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Notice of Appeal.

Filed February 21, 1917.

Essex County Circuit Court.

MARY F. K. MICHAEL, *Plaintiff-Respondent,* *vs.* HARRY W. MINCHIN, *Defendant-Appellant.*	*Notice of Appeal.*

To Ralph E. Lum., Esq., Attorney for Plaintiff-Respondent:

TAKE NOTICE that the defendant above named appeals to the Court of Errors and Appeals, the last resort in all causes, from the judgment entered in the above entitled cause and from each and every part thereof.

Yours, etc.,

ARTHUR H. MITCHELL,
Attorney for Defendant-Appellant.

Service of a copy of the within notice of appeal is hereby acknowledged this 15th day of February, 1917.

RALPH E. LUM,
Att'y for Plaintiff-Respondent.

Grounds of Appeal.

Filed February 21, 1917.

New Jersey Court of Errors and Appeals

MARY F. K. MICHAEL, *Plaintiff-Appellee,*	*On Appeal.*
vs.	*Grounds of Appeal.*
HARRY W. MINCHIN, *Defendant-Appellant.*	

The appellant states the following ground of appeal:—

1. Because the Judge of the Circuit Court of Essex County decided as follows: "I think that the estate of the defendant is an estate in fee simple, subject to be divested on his death without issue, in which event the executory devise over to his sister, Emma Jane Minchin, will vest in her heirs or devisees."

ARTHUR H. MITCHELL,
Attorney of Appellant.

Service of copy of the within grounds of appeal is hereby acknowledged this twentieth day of February, 1917.

LUM, TAMBLYN & COLYER.

Summons.

The State of New Jersey to Harry W. Minchin:

You are summoned to answer the annexed complaint of Mary F. K. Michael in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

[L. S.]

WITNESS, Nelson Y. Dungan, Judge of the Essex County Circuit Court, at Newark, this tenth day of April, nineteen hundred and sixteen.

JOSEPH McDONOUGH,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

MARY F. K. MICHAEL, *Plaintiff,* vs. HARRY W. MINCHIN, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff, Mary F. K. Michael, of Elizabeth, Union County, New Jersey, says that:

FIRST COUNT.

1. On April 5, 1916, defendant under his hand and seal, made and delivered to plaintiff, a deed of certain land in the City of Newark, County of Essex, State of New Jersey, described as follows:

Beginning at a point in the westerly line of Essex Street distant northerly about one hundred and seventy feet from the intersection of said westerly line of Essex Street with the northerly line of James Street, and at a corner of land conveyed by Abraham Minchin and wife to Mary Minchin by deed recorded in Book G-20 of Deeds for Essex County at page 230, &c.; thence northerly along said westerly line of Essex Street ninety-four feet and six inches more or less to the northerly line of land formerly owned by Geo. Minchin, deceased, seventy-nine feet nine inches more or less to land formerly of Henry J. Yates; and thence along said Yates' land in a southerly direction forty-five feet to a corner; thence north fifty-eight degrees thirty minutes

west twelve feet more or less to land sold by Andrew Roaless to John C. Plumley; thence along the same south twenty-five degrees forty-five minutes west forty-nine feet more or less to a corner of land conveyed to Mary Minchin by deed recorded in Book G-20 of Deeds for Essex County, at page 230, &c., thence easterly along her land seventy-four feet seven inches more or less to the point or place of beginning.

Being all of the premises conveyed by William Wright, Sheriff to George Minchin by deed recorded in Book S-21 of Deeds for Essex County at page 372, &c., and by the Mutual Benefit Life Insurance Company by deed dated April 1, 1881, and recorded in Book A-21 of Deeds for Essex County at pages 334, &c., which said premises were devised to Harry W. Minchin by George Minchin, by his last will and testament, dated the 18th day of July, 1890, and probated in the Essex County Surrogate's Office on August 8, 1892.

2. In said deed, defendant covenanted with the plaintiff that he, the said defendant, was well seized of said tract of land as of a good and indefeasible estate in fee simple.

3. The defendant was not then well seized of said tract of land as of a good and indefeasible estate in fee simple.

4. Defendant claims to be seized of an indefeasible estate of inheritance in fee simple under the will of his father, George Minchin, which will was duly probated in the Surrogate's office of Essex County on August 8, 1892, but which said will does not devise to said Harry W. Minchin an indefeasible estate of inheritance in fee simple, but is an estate vested in said Harry

W. Minchin subject to being divested upon his dying without issue.

5. Plaintiff paid defendant $1,000. for said tract of land upon receiving said deed.

SECOND COUNT.

1. On April 5, 1916, defendant under his hand and seal, made and delivered to plaintiff, a deed of certain land in the City of Newark, County of Essex, State of New Jersey, described as follows:

Which said lot hereby conveyed may be found in the northerly line of Academy Street between the lot of the late Anthony Sanders, deceased on the west and George Herdman on the east, being twenty-six feet front and rear and running from the said line of Academy Street to the line of the Morris Canal, being the same premises which were conveyed to the said Ellen Hogan in trust by Patrick King and wife by deed, dated January 13, 1873, and recorded in Book, Volume 16, of Deeds of Essex County, on pages 423, &c., and being the same premises conveyed by bargain and sale deed made by the said Ellen Hogan to Martin J. Cooney, bearing date February 6, 1888.

2. In said deed defendant covenanted with the plaintiff that he, the said defendant, was well seized of said tract of land as of a good and indefeasible estate in fee simple.

3. The defendant was not then well seized of said tract of land as of a good and indefeasible estate in fee simple.

4. Defendant claims to be seized of an indefeasible estate of inheritance in fee simple under the will of his father, George Minchin, which will was duly probated in the Surrogate's office of Essex County on August 8, 1892, but

which said will does not devise to said Harry W. Minchin an indefeasible estate of inheritance in fee simple, there being a question under the will whether said real estate is devised to said Harry W. Minchin or his sister Addeline L. Minchin Labough and if devised to him at all is an estate vested in Harry W. Minchin subject to being divested upon his dying without issue.

5. Plaintiff paid defendant $1,000. for said tract of land upon receiving said deed.

Plaintiff demands damages as follows:

On the first count $1,000.00;

On the second count, $1,000.00.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Answer.

Filed April 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

MARY F. K. MICHAEL, *Plaintiff,* vs. HARRY W. MINCHIN, *Defendant.*	*Action at Law.* *Answer.*

Defendant, Harry W. Minchin, of the Township of Hillside, County of Union, State of New Jersey, says that:

DEFENSE TO FIRST COUNT:

1. He admits the first paragraph.
2. He admits the second paragraph.
3. He denies the third paragraph.
4. He admits that he has acquired title to the premises in question under the will of his father, George Minchin, which will was duly probated in the Surrogate's Office of Essex County on August 8, 1892, but he denies that said will does not devise to him an indefeasible estate of inheritance in fee simple or that he has a vested estate subject to being divested upon his dying without issue.
5. He admits the fifth paragraph.

DEFENSE TO SECOND COUNT:

1. He admits the first paragraph.
2. He admits the second paragraph.
3. He denies the third paragraph.

Answer.

