will which was probated? A. Yes.

Q. Were you present at the time of the probate? A. I went down to court with my mother.

Q. Were you present—yes or no? A. Yes.

Q. In whose handwriting was the will written? A. My father's.

Q. Was it all written out? A. I believe part was printed and part was written, to the best of my recollection.

30 *By the Court.*

Q. You mean, the will was written on a printed form? A. I think it was, if I am not mistaken.

The Court: Of course, you can produce the original will.

By Mr. George.

40 Q. The whole handwriting was that of your father; is that right? A. Yes.

Fred Kutschinski—For Complainants—Direct.

Q. Prior to your father's death, what were you doing? A. I was working for Sears, Roebuck & Company, New York City.

Q. Did you ever do any work for your father in his lifetime? A. I did.

Q. On salary? A. Yes; part salary and part commission. 10

Q. At the time of your father's death, what was the physical condition of the properties of the estate? A. They were not in such very good condition.

Q. You mean by that, that they required repairs? A. They needed tremendous repairs.

Q. And what was the condition of the property with respect to liens, at the time of your father's death? A. The taxes were not all paid, and the interest on mortgages was not paid either, and repairs had not been paid, and there were notes in the bank. 20

Q. Can you tell how much was due the bank on notes? A. There were two notes—one of \$500 and one of \$300 at the Highland Trust Company.

Q. Is that all? A. Yes.

Q. Can you tell how much taxes were due at the time of his death, in dollars—about how much there was due? A. No; not without referring to— 30

Q. Can you tell how much was due for interest on mortgages? A. Well, I couldn't tell exactly without—

Q. Can you tell about what the value of the repairs was, at the time of the death of your father, that were necessary? A. I can recollect at this time that my mother and my brother and Mr. Luhr, the executor, they paid up the indebtedness due on the estate at the time of my father's death, about \$3,000, and my mother paid that out of the rent she collected. 40

Fred Kutschinski—For Complainants—Direct.

Q. That was for repairs that were made before your father's death? A. Yes; repairs and interest on mortgages and other expenses.

Q. About \$3,000? A. About \$3,000.

10 Q. Can you tell about what the approximate total rent collections were since the time of your father's death? A. Around \$35,000.

Q. Can you tell what the approximate expenses for the maintenance of the property have been, including taxes, water rents, interest on mortgages, insurance, repairs, as well as your charge of \$75 a week? A. The expenses have been more than the income.

20 Q. The expenses have been more than the income? A. Yes; there has never been sufficient income to pay all the expenses.

30 Q. Why were repairs or alterations made at the gasoline station? A. That had formerly been a tumbledown shop and salesroom. It was rented out under a lease and the tenants didn't pay the rental of \$900 for three months and were dispossessed for non-payment of rent, and the property had been vacant for a number of months, and mother, after a while, with her suggestion, with my assistance, that the property be utilized if possible, to produce more income so that she could live on, and her counsel advised her that she could make alterations and repairs, and the only rental she would be required to pay under the law, under that advice and interpretation, were the taxes and insurance premiums, and mother had these alterations made, with the opinion of her counsel or his advice that it could be done.

Fred Kutschinski—For Complainants—Cross.*Cross-examination by Mr. Ranker.*

Q. This \$75 a week which your mother paid you, was for your executive ability? A. It was not; no, sir.

Q. What were you to do for that \$75 a week? A. 10
It was for managing the estate for my mother, for taking care of the collection of rents which she did not collect, for doing carpenter work, painting work, mason work, plastering, painting roofs and taking care of the books, and such other assistance as mother required in connection with the management of the estate.

Q. Besides that, you ran the gasoline service station? A. I did not. The service station was a matter that came up after that. 20

Q. When did that come up? A. About a year and a half ago.

Q. When did you start to alter the garage premises? A. About a year and a half ago.

Q. What month of the year? A. I think the permit was granted December, 1928.

Q. Was it not December, 1927? A. I don't recollect. I think it was December, 1928.

Q. Was the former tenant put out of the property right after your father's death? A. The former tenant was dispossessed. It is a matter of District Court record. I don't know the month it was in. You can look up the records. 30

Q. Have you the lease which your mother gave you for this property after it was completed? A. I have not.

Q. Did you do any painting work, plastering work or mason work yourself, which was included in your \$75 a week salary? A. I did. 40

Fred Kutschinski—For Complainants—Cross.

Q. What would you consider unusual work that would entitle you to further money? A. Why, all work outside of ordinary repairs, such as work an ordinary contractor would have to do.

Q. Name one instance? A. Repairing roof.

10 Q. At what address? A. 11th Street.

Q. What did you do there? A. I had my brother assist me.

Q. What did you do there? A. I laid practically the entire roof.

Q. How much did you charge your mother for that? A. \$200.

Q. You got \$200? A. Yes.

Q. Personally? A. Yes.

20 Q. How much did your brother get? A. He got part of that. He got \$25 a week, because he was only a helper.

Q. And what was the contractor's price? A. The last contract I had was \$250.

Q. And you did the same work for \$200? A. Yes.

By the Court.

Q. And furnished the material too? A. Yes, sir.

30

The Court: May I convey this thought, that if Mrs. Kutschinski is a life tenant entitled to receive the rents under the terms of the will, she was bound to attend to all the repairs herself at her own expense; she was bound to pay the taxes; she was bound to pay the water charges against the property, interest on mortgages; she was bound to keep her own books, because they were the books of her own expenses; and if she chose

40

to pay \$75 a week to this young man, it was

Fred Kutschinski—For Complainants—Cross.

her own business and out of her own rents, and if she paid \$3,500 a year to this young man for doing her work for her, that won't excuse her for not having enough rent to live on.

Q. I show you a yellow sheet of paper, and ask you if that is in your handwriting? A. It is.

Q. And what does that represent? A. I don't know what it represents. It does not state.

Q. Didn't you write those figures on this yellow sheet of paper? A. I did.

Q. What do the figures "1191" indicate under July, 1927? A. I don't know what it represents.

Mr. George: I object to that as immaterial, incompetent and irrelevant.

The Court: Objection sustained.

Q. Did you not give this yellow sheet to Mr. Luhr? A. I don't know whether I did or not.

Mr. George: I object.

The Court: Objection overruled.

Q. You don't remember? A. I don't remember.

By the Court.

Q. That paper is in your handwriting? A. Yes, sir; it is.

Q. Why did you put those figures and words on that paper? A. It may have been part of my memorandum. It may have been taken by Mr. Luhr, out of my records.

Q. I did not ask you that. I asked you why you wrote these figures and words on that sheet? A. I don't know. It may have been part of my memorandum work in checking up my records, and so on.

Fred Kutschinski—For Complainants—Cross.

Q. Does this paper indicate the amount of rents received and the expenses incurred for the years and months mentioned in this paper? A. It looks like as if it was a memorandum of rent collected for various months.

10

By Mr. Ranker.

Q. Didn't you give that sheet of paper to Mr. Luhr when he asked you for the rents? A. No, sir.

Q. Didn't you testify before Vice Chancellor Fallon that that is a list of rent which you collected, and give it to Mr. Luhr? A. No, sir; I did not.

20

Q. Do you know whether these figures represent the rents collected by you or your mother and taken by you from your books? A. Taken from books, various records, but I don't know whether it is exact or not.

Q. What books? A. Rent books.

Q. You took it from the rent books? A. I took it from the rent books; yes, sir.

Q. When? A. I don't know when.

Q. Did you give this to Mr. Luhr? A. No, I did not.

30

Q. To whom did you give this paper? A. I did not give it to anybody. It looks like one of the papers that was stolen from the record.

Q. What did you make this memorandum for? A. I made all kinds of memorandums. I made all kinds of memorandums to assist me in my work.

Q. You have no recollection why you made this memorandum? A. To assist me in my work, no doubt.

40

Q. Did you make it out at anybody's request? A. No, sir.

Fred Kutschinski—For Complainants—Cross.

- Q. You are sure of that? A. Absolutely.
 Q. Do you know what the rents of the property are? A. No, sir, I do not.
 Q. Do you know how much you have collected?
 A. Not without looking at the records.

10

By the Court.

- Q. Did you bring the records with you? A. No, sir, I didn't do that, but I understood that—

The Court: The answer is: "No, I did not."

By Mr. Ranker.

- Q. Has your mother given you any money lately?
 A. Mother has not given me any money lately. 20
 Q. Has your mother collected the money on the Manzo mortgage? A. Yes, she has.
 Q. Did she turn that money over to somebody to hold for her? A. She turned it over to hold for her; yes.
 Q. Where is it now? A. In my possession.
 Q. Then you are holding that money for her?
 A. She has turned that money over in my possession and I have paid various bills for her.
 Q. You now have that money on deposit— A. 30
 Not right now.
 Q. In what bank did you put it? A. In the Weehawken Trust & Title Company.
 Q. In what name? A. In the name of the Rainbow Service Station.
 Q. What bills did you pay? A. I could not say offhand.
 Q. Did you pay Rainbow Service Station bills?
 A. No, sir. 40

Fred Kutschinski—For Complainants—Cross.

Q. What bills did you pay? A. I paid estate bills out of the money.

Q. What estate bills? A. I could not say off-hand, without referring to the list.

10 Q. When did you receive the money? A. When the mortgage was paid off.

Q. When? A. I cannot tell you what month it was.

Q. Was it not May 30, of this year? A. I do not recollect.

Q. Did you expend the money? A. I believe the money has been expended by me.

By the Court.

20 Q. Do you mean to tell me you cannot remember as far back as May of this year? A. It was about the summertime of this year; I cannot say exactly what month.

By Mr. Ranker.

Q. What business were you in at the time of your father's death? A. I was working for Sears & Roebuck.

30 Q. Selling pots and pans? A. No, sir; I was not selling pots and pans.

Q. Were you not selling pots and pans? A. No, sir, I was not.

Q. What was the nature of the suit against your father by some pot and pan concern, which is pending in New York State?

Mr. George: Objected to.

The Court: Objection sustained.

Fred Kutschinski—For Complainants—Cross.

By Mr. Kelsey.

Q. Where was this Manzo mortgage money paid—at whose office? A. At the office of Charles Simpson in Hackensack.

Q. Was Mr. Luhr, the other executor, present when that money was paid? A. No, sir; he was not. 10

Q. Do you know what right your mother had to receive this money without Mr. Luhr also taking part in that transaction?

Mr. George: Objected to.

The Court: Objection sustained.

Q. That was about three weeks ago, was it not?

A. No, sir; it was longer than three weeks ago. 20

Q. And then your mother executed a deed to Manzo for that property? A. She executed an executor's deed.

Q. And you took that money. How much was it? A. I did not take any money.

Q. Your mother turned that money over to you to put in this account in the Rainbow Service Station? A. That is what she did, but I did not take it.

Q. How much money was it? A. \$1,000. 30

Q. Do you know what other mortgages were paid off in that way, the money, or proceeds of which you deposited? A. In what way?

Q. Paid off that way, by your mother accepting the money without Mr. Luhr.

The Court: Do not let us go into this matter. The only purpose, as I have explained before, was to find out what estate was left at the time of Mr. Kutschinski's death. 40

Fred Kutschinski—For Complainants—Cross.

Q. Do you mean to say, that you personally have made all of these repairs on this property after your father died? A. I did not say that.

Q. As a matter of fact, you hired mechanics and bought materials for whatever work was done?
10 A. I hired mechanics for what work I could not do.

Q. You did not do very much? A. I did considerably more than what I was paid for.

Q. Taxes for 1928, 1929 and one-half of 1930, are all unpaid on these various pieces of real estate, are they not? A. No, sir; they are not.

Q. On what pieces of property, if any, were the 1928 taxes paid? A. I cannot say without referring to the records. I think you have a tax search there to show it, have you not?

20 Q. Please don't ask me questions. I have tax searches, and they show 1928 taxes were unpaid. A. Mr. Luhr paid some of the taxes with mother.

Q. You say you don't know how much the gross rents are?

The Court: He said around \$35,000 since his father died.

30 Q. Didn't you produce books and testify before Vice Chancellor Fallon that they amounted to \$1,100 a month? A. I do not recall the testimony. The testimony is a matter of record.

Q. So you have been receiving up to the present time, \$75 a week? A. I have not.

Q. When did you stop receiving \$75 a week? A. About the 17th of June, when the receiver was appointed.

40 Q. Now, you say, you received extra compensation from your mother, above the \$75 a week. How much did you receive approximately, from your mother for this extra compensation above the \$75

Fred Kutschinski—For Complainants—Cross.

a week? A. I can't say without referring to the records.

Q. Approximately, how much? A. I cannot say offhand.

Q. Was it \$5,000 all told? A. I cannot say offhand.

10

Q. Can you give us any idea at all? A. I cannot, without referring to the records.

Q. Why did you say, in answer to Mr. George's question, that these rents were approximately \$25,000, if you say now you do not know what they are? A. I did not say that.

The Court: \$35,000.

Q. Why did you so testify? A. Because it has been the previous testimony. I know it has been about that.

20

Q. How much has been collected by the executors, or by either one of the executors, in payment of mortgages that your father held at the time of his death, that he held on other real estate? A. How much mortgages the executors collected since my father's death?

Q. Yes. A. I cannot give you the amount, but I know offhand some of it.

30

Q. They have all been paid? A. No; they have not all been paid.

Q. What is the amount that has been paid, approximately—about \$20,000? A. No, sir; I would not say that.

Q. Not as much as that? A. I would not say that.

40

*Fred Kutschinski—For Complainants—Cross.**By the Court.*

Q. I understood your mother to testify that at the time of your father's death, she was living with him in one of these pieces of property that he owned? A. Yes.

10 Q. She continued to occupy that house or another piece of property owned by the estate? A. Yes; she still lives in it.

Q. She does now? A. Yes.

Q. She pays no rent? A. No, sir—a five-room floor in a two-family house, worth about \$35 or \$40 a month.

By Mr. Kelsey.

20 Q. You say, that out of the money that was collected from these mortgages, that the debts of the estate were paid? A. Yes, sir; and also the Prosser estate.

Q. How much of the money that was collected was paid for debts of the estate? A. There was \$1,000 paid off to the Highland Trust Company on the renewal of mortgage on 280 West Street, it had been \$8,000 reduced to \$7,000.

30 Q. That was in reduction of the principal? A. No; there was a judgment decree which the Highland Trust Company purchased from the Meyer people. That was one of them.

Q. You kept the books for your mother, the executor's account, did you? A. I kept the records for my mother.

Q. The executor's account? A. No.

Q. Mr. Luhr didn't have anything to do with this sheet? A. Not with mother's personal record.

40 Q. You included money that was received by her as executor? A. Yes.

Fred Kutschinski—For Complainants—Cross.

Charles Schnable—For Complainants—Direct.

Q. Who handled all of this money—who put it in the bank for her? A. She did. She handled a great deal of it herself. When she told me to deposit it, I deposited it.

Q. How much money did you deposit since your father's death in banks in New York for your mother? A. None whatsoever. 10

Q. In banks in New Jersey? A. Yes, sir.

Q. What banks did you deposit money in for her since your father's death? A. Highland Trust Company, National Bank of North Hudson.

By the Court.

Q. Those are the only ones? A. Yes. 20

By Mr. Ranker.

Q. What is the amount of judgment against you, if there are any?

Mr. George: Objected to.

The Court: Objection sustained.

CHARLES SCHNABLE, sworn as a witness on the part of the complainant, testifies as follows: 30

Direct examination by Mr. Carey.

Q. You are connected with the Hudson County Surrogate's office? A. Yes.

Q. You are here in response to a subpoena to the Surrogate to produce certain records in the matter of the estate of Kutschinski? A. Yes.

Q. Have you the records here? A. Yes. 40

Charles Schnable—For Complainants—Direct.

