INDEX.

Bill of Complaint.

Filed Jan. 24, 1917.

In Chancery of New Jersey.

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

The complainants, Edna S. Wilson and William C. Wilson, her husband, of Short Hills, New Jersey, and Mable S. Schreiner and George J. Schreiner, of New York City, New York, respectfully show that

1. On December 11th, 1916, and at all time since said date your complainants were together seized of a valid fee simple title to premises known as Nos. 99 and 101 Lincoln Park, in the City of Newark, Essex County, New Jersey.

2. On December 11th, 1916, said complainants entered into an agreement, in writing, a copy of which is attached hereto and made a part hereof, for the sale by your said complainants to one George L. Vogel, of East Orange, New Jersey, of said premises, for the sum of $32,000, the deed for said premises to be delivered on January 11th, 1917.

3. Your complainants performed all the conditions of said agreement, including the lawful tender of a deed in accordance with the provisions thereof, in order to entitle said complainants to the payment of the purchase price for said premises; and still stand ready and willing to deliver said deed in accordance with the provisions of said agreement.

4. Said George L. Vogel, the defendant, herein, refused to accept the said deed, to pay the purchase price of the said premises, and the other sums agreed to be paid by him in accordance with the said agreement.

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

1. That George L. Vogel, who is the defendant in this suit, may answer this bill of complaint, without oath, and each statement therein made.

2. That the defendant may be decreed to pay complainants the said purchase price of the said premises, together with all other sums in said agreement agreed to be paid to the said complainants.

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

RIKER & RIKER,
Solicitors for Complainants.

RICHARD HARTSHORNE,
Of Counsel.

THIS AGREEMENT, made this 11th day of December, in the year of our Lord One Thousand Nine Hundred and Sixteen (1916) Between EDNA S. WILSON and WILLIAM C. WILSON, her husband, of Township of Millburn, Essex County, New Jersey, and MABEL S. SCHREINER and GEORGE J. SCHREINER, her husband, of the City, County and State of New York, hereinafter described as the vendors and GEORGE L. VOGEL, of the City of East Orange,

Essex County, New Jersey, hereinafter described as the vendee,

WITNESSETH, That the said vendors for and in consideration of the sum of $32,000. to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned made and entered into by the said vendee do agree with the said vendee that they will convey to the said vendee by a general warranty deed (not "short form") all that tract of land together with the buildings thereon situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING in the southerly line of LaGrange Place (now Lincoln Park) at a point therein distant westerly one hundred and two feet, and nine inches from the corner formed by the intersection of said line of LaGrange Place with the westerly line of Broad Street, said beginning point being also the northwesterly corner of a lot of land now or formerly of—Lemassena; from thence running southerly along the westerly line of said last mentioned lot and in continuation of said line, at right angles to La Grange Place one hundred and forty-six feet to the northerly line of a lot now or formerly of P. Sandford Ross; thence in a westerly direction along said Ross' said line and the line of an alleyway opening on Pennsylvania Avenue, fifty-three feet and five inches to the southeasterly corner of a lot of land now or formerly of John Colyer; thence in a northerly direction along the easterly line of said last mentioned lot, in a line at right angles to LaGrange Place and passing through the centre of the wall between the house on the lot hereby conveyed and the

house of said Colyer on the lot adjoining on the west, one hundred and forty-four feet, seven inches to the said line of LaGrange Place; and thence easterly along said line of LaGrange Place fifty-three feet and five inches to the place of Beginning. Together with the perpetual right of way to and through the alley hereinbefore mentioned running from Pennsylvania Avenue along the rear of the above described lot.

"This conveyance is made upon the express covenant and agreement on the part of the grantee, his heirs and assigns, that the dwelling house to be erected upon the said property shall be built of stone or brick; and that the same shall be set back twelve feet from the line of said lot on LaGrange Place; and that he will not suffer or permit a privy or water closet to be erected upon said lot other than in the dwelling or stable to be erected thereon."

The white and colored window shades and the screens are to pass with the property.