4. He admits that he has acquired title to the premises in question under the will of his father, George Minchin, which will was duly probated in the Surrogate's Office of Essex County on August 8, 1892, but he denies that said will does not devise to him an indefeasible estate of inheritance in fee simple or that Addeline L. Labaugh, or her heirs, have any interest in said premises or that he has a vested estate subject to being divested upon his dying without issue.

ARTHUR H. MITCHELL,
Attorney for Defendant.

Agreed State of Facts.

Filed January 2, 1917.

ESSEX COUNTY CIRCUI TCOURT.

MARY F. K. MICHAEL, *Plaintiff,* vs. HARRY W. MINCHIN, *Defendants.*	*Action at Law.* *Agreed State of Facts.*

For the trial and determination of the issue joined in this cause and now submitted to the Court as a jury, and for the purpose of said trial, the said parties, by their respective attorneys agree that the facts are as follows:

George Minchin died July 28, 1892, seized of certain real estate known and designated as Nos. 31, 33, 35 and 37 Essex Street, in the City of Newark, and also seized of certain other real estate in City of Newark, known as No. 211 Academy Street, and more particularly described in the complaint, leaving last will and testament probated in the Surrogate's Office of the County of Essex, on August 8, 1892, a true copy of which is as follows:

"The last will and testiment of George Minchin of the City of Newark County of Essex and State of New Jersey—Considering the uncertainty of this Mortal life and being of Sound mind and memory do make and Publish this my last will and testament in manner and form following (that is to Say)—

Agreed State of Facts.

First—My Houses & Lots No. 31 to 39 Essex St. and Houses & Lots No. 75-77-79-81-83-87 and 89 Boyden St and—House and lot No. 211 Academy St in the above mentioned City County and State together with everything Contained therein I give and bequeat to my Wife Mary Jane for her use during her natural life and at her death the whole of the above mentioned Property to revert to my Children in this Propor- My Son Harry W. Minchin all my Essex St Property as now known from No. 31 to 41 to my *Dauter* Emma J. Minchin Four (4) Houses and lots known now as No. 77-79-81 and 83 Boyden St as above mentioned to my *Dauter* Addeline No. 85-87-89 three Houses and lots of the above mentioned and House and lot No. 211 Academy St I give to my Son Harry W. Minchin and I give To my Son Abraham C. Minchin the Sum of Three Thousand dollars ($3000.00/100) now Should death take my *dauter* Addeline or She do not have *anny* Issue Children living at her death her Part will be divided between my Son Harry W. Minchin and my *dauter* Emma J. Minchin in Case my Son Harry W. Minchin Should depart this life without Issue His Share will go to my *Dauter* Emma Jane Minchin and if Emma Should depart this life without (Issue Children) her Share Should go to my Son Harry W. Minchin in Case all my (three 3) last mentioned Children depart this without Issue then the whole Shall go to my Son Abraham C. Minchin.

Second—I leave to my wife Mary Jane my life Insurance *Poliseys* and when Paid She Should Pay my Son Abraham C. Minchin his Share $3000.00/100 out of it besides in Say Sixty days after or as can be done I leave my Wife Mary Jane all my Personal Property for

her life time and at her death it Shall go to my Son Harry W. Minchin if alive if not alive to my *Dauter* Emma Jane and is not alive to my *Dauter* Addie L. Labough and if She is dead to my Son Abraham C. Minchin but at *anny* time during my wife life if She wish She Can give to my son Harry or my *Dauter* Emma *anny* or all Parts of what was left to them besides She is to *Seport* them *untill the* are of age in as good a way as it will *alow* I *diret* my *Exectiors* to Pay all my *lawful deaths.*

Lastly I do appoint my Wife Mary Jane and my Son in law William Labough of the City of Newark County of Essex and State of New Jersey to be the Executors of this my last will and *testiment* in testimony whereof I the Said George Minchin have to this my last will and *testiment* Contained on one Sheet of Paper. Subscribed my name and affixed my Seal this *eighteen* day of July A. D. eighteen hundred and ninety.

GEORGE MINCHIN (L. S.)

The above instrument Consisting one Sheet or 3 Pages was here Subscribed by George Minchin to be his last will and *testiment* in the *Presents* of each of us and we at his request *Signe* our name hereto as attesting witness.

ABRAHAM MINCHIN
Reside at Newark in Essex County N. J.

Witness

PETER BURTCHELL
Reside at Bath Beach Kings Co N. Y."

That George Minchin left him surviving his widow, Mary J. Minchin, a son Abraham C.

Minchin, a son Harry W. Minchin, a daughter Addeline L. Labaugh and a daughter Emma J. Avarre mentioned in the will as Emma J. Minchin; that said Addeline L. Labough died April 22, 1901, leaving her surviving and still living William D. Labaugh, husband, and one daughter Mary Emily Labaugh, and a son William Irwin Labaugh.

That Emma J. Avarre died July 6, 1903, leaving her surviving and still living Harry W. Avarre, husband, and one daughter, Sarah M. Avarre.

That Abraham C. Minchin died on or about the first day of June, 1915, without issue, leaving him surviving William Edwin Labaugh, Sarah M. Avarre, Harry W. Minchin.

That Harry W. Minchin has two children; viz., Mary Elizabeth Minchin and Robert W. Minchin.

That prior to the making of the above mentioned will George Minchin gave to Addie L. Labaugh premises known as 73 Boyden Street, Newark, N. J.

That Mary J. Minchin, widow of George Minchin, conveyed her life estate to Harry W. Minchin.

That Harry W. Minchin, the defendant herein, together with his wife, Elsie M. Minchin, conveyed the property referred to by deed containing a special covenant of seizin, as set forth in the complaint, to Mary F. K. Michael, the plaintiff.

Dated November 17, 1916.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

ARTHUR H. MITCHELL,
Attorney for Defendant.

Decision.

Filed January 2, 1917.

ESSEX COUNTY CIRCUIT COURT.

MARY F. K. MICHAEL, *Plaintiff,*
vs.
HARRY W. MINCHIN, *Defendant.*
} *Decision.*

Ralph E. Lum, Attorney for Plaintiff.
Arthur H. Mitchell, Attorney for Defendant.

DUNGAN, *J.*

In this case a jury was waived and it is submitted to the Court upon an agreed state of facts. It appears that George Minchin died July 28, 1892, seized of the real estate in question, and leaving a last will and testament which gave the use of his real estate to his wife, Mary Jane, during her natural life, and then provided as follows:—

"At her death the whole of the above mentioned property to revert to my children in this proportion my son Harry W. Minchin all my Essex St. property as now known from No. 31 to 41" * * * and "House and lot No. 211 Academy Street I give to my son Harry W. Minchin." "In case my son Harry W. Minchin should depart this life without issue his share will go to my *dauter* Emma Jane Minchin."

The testator left him surviving his widow, the said Harry W. Minchin, and the said Emma J. (Minchin) Avarre. Emma J. Avarre died

July 26, 1903, leaving her surviving and still living Harry W. Avarre, husband, and one daughter Sarah M. Avarre.