Q. Have you here the application for the probate of his will? A. Yes.

Q. Will you produce it? A. (Witness does as requested.)

10 Q. What you now produce is the application for probate? A. Probate and letters.

Q. Is that the original petition? A. It is.

Q. As the result of the presentation of that petition, do the records show what was done with the will? Was it probated? A. Yes.

Q. When was it probated, according to your records? A. According to the records, July 8, 1927.

Q. And afterwards the original will, I assume, was transferred to the Secretary of State? A. Yes.

20 Q. Do the records show the qualification of the executors? A. Yes; we have them here.

Q. Were letters testamentary issued? A. That is all with the letters testamentary and the application for probate.

Q. You have that here? A. Yes.

Q. Will you show, whether or not, an inventory was filed? A. Yes.

30 Q. If it was, will you kindly draw our attention to it? A. We have a record of the inventory. I have brought the inventory book right down here. I can give it to you if you want it.

Q. What was the date of the filing of the inventory, do you know? Have you the original inventory here? A. Yes.

Q. Produce it? A. I have the book here.

Q. I mean, the original inventory itself. A. No; that I have not.

40 Q. Where is that? A. I believe it is in the Surrogate's office.

Charles Schnable—For Complainants—Direct.
William E. Hopper—For Complainants—Direct.

Q. Have you the entry of the inventory in the Surrogate's book? A. Yes.

Q. In July? A. Yes.

Q. Will you produce that and state in what volume it is? A. Book 44, page 336, of inventories. 10

Mr. Carey: I offer in evidence record of the Surrogate's office of the County of Hudson as produced, as showing inventory as filed in this estate, filed on February 27, 1928. The inventory of personal estate as shown by the record here is \$30,502.07, which is made up of eight bonds and mortgages, two small items which include a savings bank account of \$5,000, a deposit in the Highland Trust Company of New Jersey, a checking account in the Highland Trust Company amounting to \$1,403.57, and a note of one Andrew Hoffman for \$500. All the other items set forth are mortgage items. I now offer in evidence the application for the probate of the will and the grant of letters, the order admitting the will to probate and the record of the Surrogate's office containing a copy of the will as probated. 20 30

WILLIAM E. HOPPER, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. George.

Q. Where do you live? A. 301 Palisade Avenue, Union City. 40

William E. Hopper—For Complainants—Direct.

Q. Did you know Gustav Kutschinski in his lifetime? A. I did.

Q. For how many years? A. About ten years or more.

10 Q. Did you have personal dealings with him? A. Yes; on the average of twice a week, well, off and on.

Q. Did you know him intimately? A. Very intimately.

Q. You were one of the subscribing witnesses to his last will? A. Yes; I was.

Q. Were you present at the time the will was drawn? A. Yes; on two nights.

Q. You mean it took two nights? A. It took two nights in order to draw the will.

20 Q. You mean, two nights for the writing of it? A. For the writing of it, and going over it.

Q. Who were the persons who were present with Mr. Kutschinski, both in the discussion concerning the drafting of the will, and the actual drafting of the will?

Mr. Kelsey: I object.

The Court: Objection overruled.

30 A. I was the only one.

Q. On both nights? A. On both nights. He asked me to come there purposely.

Q. Purposely for what? A. In regard to the will.

Q. Where did you go? A. At his office. He and I were alone.

Q. Where was that? A. On Hudson Boulevard.

Q. What city? A. Union City.

40 Q. What conversation did you have with Mr. Kutschinski concerning the will?

William E. Hopper—For Complainants—Direct.

Mr. Kelsey: Objected to.

The Court: Objection sustained.

Q. Who wrote the will? A. Mr. Kutschinski.

Q. You were present when he wrote it? A. I was.

Q. Did he say anything to you while writing the will, or immediately prior to the writing of the will, concerning the will?

10

Mr. Kelsey: Objected to.

The Court: Objection sustained.

Q. Was there any conversation between you and Mr. Kutschinski concerning his children?

Mr. Kelsey: Objected to.

20

The Court: Objection sustained.

Q. You say he wrote the will out in handwriting? A. He wrote the will in handwriting.

Q. Entirely? A. As I recall it.

No cross-examination.

Mr. Carey: As solicitor of record, I have nothing further to offer.

Mr. George: That is all I have.

Mr. Simpson: I have nothing.

30

(Complainant rests.)

(Defendants rest.)

(Case closed.)

40

Conclusions.

(Filed October 21, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between MARGARETHA H. KUTSCHINSKI, Complainant. and FRED LUHR et als., Defendants.	}	74-110. On Bill &c. Conclusions.
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20 MESSRS. CAREY & LANE, MAURICE A. SILVER,
 CHARLES E. SIMPSON and WILLIAM GEORGE for
 complainants.

MESSRS. KELSEY & LUDWIG, for defendants Henri-
 etta E. Sheffer et al.

MESSRS. BAUER & RANKER, for defendants Fred
 Luhr et al.

MESSRS. KALISCH & KALISCH, for defendant Samuel
 Kalisch, Jr., guardian.

30

FIELDER, V-C.:

The issue presented by the pleadings calls for construction of the will of Gustav M. Kutschinski, deceased. The will was prepared by the testator himself and is inartistic and ungrammatical in structure and contains many misspelled words. Its pertinent clauses are as follows:

40 First, after my lawful debts are paid, I give, de-
 vise and bequeath to my beloved Wife Margaretha

Conclusions.

Kutschinski nee Meyer all My Estate and Property Real and personal Property Where Soever the Same may be and of Wat Soever kind it May consist of at the time of My dead forever.

Second, but in Case my Wife Margaretha H. Kutschinski gets Married agani then She Shall receive only one third (1 3) from My Estate left forever. 10

Third. And after the decease of My Wife Margaretha H. Kutschinski all My Estate Shall be divided amongst our Children or their respective heirs Share and Share alike * * *.

The first clause standing alone, clearly contains the gift and devise to his wife absolutely and in fee, of the whole of the testator's personal and real estate after the payment of debts. The second clause however, contains a proviso which conditionally limits said bequest and devise; it is that if his wife shall remarry she shall be entitled to but one-third of his estate "forever." It is claimed by the defendants, or some of them, that the effect of the third clause is to further modify the first and second clauses and to reduce the estate in fee given thereby to an estate for life, otherwise the testator's intention said to be expressed in the third clause, that his children should take the property after his wife's death, will be defeated. Of course, the testator's intent should be gathered from the whole will, but in ascertaining such intent the application of well-established rules of construction must be considered. It is a rule that all words contained in a will must be given effect so far as possible; that doubts must be resolved in favor of the testator having said what he meant and that when words are plain and clear when read in their ordinary sense they must control. To concede the defendants' claim, the word "forever" as contained 20 30 40

Conclusions.

in the first and second clauses must be rejected and we must say that the testator did not mean "forever" in either case, but intended to say "for life." The word "forever" has a plain, legal meaning and as used by the testator it imports a fee and there is nothing in the will except as contained in the third clause, to indicate that the testator did not use it in its common and general sense. The third clause is in irreconcilable conflict with the first and second clauses, for having by the first and second clauses given to his wife an estate in fee in the whole if she remained unmarried, or in one-third of it in case she remarried, the testator proceeded to make other and further disposition of that which he had previously disposed of. What he had in mind can only be conjectured, but instead of resorting to surmises I am guided by decisions of our courts which settle authoritatively that where a testator has manifested an intent to vest an absolute fee simple in the first taker, a subsequent limitation thereof is void as inconsistent with the rights of the first taker.

- Den v. Gifford, 9 N. J. L., 46.
 Annin v. Vandoren, 14 N. J. Eq., 135.
 McClellan v. Larchar, 45 N. J. Eq., 17.
 Rodenfels v. Schumann, 45 N. J. Eq., 383.
 Dodson v. Sevars, 52 N. J. Eq., 611; aff'd
 53 N. J. Eq., 347.
 Tuerk v. Schueler, 71 N. J. L., 331.
 McCloskey v. Thorpe, 74 N. J. Eq., 413.
 Bennett v. Home &c., 79 N. J. Eq., 76.
 Hueton v. Boyd, 84 N. J. Eq., 107.
 Henderson v. McGowan, 91 N. J. Eq., 359.
 Brohm v. Berner, 95 N. J. L., 85.
 Galante v. Silverstein, 98 N. J. Eq., 52.

Conclusions.

I must therefore construe the will before me to mean that the complainant, Margaretha H. Kutschinski, shall be entitled to possession, as owner in fee, of all the estate, personal and real, of which the testator died seized and possessed, subject to being divested in the event of her remarriage of two-thirds thereof. The testator died more than three years ago, said complainant has not remarried and is now nearly seventy-three years of age. As to what shall happen to the two-thirds of the estate in the event of her remarriage, the will is silent and I shall not attempt to indicate its disposition because the event may never happen. 10

The defendants' counterclaim for an accounting by the complainant and for the appointment of a receiver will be dismissed and the temporary receiver will be discharged and directed to file his report and account forthwith and to pay over to the complainant, Margaretha H. Kutschinski, such balance as the court may determine remains in his hands after such allowances as the court may make therefrom. 20

30

40

Final Decree.

(Filed November 4, 1930.)

IN CHANCERY OF NEW JERSEY.

	Between	}	
10	MARGARETHA H. KUTSCHINSKI		
	et als.,		
	Complainants,		74-110
	and		On Bill, &c.
	FRED LUHR et als.,		
	Defendants.		

20 This matter coming on regularly to be heard in the presence of Robert Carey, Esq., of Carey & Lane, Charles E. S. Simpson, Esq., and William George, Esq., of counsel with the complainant and Clarence Kelsey, Esq., of Kelsey & Ludwig, of counsel with the defendants Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, and Joseph Ranker, Esq., of Bauer & Ranker, of counsel with the defendants Fred Luhr individually and as

30 executor of the Last Will and Testament of Gustav M. Kutschinski, deceased, and Emilie Luhr, and Maurice A. Silver, Esq., of counsel with the defendants Frederick W. Kutschinski and May L. Kutschinski, and Samuel Kalisch, Esq., guardian ad litem for Gustav A. Kutschinski on Bill of Complaint, Answer and Counterclaim, and Replication, and it appearing that the Last Will and Testament of Gustav M. Kutschinski was duly admitted to

40 probate by the Surrogate of the County of Hudson on the 8th day of July, 1927, and that letters testamentary were duly issued thereon to Margaretha

Final Decree.

H. Kutschinski and Fred Luhr as executors of the Last Will and Testament of the said Gustav M. Kutschinski, and the Bill of Complaint herein praying that this Court construe the said Last Will and Testament of the said Gustav M. Kutschinski, deceased, and declare and determine the rights and interests of the parties to this suit; and the Court having examined the pleadings, and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that, by the true construction of the said Last Will and Testament, that the complainant Margaretha H. Kutschinski is entitled to possession, as owner in fee, of all the estate, personal and real, of which the said testator died seized and possessed, subject to being divested in the event of her re-marriage of two-thirds thereof;

It is thereupon on this third day of November, A. D. 1930, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on motion of Carey & Lane, solicitors for the complainant, ORDERED, ADJUDGED AND DECREED, that the complainant Margaretha H. Kutschinski is seized and possessed, in fee simple, of all the estate, both real and personal, of which the testator, Gustav M. Kutschinski, died seized and possessed of, subject to being divested of two-thirds thereof in the event of her re-marriage;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the counterclaim of the defendants for an accounting by the complainant Margaretha H. Kutschinski of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, and for the appointment of a

Final Decree.

receiver of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, be and the same is hereby dismissed.

10. AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that William J. Stack, the temporary receiver of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, be and he is hereby directed to file his report and account forthwith and to pay over to the complainant Margaretha H. Kutschinski the balance of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, remaining in his hands after such allowances as may be made therefrom.

And it is further ordered that a counsel fee of \$2000.00 be allowed to Carey & Lane, solicitors for and of counsel with the complainant, and a counsel fee of \$500.00, be allowed to Charles E. S. Siapson, of counsel with the complainant, and a counsel fee of \$500.00 be allowed to William George of counsel with the complainant, and a counsel fee of \$100.00 be allowed to Samuel Kalisch, Jr., guardian of Gustav A. Kutschinski, defendant, and a counsel fee of \$250.00 be allowed Bauer & Ranker, solicitors for and of counsel with the defendants Fred Luhr, individually and as executor of the last Will and Testament of Gustav M. Kutschinski, deceased, et al, defendants, and a counsel fee of \$250.00 be allowed to Kelsey & Ludwig, solicitors for and of counsel with the defendants, Henrietta E. Sheffer, et al, and a counsel fee of \$150.00, be allowed to Maurice A. Silver, Solicitor for and of counsel with Frederick W. Kutschinski, et al, defendants, said counsel fees to be paid by the complainant, Margaretha H. Kutschinski, and the defendant, Fred Luhr, executrix and executor of the last Will and Testament of Gustav M. Kutschinski, deceased, out of the estate in their hands and that the said counsel fees shall be a lien upon the real estate of which the said Gustav M. Kutschinski died seized until paid.

Notice of Appeal.

(Filed November 13, 1930.)

IN CHANCERY OF NEW JERSEY.

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Between

MARGARETHA H. KUTSCHINSKI,
Complainant,

and

FRED LUHR, individually and as executor of the last will and testament of Gustav M. Kutschinski, deceased, EMILIE LUHR, HENRIETTA E. SHEFFER, NORMAN SHEFFER, ALVINA A. NEUMANN, EDWARD NEUMANN, MARGARETHA L. GREWE, ERNEST GREWE, JR., WALTER H. KUTSCHINSKI, FREDERICK W. KUTSCHINSKI, MAY L. KUTSCHINSKI, and GUSTAV A. KUTSCHINSKI,

Defendants.

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On Bill, etc.

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The defendants Henrietta E. Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, hereby appeal from the final decree made in the above-entitled cause on November 3, 1930, by the Chancellor on the advice of Vice-Chancellor Fielder, and from the whole and every part thereof,

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Notice of Appeal.

to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated November 5, 1930.

10

KELSEY & LUDWIG,
Solicitors for and of Counsel with
Defendants Henrietta E. Sheffer,
Alvina A. Neumann, Edward Neu-
mann, Margaretha L. Grewe, Er-
nest Grewe, Jr., and Walter H.
Kutschinski.

20

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

CLARENCE KELSEY,
Of Counsel with Defendants Hen-
rietta E. Sheffer, Alvina A. Neu-
mann, Edward Neumann, Mar-
garetha L. Grewe, Ernest Grewe,
Jr., and Walter H. Kutschinski.

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(Service acknowledged on November 7, 1930.)

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Petition of Appeal.

(Filed December 2, 1930.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

<p style="text-align: center;">Between</p> <p>MARGARETHA H. KUTSCHINSKI, Complainant below, Appellee,</p> <p style="text-align: center;">and</p> <p>FRED LUHR, individually and as executor of the last will and testament of Gustav M. Kut- schinski, deceased; EMILIE LUHR, FREDERICK W. KUT- SCHINSKI, MAY L. KUTSCHIN- SKI and GUSTAV A. KUT- SCHINSKI,</p> <p style="text-align: center;">Defendants below, Appellees,</p> <p style="text-align: center;">and</p> <p>HENRIETTA E. SHEFFER, ALVINA A. NEUMANN, EDWARD NEU- MANN, MARGARETHA L. GREWE, ERNEST GREWE, JR., and WAL- TER H. KUTSCHINSKI,</p> <p style="text-align: center;">Defendants below, Appellants.</p>	<p>10</p>
<p style="text-align: center;">On Appeal from Court of Chancery.</p>	<p>20</p>
<p style="text-align: center;">Appellants.</p>	<p>30</p>

*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

The petition of Henrietta E. Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski, the appellants in the above entitled cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert

Petition of Appeal.

Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Fielder, bearing date the 3rd day of November, A. D. 1930, in a certain cause in said Court of Chancery wherein the said Margaretha H. Kutschinski was complainant and the said Fred Luhr, individually and as executor of the last will and testament of Gustav M. Kutschinski, deceased, Emilie Luhr, Frederick W. Kutschinski, May L. Kutschinski, Gustav A. Kutschinski, Henrietta E. Sheffer, Norman Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski were defendants, in this respect, to wit, that the said decree recites that by the true construction of the last will and testament of Gustav M. Kutschinski, deceased, the complainant Margaretha H. Kutschinski was entitled to possession, as owner in fee, of all the estate real and personal, of which the said testator died seized and possessed, subject to being divested in the event of her remarriage of two-thirds thereof; and that said decree adjudges that the complainant Margaretha H. Kutschinski is seized and possessed, in fee simple, of all the estate, both real and personal, of which the testator Gustav M. Kutschinski died seized and possessed, subject to being divested of two-thirds thereof in the event of her remarriage, and that the counterclaim of the defendants for an accounting by the complainant Margaretha H. Kutschinski of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, and for the appointment of a receiver of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, be and thereby was dismissed; and that said decree further

Petition of Appeal.

adjudges that William J. Stack, the temporary receiver of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, be and thereby was directed to file his report and account forthwith and to pay over to the complainant Margaretha H. Kutschinski the balance of the rents, issues, profits and income of the real and personal estate of Gustav M. Kutschinski, deceased, remaining in his hands after such allowances as may be made therefrom; and that said decree further adjudges that the following counsel fees be and were awarded to the counsel who represented the parties in said suit in the Court of Chancery, to wit, \$2,000.00 to Carey & Lane, \$500.00 to Charles E. S. Simpson, \$500.00 to William George, \$100.00 to Samuel Kalisch, Jr., \$250.00 to Bauer & Ranker, \$250.00 to Kelsey & Ludwig and \$150.00 to Maurice A. Silver, and that said counsel fees be paid by the complainant Margaretha H. Kutschinski and the defendant Fred Luhr, executrix and executor of the last will and testament of Gustav M. Kutschinski, deceased, out of the estate in their hands, and that said counsel fees shall be a lien upon the real estate of which the said Gustav M. Kutschinski died seized until paid.

And your petitioners appeal from the said decree of the Chancellor which decrees as aforesaid and from the whole and every part thereof, upon the ground that the same is erroneous in that the said Chancellor should have adjudged, in and by said decrees, that under the terms of said will and the true construction to be placed thereon and the evidence, the real and personal estate of the said testator Gustav M. Kutschinski, deceased, is devised and bequeathed to his widow, the said

Petition of Appeal.

10 Margaretha H. Kutschinski, for life provided she does not remarry, and in the event of her remarriage she is to have only the income from a one-third part of the said real and personal estate from the time of such remarriage until her death, and upon her death all the corpus of the estate is to go to and be divided amongst the children of the testator or their respective heirs, share and share alike, with a deduction from such shares of any advancements made by the testator in his lifetime, and the said decree should have further adjudged that the said receiver be made a permanent receiver until such time as the unpaid taxes assessed against the lands of which the testator died seized and the unpaid interest on the mortgages covering those lands had been paid and until the structures standing on said lands had been put in a reasonably good condition of repair, and should have further adjudged that the life tenant, Margaretha H. Kutschinski, account to the appellants herein and to the other heirs-at-law of said testator for the waste and depreciation of said lands while in her possession, all as prayed for in the counterclaim filed by said appellants in said suit; and that 20 the said decree should have further adjudged that the bill of complaint in said suit in the Court of Chancery be dismissed and that a counsel fee of \$2,000.00 be awarded and paid out of said estate to the counsel of your petitioners.

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Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this court shall seem proper.

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KELSEY & LUDWIG,
Solicitors for and of Counsel with
Appellants.

(Service acknowledged December 1, 1930.)

NEW JERSEY

Court of Errors and Appeals

Between

MARGARETHA H. KUTSCHINSKI,
Complainant below,
Appellee,

and

FRED LUHR, individually and as Executor of
the Last Will and Testament of Gustav
M. Kutschinski, deceased, EMILIE LUHR,
FREDERICK W. KUTSCHINSKI, MAY L.
KUTSCHINSKI and GUSTAV A. KUTSCHIN-
SKI,

Defendants below,
Appellees,

and

HENRIETTA E. SHEFFER, ALVINA A. NEU-
MANN, EDWARD NEUMANN, MARGARETHA
L. GREWE, ERNEST GREWE, JR., and
WALTER H. KUTSCHINSKI,

Defendants below,
Appellants.

On Bill, etc.
On Appeal
from Court
of Chancery.

BRIEF OF APPELLANTS.

Statement of the Case.

This case comes up on appeal from a final decree of the Court of Chancery holding and decreeing that by the true construction of the last will and testament of Gustav M. Kutschinski, deceased, his

widow is seized and possessed in fee simple of all the estate, both real and personal, whereof he died seized, subject to being divested of two-thirds thereof in the event of her remarriage; that the counterclaim filed by the defendants for an accounting by the widow and for the appointment of a receiver of rents be dismissed; that the receiver pay over to the widow the balance of rents remaining in his hands; and that the counsel of the respective parties to the suit be paid by the executors out of the estate in their hands the counsel fees awarded by the decree (Case, pp. 82-84).

The bill of complaint was filed in June, 1929, by Margaretha H. Kutschinski, widow of Gustav M. Kutschinski, deceased, and by her son, Frederick W. Kutschinski, and the latter's wife, May L. Kutschinski, to obtain a construction of the last will and testament of said Gustav and a decree declaring and determining the rights and interests of the complainants and defendants thereunder (Case, pp. 1-5).

The defendants are Fred Luhr, one of the executors of the estate, and the remaining six children of Gustav and Margaretha, viz., Emilie Luhr, Henrietta E. Sheffer, Alvina Neumann, Margaretha L. Grewe, Walter H. Kutschinski and Gustav A. Kutschinski and the husbands of the four daughters, viz., Fred Luhr, Norman Sheffer, Edward Neumann and Ernest Grewe, Jr.

The defendant, Gustav A. Kutschinski, is an inmate of an asylum in the State of Wisconsin, and filed an answer through his guardian ad litem, Samuel Kalisch, Jr., averring that they are unable to determine the proper construction of the will and the interest said Gustav A. Kutschinski is entitled to in the said estate (Case, p. 18½).

The defendants, Fred Luhr, individually and as executor, and Emilie Luhr, his wife, filed their answer, setting up that the widow and the other complainants had always construed the will as giving the widow only a life estate (Case, p. 17).

The defendants below and appellants here, Henrietta E. Sheffer, Alvina A. Neumann, Edward Neumann, Margaretha L. Grewe, Ernest Grewe, Jr., and Walter H. Kutschinski filed an answer setting up, *inter alia*, that by the terms and true construction of the will in question the real and personal estate is devised and bequeathed to the widow Margaretha H. Kutschinski for life, in the event she does not remarry, and in the event of her remarriage, she is to have only the income from one-third part of the estate from the time of such remarriage until her death, and that from and after her death, the estate is to be divided amongst the children of the testator, or their respective heirs, share and share alike, with a deduction from such shares of any advancements in the lifetime of the testator (Case, pp. 8, 9); and in addition to their answer they filed a counterclaim against their co-defendants and the complainants, alleging the collection by the widow of all the rents of the lands and her neglect to pay the municipal liens thereon and interest on the mortgages and her failure to keep the buildings on the lands in repair and insured against loss or damage by fire (Case, pp. 9-16).

The prayer of the counterclaim is that the widow account for the waste and depreciation of the lands and that a receiver be appointed to collect the rents thereof, make the necessary repairs, pay the municipal liens thereon and the interest on mortgages and keep the buildings insured (Case, pp. 15, 16).

The complainants, Frederick W. Kutschinski and May L. Kutschinski, his wife, took an order on

March 10, 1930, that they be substituted as parties defendant instead of parties complainant and that they be allowed twenty days in which to file an answer to the bill of complaint and a replication to the counterclaim (Case, p. 18), and their substituted solicitor served on the solicitors of the defendants a copy of their answer and counterclaim (Case, p. 19), and the order, answer and counterclaim were printed in the state of the case herein on the supposition that they had been filed, but a later examination of the original file showed that neither the order nor the answer and counterclaim were ever filed.

By permission of the Court, the three original complainants filed a joint replication to the answer and answer to the counterclaim of the defendants, on September 18, 1930, and the defendants joined issue thereon (Case, pp. 24-33).

On June 17, 1930, an order was made in accordance with the prayer of the counterclaim appointing William J. Stack receiver of the rents, and he is still acting as such.

Grounds of Appeal.

This appeal is from the final decree made on November 3, 1930, and from the whole and every part thereof (Case, p. 85).

The grounds of appeal are set forth in the petition of appeal printed in the record on pages 87 to 90. Briefly they are that the said decree is erroneous in adjudging and decreeing that by the true construction of the said will the complainant, Margaretha H. Kutschinski, is seized and possessed in fee simple of all the estate of which Gustav M. Kutschinski, deceased, died seized and possessed

subject to being divested of two-thirds thereof in the event of her remarriage, and in dismissing the counterclaim of the defendants-appellants, and in directing the receiver to file his report and account and pay over to the complainant, Margaretha H. Kutschinski, the rents remaining in his hands, and in the awarding of counsel fees; and that the Chancellor should have adjudged, in and by the said decree, that under the terms of said will and the true construction to be placed thereon and the evidence, the real and personal estate of the said testator is devised and bequeathed to his widow for life provided she does not remarry and in the event of her remarriage she is to have only the income from a one-third part of said estate from the time of such remarriage until her death and that upon her death all the corpus of the estate is to go to and be divided amongst the children of the testator or their respective heirs *per stirpes*, with a deduction from such shares of any advancements made by said testator in his lifetime to said children; and that the Chancellor should have further adjudged that the said receiver be made a permanent receiver until such time as the unpaid municipal liens assessed against the lands of which the testator died seized and the unpaid interest on the mortgages covering those lands had been paid and until the structures standing on said lands had been put in a reasonably good condition of repair and that the said Margaretha H. Kutschinski account to the appellants herein and to the other heirs-at-law of said testator for the waste and depreciation of said lands while in her possession, as prayed for in the said counterclaim filed by the appellants; and that said decree should have adjudged that a counsel fee suitable in amount be awarded and paid out of the said estate to the counsel of the defendants-appellants.

The conclusions of Vice-Chancellor Fielder upon which the said final decree was made are found on pages 78 to 81 of the printed book and the final decree on pages 82 to 84.

BRIEF OF THE ARGUMENT.

The Facts.

Gustav M. Kutschinski died on June 22, 1927, at Union City, Hudson County, leaving his widow, Margaretha H. Kutschinski and seven children him surviving, and a last will and testament. All the children are over twenty-one years of age and five are married. One of the sons, Gustav A., is insane and in an asylum in Wisconsin (Case, pp. 35, 36).

The will in question (Case, pp. 5-7, 35; Exhibit A) reads as follows, viz.:

“IN THE NAME OF GOD, AMEN.

I, Gustav Martin Kutschinski, of the City of Union City in the County of Hudson, State of New Jersey, being of sound and disposing mind and memory, and considering the uncertainty of this life, do make publish and declare this to be my last will and Testament as follows, hereby revoking all other and former wills by me at any time made.

First, after my lawful debts are paid, I give, devise and bequeath to My beloved Wife Margaretha Kutschinski nee Meyer all My Estate and Property Real and personal Property Where Soever the Same May be and of Wat Soever kind it May consist of at the time of My dead forever.

Second, but in Case My Wife Margaretha H. Kutschinski gets Marriad agani then She

Shall receive only one third ($\frac{1}{3}$) from My Estate left forever.

Third And After the decease of My Wife Margaretha H. Kutschinski all my Estate Shall be divided amongst our Childern or their respective heirs Share and Share alike the following Names of our childern

- 1 daughter Emilie A. Kutchinski Now wife of Fred Luhrs
- 2 Son Gustav Adolph Kutschinski — Missing from Home since 1914
- 3 daughter Henrietta E. Kutschinski Now wife of Narman Sheffer
- 4 Son Frederick W. Kutschinski
- 5 daughter Alwine Kutschinski now wife of Edward Newman
- 6 daughter Margaretha L. Kutschinski Now Wife of Ernst Grewe Jr
- 7 Son Walter H. Kutschinski

Fourth but this Childern Whom receiving all readdy from their pearants by their Fathers life time a part for help from their Share each of them Shall receive So much less from their Share and the amount each one did receive by their Fathers life time Shall be Estimated and deecided by the Executors.

Fifth And I order and direct in Case any one of My heirs is not Satisfied with My Will or Make a contest against My Will Shall loose his or their share in My Estate herein Stipulated and Shall receive Notting except that part Which the have received all readdy by their Fathers life time and this last Share or part of last Share if any one Should loose by being Not satisfied or contesting My Will this Share or part of the Share shall be divided amongst the rest of

my heirs herein Stipulated Likewise, I make, constitute and appoint My Wife Margaretha H. Kutschinski and Fred Luhrs to be my executors of this, my last will and Testament and that My Said Executors be not required to give Bonds for the performances of their Said duties.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, the 6th day of July, in the year of our Lord one thousand Nine hundred and Twenty Five 1925

GUSTAV M. KUTSCHINSKI (SEAL)"

The will was written by the testator himself (Case, pp. 76, 77), and he used a printed form and filled it out (Case, p. 60). Probate thereof was granted and letters testamentary thereon were issued to the two executors on July 8, 1927, by the Surrogate of Hudson County (Case, p. 35).

The value of the personal estate left by the testator was \$30,502.07 (Case, p. 75), and the assessed value of the real estate \$98,150 (case, pp. 40, 42). The real estate consisted of about ten improved parcels (Case, pp. 39, 40), covered by mortgage liens amounting to about \$35,000 (Case, p. 40), and some of the mortgages are in process of foreclosure (Case, p. 41). The gross rentals of the real estate at the testator's death were \$1,100 a month (Case, p. 41), and in the three years succeeding his death the total gross rents collected by the widow amounted to around \$35,000 (case, pp. 62, 41, 56).

On the final hearing before Vice-Chancellor Fielder, the complainant endeavored to prove that the income to be derived from the estate was so meagre that she could not obtain a living from it and that the testator therefore must have intended that

she should have the entire estate (Case, p. 41). She was not successful in this, for from the testimony thus elicited it clearly appears that she has had, and will continue to have, the use and occupation of the former home of the testator rent free (Case, p. 72), and that the testator in his lifetime was able to live and support his family on the income derived from his estate (Case, p. 44), also that all their children are of full age and she is not obliged to support any of them, and that she paid \$75 per week besides extra compensation to her son Frederick to manage the estate after the death of the testator (Case, pp. 57, 58, 48, 70, 71). The complainant had the burden of proof, and it was shown that books were kept by her wherein the rents and interest received by her from the estate and disbursements therefrom had been set down, but these books were not produced (Case, pp. 45, 46). No explicit evidence was offered showing how the \$35,000 of rents collected by the widow were expended, and she admitted that none of the taxes assessed against the lands after the testator's death had been paid (Case, p. 51).

The Law and Argument.

Among the rules adopted by our Courts in the construction of Wills are those which provide that heirs are not to be disinherited unless the intent to do so is very clearly expressed; that force should be given to the intent of the testator, however rudely expressed, in preference to adherence to ancient technical rules; and that in determining the intent of the testator the court must look at the entire instrument and compare all of its clauses and

directions in order to arrive at its general plan and purpose, and that effect should be given to every word and every part thereof.