And the said vendee does covenant, promise and agree with the said vendors that he the said vendee will pay and satisfy or cause to be paid and satisfied unto the said vendors the said sum of THIRTY-TWO THOUSAND ($32,000.00) Dollars as and for the purchase money of the foregoing described premises in the following manner: FIVE HUNDRED ($500.00) Dollars on the execution and delivery of this agreement, the receipt whereof is hereby acknowledged by said vendor, THIRTY-ONE THOUSAND, FIVE HUNDRED Dollars in cash upon the delivery of the deed as hereinafter mentioned.

Consideration to be paid as follows:

Paid on delivery of this agreement..	$ 500.00
To be allowed for (1) existing mortgage held by	
(2) purchase money mortgage	
(3)	
Payable in cash on delivery of deed..	31,500.00
Total consideration	$32,000.00

The grantors are to pay 1916 Taxes.

Title to be conveyed subject only to

(1). Covenants and restrictions as in Deed Book F 37 page 369, as above set forth.

It is further agreed that the vendee may enter into possession of said premises on delivery of deed, and from said time take the rents, issues and profits thereof.

The deed conveying said premises shall be delivered and received at the office of Fidelity Trust Company, Newark, New Jersey, on or before January 11, 1917, at M.

1. Rents and interest on mortgages, if any, are to be adjusted as of the date of closing.

2. Gas and electric fixtures and chandeliers now in said premises are included in this sale.

4. The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the vendor.

5 In case the premises shall suffer injury beyond the ordinary wear and tear, the vendor shall repair the damage done before the date set for the delivery of this deed or make an appropriate deduction from the purchase price herein stated.

6. It is understood and agreed between the parties hereto that (1) title is to be marketable; (2) premises to be free from violation of municipal and state ordinances, and laws, and building requirements, and vendor is to furnish a certificate of inspection and approval by the Board of Tenement House Supervision of any building for three or more families; (4) title is not one based on tax sale, and (5) every building included in this sale is to be wholly within property lines.

7. If the title to the above described land is not satisfactory to Fidelity Trust Company, employed by the vendee to examine said title, either because of alleged defects or encumbrances in or on the title, or encroachments on the land, or because of uncertainties or insufficient information in the public records not excepted in this agreement, said vendor shall clear the records of such defects and encumbrances and said land from said encroachments, and furnish documentary evidence to Fidelity Trust Company which shall satisfactorily to it supplement the public records prior to the date above fixed for the delivery of the said deed, or prior to such other date as may be agreed upon by the parties hereto.

8. The vendee may refuse to accept said deed by reason of the failure of the vendor to comply with any of the requirements of this agreement, whereupon the vendor shall pay to the vendee what the latter has paid or contracted to pay for title examination by Fidelity Trust Company not exceeding the sum of Forty-five dollars, and for a survey and also any payments made by the vendee on account of the purchase price.

11. This agreement applies to and binds the heirs, executors, administrators, successors and assigns of the respective parties.

Witness the hands and seals of the above parties the day and year first above written in duplicate.

EDNA S. WILSON (L. S.)
WILLIAM C. WILSON (L. S.)
MABEL S. SCHREINER (L. S.)
GEORGE J. SCHREINER (L. S.)
GEORGE L. VOGEL (L. S.)

Attest:

WILLIAM R. HURLEY.

THE OBSERVANCE OF THE FOLLOWING SUGGESTIONS WILL SAVE TIME AND TROUBLE AT THE CLOSING OF THIS TITLE.

First: Should bring with him all insurance policies and duplicates, if the same are in his possession, or a memorandum thereof, if held by others.

Second: He should also bring all tax, assessment and water receipts; and any leases, deeds or agreements.

Third: If there is a mortgage on the premises to be conveyed, the seller should produce receipt showing to what date the interest has been paid, and if the principal has been reduced a receipt showing that fact.

Fourth: If vendor is married his or her husband or wife must join in the deed. If he is unknown at Fidelity Trust Company he should arrange to be properly identified.

THE PURCHASER.

Should be prepared with money or a certified check drawn to his own order. The check may be certified for an approximate amount and money may be provided for the balance of the settlement.

In consideration of.....dollars to..... in hand paid.....hereby assign to..... this contract and all.....rights thereunder.