Harry W. Minchin is the defendant and has two children, and he, together with his wife, conveyed the property referred to in the plaintiff's complaint by deed containing a special covenant of seizen as set forth in the complaint to Mary F. K. Michael, the plaintiff; and she brings suit for a breach of that covenant in the defendant's deed by which he claims to be seized of an indefeasible estate of inheritance in fee simple under the will and testament of his father, George Minchin, insisting that in the event of his death without leaving issue him surviving the inheritance would go to the heirs of Emma Jane.

There can be no doubt but that the proper construction of the words "Depart this life without issue" mean, under our State of Wills (Comp. St. 5870, Sec. 27) a definite failure of issue,—"A want or failure of issue, in the lifetime or at the death of such person." "Unless a contrary contention shall otherwise appear by the will," and I think there is nothing in the will indicating such a contrary contention.

Unless the case of *Barrell* v. *Barrell,* 38 Eq. 60, upon which comment will presently be made, is controlling the attorneys of both plaintiff and defendant agree that the situation presented by the will in question is that Harry W. Minchin took an estate in fee in the lands in question subject to be defeated in the event that he should die without issue. *Den* v. *Alaro,* 20 N. J. L. 10, *Wilson* v. *Wilson,* 46 Eq. 321; *Stewart* v. *Knight,* 62 Eq. 232; *Dilts* v. *Clayhaunce,* 72 Eq. 10; *Brooks* v. *Kipp,* 54 N. J. Eq. 462; and therefore there could be no doubt about the plaintiff's

right to recover in this case were it not for the fact that Emma Jane is deceased in the lifetime of Harry.

But the defendant insists that this fact alone vests in Harry a fee simple title to the property and defeats the plaintiff's right of recovery and cites as authority for that contention the cases of *Sedel* v. *Wills,* 20 L. 223; *Den* v. *Schenck,* 3 Hal. 29; *Groves* v. *Cox,* 40 L. 40; *Brazzalle* v. *Dehm,* 86 L. 276, and *Drummond, executors* v. *Drummond,* 26 Eq. 234.

All of these cases I have examined with great care and think they do not constitute authority for the defendant's contention because of the peculiar provisions of the wills involved.

It is insisted that the case of *Sedel* v. *Wills* is authority for the contention that because Emma Jane Minchin is now deceased there is no one to take at the death of Harry W. Minchin the real estate devised to him, notwithstanding the fact that his deceased sister Emma left a child her surviving; but I do not so regard that case. The decision, holding that the words "Surviving sons and daughters" meant sons and daughters surviving the first taker, is based upon the peculiar wording of the will of Samuel Wills which provides that "I will that if either of my sons Thomas or Samuel should die without lawful issue the land heretofore devised to them shall be equally divided between my surviving son and daughter before mentioned. Item. If either of my said daughters before mentioned should die without issue it is my will that the lands devised to such daughters as shall die without lawful issue, shall be equally divided among my *surviving sons and daughters* as aforesaid.

Decision.

The Court distinctly said, upon the supposition that the devise over was to *all his other children;* then immediately upon the testator's death they each became seized of or entitled to an executory devise in fee in each other's lands, subjected to be defeated upon the others leaving issue at the time of their death; and consequently if one died leaving issue after the testator, but before the death of a brother or sister without issue, *the issue of the one so dying would take a share of the land, dying without issue, not as devisees of the testator nor yet as heirs of the one dying without issue but as heirs at law of his or her deceased father or mother, although such deceased father or mother did not die seized of the land in possession but seized only of the executory interest or estate.* For, in the case of executory devises, when the person who is to take upon the happening of the contingency is ascertained such actual seizin of the ancestor of the estate in possession in his lifetime is not necessary to cast the estate upon his heirs at law. If he dies before the contingency happens, he dies seized of the interest or estate, created by the executor devise to him; and whenever the contingency happens, the estate vests in possession of his heirs at law or devisees."

Unless therefore there is some peculiar wording of the will of George Minchin which would justify a construction that he intended that his daughter Emma should receive the share of his son Harry only in the event that she should survive him, she would stand in the same position as would the sons and daughters of Samuel Wills in the event that his will had been construed to mean "All his other children," instead of "Such of them as should actually sur-

vive the one dying without issue," as it actually was construed.

In the case of *Den* v. *Schenck,* 3 Hal., p. 29, the testator provided that "If any of my children should happen to die without any issue alive that such share or dividend shall be divided by the survivors of them."

Although not distinctly so stated in the opinion of Mr. Justice Fort, this case, like the case of *Sedel* v. *Wills* seems to have been decided upon the interpretation of the word "survivors" in the connection in which it is there used, and since there were no "survivors of his children" the court held that when his two sisters died it became impossible that the estate should be defeated by going over to survivors when there were none; from that time it became an absolute fee simple in Gilbert, and that the title held by defendant as a purchaser under him must be good.

There are no words in the will in question, as above suggested, evidencing as intention on the part of the testator that the share of his son Harry should go to his daughter Emma only in the event that she should survive him.

In the case of *Groves* v. *Cox,* Justice DePue said, "In the event of there being no one surviving, at the death of James, competent to take under the designation of 'the surviving heirs' his estate was a fee simple absolute and passed to the devisee under his will.

In the case in hand, the gift to Emma Jane Minchin upon the death of Harry Minchin without issue is not made conditional upon her surviving him, as is suggested by the cases above cited.

Decision.

It is insisted that the case of *Brazzalle* v. *Diehm* is authority for the defendant's position, that by the death of Emma Jane there is no person to whom the land in question could go upon the failure of issue of Henry and that therefore Henry takes a fee, but I do not so regard it. It is true, Justice Bergen says, "If the devise over to Elsie is void for want of a person in being to take the prior estate it becomes absolute," and that "The appellant, however, urges that the gift to Elsie was personal, there being no words of inheritance, and as she died during the life tenancy, the legacy to her lapsed, and, therefore, the testator died intestate if both John and Margaret should die without issue leaving issue. There are two answers to this—first, if by the death of Elsie the gift being personal, the executory devise became void, the prior devise became absolute," etc., but this seems to be by way of meeting the contention of the parties, either in argument or briefs, and was in no way necessary to the decision of the case, because it appeared that the heirs of Elsie who died in the lifetime of John and Margaret conveyed the interest of Elsie to the life tenant and John and Margaret. Indeed I regard this case as authority for the contention that the gift to Elsie was an inheritable interest rather than for the contention that it became void at her death for want of a person in being to take.

This case cites *Howell* v. *Gifford,* 64 N. J. Eq., 180, in which the testator left his estate to be divided among his children, with a provision for a gift over to his other children "Should any of said children die without leaving lawful issue him or her surviving." The Court said "In the case of Elizabeth Mitchell,

the contingency happened on which her share was to go over. She survived her brother Henry Howell''—who left children—''And died before her mother.'' The question is ''Who takes the proportionate part of her share which Henry would have taken had he survived her.'' And the Court held ''I think, therefore, that the land goes to the heirs,'' who were the children of Henry.