It is our contention that under the will here in question and in the absence therefrom of a power of disposal in the widow, the testator bequeathed and devised his estate to her for life provided she did not remarry, and that in the event of her remarriage she is to have the income from one-third part thereof from the time of her remarriage until her decease, and upon her death *all* the corpus of the estate, with the income that has accumulated from the two-thirds part, is to go to and be divided amongst the seven children of the testator or their respective heirs, with a deduction from such shares of any advancements made by the testator in his life time, and that we are warranted in this construction; first, from the sound legal construction of the whole instrument, and second, from the manifest intent of the testator.

The will in question is much like that of Mathias W. Myers, which was construed by Vice-Chancellor Leaming in *Myers v. Moorestown Trust Co.* (not officially reported), 7 N. J. Advance Reports, Pamph. 16. p. 561; 145 Atl. Rep. 540. Under the Myers will, the testator gave all his estate to his wife, provided, however, that in case she should remarry it should be so divided that she would receive a one-third part thereof and the testator's son the remaining two-thirds, and after the death of the widow the whole estate should descend to the son.

Vice-Chancellor Leaming, in deciding the Myers case, and holding that the widow took only a life estate, said:

“Where the devise in the first instance is in general terms without defining or limit-

ing any specific estate, a life estate results by implication in the absence of other controlling circumstances. *Downey v. Borden*, 36 N. J. Law 460; *Groves v. Cox*, 40 N. J. Law 40, 43.

The statutory modification of this rule of construction by section 36 of our statute of wills (4 Comp. Stat. p. 5873), which statute declares that a fee may result from a gift of that nature, *extends only to instances in which no expressions are contained in the will whereby it shall appear that such devise was intended to convey only an estate for life, and no devise over is made after the death of the first devisee.*

An exception to this general rule or construction is to be found in cases in which such a devisee is given a power of disposal without restriction as to the mode of execution, and also in cases in which a charge is made upon the person of the devisee or on the quantum of the interest so devised. *Downey v. Borden*, *supra*; *Tuerk v. Schueler*, 71 N. J. Law, 331; *Groves v. Fox*, *supra*, *Brooks v. Kip*, 54 N. J. Eq. 462. But no such power of disposal is conferred or charge created by the devise here in question.

It follows that the widow enjoys a life estate only. The same rules of construction obtain whether the gifts are of real estate or personal property. *Gaston v. Ford*, 99 N. J. Eq. 592."

The statute enacted in the year 1784 to which Vice-Chancellor Leaming referred in his opinion in the *Myers* case (Vol. 4 Comp. Stat., p. 5873, Sec. 36), reads as follows, viz:

"Devises of lands in which the word 'heirs and assigns' are omitted; construction; fee conveyed—Sec. 1. That from and after the publication of this act, all devises made of land or other real estate, within this state, in which the words, heirs and assigns, or,

heirs and assigns forever, are omitted, and no expressions are contained in such will and testament, whereby it shall appear that such devise was intended to convey only an estate for life, and no further devise thereof being made of the devised premises, after the decease of the devisee, to whom the same shall be given; all such devises shall be taken and understood to be the intention of the testator, thereby to grant and devise an absolute estate in the same, and shall be construed, deemed and adjudged in all courts of law and equity, in this state, to convey an estate in fee simple to the devisee, for all such devised premises, in as full a manner as if the same had been given or devised to such devisee, and to his heirs and assigns forever; any law, usage or custom to the contrary notwithstanding (Rev. 1877, p. 300)."

The words "heirs and assigns" are omitted from the will in the present case as they were from the will in the *Myers* case; and the statute does not serve to make the devise in the present case one in fee in the widow or the bequest an absolute one any more so than it did in the *Myers* case, notwithstanding the use of the words "all my estate" in the first clause and the word "forever" in the first and second clauses, for the reason that there are expressions contained in this will, as there were in that of Myers, whereby it appears that the devise and bequest were intended to convey only an estate for life, and there is also contained therein a further devise and bequest of the estate of the testator to his children after the remarriage or death of the widow; and the statute provides that where such expression or further devise appears in the will an estate for life only and not one in fee simple passes to the widow.

If the will to be considered in the instant case had been executed prior to the passage of the statute of 1784 and it had contained no limitations over to the children, the devise to the widow, in the absence of words of inheritance or perpetuity, would not have carried a fee simple estate.

Myers v. Moorestown Trust Co. (*supra*).

Hensler v. Seufert, 52 N. J. Eq. 754 (at p. 755).

Galante v. Silverstein, 98 N. J. Eq. 52 (at p. 54).

Adams v. Ross, 30 N. J. L. 505.

And that statute provides, in effect, as we have shown, that where, as in the instant case, it appears from the will that *the devise was intended to convey only an estate for life or there is a further devise made therein of the devised premises*, then it shall not be understood to be the intention of the testator thereby to grant an absolute estate in the lands.

If it can be successfully maintained, under the decision in *Galante v. Silverstein*, 98 N. J. Eq. 52, and the cases therein cited, that a fee simple was devised to Mrs. Kutschinski because *all* the testator's estate is given to her in the first instance, then there was a similar estate given to the wife in the case of *Myers v. Moorestown Trust Co.*, case; and yet, it was there held that the widow took a life estate only.

In *Buck v. Beckman*, 102 N. J. Eq. 94, where a will much like the Kutschinski will was construed by Vice-Chancellor Berry, he said (at p. 98) :

“As I read this will, it discloses both an intent to convey a life estate and contains a devise over upon the death of the first taker.”

The word "forever" here made use of by the testator in the devise and bequest to the widow does not serve to enlarge her life estate. The word "forever" is not a word of inheritance, and a human being cannot hold property forever.

In *Sheafe v. Cushing*, 17 N. H. 511, it was held that a devise to a wife "to have and to hold forever and during her life," gave the wife a life estate, the Court saying that the subsequent part of the sentence shows that he meant by "forever"—that is, during her life; "a very limited forever, certainly, but as large a forever as she could have in which to hold any property."

In *Morris v. LeBel*, 71 N. J. Eq. 43, Chancellor Magie said (at p. 46):

"Where a devise of the same land is expressly made, to take effect after the death of the first devisee, it is impossible to doubt that the intent of the testator was to make the interest of the first devisee a mere life estate";

and he held further (at p. 43):

"The act 'to pass estates in fee by certain devisee in wills and testaments and to limit estates in tail,' passed August 27th, 1784 (3 Gen. Stat., p. 3763), was not designed to prevent a testator from devising an estate for life in lands, either by express words or by necessary implication, unless he also made a further devise of such lands after the decease of the devisee for life. The legislative intent was to compel the construction of devises which omitted the words 'heirs and assigns' as passing an estate in fee except in two cases—first, where the will contained expressions from which it appeared that the devise was intended only to convey an estate

for life; and second, when testator made no further devise after the death of the first devisee. Although the act connects the description of these two classes of cases by the conjunction 'and,' the plain intent requires 'and' to be read as 'or,' and the statutory construction cannot be made if either case appears."

In *West Side Trust Co. v. Guiliano*, 106 N. J. Eq. 475, and Vol. 8, N. J. Advance Reports, Pamphlet 32, page 475 (decided after his determination of the *Galante v. Silverstein* case), Vice-Chancellor Backes held:

"A devise of lands or bequest of chattels, by words which clearly would give the absolute estate, will be construed into a devise or bequest for life only, if the will contains words giving it to another upon the death of the first taker."

In *Feit v. Richards*, 64 N. J. Eq. 16, a devise to a son was without words of perpetuity or inheritance and it was held that under the statute of 1784 he took an estate in fee simple in the lands devised, *unless the will disclosed an intent to convey only an estate for life, or contained a devise over upon his death*, and that no such intent appeared.

In the case at bar the will contains both the intent to convey only a life estate and a devise over after the death of the widow.

The case of *Galante v. Silverstein* (*supra*), is easily distinguishable from the present. In the first place, the devise in that case was of all the testator's estate to his wife "to have and to hold the same to her executors, administrators or assigns forever," followed by a gift after the death of the wife of the residue and remainder of the estate to the testator's surviving children, while in the

instant case the devise and bequest is of all the estate to the testator's wife forever, but in case of her remarriage only one-third of the estate left forever, and a gift over of *all* the estate, after the death of the wife, to their children or their respective heirs. Vice-Chancellor Backes, who decided the *Galante v. Silverstein* case, held (at p. 53): "The devise over to the testator's children (of the residue) was probably intended that if at the wife's death anything remains, it should go to the children," whereas in the instant case no mention is made of a residue or remainder but the direction is that after the death of the wife *all* the estate shall be divided amongst the children; and in the *Myers v. Moorestown Trust Co.* case the direction contained in the will was that after the death of the testator's wife the *whole* of his estate should descend to his son.

In the *Galante v. Silverstein* case, the decision, as we read it, holds that where *all* of an estate is devised in the first instance, it carried an estate in fee simple and the statute of 1784 is not applicable, even though no words of inheritance are used and even though there be, to use the words of the statute, "A further devise made of the devised premises after the decease of the devisee to whom the same shall be given"; except this, *that such an estate in fee will not pass if an intention to pass a less estate appears by construction or operation of law.* The Vice-Chancellor held also, in effect (at p. 53), that the words "residue and remainder," in the third clause, meant anything that remained after the wife's death, with a resulting right of disposal in her.

Now the decision of Vice-Chancellor Leaming in the *Myers v. Moorestown Trust Co.* case seems to be diametrically opposite that in the *Galante v.*

Silverstein case, for there also the devise was of all the testator's property to his wife, in the first instance, with a gift over upon her death, as in the *Galante v. Silverstein* case, and which under the *Galante v. Silverstein* case was held to be a fee simple, and Vice-Chancellor Leaming decided, as we have shown, that the statute of 1784 was applicable and that in such a case a fee could result from a gift of that nature only in instances in which no expression is contained in the will whereby it shall appear that such devise was intended to convey only an estate for life or no devise over is made after the death of the first devisee.

We think the force of the decision in *Galante v. Silverstein* has been greatly lessened by Vice-Chancellor Backes himself, in his determination of the later case of *West Side Trust Co. v. Giuliano*, 106 N. J. Eq. 475, and Vol 8, N. J. Advance Rep., Pamph. 32, p. 475, where there was a devise of all the remainder of the testator's property to his nephew *and his heirs and assigns forever* with further remainder over to the issue of said nephew, and, holding that the nephew took only a life estate, the Vice-Chancellor referred in his opinion to his earlier decision in the *Galante v. Silverstein* case and to the case of *Den v. Gifford* and said that in each of those cases there was nothing in any other part of the will which in any way modified or limited the estate given to the first taker. We quote parts of his opinion:

"The nephew stakes his claim on the absolute disposition of the estate to him and his heirs by the tenth paragraph and the rule of construction, that once having given the residue to him unconditionally, the testator had nothing left to dispose of and that the gift over is void, as in *Den v. Gifford*, 9 N. J.

Law 46, and *Galante v. Silverstein*, 98 N. J. Eq. 52. In each of these cases of consecutive absolute gifts of the same estate, and where the second gift was held to be null, it will be observed that there was nothing in any other part of the will which in any way modified or limited the estate given to the first taker. That feature distinguishes the two cases from the one at bar.

In the will under consideration the testator, after giving to the nephew what otherwise would be an absolute estate, cut it down and put an end to it at the nephew's death by giving the residue to his issue and over to the nieces upon failure of issue. The gift in remainder, though it be in a different paragraph, is as pregnant of meaning as the language of the absolute gift to the nephew and cannot be ignored or discarded because it is in conflict with the initial gift. Apparent conflict in provision must be reconciled so that the whole may stand and all parts of the will be given their full significance. The applicable rule of construction is declared in *Jones, Executor, v. Stites*, 19 N. J. Eq. 324, where the chancellor, in addressing his remarks to the language of a will substantially like the one under consideration, said: "The terms on which this residue is given to the two daughters, would give them the absolute estate, were it not for the subsequent limitations; they are adapted to that purpose, and nothing but a clear expression of a different intent would control them. But it is well settled that a devise of lands or bequest of chattels, by words which clearly would give the absolute estate, will be construed into a devise or bequest for life only, if the will contains words giving it to another upon the death of the first taker." Vice-Chancellor Grey adopted the ruling in *Peirsol v. Roop*, 56 N. J. Eq. 739."

In *Jones' Executors v. Stites*, 19 N. J. Eq. 324, it was held :

“A devise of lands or bequests of chattels, by words which clearly would give the absolute estate, will be construed into a devise or bequest for life only, if the will contains words giving it to another upon the death of the first taker.”

In *Peirsol v. Roop*, 56 N. J. Eq. 739 (citing *Jones' Executors v. Stites*, 19 N. J. Eq. 324, and *Akers' Executors v. Akers*, 23 N. J. Eq. 26), it was held :

“In the case under consideration, though the testator gave the daughters who survived their mother an absolute estate, yet he in express terms provides that the trustees shall invest and care for the fund and pay over the net interest to the daughters for their sole use during their lives. Considering this direction with the subsequent gift of the daughters' shares, upon their death, to their children, I think the construction given by Chancellor Zabriskie in *Jones' Executors v. Stites* should control the present case, and that the bequest to the daughters should be held to be a life estate, the custody and investment of the fund to remain in the hands of the trustee, who should pay to each daughter the interest on her share during her life, and on her death the principal to her children if she leaves any.”

In *Downey v. Borden*, 36 N. J. L., p. 460, this Court held that :

“There is no devise over of the ultimate fee in the one-third, after the termination of the life estate of the widow in the entire estate, although the other two-thirds are expressly limited over to other persons after her death. Under these circumstances, a devise in fee

of the one-third would be created, by the preceding words of gift, by force of the statute referred to (citing *Den v. Snitcher*, 14 N. J. L. 54). *This effect must be given to the preceding words of devise, unless the generality of the gift is qualified by other expressions in the will, from which it shall appear, affirmatively, that the intention was to give an estate for life only. No such intention can be gathered from the force of this will.*"

But in that case the bequest and devise were to the testator's wife as long as she remained his widow and in event of her remarriage she was to have none of his money, but only the lands, and at her death she was to have one-third of the estate remaining at time of her death *to dispose of as she might see proper*, while in the instant case the generality of the gift of the one-third if the widow remarries is qualified by other expressions of the will; for it is therein provided that after her death *all* the testator's estate is to go to his children.

In *Den v. Crevcling*, 25 N. J. L. 449, the devise was to the daughter of the testator, *to her and her heirs and assigns forever*, with a further provision, however, that when the daughter died, the executor should sell and dispose of the lands and divide same among her children, and it was held that the terms of the devise to the daughter were restricted and qualified by the subsequent provisions of the will, so that she took not an estate in fee but an estate for life only; and that her children were entitled to the beneficial interest in the remainder.

In *Den v. Snitcher*, 14 N. J. L. 53, the devise was to testator's son and if he died without issue, then, at his decease, the lands should be equally divided, etc. Chief Justice Hornblower, writing the opinion for the Supreme Court, said (at pp. 60, 61) :

"The testator has certainly used expressions in his will, sufficient in law, to show that he did not intend to give Samuel an absolute and unconditional fee in the whole of the lands devised to him; for, in the event of his death without issue, and at the time of his death, the testator directs the lands to be equally divided."

In *Brooks v. Kip*, 54 N. J. Eq. 462, it was held (at p. 467) :

"The quantity or duration of the estate which John I. Ackerman took in the realty devised to him by the second and fourth paragraphs of his father's will, is not expressly defined in those paragraphs.