Witness—hand and seal this—

(L. S.)

In consideration of mutual promises and agreements we hereby postpone the date for the delivery of above stated deed and the execution of this contract to.....at same hour and place.

WITNESS our hands and seals this.....(L S.)

(L. S.)

NOTE 1. Many of the features of this form are inserted as suggestions. They may, of course, be amended or omitted at the option of the parties.

2. If the title to above land is to be guaranteed by the Fidelity Trust Co. the deed may be delivered at its office without extra charge. Facilities for the execution of papers, holding them in escrow, recording, &c. and for the distribution of money are offered by the Fidelity Trust Co. In cases where the Company is not employed to guarantee the title, reasonable charges will be made for the services rendered. To avoid delays, arrange a date of settlement after consulting the Company.

FIDELITY TRUST COMPANY.

Its Banking Department does a general banking business, receives deposits subject to check and allows interest thereon.

Its savings department allows interest on deposits from the first day of each month.

Its trust department administers trusts of every kind, acts as executor, administrator, and takes entire charge of estates.

Its safe deposit department rents boxes and storage room in the most approved burglar and fireproof vaults.

Its title department examines and guarantees titles to real estate throughout the State of New Jersey.

OFFICERS.

Uzal H. McCarter, President.
Anthony R. Kuser, Vice President.
Frederick W. Egner, 2nd Vice President.
James H. Shackelton, Sec'y and Treas.
Samuel W. Beldon, General Counsel.
Jerome Taylor, Trust Officer.
Charles Grant Titsworth, Title Officer.
Simon P. Northrup, Ass't Title Officer.

No.

AGREEMENT OF SALE.

Between

EDNA S. WILSON, and husband, *et als.*,

and

GEORGE L. VOGEL.

DATED December 11th, 1916.

FIDELITY TRUST COMPANY

Capital, Surplus and Undivided Profits over $9,500,000.

HOME OFFICE.

Prudential Building, Newark, N. J.

UNION COUNTY AGENCY

142 Broad Street, Elizabeth, N. J.

EXAMINES AND GUARANTEES TITLES TO REAL ESTATE THROUGHOUT NEW JERSEY.

The Title Insurance Policy issued by the Company is the broadest and most liberal. It indemnifies the insured against all defects in title, frauds, forgeries, incumbrances and liens. It is quickly procured.

FOR INFORMATION AND FOR COPIES OF THIS BLANK APPLY TO APPLICATION DEPARTMENT.

Answer.

Filed Jan. 24, 1917.

The answer of the defendant, George L. Vogel.

This defendant answering the bill of complaint, says that:

1. Paragraph 1 is denied.
2. Paragraph 2 is admitted.
3. Paragraphs 3 and 4 are denied.

SEPARATE DEFENSE.

Defendant admits the execution of the contract as set forth in the bill of complaint herein, and the performance by the parties hereto of the conditions thereof preceding the delivery of a deed for the premises therein described, and the payment of the purchase price therefor, including the tender by the complainants herein of a deed for said premises; but this defendant denies the validity of such tender, inasmuch as the said deed was not in accordance with the provisions of said agreement in that the complainants herein, the grantors in said deed, were not at the time of the execution thereof seized of a fee simple title to the premises agreed to be conveyed.

This defendant, therefore, prays that said complainants may be decreed to convey to him a valid fee simple title to the said premises, or that in the event that they are unable to do so, that he may be dismissed, and said complainants decreed to return to him the deposit money paid in accordance with the provisions of the said contract.

ARTHUR R. DENMAN,
Solicitor for Defendant.

Stipulation.

Replication.

Filed Jan. 24, 1917.

The complainants join issue on the answer of the defendant.

RIKER & RIKER,
Solicitors for Complainants.

Stipulation.

It is hereby stipulated by and between Messrs. Riker & Riker, solicitors for the complainants, Edna S. Wilson, William C. Wilson, Mabel S. Schreiner and George J. Schreiner; and Arthur R. Denman, Esquire, solicitor for the defendant, George L. Vogel, that the following constitutes the sole state of facts in the above entitled cause:

1. That on the 11th day of December, 1916, the said complainants and defendant entered into a contract for the sale by the complainants to the defendant of certain lands in Newark, New Jersey; a copy of which contract is attached hereto and made a part hereof.