The case of *Drummond's executors* v. *Drummond* is cited in this case as well as in the defendant's brief, but I do not regard that case as authority for the defendant's contention, because it appeared that the gift over to Philip McGran, after the death of testator's adopted daughter Jane Drummond, lapsed because of the decease of McGran in the lifetime of testator, and it was upon that ground that the case was decided.

After carefully considering all the cases to which my attention has been directed and others which have come under consideration in the course of my examination, I conclude Emma Jane in her lifetime took an executory interest in the land in question which at her death passed to her heirs or devisees, and that therefore Henry had not a defeasible estate of inheritance therein and that the plaintiff is entitled to recover, unless this case is controlled by the case of *Barrell* v. *Barrell,* 38 Eq., p. 60.

It will be observed that in that case, following the gift, absolute in its terms, to his four children, there followed a clause with alternative limitations over which provided for the event of the death of the donee under all possible circumstances, death with or without issue.

Decision.

Mr. Jarman, in his work on wills (3 Jarm. on Wills R. & R. Ed., 643) says, "Sometimes it happens that a devise in fee simple is followed by alternative limitations over, which collectively provide for the event of the death of the devisee under all possible circumstances. In such case, the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime.

This seems to be the principle upon which the case of *Barrell* v. *Barrell* was decided.

In the case in hand, there is no such provision for the event of the death of the devisee *under all possible circumstances.* The will of George Minchin simply being "In case my son Harry W. Minchin should depart this life without issue, his share will go to my daughter Emma Jane Minchin."

I think there is nothing in this case or in the will of George Minchin from which the Court can say that the cases first above quoted are not controlling. It would require a strained construction of the George Minchin will to hold either that the gift over to Emma Minchin became void for want of person in being to take at the death of Harry Minchin or that the words "Depart this life without issue" mean "Death in the lifetime of the testator."

I think that the estate of the defendant is an estate in fee simple subject to be defeated upon his death without issue, in which event the executory devise over to his sister Emma Jane Minchin will vest in her heirs or devisees.

Judgment for plaintiff.

Rule for Judgment.

Filed February 15, 1917.

ESSEX COUNTY CIRCUIT COURT.

MARY F. K. MICHAEL, *Plaintiff,*	*Action at Law.*
vs.	
HARRY W. MINCHIN, *Defendant.*	*Rule for Judgment.*

This action coming on for trial before Honorable Nelson Y. Dungan, Judge of the Essex County Circuit Court, in the presence of the counsel for the respective parties on the seventeenth day of November, nineteen hundred and sixteen, without a jury, a jury having been waived by the parties hereto and upon an agreed state of facts submitted by the attorneys for the respective parties, and the argument of counsel having been heard and the court having found that the plaintiff herein is entitled to recover against the said defendant, and it appearing that the parties hereto have stipulated that the plaintiff, if entitled to recover, shall be entitled to damages of one thousand dollars upon each of the two counts of the complaint herein;

Thereupon it is considered that judgment final be rendered in this cause in the favor of the said plaintiff and against the said defend-

ant in the sum of two thousand dollars besides costs of this action to be taxed.

On motion of

RALPH E. LUM,
Attorney for Plaintiff.

Let the above rule be entered.

NELSON Y. DUNGAN.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MARY F. K. MICHAEL,
Plaintiff-Respondent,

vs.

HARRY W. MINCHIN,
Defendant-Appellant.

Action at Law.

Brief of Defendant-Appellant.

This action was brought in the Essex County Circuit Court by Mary F. K. Michael against Harry W. Minchin to recover damages on covenants in two certain deeds given by said Harry W. Minchin and wife to the plaintiff; the first deed, dated April 1, 1916, for certain lands in the City of Newark, County of Essex, State of New Jersey, on the westerly side of Essex street; and upon a covenant in a certain other deed given by said Harry W. Minchin and wife to Mary F. K. Michael dated April 5th, 1916, for premises on the northerly line of Academy street in the City of Newark; the damages on each count being $1,000.00.

In the covenants above mentioned Harry W. Minchin claimed to be seized of an indefeasible estate of inheritance in fee-simple under the last will and testament of his father, George Minchin, which said will was duly probated in the Surrogate's Office of Essex County August 8th, 1892, a copy of which will is set forth in the state of facts agreed to in this case. Judgment was given by said Court for the plaintiff against the defendant, from which judgment the said Harry W. Minchin, defendant-appellant, now appeals to this Court.

New Jersey State Library

The controversy in this matter depends entirely upon the construction given of the will of George Minchin, deceased, as to what estate he intended to devise to Harry W. Minchin under the provisions of the same. Testator first gives all of his real estate, designating it by street numbers, together with everything contained in the houses, to his wife, Mary Jane, for her use during her natural life

> "and at her death the whole of the above mentioned Property to revert to my Children in this Proportion My Son Harry W. Minchin all my Essex St Property as now Known from No. 31 to 41 to my *Dauter* Emma J. Minchin Four (4) Houses and Lots Known now as No. 77, 79, 81, and 83 Boyden St as above mentioned to my *Dauter* Addeline No. 85, 87 & 89 three Houses and lots of the above mentioned and and House and lot No. 211 Academy St I give to my Son Harry W. Minchin and I give To my Son Abraham C. Minchin the Sum of Three Thousand dollars ($3000 00/100) now Should death take my *dauter* Addeline or She do not have *anny* Issue Children living at her death her Part will be divided between my Son Harry W. Minchin and my *dauter* Emma J. Minchin in Case my Son Harry W. Minchin Should depart this life without issue his Share will go to my *Dauter* Emma Jane Minchin and if Emma Should depart this life without (Issue Children) her Share Should go to my Son Harry W. Minchin in Case all my (three 3) last mentioned children depart this without Issue then the whole Shall go to my Son Abraham C. Minchin."

This language unquestionably created in the widow, Mary Jane Minchin, a life estate which was conveyed to Harry W. Minchin before the beginning of this action and now that said

Mary Jane Minchin has departed this life (see state of facts) there is no question as to her rights in this proceeding.

It is contended by the defendant that there are three periods possible when the testator intended that Harry W. Minchin should acquire a fee simple absolute in the real estate devised to him, namely: 1st. At the time of testator's death. 2nd. At the date of death of widow, Mary Jane Minchin. 3d. At the death of Harry W. Minchin.

At the time of Testator's death.

In support of the contention that the testator intended that Harry W. Minchin should acquire a fee-simple absolute in the real estate devised to him at testator's death providing he had not died prior to that time without issue, I would cite the case of *Barrell* v. *Barrell,* 38 Eq. 60, affirmed by the Court of Errors and Appeals in 39 Eq. 603.

In this case testator gave his residuary estate to his children George, Mary Henry and Charles, to be equally divided among them and then continues:

> "In case of the death of any one or more of any of my children without leaving issue it is my will and I direct that the shares or shares of the one or more so dying shall go to the survivor or survivors of my children, but if any of the children shall die leaving lawful issue living, such issue to take the share his, her or their parents would have taken, share and share alike."