At the common law, such a devise, standing by itself, would give only a life estate. By force of our statute of 1784, the devise, standing by itself * * * would give a fee, *but as the sixth paragraph makes further devise of the property at the death of John, the case is not within the statute.*"

In the case of *Den v. Gifford*, 9 N. J. L. 46, cited in *Galante v. Silverstein*, 98 N. J. Eq. 52, the devise was to the son of the testator and his "heirs forever" and after his decease to the son of the first devise and "his heirs and assigns forever." The will in that case was executed in the year 1768, long prior to the passage of the statute of 1784, and so was construed in accordance with the common law, and the Court said (at pp. 55) :

"The plaintiff claims that by reason of the subsequent words, the devise to Eleozarus and his heirs should be reduced to an estate for his life. *Such an estate would have been created if the words 'and his heirs' had been omitted, and if the intention of the testator had been to create such estate, those words ought to have been omitted.*"

It follows then, that the *Den v. Gifford* case is an authority for the proposition that under the common law a devise of land to A forever and after the decease of A to B forever gave A an estate for his life only.

The contention of the appellees will be, no doubt, that the use by the testator of the words "one-third of my estate *left* forever" in the second clause of his will indicates an intent on his part to give the widow a power of disposition and use of his entire estate and therefore a complete title thereto. It is our contention that he did not make use of those words with any such intention or purpose in view.

It would seem that the case at bar, where the testator provides by the second paragraph of his will that in the event of her remarriage his widow shall receive only one-third from his estate *left* forever, should be distinguished from those reported cases in this State where it has been held that a devise or bequest to a residuary devisee or legatee of what is *left*, or similar word, serves to create a power of disposal and hence an absolute estate in the one to whom the estate had been given for life. The use by the testator of the word "left" in the instant case, cannot have the significance that had been assigned to its use in such other cases; for here, by the third clause of the will in question, the widow is required to keep *all* the corpus of the estate intact so that upon her death it can be divided amongst her children.

In making use of the word "left" in the second clause of this will, the testator, who evidently was illiterate, had in mind the balance of his estate that would be left after the payment of his debts, and because the life estate of the widow would terminate upon her remarriage he meant by the use of the words "one-third of my estate left" a one-

third share of the income to be thereafter derived from the combined corpus of the estate and amount of income then in her hands. He certainly did not intend by the use of those words to give her the power of disposal and use of his entire estate, for by the very clause wherein the word is used he provides that she shall have only a one-third share in the event of her remarriage and, by a later clause, that upon her death *all* his estate shall go to his children.

In *McCloskey v. Thorpe*, 74 N. J. Eq. 413, this Court said (at p. 415) that a testator in making use of the words "whatever it may be at the death of my daughter" did not imply a power of disposition, but may have had in mind an increase or decrease in his estate by investment or accident.

In *Wilson v. Wilson*, 46 N. J. Eq. 321, Chancellor McGill held that the words "whatever it may be at the decease of my said daughter" did not imply a power of disposition in the daughter. He said, *inter alia*:

"The power of disposition or absolute dominion, however, must be given either expressly or by necessary implication. The will must be construed, if possible, so that all parts of it may stand. Hence if the expression depended upon, be susceptible of a fair interpretation, that will permit the limitation over to stand, that interpretation should be given it. * * * By the use of the words 'whatever it may be at the decease of my said daughter,' the testator, then may have had in mind changes wrought by investment."

In *Brohm v. Berner*, 95 N. J. L. 85, Chief Justice Gummere, referring to the case of *Annin v. Van Doren*, reported in 14 N. J. Eq. 135, said that the

words "so much as remains unexpended" *unless qualified by other provisions in a will limiting the power of expenditure*, conferred an absolute and unrestricted power of disposal.

In the instant case of the Kutschinski will, the testator in the third clause of his will directs that after the death of his widow *all* his estate shall be divided amongst their children; and it would be difficult to conceive of words more potent to limit the power in his widow of disposition and expenditure of the corpus of his estate.

The force of the word "all" here used, as showing the intent of the testator to give an estate for life only to his widow, with remainder over of his entire estate to their children, is exemplified in the case of *Bennett v. Association to Provide &c., Home for Friendless*, 79 N. J. Eq. 76, where Vice-Chancellor Stevens (at p. 77) inferred that if the testator in that case had provided that the whole (or all) of the estate instead of only such part as the devisee might see fit to leave was to go over, he would have decided the case in favor of the remainderman.

The word "from" in the second clause of the will is worthy of note. If the testator had intended his widow to have one-third share of the corpus of his estate in the event of her remarrying he would have used the expression "one-third of my estate" instead of "one-third *from* my estate." The word "from" as there used means "income from."

The case of *Tooker v. Tooker*, 71 N. J. Eq. 513, decided by Vice-Chancellor Pitney, strongly favors our contention that the use of the word "left" in the third clause of the will here under consideration does not show an unlimited power of disposition in the widow.

In the *Tooker* case the syllabus reads as follows :

“Testator’s will set apart a sum to be invested and the income paid to his parents during their lives. A subsequent clause directed that all the residue be invested for his wife for her life. Provision was then made for legacies to be paid on her death, ‘the balance of my estate to be invested for the benefit of my father and mother, but, in case they have both died, then all to go to my brother, and at his death what remains to his children—my intention being that after the death of my wife, and my father and mother, that my brother should receive all that remains, and after him his children’—*Held*, that the phrase ‘what remains’ did not show an unlimited power of disposition given to the brother, creating an absolute estate inconsistent with the gift to his children, but the children were entitled to receive, on the death of their father, all that he received.”

This decision of the Vice-Chancellor was considered but not disapproved by this Court in *Brohm v. Berner* (*supra*).

In the case of *Weaver v. Patterson*, 92 N. J. Eq. 170 (decided by Vice-Chancellor Buchanan), it was held :

“Where a will gives the entire estate directly to a tenant expressly for life, and at the death of the life tenant gives ‘the same, or so much as shall remain’ to other beneficiaries, *and there are no other provisions of the will indicating an intention otherwise*, the life tenant takes by implication an unlimited power of disposal of the remainder.”

We also contend that the widow in this case does not, under the second clause of the will, take

an absolute estate in one-third of the property left by the testator or in one-third of the estate left at the time of her remarriage; for the gift of one-third upon her remarriage is cut down by the subsequent devise and bequest over to their children of all the estate upon her death, and is controlled by this latter clause to the same extent that the first clause is controlled thereby. The intent to give her the *income* only of a one-third share clearly appears. The testator knew that if she remarried she would receive support from her second husband and would no longer need all the income to be derived from the estate and that one-third of such income would be sufficient. The fact that he gives her the one-third in the event of her remarriage negatives the construction by her counsel that she is to have the entire estate absolutely with power to dispose of the corpus and principal for her own use.

If the testator had intended that his widow should have the power to dispose of and use the entire estate his insertion of the second clause in his will was but an idle ceremony.

The final decree in this case adjudges (Case, p. 83) that the widow is seized in fee simple of all the estate, subject to being divested of two-thirds thereof in the event of remarriage. This is inconsistent with the claim made by the appellees that under the first clause of the will the widow is entitled to the entire estate in fee; for if she were so entitled, how could the devise be cut down by the second clause to a one-third share?

Furthermore in support of the appellants' contention reference is made to paragraphs one and two in the will which gives to the wife, not to the wife "and" or "or" her *heirs*. Whereas, in paragraph three, the testator provides that "*all* my es-

tate shall be divided amongst our children *or their respective heirs * * **." By omitting the word "heirs" in one part of the will and inserting it in another part he thereby made manifest his intention that he wanted his wife to get only a life estate and the fee to go to his children and their heirs.

Twelve cases were cited by Vice-Chancellor Fielder in his conclusions (Case, p. 80). With the exception of the first, that of *Den v. Gifford*, they hold that a fee simple estate was vested in the first takers because they had a power of disposal without restriction as to the mode of execution. There are no expressions contained in the Kutschinski will from which a power of disposal can be inferred, and in the case of *Den v. Gifford*, the will was executed prior to the enactment of the statute of 1784 and construed in accordance with the common law.

The next question for determination concerns the disposition of the two-thirds of the income in the event that the widow remarries and thereafter takes but one-third. There would be a hiatus as to this two-thirds between the date of the remarriage and the death of the widow, as the division amongst the children is not to take place until after her death. It would seem that the executors or trustees appointed by a court for that purpose would have the right to collect and hold such two-thirds share of the income and divide it amongst the children upon the death of the widow.

The fourth clause of the will directs that the executors shall be the ones who are to estimate and decide the amounts of the advancement made by the testator in his lifetime to the children.

The only remaining question is whether in the event of the death of a child or children of the tes-

tator prior to that of the widow the heirs at law and next of kin of such child or children will share equally with the surviving children of the testator or take only the share their parent would have taken had he or she survived the life tenant. In other words: Will they take *per capita* or *per stirpes*?

This question may not have to be decided in the present suit. Should all the testator's children survive their mother the question would not arise. If it is necessary that it be determined, we contend that under the case of *Hard v. Turnure*, 39 N. J. Eq. 121, which is the case nearest in fact to the present that we have been able to find, the persons who are to take are to be ascertained with reference to the time of the death of the testator and not the period of division or distribution, and that, as all seven of the testator's children survived his death, their shares are fixed, and in the event of the death of any of them prior to that of the life tenant, his or her share would go to his or her heirs and next of kin *per stirpes*.

Aside from the help afforded by the statute of 1784 and the reported cases, even if the widow of the testator did not remarry the greatest estate which she could claim under his will is a life estate, and the manifest intention of the testator to give her no estate greater than a life estate with a remainder over to his children is clearly indicated in the wording of his will. It is a home-made will—drawn by the testator himself—and if it had been his intention to devise and bequeath all his estate to his wife absolutely, the second and third sections thereof, which provide that the estate shall go to his children and their heirs upon his remarriage or death, are meaningless and useless surplusage and would not have been inserted in the will. The sec-

ond and third sections are not ambiguous and should not be discarded.

It is respectfully submitted that the final decree herein should be reversed and there should be a decree in accordance with the foregoing contentions of the appellants; that the receivership should be made permanent, and the life tenant compelled to account; and that counsel for the defendants-appellants should be awarded a suitable counsel fee.

KELSEY & LUDWIG,
Solicitors for and
of Counsel with Appellants,
Henrietta E. Sheffer, et als.

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New Jersey Court of Errors and Appeals

Between

MARGARETHA H. KUTSCHINSKI,
Complainant below,
Appellee,

and

FRED LUHR, individually and
as Executor of the Last
Will and Testament of Gus-
tav M. Kutschinski, de-
ceased, EMILIE LUHR, FRED-
ERICK W. KUTSCHINSKI, MAY
L. KUTSCHINSKI and GUS-
TAV A. KUTSCHINSKI,

Defendants below,
Appellees,

and

HENRIETTA E. SHEFFER, AL-
VINA A. NEUMANN, EDWARD
NEUMANN, MARGARETHA L.
GREWE, ERNEST GREWE, JR.
and WALTER H. KUTSCHIN-
SKI,

Defendants below,
Appellants.

On Bill, etc.

On Appeal
from Court
of Chancery.

BRIEF OF APPELLEE, GUSTAV A. KUTSCHINSKI,

by Samuel Kalisch, Jr., Esq., Guardian Ad Litem.

Statement of Facts.

The case comes up on appeal from a final de-
cree of the Court of Chancery (state of case pp.
78-84) on a bill of complaint praying the con-

struction of the Last Will and Testament of Gustav M. Kutschinski, deceased, and a declaration and determination of the rights and interests of the parties to the suit; and on the counter-claim for an accounting by Margaretha H. Kutschinski, widow of the testator, of the rents, issues, profits and income of the real and personal Estate of the testator, and for the appointment of a receiver of the rents, issues, profits and income of the real and personal estate of the testator. The court ordered, adjudged and decreed that by the true construction of the said last Will and Testament, Margaretha H. Kutschinski is seized and possessed in fee simple of all the estate, both real and personal, of which the testator died seized and possessed, subject to being divested of two-thirds thereof in the event of her re-marriage; and further ordered, adjudged and decreed that the counter-claim be dismissed.

The defendant Gustav A. Kutschinski, filing his brief by his guardian *ad litem*, is one of the seven children whom the testator left him surviving, and is an inmate of the asylum for the insane in the State of Wisconsin (case pp. 35, 36).

The last Will and Testament of Gustav Martin Kutschinski (case pp. 5-7, 35; Exhibit A) was written in the testator's own hand (pp. 76-77), and was probated on July 8, 1927, by the Surrogate of the County of Hudson and letters testamentary to the executors therein named were issued (case p. 35). The will (case pp. 5-7, 35; Exhibit A), reads as follows:

IN THE NAME OF GOD, AMEN,

I, Gustav Martin Kutschinski, of the City of Union City in the County of Hudson, State of New Jersey being of sound and disposing mind and memory, and considering the uncertainty of this life, do make publish and declare this to be my last will and Testament as follows, hereby revoking all other and former wills by me at any time made.

First, after my lawful debts are paid, I give, devise and bequeath to My beloved Wife Margaretha Kutschinski nee Meyer all My Estate and Property Real and personal Property Where Soever the Same May be and of Wat Soever the Same May be and of Wat Soever kind it May consist of at the time of My dead forever.

Second, but in Case My Wife Margaretha H. Kutschinski gets Marriad agani then She Shall receive only one third (1/3) from My Estate left forever.

Third. And after the decease of My Wife Margaretha H. Kutschinski all my Estate Shall be divided amongst our Childern, or their respective heirs Share and Share alike the following Names of our childern

1 daughter Emilie A. Kutschinski now wife of Fred Luhrs

2 Son Gustav Adolph Kutschinski—Missing from Home since 1914

3 daughter Henrietta E. Kutschinski Now wife of Narman Sheffer

4 Son Frederick W. Kutschinski

5 daughter Alwine Kutschinski now wife of Edward Newman

6 daughter Margaretha L. Kutschinski Now Wife of Ernst Grewe Jr

7 Son Walter H. Kutschinski.

Fourth but this Childern Whom receive all ready from their pearants by their Fathers life time a part for help from their share and the amount each one did receive by their Fathers life time Shall be Estimated and deecided by the Executors.

Fifth, and I order and direct in Case any one of My heirs is not Satisfied With My Will or make a contest against My Will Shall loose his or their share in My Estate herein Stipulated and Shall receive Notting except that part Which the have receivid all ready by their Fathers life time and this last Share or part of last Share if any one Should loose by being Not Satisfied or contesting My Will this Share or part of the Share shall be divided amongst the rest of my heirs herein Stipulated likewise I make, constitute and appoint My Wife Margaretha H. Kutschinski and Fred Luhrs to be my executors of this, my last will and Testament and that My Said Executors be not required to give Bonds for the performents of their Said duties.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, the 6th day of July in the year of our Lord one thousand Nine hundred and Twenty Five 1925

GUSTAV M. KUTSCHINSKI (Seal)

We, whose names are hereto subscribed, do certify that Gustav Martin Kutschinski. the testator, subscribed his name to this instrument in our presence, and in the presence of each of us, and at the same time he declared in our presence and hearing that the same was his last will and Testament, and requested us, and each of us to sign our names thereto as witnesses to the execution thereof, and which we hereby do in the pres-

ence of the testator and of each other, this 6th day of July, the day of the date of the said Will, and write opposite our names our respective places of residences.

Erick Krause residing at 3876 Boulevard West Hoboken, N. J.

W. E. Hopper residing at 301 Palisade Ave West Hoboken, N. J.

Gustav M. Kutschinski Gustav M. Kutschinski.