2. Said premises are known as Nos. 99 and 101 Lincoln Park, in the City of Newark, New Jersey.

3. That said complainants, Edna S. Wilson and Mabel S. Schreiner were respectively Edna L. Selby and Mabel E. Selby, the daughters of Esther G. Selby, who died on April 11th, 1911, and a copy of whose Last Will and Testament is attached hereto and made a part hereof.

4. That the complainants herein performed all the conditions of said agreement, including

the lawful tender of a deed in accordance with the provisions thereof to entitle said complainants to the payment of the purchase price of said premises, except that it is alleged by said defendant that said complainants are not seized of a vested fee simple title to the premises so agreed to be conveyed by them.

5. The defendant, George L. Vogel, has refused to accept the delivery of such deed for the aforesaid reason, and the sole question at issue in this cause is whether the complainants herein were on January 11, 1917, vested with a valid fee simple title to the premises in question by virtue of the said Last Will and Testament of said Esther G. Selby.

6. The parties hereto respectively agree to pay their counsel fees in this litigation, but the complainants agree to assume the payment of the taxed costs thereof irrespective of the outcome of such litigation.

7. In the event that the issue in this cause is determined in favor of the complainants, it is agreed between the parties hereto, that one-half of the taxes imposed upon the said premises for the period of such litigation, shall be paid by the complainants and one-half thereof by the defendant.

Dated, January 11th, 1917.

RIKER & RIKER,
Solicitors for Complainants.

ARTHUR R. DENMAN,
Solicitor for Defendant.

(See copy of contract attached to bill herein, page 2.)

Stipulation.

IN THE NAME OF GOD, AMEN:

I, ESTHER G. SELBY, of the City of Newark, in the County of Essex and State of New Jersey, being of sound and disposing mind and memory, do make and publish my Last Will and Testament as follows:

FIRST. I direct all my just debts and my funeral expenses to be paid as soon as may be reasonable after my decease.

SECOND. I give and bequeath to my son, William E. Selby, one thousand dollars ($1000.00); one large hand-carved dark oak clock and the gold headed cane which belonged to his grandfather, Edwin Lister; the crayon portrait and its frame of his grandfather, Edwin Lister; the two crayon portraits and their frames of his father and mother; the gold watch which belonged to his father; the single horse purchased for and used by my said son; one runabout, one high cart, one sleigh and the robes, blankets and harness used with the same.

THIRD. I give and bequeath to my daughter Edna L. Selby one thousand dollars ($1000.00); my diamond ear rings; diamond and emerald ring; blue enameled diamond studded watch; my solitaire diamond engagement ring; one Steinway piano and gold music cabinet; the white marble statue known as "Crossing the Brook" and the pedestal belonging thereto.

FOURTH. I give and bequeath to my daughter Mabel E. Selby one thousand dollars ($1000.00); my diamond brooch; diamond ruby and emerald ring; solitaire diamond ring, which contains her father's diamond stud; gold watch with monogram thereon; and the large mahogany chime hall clock.

Stipulation.

FIFTH. I give and bequeath to my cousin Esther E. Gibson, now of New York City, the sum of five thousand dollars ($5000.00).

SIXTH. I give and bequeath to my coachman William Peterson, if he is still in my service at the time of my death, the sum of five hundred dollars ($500.).

SEVENTH. It is my will and I order and direct that a trust fund of five thousand dollars ($5000.00) shall be raised out of my estate and invested at interest, the income and produce of which trust fund I give unto Annie Greaves of Newark, New Jersey, single woman, if she be living at the time of my death, to be paid to her half yearly, during her natural life and at the decease of the said Annie Greaves the principal sum or trust fund, I give and bequeath to my children, equally, share and share alike, and if any of my children be deceased, I direct that the issue of said child or children shall take the parents share thereof.

EIGHTH. I also direct that another trust fund of one thousand dollars ($1000.00) shall be raised out of my estate and invested at interest, the income thereof to be used for the care and maintenance of my cemetery lot in Fairmount Cemetery, Newark, New Jersey.