At testator's death the four children above mentioned survived him and were still living at the time that the action was brought. George

and Henry had children. Mary and Charles were unmarried. The Court held:

> "That the intention of the testator was to give to each of his children an absolute estate in the residue, *subject only to be defeated by the death of the child in testator's lifetime.*"

Chancellor Runyon in his opinion at page 62 says:

> "It will be seen that here is a gift, absolute in terms, followed by alternative limitations over, which collectively provide for the event of the death of the donee under all possible circumstances—death either with or without issue. In such case the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime in order to avoid repugnancy, inasmuch as the alternative limitations over, if not so qualified and restricted, would reduce the prior devise from a fee to a life estate. 3 *Jarm on Wills* (R. & T. ed.) 643."

While George Minchin in his will made a gift absolute in its terms to Harry W. Minchin and while he did not specifically say that should Harry W. Minchin die with issue the issue should take his share, nevertheless it seems as though this language could properly be substituted, the same being the clear intention of the testator. If such language were added it seems that the case in question would clearly come within the provisions of the case of *Barrel* v. *Barrell* above mentioned.

2nd. Die without issue at date of death of widow, Mary J. Minchin.

In the event that the Court does not take the view that the death of the testator marks the time when the estate shall vest in Harry W. Minchin absolutely, provided he had not died prior thereto without issue, then it appears that it would be reasonable to infer from the following language of the testator, namely:

> "At her death (death of Mary J. Minchin, the widow) the whole of the above mentioned property to revert to my children in this proportion; my son Harry W. Minchin all my Essex Street property, &c."

that the testator intended that his children who were alive at the time of the death of Mary J. Minchin should take absolutely the real estate devised to each of them.

This contention is supported by the case of *Pattersen* v. *Madden,* 54 Eq. 714. The facts in this case are as follows: The testator by his will gave his farm to his son J. He then gave another farm to his second son, and other two farms to his wife, with remainder to his third and fourth sons. He then provided that none of the farms given to his sons should be sold by them during the life of his wife; and that if any of his sons should die without leaving issue, but leaving a widow, the farm of such son should go to his widow during her widowhood and afterwards to the heirs-at-law of the testator. Held:

> "That J. took a vested estate in fee-simple in the farm devised to him, subject, however, to be divested by his death during the lifetime of his mother, without leaving issue but leaving a widow; HELD FURTHER: that by the death of the testator's wife during the lifetime of J. the limitation over

to the heirs of the testator was defeated and the estate of J. became indefeasible."

Mr. Justice Gummere, at page 721, says in that case:

"As I read the will before us, the appellant's estate becomes divested and vests in the heirs of the testator, upon his death without issue surviving him and leaving a widow, only in case his death occurs during the lifetime of his mother, the widow of the testator."

As a further argument that this was the intention of the testator I refer to that portion of the will which states as follows:

"But at any time during my wife life if she wish she can give to my son Harry my daughter Emma *anny* or all parts of what was left to them besides she is to *seport* them until *the* are of age in as good a way as it will *alow,* &c."

It may be argued or contended that this language simply relates to the personal property given under the second section of the will of George Minchin but this does not seem to be so because under this section Emma Jane is given no part of the personal property until after the death of Harry and therefore it seems that this language relates to the real estate devised to the different children under the first section of the will. From the reading of the will it would seem to clearly be the intention of the testator that his wife should enjoy the property during her lifetime and that at her death the estates devised to the particular children should vest in them absolutely, providing any of them had not died prior to her death without leaving issue.

The above language of the testator might be construed to mean that it lay in the power of the widow, Mary J. Minchin, to defeat any executory devise which might go over to Emma J. Minchin or to Harry W. Minchin in the event that either of them should die without issue prior to the death of the other, which power of disposition on her part would be inconsistent with and avoide the limitation over, to either Emma J. Minchin or Harry W. Minchin.

In this connection I would cite the case of *Armstrong* v. *Kent,* 2 *Halstead,* p. 559, the facts being as follows:

> "1. M. A. devised and bequeathed all the rest and residue of her estate, real, personal, or mixed, to E. R. A., to be by her possessed, enjoyed, and occupied to her and her heirs forever; but if she should die without heirs, and intestate, then that all the estate above devised to her shall vest in her brother, Charles M. Armstrong, and sister, Margaret Salter, and their heirs, to be equally divided between them, share and share alike.
>
> "2. Held, that E. R. A. took an estate in fee-simple in the lands, and an absolute property in the personal estate; that the words, 'without heirs and intestate,' imply a power of disposition, and are inconsistent with, and avoid the limitation over."

So with the case in hand; the devises to Harry and Emma being in fee-simple with the power in the widow to give to either of these children all parts of what was left to them seems to imply clearly a power of disposition which would be inconsistent with and avoid the limitation over.

3rd. Die without issue at date of death of Harry Minchin.

The only other construction that seems to be possible is that Harry W. Minchin acquired at the death of his father a vested estate in the Essex street and Academy street properties, which estate was subject to be divested upon the death of said Harry W. Minchin without issue at the time of his death and that Emma Jane Minchin in her lifetime took an executory interest in the land in question which at her death passed to her heirs or devisees.

In answer to this contention, which is the contention of the plaintiff, I would call the Court's attention to the fact that all the brothers and sisters of said Harry W. Minchin are now dead, two of whom have left issue. It is the contention of the defendant that if the latter interpretation is put on the will of George W. Minchin, namely, that the period at which the devise over is to take effect is the time when Harry W. Minchin shall die, then at such time if said Harry W. Minchin be without issue living (there being issue of Harry W. Minchin at the present time as shown by the state of facts) then there will be no one to take title to the land, as all of the sisters and brothers whom the testator specifically designated the real estate should go to upon Harry W. Minchin's dying without issue, have departed this life. The language of the testator is as follows:

> "Now Should death take my *Dauter* Addeline or She do not have *anny* Issue Children living at her death her Part will be divided between my Son Harry W. Minchin and my *dauter* Emma J. Minchin in Case my Son Harry W. Minchin Should depart this life without Issue his Share will go to my *Dauter* Emma Jane Minchin and if

> Emma Should depart this life without issue (Issue Children) her Share Should go to my Son Harry W. Minchin in Case all my (three 3) last mentioned Children depart this without Issue then the whole Shall go to my Son Abraham C. Minchin."

In other words, it seems that the testator intended that in the event that Harry should die without issue then his share should go to his sister Emma, no mention being made of the issue of Emma in the event that she had departed this life prior to the death of Harry W. Minchin; and therefore it would seem that Emma having died prior to the death of Harry it would be impossible for Harry to be divested of the estate in the event that he should have no issue at the time of his death, because the devise over would fail on account of there being no one to take.

This contention is supported by the case of *Seddel* v. *Wills,* in which the facts are as follows:

> "1. A testator, by several clauses in his will, devised to each of his daughters a tract of land in fee; and then added the following clause: 'If either of my daughters before mentioned, should die without lawful issue, it is my will that the lands devised to such daughter as shall die without lawful issue, shall be equally divided among my surviving sons and daughters as aforesaid.'
>
> "Held that the daughters severally took estates in fee in the lands devised to them respectively, subject to be defeated upon their dying without issue living at the time of their death.
>
> "2. That the devise over was not to the testator's 'other' children, who were living when he made his will; nor to those, who

should survive him; but to such only as should survive the one dying without issue.