The defendant appeals from the decree of the Court of Chancery ordering and adjudging as aforesaid, and from the whole and every party thereof, upon the following grounds: (1) that under the terms of the will and the true construction to be placed thereon, the real and personal estate of the testator was devised and bequeathed to his widow for life, provided she does not re-marry, and in the event of her re-marriage she is to have the income from one-third part of the estate, real and personal, from such time until her death; (2) upon her death all the corpus of the estate, real and personal, is to go to, and be divided among, share and share alike, with deductions for advancements, the children of the testator or their respective heirs; (3) that an accounting by the widow of the rents, issues, profits and income of the estate, and for the waste and depreciation of the real estate while in her possession, and an appointment of a permanent receiver of the rents, issues, profits and income of the Estate, all as prayed for in the counterclaim, should be ordered, adjudged and decreed; (4) and that a counsel fee suitable in amount be ordered paid out of the estate to counsel.

LAW AND ARGUMENT.**FIRST POINT.**

The one rule of construction to which all others are servient and assistant is, that the meaning intended by the testator is to be ascertained and given effect to, in so far as legally possible. To determine such meaning the court is to take the instrument "by its four corners" and consider it in all its parts. Effect is to be given to all its provisions if they can be so reconciled as to make them lawful. Construction is to be in favor of the heirs.

The intention of the testator is to be collected from the whole will and from a consideration of all the provisions of the instrument taken together, and is not to be gathered from detached portions alone. *Miller v. Worrall*, 62 N. J. E.

776. Intent is to be ascertained from the full view of everything "within the four corners" of the instrument, and effect should be given to every word and clause if not inconsistent with the general intent of the whole will when taken together. *Where two constructions are suggested, the one disregarding a part of the will and the other giving effect to the will as a whole, the latter must be adopted.* The general pervading purpose of the testator should override any inconsistent, special provision found in the will, and his particular intent as shown by a single provision standing by itself must yield to the general leading intent as manifested in the whole instrument.

In *Rogers v. Rogers*, 49 N. J. E. 98, and in *Graydon v. Graydon*, 25 N. J. E. 561, the court held that in construing the will the intention of the testator is to be collected from all the parts

of the will taken together; and after looking at the whole instrument and considering all its parts, such construction is to be adopted as will give effect, if possible, to every part of the will.

The first great leading rule from which courts of justice never depart, is, to put such a construction on apparently conflicting parts that both of them if possible may stand, and the whole will be carried into effect. The rule of law is imperative that every clause in a will shall be made to operate if possible. (*Vide Kent v. Armstrong*, 6 N. J. E. 637, 644.)

In *Marshall v. Hadley*, 50 N. J. E. 547 it was said the courts in construing wills may depart from their strict words and read a word or a 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 view of the whole will, to have been the intention of the testator.

In *Blackwell v. Blackwell*, 15 N. J. L. 386, it was held that in determining whether a word is used in a will in a technical or more general sense it is to be considered which will best effectuate the testator's intention.

If a will is capable of two constructions one of which would exclude the issue of the testator and the other permit such issue to participate in a remainder limited upon a life estate given to the widow, the latter construction is to prevail. The heirs of a testator are favored by the policy of the law, and cannot be disinherited by weak implication, and when the testator intends to disinherit them he must indicate that intention clearly. *Miller v. Worrall* 62 N. J. E. 776; *Woodruff v. White* 79 N. J. E. 225; *Rowley v. Currie* 94 N. J. E. 606.

The courts of other States follow the same rules of construction. *E. g.*, in *Eaton v. Straw*, 18 N. H. 320 the court held that while there can be no limitation over after a devise of a fee simple, yet an attempt to constitute a limitation over may serve to give such a construction to the phraseology that a defeasible fee may be taken as intended (*Vide* also *Taylor v. Martin*, 3 Pa. Co. Ct. R. 146; *in re McClure's Will*, 136 N. Y. 238, 32 N. E. 758).

SECOND POINT.

A devise not defined by terms of inheritance and perpetuity, and not expressly for life, vests the fee in the devisee; PROVIDED THERE IS NOT IN THE WILL A SUBSEQUENT DEVISE OF THE SAME PREMISES UPON THE DEATH OF THE FIRST TAKER. THE INSTANT CASE COMES WITHIN THE PROVISIO.

The legislative intent in passing the Act of 1784 "to pass Estates in fee by certain devises in wills and testaments and to limit estates in tail" (4 Comp. Stat., p. 5873, sec. 36), was to compel the construction of devises which omitted the words "heirs and assigns" as passing an estate in fee, except in two cases; namely, (1) where the will contained expressions from which it appeared that the devise was intended only to convey an estate for life, and (2) *when the testator made a further devise after the death of the first devisee.* *Morris v. LeBel*, 71 N. J. E. 43.

"Where devise of the same land is expressly made to take effect after death of first devisee, it is impossible to doubt that the intent of the testator was to make the interest of the first devisee a mere life estate." *Ibid.*, at p. 46.

In *Jones' Exec. v. Strites*, 19 N. J. E. 324, the court held: a devise of land or bequest of chattel by words which clearly would give the absolute estate will be construed into a devise or bequest for life only, if the will contains words giving it to another upon the death of the first taker.

A testator having given his devisee an absolute estate in fee could limit the estate by subsequent provision clearly showing his intention that the estate should go over to another upon the happening of a specified contingency. *Sayre v. Kimble*, 93 N. J. E.

In the recent case of *Myers v. Moorestown Trust Co.*, 145 Atl. 540, the Vice-Chancellor construed section 36 of the Statute of Wills above referred to. We quote from the court's opinion as follows:

“Where the devise in the first instance is in general terms without defining or limiting any specific estate, a life estate results by implication in the absence of other controlling circumstances. *Downey v. Borden*, 36 N. J. L. 460; *Groves v. Cox*, 40 N. J. L. 43. The statutory modification of this rule of construction by section 36 of our statute of Wills (4 Comp. Stat. p. 5873), which statute declares that a fee may result from a gift of that nature, extends only to instances in which no expressions are contained in the will where it shall appear that such devise was intended to convey only an estate for life and no devise over is made after the death of the first devisee. An exception to this general rule of construction is to be found in cases in which such devisee is given the power of disposal without restriction as to the mode of execution and in cases in which a charge is made upon the person of the devisee or on the *quantum* of the interest so devised.”

“A clear gift in one clause cannot be taken away or cut down by doubtful expression in another clause, but only by express words or by clear implications,” held the Court of Chancery in *Johnson v. Haldane*, 95 N. J. E. 406. Counsel confesses that to use this quotation may mean the use of a double-edged sword; for just as the second paragraph of the will should not make the fourth ineffectual, so, it may be argued the fourth should not cut down the estate devised in the second. Our answer is that whatever “express words” or “clear implications” there are, are to be found in the fourth and not in the second paragraph. There is no doubt about the intendment of the words in the fourth paragraph. The question then is: did the testator mean just what he said in the second paragraph? But this provokes another question; namely, in the light of the provisions of the fourth paragraph what *did* the testator mean in the second paragraph? *Did* he there use “express words” or such as evidence a “clear implication”? Considering what follows that paragraph, is the sense of the term “for ever” absolutely unequivocal?

Advertence to the holdings of the courts of other states reinforces our position. Thus in *Baxter v. Bowyer*, 19 Oh. St. 490, the court held that where by one clause in the will property is devised *prima facie* importing an absolute estate, and by a subsequent clause is given in remainder to another person, the first devisee takes only a life estate. Also *Shaftall v. Roe*, 3 Ga. 453; *Conover v. Stringer*, 53 Ind. 248. In *Corby v. Corby*, 85 Mo. 371, it was held that a devise and bequest in such general terms as standing alone would give the fee will be deemed to give an estate only for life where the intention

so to limit them clearly appears from the will taken as a whole. In *Stevens v. Miller*, 2 Den. Sur. 597 (N. Y. 1884), the court held that an absolute devise must be construed in connection with subsequent clauses of the will which modify its effect. Also, *Ellet v. Paxson* 2 Watts. & S. 418 (Pa); *Appeal of Urich*, 86 Pa. 386; *Robinson v. Finch*, 116 Mich. 180, 74 N. W. 472; *In re Schomer's Estate*, 211 Pa. 297, 60 Atl. 789.

In the recent case of *In re Robinson's Will*, 144 Atl. 457, the Supreme Court of Vermont said:

“Even when an absolute estate is in terms given by the will, if subsequent passages therein plainly show that it was intended that the beneficiary should take a life interest only, the gift is restricted accordingly.”

THIRD POINT.

The statutory rule as defined in our Second Point, *supra*, may be supplemented thus: A devise not defined by terms of inheritance and perpetuity and not expressly for life vests the fee in the first taker if an unrestricted power of disposition is expressly given or where such a power may be implied from the fact that the gift over is only of what may remain undisposed of at the time of the first taker's death. This rule is controlling in each of the twelve cases cited by the Vice-Chancellor; but as the will in the instant case neither expressly nor, as defined, impliedly grants such a power of disposition, the cases, it is submitted, are not in point.

The Vice-Chancellor in his opinion (case p. 80) cites twelve cases for the proposition that where a testator has manifested an intent to vest an absolute fee simple in the first taker, a sub-

sequent limitation thereof is void as inconsistent with the rights of the first taker.

With the principle thus formulated we do not quarrel; but our contention is that it is applicable only to an instance where there can be no question but that the first devisee *does* take a vested fee. To apply this rule to the instant case is to beg the question. *This is not a rule of construction; it is a rule which is applicable only after the will has been construed to intend a vesting of the fee simple absolutely in the first taker.*

The cases are further interesting to us for the reason that they define conditions none of which is to be found in the case *sub judice*. They formulate a rule of construction which is patently inapplicable to the Kutschinski will.

In the leading case of *Downey v. Borden*, 36 N. J. L. 460, Depue, *J.*, said: "The principle is entirely settled that where lands are devised in the first instance in language indeterminate as to the quantity of the estate, from which an estate for life would result by implication, and words adopted to the creation of the power of disposal without restriction as to the mode of execution are added, the construction will be that an estate in fee is given."

The Vice-Chancellor in his opinion cites (1)* *Brohm v. Berner*, 95 N. J. L. 85, in which the court in referring to *Downey v. Borden* says: "Since the promulgation of that decision the principle there declared has been steadfastly adhered to by this court."

Then the court (in the *Brohm* case) holds "that the devise now under consideration

* The numbered cases are those cited by the Vice-Chancellor.

is clearly within the class designated in the citation from *Downey v. Borden.*" The will in the *Brohm* case reads as follows: "I give and bequeath to my beloved wife all my real estate, also all my personal property of every description, also all moneys due at my decease to her own private use forever, and after her decease to the relatives of myself, as well as her, the balance in equal parts or shares." The court held this residuary clause "almost identical with the provision of the will construed in (2) *Annin's Execs. v. Van Doren's Adm.*, 14 N. J. E. 135. In that case the testator gave his daughter one fourth part of his residuary estate. He then provided that if she should die leaving no legal issue so much of the share paid over to her "as remains unexpended" should go to his surviving children and their heirs. "It was considered that the words 'so much as remains unexpended' unless qualified by other provisions in the will limiting the power of expenditure, conferred an absolute and unrestricted power of disposal."

The court in the *Brohm* case cites also (3) *McCloskey v. Thorpe*, 74 N. J. E. 413. In that case the testator directed by his will that the proceeds of the sale of his mill be paid over to his wife, to whom he also bequeathed all of the personal property of which he was possessed, and then provided that "if there should be anything left after her death" it should be divided among specified beneficiaries. The only difference between these two cases cited and the *Brohm* case, the court in the latter case found, was that in the *Brohm* case the disposition was of realty while in the earlier cases it was of personal estate, but that this made no material difference.

The only other case cited as authority by the court in the *Brohm* case is that of (4) *Tuerk v. Schueler*, 71 N. J. L. 371. In that case the devise read as follows: "I give, devise and bequeath all my property, real or personal, to my beloved wife * * * *she to have full disposing power of the same* to sell, lease or dispose of the said property real and personal as she desires. *And what is left at her death* of said property real and personal, I give, devise and bequeath to my granddaughter * * *."

(5) In *Hendeern v. McGowan*, 91 N. J. E. 359, the will read as follows: "I give, bequeath and devise all my rest, residue and remainder of my estate real, personal or mixed in whatever it may consist or wherever situated which shall belong to or be owned by me at the time of my death to my said wife * * *; and it is my will and I do order that any of my estate devised as aforesaid, *remaining in her possession at the time of her death* shall be inherited by my heirs at law."

(6) In *McClellan v. Larchar*, 45 N. J. E. 17, the devise was of all the estate to the testator's wife, "the same to be held and enjoyed by her fully and absolutely and without restriction of any kind *with full power to alienate, convert or dispose* of the same in such manner as she may deem best"; and there was the subsequent provision in the same instrument that upon the death of his wife all his estate, "*or so much of it as remains the property of my wife* at her death" should go to his children.

(7) In *Rodenfels v. Schumann*, 45 N. J. E. 383, the will was as follows: "My will and desire is that all my property both real and personal shall be for the sole use and benefit of my wife * * *, after my decease, and, in the

event of her death *then what shall remain* be disposed of in the following manner * * *.”

(8) In *Galante v. Silverstein*, 98 N. J. E. 52, the devise was to the wife, “to have and to hold the same *to her executors, administrators, or assigns forever*”; then a devise over of the Estate after his wife’s death to his children.

(9) In *Bennett v. Home etc.*, 79 N. J. E. 76, the testatrix gave to complainant, not for life or indeterminately but to *her, her heirs and assigns forever* and added in another clause *an authority to sell or otherwise dispose of the whole or any part or portion of it*; adding that “if the said (complainant) should die without children, *leaving* the estate hereby bequeathed to her or any part or portion of the same, then it is my will that *so much thereof or such part or portion of said estate as she may leave* at her decease shall go to the Home for the Friendless.”

(10) In *Dodson v. Sevars*, 52 N. J. E. 611, aff’d 53 N. J. E. 347, there was a bequest absolutely to T., with the proviso added that if she should die intestate *leaving any part of it undisposed of*, then the executors were to convert it into money and distribute it. This statement of the will shows an absolute gift for an indefinite time with an unlimited power of alienation.

(11) In *Huston v. Boyd*, 84 N. J. E. 107, the devise was to testator’s wife, for her support and maintenance and *to dispose of as she may deem proper*. “The estate *that may remain undisposed of* after the death of my wife I give, devise and bequeath unto the children of my several three sisters.”

In the earliest case cited by the Court of Chancery, namely (12) *Den v. Gifford*, 9 N. J. L. 46,

the devise was as follows: "I give and bequest unto my son, E. B. all my lands and interests and interest in lands * * * which I give and bequeath *to him and his heirs forever* * * * and after the decease of my son E. B. I give and devise to my grandson A. B. son of E. B. all of the above mentioned lands * * *, which I give to him and his heirs and assigns forever." Obviously the fee vested in the son, and the devise over to the grandson was void because inconsistent with the first gift.

It is respectfully submitted that the final decree of the Court of Chancery should be reversed and there should be a decree in accordance with the contentions in this brief.

KALISCH & KALISCH,
Solicitors for and of Counsel
with Appellee Gustav A. Kutschinski.

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New Jersey Court of Errors and Appeals

Between

MARGARETHA H. KUTSCHINSKI,
Complainant below,
Appellee,

and

FRED LUHR, individually and
as Executor of the Last
Will and Testament of
Gustav M. Kutschinski, de-
ceased, EMILIE LUHR, FRED-
ERICK W. KUTSCHINSKI, MAY
L. KUTSCHINSKI and GUSTAV
A. KUTSCHINSKI,

Defendants below,
Appellees,

and

HENRIETTA E. SHEFFER, AL-
VINA A. NEUMANN, EDWARD
NEUMANN, MARGARETHA L.
GREWE, ERNEST GREWE, JR.,
and WALTER H. KUTSCHIN-
SKI,

Defendants below,
Appellants.

On Bill, etc.

On Appeal
from Court
of Chancery.

BRIEF OF MARGARETHA H. KUTSCHINSKI, COMPLAINANT-APPELLEE.