NINTH. I give and bequeath to the Sleepy Hollow Cemetery Association of Tarrytown, New York, the income of five hundred dollars ($500.00) each year for the maintenance and care of the plot and monument where my father Edwin Lister is buried. If before my decease, I should pay to the said Sleepy Hollow Cemetery Association, the sum of five hundred dollars ($500.00), then this bequest is withdrawn and becomes null and void.

Stipulation.

TENTH. I give and bequeath to Miss Julia Warner the oil painting and its frame, of her grand-mother, my aunt, Julia Warner, now in my possession.

ELEVENTH. I give, devise and bequeath to my said daughter Edna L., and my said daughter Mabel E., their heirs and assigns to be divided between them, share and share alike, my house, stable and lots of land, known as Numbers 99 and 101 Lincoln Park in the City of Newark, New Jersey, where I now reside, together with all the fixtures, fittings, appurtenances, parts, furnishings, and decorations to the same belonging or in any way appurtaining, and also the furniture, rugs, draperies, curtains, beds, bedding, and linen, wearing apparel and material for same, clocks, silver and plated ware, metal, glass and china ware, printed books and music, opera glasses, diamonds, watches and jewelry, statuary, bronzes, bric-a-brac and other works of art and virtu, paintings, engravings, photographs, and other portraits, and their frames, safes, desks, fuel, family stores, horses, carriages, harness, robes, livery and all other useful and ornamental articles of what nature and kind soever, contained in and belonging to or used in and about the aforesaid house, stable and premises, with the exception of that part of my personal property which I have heretofore bequeathed. In case either of my said daughters dies without issue and intestate, her share in said house, lots and stable and contents thereof shall go to the survivor.

TWELFTH. It is my will and I order and direct that all the rest, residue and remainder of my estate, wheresoever situate or located and whether now owned by me or acquired in any

manner, shall be held in trust by my trustee or trustees hereinafter named, or such of them as shall qualify and invested and re-invested by them in lawful interest bearing securities, the income, rents, issues and profits thereof to be collected by them and from such income to pay the sum of seven hundred and fifty dollars ($750.00) to my daughters Edna L., and Mabel E., on the fifteenth day of each month to be divided equally between them for their support and maintenance, until my youngest daughter Mabel E., shall attain the age of twenty-one years. If my said daughter Edna L., shall die before my daughter Mabel E. becomes twenty-one years old leaving a child or children her surviving I order and direct that the share of said income to be paid to my daughter Edna L., shall be paid to said child or children. If my said daughter Edna L., shall die leaving no issue then I order and direct that the whole of said seven hundred and fifty dollars ($750.00) shall be paid to my daughter Mabel E. until she becomes twenty-one years of age. The balance of such income I direct to be divided equally between my three children William E., Edna L., and Mabel E., and their heirs. At the time my daughter Mabel E. shall attain the age of twenty-one years, or should she die before reaching the aforesaid age, I then direct my trustee or trustees hereinafter named to divide the residue of my estate into three equal shares, either in money, securities or property and to distribute the said shares at that time as hereinafter directed. If my son William E. Selby be living at the time of said division, I direct my trustees or the survivor of them to hand over to him, one of said equal one-third shares as divided by my

Stipulation.

trustees, of the residue of my estate, which one equal third share I give, devise and bequeath unto my said son William E. Selby, absolutely. In case of the death of my said son William E. Selby before receiving his said one-third share, leaving a child or children him surviving, I give, devise and bequeath to said child or children at the time of said division the sum of Fifty thousand dollars ($50,000.00) and the balance of his said one-third share I give, devise and bequeath to my daughters Edna L. and Mabel E. Selby to be divided between them equally share and share alike, if he leaves no child or children him surviving, I give, devise and bequeath said share unto my said daughters Edna L. Selby and Mabel E. Selby and their heirs, equally, to be paid to each of them in the same manner as hereinafter provided for the payment to them of the one-third share of the residue of my estate. If my daughter Edna L. Selby should be living at the time of said division, I direct my trustees to hand over to her one-half of the one equal third share of said residue of my estate as divided by my said trustees which said one-half I give devise and bequeath to my daughter Edna L. Selby absolutely. In case of the death of my daughter Edna L. Selby before receiving her said one-half share leaving a child, or children, her surviving I give devise and bequeath such one equal one-third share to said child or children; if she leaves no child or children her surviving, I give, devise and bequeath said one equal one-third share to my daughter Mabel E. Selby to be paid to her in the same manner as herein provided for the payment to her of the said one-third share of the residue of my estate. If my daughter Mabel E. Selby be living at the time of