"3. Consequently upon the death of Eunice, who died after the testator without issue, her share went to her brothers and sisters, then living, in fee-simple absolute, *to the exclusion of the children of her deceased brothers and sisters.*

"4. And upon the subsequent death, intestate and without issue, of Elizabeth, another daughter of the testator, her share of the land primarily devised to Eunice, descended to Elizabeth's heirs at law; but the land devised to her by the testator, went over to her brothers and sisters then living."

It would seem from the above decision that in the event that the testator meant to fix the time of dying without issue at the time of Harry W. Minchin's death, in such event all his sisters and brothers having died prior to him there would be no one to take the title and therefore it would be an impossible devise and would vest in Harry W. Minchin a fee-simple absolute.

In this connection I would like to call the Court's attention to the case of *Denn* v. *Schenck,* 3 Halstead, 29. In this case the facts are as follows:

"Testator gives to his son Gilbert certain real estate; to his daughter Hannah certain real estate; and to his daughter Jean certain real estate; and then proceeds further, 'My will is that if any of my children should happen to die without any issue alive, that such share or dividend shall be divided by the survivors of them.' Both of Gilbert's sisters died prior to his death but Gilbert had sold the property to Schenck, prior to the death of his sisters. Hannah, one of the sisters, left four children. Gilbert died in 1820 without leaving issue."

Justice Ford, at page 42, states:

> "On the whole, the estate was taken by Gilbert in fee; subject to be defeated on the happening of two contingent events; fiirst, that he should die without issue at his death; second, that his sisters should survive him; *when his two sisters died it became impossible that the estate should be defeated by going over to survivors when there were none; from that time it became an absolute fee-simple in Gilbert;* and the title held by the defendant as a purchaser under him must be good."

The trial Court in his decision did not pass upon the title of the defendant to the premises known as 211 Academy street but the plaintiff-respondent contends that this house and lot was given by the testator to his daughter Addeline.

The language of the will in relation to the above real estate is as follows:

> "My son Harry W. Minchin all my Essex St Property as now Known from No. 31 to 41 to my *Dauter* Emma J. Minchin Four (4) Houses and lots Known now as No. 77'' 79'' 81' and 83 Boyden St. as above mentioned to my *Dauter* Addeline No. 85'' 87'' 89 three Houses and lots of the above mentioned and and House and lot No. 211 Academy St I give to my Son Harry W. Minchin the Sum of Three Thousand dollars ($3000.00/100)."

There is no punctuation in the will to assist us in determining testator's meaning, but the natural punctuation would be a period or semi-colon after each of the devises, namely, after "41"; after the words "above mentioned"; after "Harry W. Minchin"; and after "$3,-000.00/100"; which would make it clear that Harry W. Minchin is to take the real estate No.

211 Academy street. If this construction is not placed upon the language of the will then the testator must have intended that Harry W. Minchin and Abraham C. Minchin were each to receive three thousand dollars from his estate. The latter construction does not seem to be the correct one for the reason that in the second clause he directs that the three thousand dollars bequeathed to Abraham C. Minchin shall be paid from his insurance money within sixty days after said policies are paid, or as soon after as possible. If he had intended that Harry W. Minchin should have a like amount of money he no doubt would have mentioned Harry W. Minchin's name in connection with Abraham C. Minchin in this second clause.

Let us consider now particularly the provisions of the testator's will, in which provision is made for gifts over. He provides that should death take his daughter Addeline or should she not have issue living at her death her part was to be divided between his son Harry and his daughter Emma. In case his son Harry should depart this life without issue then his share was to go to the daughter Emma. If Emma should depart this life without issue her share should go to Harry. Finally he concludes in these words:

> "In case all my three last mentioned children depart this without issue, then the whole shall go to my son Abraham C. Minchin."

By reference to the state of facts it appears that all his sisters and the brother of Harry are now dead, two of whom have left issue. Evidently, then, the gift over to Abraham could not under any circumstances take effect, because his right depends upon the other three children

all dying without issue. According to the facts some one other than Abraham must have died with issue and it necessarily follows that this provision cannot take effect. Furthermore, a reading of the will makes it clear that the gift over of Harry's share depends upon two contingencies: First, that he should die without issue at his death, and, second, that his sister Emma Jane should survive him.

Similar provisions were considered in the case of *Groves* v. *Cox,* 40 N. J. L. 40. Here the testator devised certain premises to his son. By a subsequent clause he declared that:

> "It is my will should any of my children *dye* without *isue,* such share or shares to be equally divided amongst the surviving heirs."

The Court considered among other things, whether the estate of James ended at his death without issue. In the course of the opinion, Depue, *J.* says:

> "The estate thus created was determinate and defeasible on the happening of two events: First, the death of James, without issue at his death; and second, the survivorship, at his death, of some one or more individuals entitled, under the designation of 'the surviving heirs' to take the estate under the executory devise, *per formam doni.* The period of time to which the survivorship related is the death of James." (Cases cited).
>
> "In order to determine the estate of James, both the events mentioned must happen. On a devise of a fee-simple conditional, with an executory devise over to another, the whole estate goes out of the devisor, in the first instance, to the complete disinherison of the heir." (Cases cited).

"And if there be no one to take under the executory devise, the estate will not revert to the right heirs of the testator." (Cases cited).

"In the event of there being no one surviving, at the death of James, competent to take, under the designation of 'the surviving heirs,' his estate was a fee-simple absolute, and passed to the devisees under his will."

Again, in the case of *Brazzalle* v. *Diehm,* 86 N. J. L. 276, the terms of a will were considered. After the death of the widow, who took the estate for life, the testator devised the residue of his estate to two of his children, "their heirs and assigns forever," and further provided that if John and Margaret, two children "should die without lawful issue" that his or her share should go to the other, but if both should die, then to "my first named daughter, Elsie Jane Boman." Elsie died intestate after the testator and thereafter her only heirs at law conveyed to testator's widow and two children. In the course of the opinion, the Court proceeds:

"The appellant, however, urged that the gift to Elsie was personal, there being no words of inheritance, and as she died during the life tenancy the legacy to her lapsed, and, therefore, the testator died intestate if both John and Margaret should die without leaving issue. There are two answers to this—first, if, by the death of Elsie, the gift being personal, the executor devise became void, the prior devise became absolute."

Citing *Drummond's Executors* v. *Drummond,* 26 N. J. Eq. 234.