The issues presented by the pleadings call for the construction of the will of Gustav M. Kutschinski, deceased. The pertinent clauses of the will are in the form following:

“First, after my lawful debts are paid, I give, devise and bequeath to my beloved Wife Margaretha Kutschinski nee Meyer all My Estate and Property Real and personal

Property Where Soever the Same may be and of Wat Soever kind it May consist of at the time of My dead forever.

“Second, but in Case my Wife Margaretha H. Kutschinski gets Married agani then She Shall receive only one third (1 3) from My Estate left forever.

“Third. And after the decease of My Wife Margaretha H. Kutschinski all My Estate Shall be divided amongst our Children or their respective heirs Share and Share alike * * *.”

The Court below held that the first clause standing alone, clearly contains the gift and devise to the wife of the testator absolutely and in fee, of the whole of the testator's real and personal estate after his debts.

A similar provision in a will was considered by Vice-Chancellor Backes in *Galante v. Silverstein*, 98 N. J. Eq. 52. It was in the form following:

“Second. I give, devise and bequeath unto my beloved wife, Lucia Galante, all my household furniture, and all the rest of my personal property, and also all the residue of my real or mixed estate of which I shall be seized or possessed or to which I shall be entitled to at the time of my decease, to have and to hold the same, to her executors, administrators or assigns forever without any litigation on the part of my children or their heirs.

“Third. I give and bequeath unto each and every of my surviving children all the residue and remainder of my estate, real and personal or mixed, after my wife, Lucia Galante, is death, share and share alike.”

In construing this will the Vice-Chancellor says:

“The devise to the testator's wife vested in her an estate in fee. *Den v. Schenck*, 8

N. J. Law 29; *Den v. Bowne*, 18 N. J. Law 210; *Jarm. Wills* (5th Ed.) 31, 43. The later devise over to the testator's children was probably intended that if at the wife's death anything remains, it should go to the children, but he did not thereby mean to, nor did he, cut down her fee. The devise over is void. *Den v. Gifford*, 9 N. J. Law 46."

Furthermore, the Court disposed of the contention that only a life estate passed to the wife as follows:

"It is claimed that as the devise to the wife does not contain words of inheritance, and because there is a further devise of land to the children, only a life estate passed to the wife. Section 36 of the Wills Act (Comp. Stat. p. 5873). At common law the words 'heirs and assigns' were not necessary to pass a fee by devise. *Swinb. Wills* (6th Ed.) 174; 3 *Jarm. Wills* (5th Am. Ed.) Sections 30, 48; *Den v. Bowne*, *supra*. Any words denoting an intention to pass the whole interest of the testator will carry an estate of inheritance. 3 *Jarm. Wills* 48. The statute is remedial, and applies only, as its language indicates, to devises where 'no expressions are contained in such will and testament whereby it shall appear that such devise was intended to convey only an estate for life, and no further devise thereof being made of the devised premises after the decease of the devisee to whom the same shall be given.' It does not apply to wills, certain in their language, devising a fee. *Den v. Bowne*, *supra*. The common law rule of construction is that a devise of land without words of limitation or description of the extent of the interest devised, creates a life estate only, in the absence of a contrary intent. Technical terms are not necessary to show such intent. The effect of the statute is to change the common law rule of construction and make an indefinite devise

without any words of perpetuity annexed pass an estate in fee-simple instead of a life estate. It reverses the common law rule. Formerly an estate for life only would pass by an indefinite devise unless a contrary intention could be inferred from the will. Now, an estate in fee will pass by such devise unless an intention to pass a less estate appears by construction or operation of law. 30 Am. & Eng. Encycl. L. 745, 747; 3 Jarm. Wills 48; *Den v. Bowne, supra*; *Den v. Schenck, supra*; *Elle v. Young*, 24 N. J. Law 775."

In support of the doctrine that any words denoting an intention to pass the whole interest of the testator will carry an estate of inheritance, the Court in the last case cited among others, *Den v. Bowne*, 18 N. J. Law 210.

In this case a devise was made in these words:

"I give and bequeath to my wife P. B. all my real estate and personal property to have hold and enjoy forever, for the free use of her, and no other person excepting by her assignment or will."

In the course of the opinion of the Supreme Court, Nevius, Justice, says at the top of page 211:

"Therefore where a testator by will devises his whole real estate to A, he devises the highest estate of which he himself is seized. If a fee tail or an estate for life, the will conveys such estate, and if a fee-simple the devises takes a fee-simple. Words of inheritance are not necessary in a will to devise and carry a fee-simple. * * *

"In the present case it is clear that the testator did not design to limit the estate devised to his wife, to a life estate, for he gives it to her to hold and enjoy *forever* for her free use and that of no other person."

Again in the same case in the opinion of Justice White, on page 212 he says:

“Lord Mansfield says, ‘no technical words are necessary in a will. If the testator makes use of what is tantamount, as if he says “I give in fee simple all my estate,” that will carry all his interest in the land devised and will pass a fee if testator have a fee in the premises.’

“If a man devises all his estate, it comprehends all that he has; for the word ‘estate’ is genus generalissimum and includes all things real and personal.”

In *Den v. Schenck*, 8 N. J. L. 29, our Supreme Court considered a devise in a will made with these words:

“Further, I give unto my said son, Gilbert, all my real estate, together with a lot of land lying and being at Raritan Landing, etc.”

In the course of the opinion of Justice Ford, he says:

“The question arising on the will in discussion is, what estate Gilbert Lane took in the devised premises? It is my opinion that he took a fee simple, defeasable on specified conditions; that if he had no issue at his death, and his sisters survived him, that they should take the estate.

“The devise to Gilbert of all the testator’s ‘estate’ comprehended a fee simple, according to the principle and reason of the thing; for ‘estate’ means *interest*; and *all the interest* of the testator must mean a fee simple if the testator had one. 1 Salk. 236; 2 P. Wms. 524; 1 T. R. 411; 3 Cranch 134.”

Applying the doctrine of these several cases to the first clause of the testator’s will, it is quite apparent that the words used by him denote an intention to pass his whole interest in the property and will carry an estate of inheritance.

These cases abundantly prove that technical words are not necessary for that purpose. The testator devises all his estate to his wife whatsoever it may be and of whatsoever kind it may consist at the time of his death, to her forever. In making this devise to his wife, the testator has used the very terms which were used in the cases cited to manifest an intention to convey a fee, and these words have been held in the various cases ample and sufficient for that purpose.

At this point we should consider the effect, if any, to be given to the third clause of the testator's will. This runs as follows:

"After the decease my My Wife Margaretha H. Kutschinski, all My Estate Shall be divided amongst our Children or their respective heirs Share and Share alike * * *."

In *Galante v. Silverstein, supra*, Vice-Chancellor Backes held that a similar disposition attempted to be made in that case was void and cites as authority *Den v. Gifford*, 9 N. J. L. 46. The clause of a will there under consideration ran as follows:

"I give and bequeath unto my son Eleazarus Brewer, all my lands and interest in lands lying on the west side of Mingemihole Brook, except one acre of land, which I reserve for the use of a burial burying yard, where the burying yard now is; which I give and bequeath to him and his heirs forever; and also one-half of my grist-mill, and one-half acre of land about it; which I give to him and his heirs; and after the decease of my son, Eleazarus Brewer, I give and devise to my grandson, Adam Brewer, son of Eleazarus Brewer, all of the above mentioned lands, lying on the west side of Mingemihole brook, and mill, and burying yard, and half an acre, and have an acre of, about the mill,

which I give to him and his heirs and assigns forever.”

The Chief Justice says at page 64:

“The first member of the devise, to Eleazarus and his heirs, is clearly a fee simple. The obscurity wholly arises from the subsequent words, after his decease to his son Adam and his heirs and assigns forever. These words, it is contended, however fully the former might give Eleazarus a fee simple, leave him only an estate for life.”

Thereafter the Court says at the bottom of page 69:

“Now the words, in the clause which has been stated, of the will of Adam Brewer, are all purely technical, to Eleazarus and his heirs, and after his decease to Adam and his heirs. There are no words in the will which shew to a demonstration that the testator did not mean what the technical words import, and if we have no right or power to say the testator did not understand their meaning, or to put a construction on them different from what has been long received and affixed by law, we must say, the intention of the testator was to give an absolute fee simple in the same premises to Adam, a disposition utterly illegal, impracticable and irreconcilable; for having given a fee simple, the whole estate, in the first instance, in the premises, he had nothing further to give, he had no further power of disposal, unless, which was expressly and rightly disavowed at the bar, he had attached some legal contingency to the first estate whereby it might be terminated and a fee simple given over by way of executory devise, or unless by a direct or implied revocation; and how far that may be effected by subsequent words will be hereafter examined.”

Again at page 73, referring to this form of disposition the Court says:

“Now the case before us does not come within the terms of the rule respecting different devises. It is a limitation over after a previous limitation. And here the rule of all the books is very different. If the limitation over be repugnant to the preceding estate, or if it be a limitation over after an estate in fee-simple, unless such estate be determinable on some legal and timely contingency, the limitation over is void.* * * ”

Finally the Court says:

“Upon the whole I am of opinion that Eleazarus took an estate in fee-simple, and not an estate for life, in the premises in question.”

In *West Side Trust Company v. Giuliano*, 106 N. J. Eq. 475, Vice-Chancellor Backes distinguished the dispositions made in that case from the devises in *Galante v. Silverstein (supra)*. In the former case there was involved the construction of a will wherein, after making certain dispositions the testator by the tenth paragraph thereof gave all his residuary estate to “his said nephew, Pasquale Giuliano, to him, his heirs and assigns forever.” In the following paragraph the testator provided: “In the event that my said nephew, Pasquale Giuliano, shall die prior to or after my decease, leaving lawful issue him surviving, then and in that event, I hereby give, bequeath and devise, all the rest, residue and remainder of my property * * * to the lawful issue of my said nephew, Pasquale Giuliano.”

In the paragraph next following the testator further provided:

“In the event that my said nephew, Pasquale Giuliano, shall die prior to or after my decease without leaving lawful issue him

surviving, then and in that event, I hereby give, bequeath and devise all the rest, residue and remainder of my property * * * to my said three nieces (naming them) to them, their heirs and assigns forever, share and share alike."

In the course of his opinion the Vice-Chancellor says:

"The nephew stakes his claim on the absolute disposition of the estate to him and his heirs by the tenth paragraph and the rule of construction, that once having given the residue to him unconditionally, the testator had nothing left to dispose of, and the gift over is void, as in *Den v. Gifford*, 9 N. J. L. 46, and *Galante v. Silverstein*, 98 N. J. Eq. 52. In each of these cases of consecutive absolute gifts of the same estate, and where the second gift was held to be null, it will be observed that there was nothing in any other part of the will which in any way modified or limited the estate given to the first taker. That feature distinguishes the two cases from the one at bar."

"In the will under consideration the testator, after giving to the nephew what otherwise would be an absolute estate, cut it down and put an end to it at the nephew's death by giving the residue to his issue and over to the nieces upon failure of issue. The gift in the remainder, though it be in a different paragraph, is as pregnant of meaning as the language of the absolute gift to the nephew and cannot be ignored or discarded because it is in conflict with the initial gift. Apparent conflict in division must be reconciled so that the whole may stand and all parts of the will be given their full significance."

"The executor and trustee is advised that Pasquale Giuliano took a life estate in the residue, the remainder to his issue and in default of issue the residue will go to the

three nieces by way of executory devise and bequest.”

The distinction pointed out by the Vice-Chancellor in the last case is perfectly apparent in the will now before the Court. In the instant case we have consecutive absolute gifts of the same estate and there is nothing in the will which in any way modifies or limits the estate given to the first taker. In the Giuliano case it was provided that in the event that the nephew die before or after the testator, leaving issue, then the lawful issue should take; it was further provided that if the nephew die prior to or before the testator, without issue, then the residuary estate should go over to the three nieces named. This situation was considered and discussed by the Court in the opinion rendered in *Den v. Gifford* (*supra*).

Upon the authority of the above cited cases, it becomes apparent that the gift over to the children of the testator in the third paragraph of the will now under consideration is void and ineffective.

It now remains to consider the second paragraph of the testator's will. This runs as follows:

“Second, but in Case my Wife Margaretha H. Kutschinski gets Married again then She Shall receive only one-third (1 3) from My Estate left forever.”

The appellants in their brief have anticipated the contention of this appellee with respect to the effect of this clause. The language used by the testator in the first paragraph is complete and ample to vest his wife with an estate in fee simple. The particular wording of the second clause tends to confirm the construction placed

upon the first clause. The effect apparently is to give the widow the power of disposition and use of his entire estate and therefore a complete title thereto. By this clause the testator attempted to make some disposition, as he expresses it, "from my estate *left*." Evidently he had in mind when making the will, the possibility that his wife might marry again after his decease. What he attempted to dispose of, apparently, is what was left of his estate at that time.

The effect of such an expression in testamentary dispositions has been considered by our courts in several cases. This subject was considered in *Bunnell v. Beam*, 86 N. J. Eq. 101. This case involved the construction of a certain clause in the will running as follows:

"Fifth. As to the rest of my estate, real, personal and mixed, I hereby give, devise and bequeath, unto my husband Charles Heldemore, after his death and all expenses are paid, if there is any residue left it is to be divided among my six cousins."

In the course of his opinion Vice-Chancellor Backes says:

"The decision depends upon whether the husband had the right to consume and exhaust the estate, for, if he had, then he was the absolute owner and the devise over is void. This is settled law. In *Annin v. Vandoren*, 14 N. J. Eq. 135, the testator gave his four daughters the residue of the proceeds of sale of certain of his real estate, and all his rights and credits, after the payment of all just debts and expenses, to be paid as soon as the estate could be conveniently settled. By a subsequent clause of the will, the testator made the following direction:

"Should my daughters Lenah and May, or either of them, die leaving no legal issue,

the share or shares herein bequeathed to her or them (if not paid over by my executors, and if paid over, then such part thereof as remains unexpended), I give and bequeath unto my surviving children and their heirs equally between them.'

"The chancellor held that the daughter Lenah, whose share had been paid over to her, took the share absolutely, by reason of the power of disposal given by the will, saying: 'The cases rest upon the principle, that if the testator, either expressly or by implication, manifests an intent to vest in the first legatee the uncontrolled power of disposing of the property, such power involves the idea of absolute ownership, and the limitation over is void, as inconsistent with the rights of the first legatee. The uncontrolled power of expenditure necessarily implies absolute ownership as fully as the power of disposing of it. And this difficulty can only be overcome by limiting the right of expenditure to so much as may be necessary for the support of the legatee.' This doctrine was cited with approval by the court of errors and appeals in *Downey v. Borden*, 36 N. J. Law 460; *McCloskey v. Thorpe*, 74 N. J. Eq. 413; *Brohm v. Berner*, 77 Atl. Rep. 517."

The Court then further refers to the opinion of Chief Justice Gummere in *Brohm v. Berner*, and he concludes as follows:

"Guided by these authorities, there is not the semblance of a doubt left of Heldemore's absolute ownership of the property in his lifetime. Upon his death it descended to his heirs, to whom the fund now in question must be paid, after the payment of Charles Heldemore's debts; and the devise over to the tetratrix's cousins must be disregarded as void."