said division I give, devise and bequeath to her one-half of the one equal share of said residue of my estate, as divided by my said trustees, which said one-half I give and devise and bequeath to my said daughter Mabel E. Selby absolutely. In case of the death of my said daughter Mabel E. Selby before receiving her one-half share, leaving a child or children her surviving I give devise and bequeath such one equal one-third share to said child or children, if she leaves no child or children her surviving I give devise and bequeath said one equal one-third share to my daughter Edna L. Selby to be paid to her in the same manner as herein provided for the payment to her of the one-third share of the residue of my estate.

The balance of the residue of my said estate I direct my trustee or trustees hereinafter named to continue to hold and invest as heretofore directed and pay the income therefrom semi-annually in equal shares to my said daughters Edna L. Selby and Mabel E. Selby until such daughters or daughter shall attain the age of thirty-five years at which time I direct my trustees or the survivor of them to divide the balance of the residue of my estate between my surviving daughters or daughter to whom I give devise and bequeath the same at that time. Should either of my said daughters die before reaching the age of thirty-five years leaving issue then I direct my said trustees to divide said balance of the residue of my estate into two equal parts and pay over one of said equal parts to said issue, but if either of my said daughters should die before she attains the age of thirty-five years without

issue, then, I direct my trustees or the survivor of them to pay the income of her share of such residue to my surviving daughter until such surviving daughter shall attain the age of thirty-five years and at that time I give, devise and bequeath her share of said residue to my surviving daughter to be enjoyed by her absolutely.

THIRTEENTH. I hereby nominate, constitute and appoint my friend John Frank Davis and my son William E. Selby, both of the City of Newark, New Jersey, Executors and Trustees of this my last Will and Testament; and in case of the death of either said John Frank Davis or my son William E. Selby or the inability to serve from any cause of either, or both of them, then in either of these events, I nominate, constitute and appoint my daughters Edna L. Selby and Mabel E. Selby to be two of my executors and trustees and I do hereby give to my said executors and trustees or such of them as shall qualify and to the survivors or survivor of them full power and authority to grant, bargain, sell and convey any or all of my lands and real estate of which I may die seized, to any person, or persons in fee simple, or otherwise at public or private sale at such times and upon such terms as they shall think best. And I further nominate constitute and appoint my said executors or such of them as shall qualify, or as shall be acting, or the survivor of them guardians of and for my daughter Mabel E. Selby until she attains the age of twenty-one years provided, however, that said guardian or guardians shall obtain a bond of some responsible surety company in the sum of one hundred thousand dollars ($100,000.00) for the faithful performance of their duties as such Guardians at the expense of my said estate.

Stipulation.

And I do hereby revoke all former and other wills by me at any time heretofore made.

In Witness Whereof, I the said Esther G. Selby have hereunto set my hand and seal this Tenth day of June, A. D. nineteen hundred and eight. The word "purchased" partially written over an erasure in line twenty on page one before signing.

ESTHER G. SELBY [L. S.]

Signed, sealed, acknowledged, published and declared, by the said Esther G. Selby, as and for her last Will and Testament, in the presence of us, both being present at the same time, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

GEORGE S. POLLARD
Chatham Morris County New Jersey

THEODORE J. BADGLEY
Montclair Essex County New Jersey

Stipulation.

It is hereby further stipulated by and between Messrs. Riker & Riker, solicitors for the complainants, Edna S. Wilson, William C. Wilson, Mabel S. Schreiner and George J. Schreiner; and Arthur R. Denman, solicitor for the defendant, George L. Vogel, that the following constitutes additional facts in the above entitled cause:

1. That on the 11th day of January, 1917, the releases (copies of which are hereto attached and made a part hereof) by Edna S. Wilson and

Stipulation.