This latter case also has a bearing upon the subject under consideration. In this case it appears that a testator gave all his property, real

and personal, to his executors with directions to divide all income equally between his wife and daughter, share and share alike; at the death of his wife the whole fund to go to his daughter when she should arrive at full age; if the daughter should die without leaving lawful issue the fund to go to his nephew P. M. P. M. died in the testator's lifetime. The widow was dead at the time of the filing of the bill and it was held that the daughter was entitled to the fund absolutely. In the course of the opinion the Chancellor proceeds as follows:

> "The testator gave his property to Jane when she should have attained to her majority, giving it over to McGran in the event of her dying without leaving issue. The gift to Jane was absolute, subject to be defeated by the contingent executory gift over. She was the primary object of his bounty. The provision made in the contingency of her dying without leaving lawful issue, was made expressly for another object of his bounty whom he desired and intended to benefit in that event. That object had ceased to exist, and the provision, therefore, was at an end, and the primary gift was left wholly unaffected by it. * * * The principle of the rule that, where there is an estate in fee liable to be defeated on a condition subsequent, and that condition originally was, or by matter subsequent, has become impossible to be performed, the defeasible estate is made absolute, applies to this case, for the estate was made liable to be defeated by a gift over, which could never, by possibility, take effect, and the primary gift, therefore, is the same as if there were no provision for its defeasance. It was so held in Den ex dem Van Middleworth v. Schenck, 3 Halst. R. 29 * * *.

> "The general rule," said Redfield, "that where the devise over fails, the estate remains in the former taker, seems to be recognized as a general principle, where the terms of the first devise are sufficient to carry the whole interest, and there is nothing in the circumstances indicating that such could not have been the intention of the testator."

By reference now to the words by the testator, it becomes apparent for the reasons hereinbefore expressed that Abraham cannot take under any circumstances because the condition never existed upon which he could possibly have taken. Furthermore it is apparent that the testator contemplated that Emma must survive Harry in order to take because in the very next sentence he provides that in case Emma should die without issue her share should go to Harry.

It would seem, then, that Harry's interest under the will comes clearly within the rules laid down in the cases above cited and that the devise over fails because there is no one to take. The gift over was a double contingency. First, that he should die without issue at his death; and second, the survivorship at his death of some one or more individuals entitled to take the estate under the executory devise.

From the state of facts it appears that the testator's daughter Addeline was at the time of the making of the will married to William LaBough and that Emma J. Minchin at the date of the making of the will was an infant of about 11 years and testator's son Harry W. Minchin was a child of about 8 years, that his son Abraham was 38 years of age. It was evidently the intention of the testator to be sure that these infant children were taken care of and the portion of the will which provides for

the contingencies of the death of his respective children without issue provides as follows:

> "Now Should death take my *dauter* Addeline of She do not have *anny* Issue Children living at her her Part will be divided between my Son Harry W. Minchin and my *dauter* Emma J. Minchin in Case my Son Harry W. Minchin Should depart this life without Issue his Share will go to my *dauter* Emma Jane Minchin and if Emma should depart this life without (Issue Children) her Share Should go to my son Harry W. Minchin, &c."

From this language the testator shows that he wishes to take care particularly of the two minor children, Harry W. Minchin and Emma Jane Minchin and his intention clearly is that the survivor of these two children shall take the share of the one dying without issue; and in this connection I wish to again call the attention of the Court to the provision under the second clause of the will for the turning over by the widow to either Harry or Emma the parts left to them under the will.

It is the general rule that courts will hold an estate vested and from the language of the will of George Minchin the common-sense construction of the will would seem to be clearly that Harry W. Minchin should have an absolute fee-simple in the Essex street property and Academy street property providing he lived to maturity and did not die before the death of his mother without issue and further in no event should there be any executory devise over in the case of his dying without issue unless his sister Emma should survive him.

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New Jersey Court of Errors and Appeals

MARY F. K. MICHAEL,
Plaintiff-Respondent,

vs.

HARRY W. MINCHIN,
Defendant-Appellant.

Action at Law.

Brief of Plaintiff-Respondent.

This action is based upon covenants in two certain deeds given by Harry W. Minchin and wife to the plaintiff, the first bearing date April 5th, 1916, for certain lands located on the westerly side of Essex street in the City of Newark, County of Essex and State of New Jersey, the second deed being between the same parties and of even date with the first for premises on the northerly side of Academy street in the said City of Newark. Damages of $1,000 were demanded on each count.

The defendant claims title to said premises under the Last Will and Testament of George Minchin, his father, said will having been duly admitted to probate in the Surrogate's Court of the County of Essex on August 8th, 1892, and defendant covenants that he is seized of an indefeasible estate of inheritance in fee simple under said will, a copy of which is set forth in the agreed state of facts in this matter.

Judgment was entered in the lower Court for the plaintiff in the amount of $1,000 damages on each count, and the decision of Judge Dungan clearly sets forth and sustains the contentions of the plaintiff.

It is contended by the plaintiff that the defendant has broken the above covenant and that he is not seized of an indefeasible estate of inheritance under his father's will, for the following reasons, namely:

The will after giving a life estate to the widow of George Minchin, namely, Mary Jane Minchin, which life estate has been conceded by the state of facts to have been conveyed to Harry W. Minchin by his mother, Mary Jane Minchin, provides as follows, namely:

> "The whole of the above mentioned Property to revert to my Children in this Proportion My Son Harry W. Minchin all my Essex St Property as now Known from No. 31 to 41 to my *Dauter* Emma J. Minchin Four (4) Houses and Lots Known now as No. 77, 81, and 83 Boyden St as above mentioned to my *Dauter* Addeline No. 85, 87 & 89 three Houses and lots of the above mentioned and and House and lot No. 211 Academy St I give to my Son Harry and I give To my Son Abraham C. Minchin the Sum of Three Thousand dollars ($3,000 00/100) now Should death take my *dauter* Addeline or She do not have *anny* Issue Children living at her death her Part will be divided between my Son Harry W. Minchin and my *dauter* Emma J. Minchin in case my Son Harry W. Minchin Should depart this life without issue his Share will go to my *Dauter* Emma Jane Minchin and if Emma Should depart this life without (Issue Children) her Share Should go to my Son Harry W. Minchin in Case all my (three 3) last mentioned Children depart this without Issue then the whole Shall go to my Son Abraham C. Minchin."

It now becomes necessary to determine the nature of the estate which Harry W. Minchin took under the will of his father. For the present purpose it may be conceded that no technical words are necessary in a will to vest a fee simple in a devisee. In the will under consideration, however, the testator has evidently fastened certain limitations upon the devises he has made.

After designating the properties to be given to Harry W. Minchin and others he provides as follows:

> "In Case my Son Harry W. Minchin Should depart this life without Issue his Share will go to my *dauter* Emma Jane Minchin."

The question now arises as to the effect of this clause in the will.

Much legal learning will be found with respect to the effect of the words "dying without issue." At common law when applied to real estate they are held to import an indefinite failure of issue; that is, not a failure at the death of the person, but the total extinction of his family; the death of all his descendants to the remotest generation.

As stated in *Den* v. *Allaire,* 20 N. J. L. 10, both in this country and in England, courts have felt themselves called upon to depart from the general rule whenever from the context, or any additional expression in the will, or difference in phraseology, it could be fairly inferred the testator intended to limit the failure of issue to the death of the first devisee.

In the case of *Den* v. *Allaire* (*supra*) the testator after making certain devises and bequests concluded his will in the following words:

> "And it is my will, that in case either of my sons before named *should die without issue,* that his share be equally divided betwixt my surviving sons, and like in my daughters, if either of them should die before they receive their legacies or have no issue, that then their part or proportion to be divided as aforesaid, between the surviving sisters."