See also *McCloskey v. Thorpe*, 74 N. J. Eq. 413. This case was considered in the Court of

Errors and Appeals on appeal from Chancery. It involved the construction of a clause in a will running as follows:

“Third. I own one-third of the saw mill, under the firm of S. L. Shimer & Co., it is my will and I do order the one-third sold, within one year after my decease to the best advantage, and the money paid over to my wife Charity for her use, and I also will her all my Personal Property, that I am possessed of, and if there should be anything left, after her death, then I want that divided also with the money from the House and Lot Provided, however, if either Harriet Eicke or John Zellers should die before my wife, both die, Then I will that the money so left to them shall be given to the Trustees of Grace Lutheran Church of Phillipsburg to be appropriated for its benefit. I want S. L. Shimer with my wife to sell the saw mill property and make a deed for the same or his executor. I will and order that my sister Fannie Mundy have Four Hundred Dollars, Taken off of the two Harriet and John’s shares after my wife death and in case the boy John Zellers don’t turn out to be a sober honest upright man he can have no legacy in this will. Dated October first, eighteen hundred and seventy.”

In the course of the opinion of the Court of Errors and Appeals, Mr. Justice Swayze says:

“The question at issue is whether Charity took an absolute estate or only a life estate in the proceeds of the saw-mill and the personal property.”

“The principle underlying the case is thus stated by Chancellor Green in *Annin’s Executors v. Van Doren’s Administrator*, 14 N. J. Eq. (1 McCart.) 135 (at p. 146): ‘The cases rest upon the principle that if the testator, either expressly or by implication, manifests an intent to vest in the first legatee the uncontrolled power of disposing of the property, such power involves the

idea of absolute ownership, and the limitation over is void, as inconsistent with the rights of the first legatee. The uncontrolled power of expenditure necessarily implies absolute ownership as fully as the power of disposing of it. And this difficulty can only be overcome by limiting the right of expenditure to so much as may be necessary for the support of the legatee.' In that case he found no such limitation in the will which contained a bequest over of such part as remained unexpended."

After referring to *Downey v. Borden*, 36 N. J. Law 460; *Rodenfels v. Schumann*, 45 N. J. Eq. 383; *Tuerk v. Schueler*, 71 N. J. Law 331; *Wilson v. Wilson*, 46 N. J. Eq. 321, and *Tooker v. Tooker*, 71 N. J. Eq. 513, Justice Swayze proceeds as follows:

"An examination of these cases demonstrates that if the language of the will is such as necessarily to imply an absolute power of disposition, the estate is absolute in the first taker, and such power of disposition is to be implied from an untrammelled power to expend the legacy."

The opinion concludes with these words:

"We are satisfied that the testator intended that his wife should expend the proceeds of sale if she wished. To do this she must have an absolute power of disposition, and the case is within the principle relied on by Chancellor Green in *Annin's Executor v. Van Doren's Administrator*."

In *Brohm v. Berner*, 95 N. J. Law 85, our Court of Errors and Appeals considered the disposition made by the testator in the words following:

"I give and bequeath to my beloved wife all my real estate, also all my personal property of every description, also all moneys due me at my decease, to her own

private use forever, and after her decease to the relatives of myself, as well as her, the balance in equal parts of shares."

In the course of the opinion of the Chief Justice he says:

"The sole question which the case presents is whether or not by force of this residuary provision in her husband's will the defendant became seized of an estate in fee-simple in the lands conveyed by her to the plaintiff."

After referring to the case of *Downey v. Borden*, 36 N. J. Law 460, and the rule laid down in that case and others following it, the Chief Justice says:

"The devise now under consideration is clearly within the class designated in the citation from *Downey v. Borden*. The determination of the case, therefore, turns upon whether there is to be found in the terms of the devise words adapted to the creation of an unlimited power of disposal in the widow. No such power is conferred by express words. Does it arise by necessary implication?"

"It is to be observed that the testator, by the residuary clause of his will, blends his real and personal estate into a single mass and disposes of it as a unit. He gives it directly to his wife and not to a third person in trust for her benefit, and declares that she shall receive it for her own private use forever. Thus employed, the word 'use' implies something more than a mere usufruct. He then provides that after her death 'the balance shall go to his and her relatives in equal shares.' From the context in which it appears the testator evidently intended the word 'balance' as the equivalent of the tenth definition given to it in the *Century Dictionary*, viz., 'What remains or is left over as "He bequeathed the balance of his estate to A. B."' Giving to the word this meaning the residuary clause is almost

identical with the provision of the will construed in *Annin's Executors v. Van Doren's Administrator*, 14 N. J. Eq. 135, a case frequently cited in our later decisions. In that case the testator gave to his daughter Lena the one-fourth part of his residuary estate, including the moneys arising from the sale of a certain portion of his real estate, and directed that it should be turned over to her as soon as his estate could be conveniently settled. He then provided that if she should die leaving no legal issue, so much of the share paid over to her 'as remains unexpended' should go to his surviving children and their heirs. It was considered that the words 'so much as remains unexpended,' unless qualified by other provisions in the will limiting the power of expenditure, conferred an absolute and unrestricted power of disposal. No such qualifying language appearing in the will, it was held that the absolute ownership of the shares vested in Lena and that the gift over was void."

And concluding, the Court says:

"We reach the conclusion, therefore, that the rule of construction declared in *Downey v. Borden* is applicable to the will now under consideration, and that the defendant by force of the residuary clause therein had an absolute estate in fee-simple in the lands which were conveyed by her to the plaintiff."

The effect of granting an uncontrolled power of disposing of the property bequeathed and devised was considered by Vice-Chancellor Stevens in the case of *Bennett v. Home for Friendless*, 79 N. J. Eq. 76. At the bottom of page 76 the Court says:

"No one can read the will without being impressed with the conviction that the testatrix intended to give to her 'namesake and beloved and adopted daughter' an estate in fee-simple with absolute and unlimited power

of disposition. She gives the estate to complainant, not for life or indeterminately, but to her heirs and assigns forever, and she adds in another clause an authority to sell or otherwise dispose of the whole or any part or portion of it.

“It is true that she provides that ‘if the said Esther May Anderson Bennett (the complainant) should die without children, leaving the estate hereby bequeathed to her, or any part or portion of the same, then it is my will that so much thereof or such part or portion of said estate as she may leave at her decease shall go to the Home for the Friendless;’ but in thus attempting to give to the home, she runs counter to that rule which declares that ‘if the testator either expressly or by implication manifests an intent to vest in the first legatee the uncontrolled power of disposing of the property, such power involves the idea of absolute ownership and the limitation over is void as inconsistent with the rights of the first legatee.’ *Annin’s Executor v. Van Doren’s Administrator*, *supra* * * *

Here what is given to the home is not ‘what remains,’ an expression that, taken in connection with the context, may often be construed as ‘remainder,’ but ‘so much’ or ‘such part or portion of said estate as she (my daughter) may leave at her decease.’ In this there is no ambiguity. It is unmistakably indicated that the testatrix desired her daughter to have the unrestricted power to dispose of principal. It was not the whole estate that was to go over, but only such part—as the daughter might see fit to leave.”

Again referring to the second clause of the will of the testator, it appears, as we have before stated, that he has attempted to make some disposition, as he expresses it, “from my estate left.” By reference to the case of *McCloskey v. Thorpe* (*supra*), it appears that the testator in

that case used a very similar expression, the words there being "if there should be anything left, after her death." In the latter case the Court found that the testator intended that his wife should expend the proceeds of sale if she wished, and consequently to do this she must have an absolute power of disposition. So in the case before the Court it must be apparent from the words used by the testator that he intended that his wife should have an untrammelled power to expend the estate. Under such circumstances and under the rules laid down in the cases cited, she must be held to have had an absolute estate.

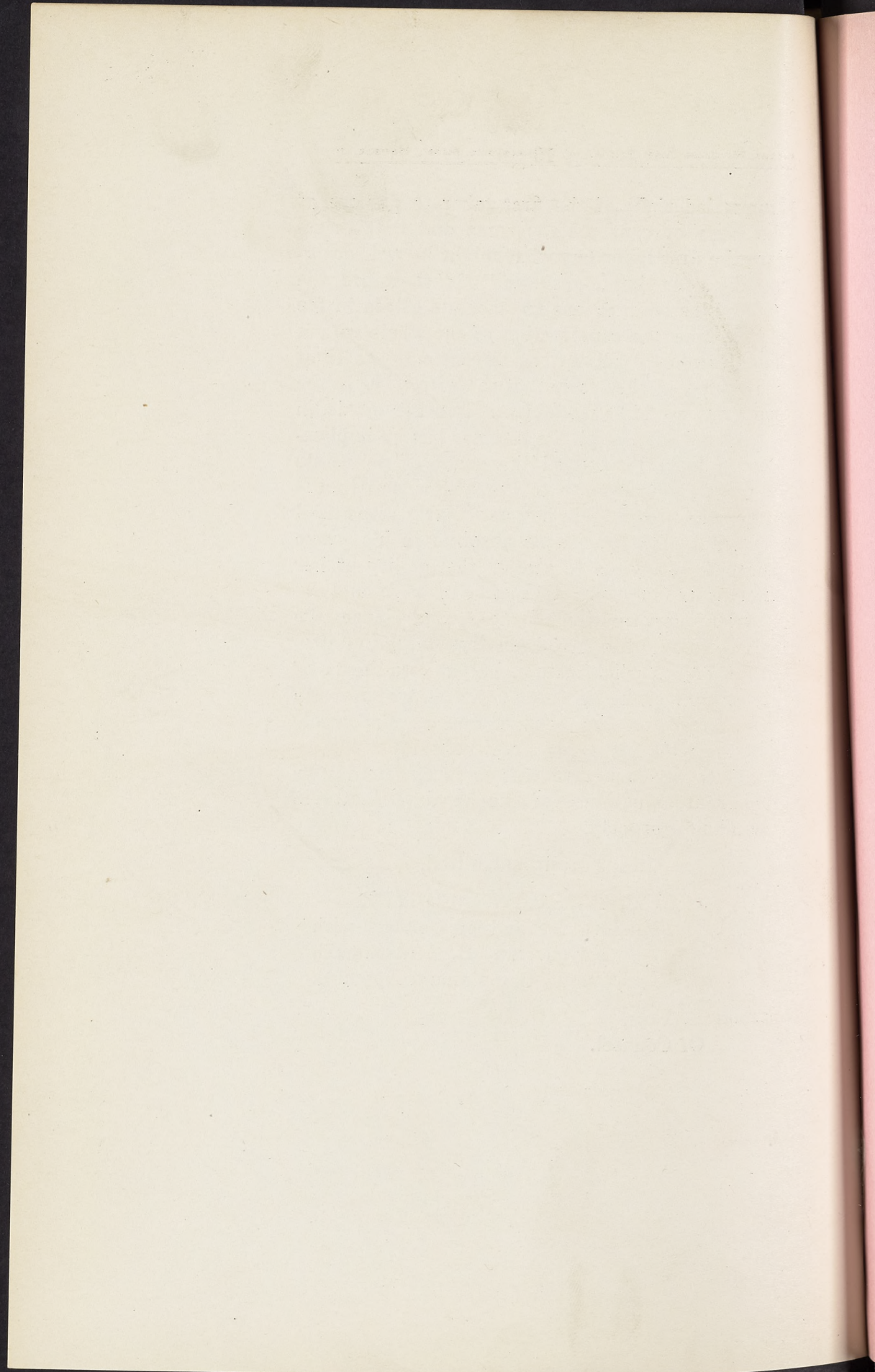
By reference to the conclusion, filed by the Vice-Chancellor in the Court below (case p. 81) it appears that he construed the will to mean that the complainant is entitled to possession as owner in fee of all of the estate, real and personal, of which the testator died seized and possessed, subject to being divested in the event of her remarriage, of two-thirds thereof. The authorities to which we have referred above, amply establish the right of the widow to the estate in fee simple, both by reason of the structure of the first clause and also by use of expressions in the second clause indicating an untrammelled power of disposition. Further examination of the second clause of the will shows, however, that there is no gift over of the part of the estate of which the widow is divested. The Court below says "as to what shall happen to the two-thirds of the estate in the event of her remarriage, the will is silent and I shall not attempt to indicate its disposition because that event may never happen." The cases we have cited indicate clearly that gifts over under such circumstances as we have under consideration are ineffective because of the recognition of an un-

trammelled right of the first taker to dispose of the same or consume the same and that therefore the first taker has what might be well designated "a fee simple absolute." If, therefore, the wife of the testator has an absolute estate in fee simple upon the construction of the whole will, it would seem to follow that any attempt to limit the quality of the estate that the wife takes in the property, would be ineffective. In other words, in the second paragraph the testator has by implication at least recognized the grant of an estate in fee simple absolute to the widow and in the same sentence wherein he particularly recognized the grant of a fee simple absolute in his whole estate, he attempts to change the quality of her interest to one-third thereof. In fact, and by a strict interpretation of the second clause, the wife can be said to have been divested not of two-thirds of his whole estate, but of two-thirds of his estate left at the time of the marriage of the wife. If upon the construction of the whole will the wife has a fee simple absolute, this attempt to divest her thereof is inconsistent with the grant and devise of the absolute estate in the whole property.

Respectfully submitted,

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INDEX

Introduction	1
Chapter I	2
Chapter II	3
Chapter III	4
Chapter IV	5
Chapter V	6
Chapter VI	7
Chapter VII	8
Chapter VIII	9
Chapter IX	10
Chapter X	11
Chapter XI	12
Chapter XII	13
Chapter XIII	14
Chapter XIV	15
Chapter XV	16
Chapter XVI	17
Chapter XVII	18
Chapter XVIII	19
Chapter XIX	20
Chapter XX	21
Chapter XXI	22
Chapter XXII	23
Chapter XXIII	24
Chapter XXIV	25
Chapter XXV	26
Chapter XXVI	27
Chapter XXVII	28
Chapter XXVIII	29
Chapter XXIX	30
Chapter XXX	31

APPENDIX FOR PLANTER

Appendix I	32
Appendix II	33
Appendix III	34
Appendix IV	35
Appendix V	36
Appendix VI	37
Appendix VII	38
Appendix VIII	39
Appendix IX	40
Appendix X	41
Appendix XI	42
Appendix XII	43
Appendix XIII	44
Appendix XIV	45
Appendix XV	46
Appendix XVI	47
Appendix XVII	48
Appendix XVIII	49
Appendix XIX	50
Appendix XX	51
Appendix XXI	52
Appendix XXII	53
Appendix XXIII	54
Appendix XXIV	55
Appendix XXV	56
Appendix XXVI	57
Appendix XXVII	58
Appendix XXVIII	59
Appendix XXIX	60
Appendix XXX	61

APPENDIX FOR DEPENDANT

Appendix I	62
Appendix II	63
Appendix III	64
Appendix IV	65
Appendix V	66
Appendix VI	67
Appendix VII	68
Appendix VIII	69
Appendix IX	70
Appendix X	71
Appendix XI	72
Appendix XII	73
Appendix XIII	74
Appendix XIV	75
Appendix XV	76
Appendix XVI	77
Appendix XVII	78
Appendix XVIII	79
Appendix XIX	80
Appendix XX	81
Appendix XXI	82
Appendix XXII	83
Appendix XXIII	84
Appendix XXIV	85
Appendix XXV	86
Appendix XXVI	87
Appendix XXVII	88
Appendix XXVIII	89
Appendix XXIX	90
Appendix XXX	91

APPENDIX

Appendix I	92
Appendix II	93
Appendix III	94
Appendix IV	95
Appendix V	96
Appendix VI	97
Appendix VII	98
Appendix VIII	99
Appendix IX	100
Appendix X	101
Appendix XI	102
Appendix XII	103
Appendix XIII	104
Appendix XIV	105
Appendix XV	106
Appendix XVI	107
Appendix XVII	108
Appendix XVIII	109
Appendix XIX	110
Appendix XX	111
Appendix XXI	112
Appendix XXII	113
Appendix XXIII	114
Appendix XXIV	115
Appendix XXV	116
Appendix XXVI	117
Appendix XXVII	118
Appendix XXVIII	119
Appendix XXIX	120
Appendix XXX	121