The testator had devised to his son Charles certain real estate and evidently had two other sons and certain daughters. Shortly after the execution of the will the testator died and the son Charles, having arrived at age, entered upon the lands devised to him and continued in possession until he conveyed the same by deed with full covenants. This son Charles died after the conveyance, leaving a daughter who was his only child and sole heir-at-law.

At the conclusion of an elaborate opinion, Whitehead, *J.,* says:

> "In my opinion, Charles, the father of the lessor, under the devise to him, took a fee simple, subject, however, to be defeated, in the event of his death without issue then living. That as he died leaving issue alive, his estate became absolute, and the defendant claiming under him by purchase, is entitled to the premises."

Again this situation was considered in the case of *Wilson* v. *Wilson,* 46 N. J. Eq. 321. In this action a construction of a will was sought with reference to the rights of the parties therein. In the residuary clause the testator devised his residuary estate to his daughter Helena and to her heirs forever.

It then provides:

> "In case my said daughter Helena should die without leaving any heir or heirs, then it is my will that after her decease I give and devise the remainder and residue of my estate, both real and personal, whatever it may be at the decease of my said daughter, unto Elmirah Norton, wife of Daniel Norton and unto her heirs forever, and further it is my will that if my said daughter Helena should decease and that her said husband should survive her, then I give and bequeath unto him, her said husband, Robert Wilson, the sum of five hundred dollars forever."

Evidently the proceeding is between the complainant and her six children.

In the course of the opinion the Chancellor says:

> "Mrs. Wilson contends that she took the farm in fee, while her children insist that she took only a life estate in it, and that they will have the remainder.
>
> "A devise to one and his heirs, with a limitation over if he die without issue, unexplained by the context, imports an indefinite failure of issue and creates an estate tail at the common law." (Cases cited). "In such a case by our statute (citation) the first taker would have merely an estate for life.
>
> "But where the devise is to A and his heirs, with a limitation over to B at the death of A, if A then leave no issue, A takes a fee subject to its being defeated by his death without issue, and the devise over to B is an executory devise." (Cases cited).

"By the use of the words 'heir or heirs,' in the statement of the contingency upon which the estate is to go over, the testator obviously intended to designate the issue, or heirs, of his daughter's body. Taking the words in this sense, the provision is, that if the daughter, Helena, shall die without issue, then, 'after her decease, the residue of the testator's estate shall go over, 'whatever it may be at the decease' of the daughter. Any ambiguity in the meaning of the word 'after,' as here used, is determined by the intention of the testator (which is evinced in the expression 'whatever it may be at the decease of my said daughter') that the period at which the devise over is to take effect is the time when the daughter shall die. The limitation over thus appears to be upon a definite failure of issue, and the daughter takes a fee, subject to the loss of it if she shall die without issue."

In the case of *Steward* v. *Knight,* 62 N. J. Eq. 232 it appears that a bill was filed to quiet title which depended upon the construction of a will. The testatrix gave all the residue of her estate, after payment of debts, both real and personal:

"To my nephew, James B. Sinnickson, and in case he shall die without children, my will then is that both my real and personal estate be divided equally among his surviving brothers and sisters."

In the course of the opinion, Brey, *V. C.,* says:

"Whether in this case the testatrix intended the limitation over to take effect upon the happening of a definite or an in-

definite event must be determined from the language of the will, considered from the point of view of the testatrix, of the pertinent circumstances which surrounded her."

After quoting from the will the Court proceeds:

"She thus refers to those of James' brothers and sisters who, at his death, should survive him. They were *then,* in case there was a default, to have and enjoy the estate. This was, therefore, a gift over a fixed time, upon the happening of a prescribed event—the death of James without children, leaving a brother or sister him surviving." * * * "This view accords with the principles enunciated in the following cases, in which a limitation over in a second devise to survivors, in case the first taker died without issue, was held to intend a definite failure of issue." (Cases cited).

Finally the Court concludes as follows:

"The gift over must, therefore, be held to be limited upon a definite, and not an indefinite, failure of issue, and to give to the first taker an estate in fee, subject to be defeated upon non-performance of the condition imposed, and not a fee-tail executed by the statute. This construction also operated upon the gift over, to make it an executory devise, becoming effective, as is permissible in wills, upon the defeat of the precedently-given fee-simple estate, and not a remainder, contingent upon a happening (an indefinite failure of issue) so remote that the law will not recognize and enforce it."

Again this subject was covered in the case of *Dilts* v. *Clayhaunce,* 70 N. J. Eq. 10.

According to the bill in this case the testator bequeathed his residuary estate to his wife for life and at her decease to his step-son. He further provided that in case his step-son "should decease without lawful issue, that my property, both real and personal, be equally divided between my brothers and sisters, and in case of the decease of either or any of them their several portions shall descend to their children."

In the course of the opinion Chancellor Magie proceeds as follows:

> "In the first place, it is clear that the stepson of the testator, Daniel B. Ege, acquired, by devise, a vested estate in fee-simple, subject, however, to be devested upon the happening of the contingency prescribed, viz., death without lawful issue.
>
> "In the second place, it is clear that the testator prescribed that, upon the happening of the contingency named, the estate of Ege in his lands should be devested, and thereafter vest in other persons" * * *
>
> "It is also clear that the estate intended to vest in such persons, upon the happening of the contingency of Edge's death without issue, was not a contingent remainder, but a provision in their favor, of the nature of an executory devise, of the kind described by Mr. Fearne as occurring when an estate is limited by devise after a preceding vested fee-simple." (Cases cited).

Referring to the nature of the interest of the brothers and sisters of the testator who were to take under the contingency, the Chancellor says:

> "While their interest was not of the nature of a contingent remainder, but only a devise executory in its character, yet the interest thus acquired is one said to be transmissible by grant, devisable by will or descendible to heirs-at-law." (Cases cited).

Again in the case of *Brooks* v. *Kip,* 54 N. J. Eq. 462 at page 468, this same subject was further considered and the doctrines laid down in the last case were again applied.

Now, to review the subject under consideration in the light of the cases cited:

In the first place if the words "departed this life without issue" imported an indefinite failure of issue then according to the rules of the common law an estate-tail would be established. If such was the nature of the estate which the said Harry W. Minchin took under his father's will, then of course he did not have the estate for which he covenanted in his deed.

In the second place if the words used import a definite failure of issue, then under the cases above cited the said Harry W. Minchin became seized of an estate in fee-simple, subject to being divested in event of his death without issue. In the latter case the persons named to take under the contingency took a devise executory in character, but as above stated the interest thus acquired is transmissible by grant, devisable by will or descendible to the heirs-at-law.

Under either aspect of the case, then, it appears from the cases above cited and the doctrines therein established that the said Harry W. Minchin was not seized of an indefeasible estate of inheritance in fee-simple and that there was a breach of the covenant of

seizin in his deeds and that such breach occurred immediately upon the delivery of said deeds.

Respectfully submitted,

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