William C. Wilson, her husband, and Mabel S. Schreiner and George A. Schreiner, her husband, were made to Mabel S. Schreiner and Edna S. Wilson, respectively, of the powers of disposal of the said Edna S. Wilson and Mabel S. Schreiner, said powers of disposal of those persons being under paragraph 11 of the last will and testament of Esther G. Selby.

2. That the said releases have been duly and legally tendered to the defendant, George F. Vogel.

Dated April 12th, 1917.

RIKER & RIKER,
Solicitors for Complainants.

A. R. DENMAN,
Solicitor for Defendant.

THIS INDENTURE MADE the ELEVENTH day of JANUARY, NINETEEN HUNDRED AND SEVENTEEN.

WITNESSETH, that whereas Esther G. Selby, who died on April 11th, 1911, in her last will and testament, which was duly probated in the office of the Surrogate of Essex County on April 22d, 1911, and recorded in Book 4 of Wills for said County, on page 544, gave, devised and bequeathed to her daughters Edna L. and Mabel E., their heirs and assigns, certain premises known as Nos. 99 and 101 Lincoln Park, Newark, New Jersey, and further provided in regard to said premises that "In case either of my said daughters dies without issue and intestate, her share in said house, lots and stable and contents thereof shall go to the survivor"; And,

WHEREAS said powers of disposal, if exercised, may defeat and cut off interests in said real es-

Stipulation.

tate which said Edna L. and Mabel E. Selby (now Edna S. Wilson and Mabel S. Schreiner) have; And,

WHEREAS said Edna S. Wilson and Mabel S. Schreiner are desirous of effecting and confirming in themselves a valid fee simple title in said premises:

Now, said Edna S. Wilson (formerly known as Edna L. Selby) and William C. Wilson, her husband, do hereby forever release unto Mabel S. Schreiner (formerly known as Mabel E. Selby), her heirs and assigns, forever, and debar themselves forever from, the exercise of the said power of disposal of the said Edna S. Wilson (formerly known as Edna L. Selby); and the said Mabel S. Schreiner (formerly known as Mabel E. Selby) and George J. Schreiner, her husband, do release unto Edna S. Wilson, formerly known as Edna L. Selby, her heirs and assigns, forever, and debar themselves forever from the exercise of the said power of disposal of Mabel S. Schreiner, formerly known as Mabel E. Selby.

IN WITNESS WHEREOF the above named persons have hereunto set their hands and seals this eleventh day of January, 1917.

EDNA S. WILSON [L. S.]
WILLIAM C. WILSON [L. S.]
MABEL S. SCHREINER, [L. S.]
GEORGE J. SCHREINER [L. S.]

Attest:

RICHARD HARTSHORNE.

Conclusions of V. C. Lane.

Filed May 19, 1917.

Riker & Riker, *Solicitors for Complainants.*

Arthur R. Denman, *Solicitor for Defendant.*

LANE, *V. C.*

This is the familiar friendly suit in specific performance to determine the validity of a title. The conclusions I have reached renders it unnecessary for me to express an opinion as to whether the title is valid or not. Complainants derive their title from Esther C. Selby, their mother. The will, so far as material, provides as follows: "I give, devise and bequeath to my said daughter Edna L. and my said daughter Mabel E., their heirs and assigns, to be divided between them, share and share alike (the property in question, and also certain personal property.) * * * In case either of my said daughters dies without issue, and intestate, her share in said house, lots and stable and contents thereof shall go to the survivor." A deed has been tendered, signed by Edna L. Wilson and Mabel E. Releases of the powers of disposition have also been duly executed by them and their husbands to each other and tendered. The sole question is whether the complainants can with the aid of such releases convey an estate in fee simple to the defendant. The residue of the estate is to be held by trustees not only for the benefit of the two daughters and their issue, but also a son. The rule

appears to be settled that if a doubt raised depends upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in a suit for specific performance, but that in such cases specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous decisions, or if there are *dicta* of weight which indicates that courts might differ as to the determination of the point involved, and that one of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to convey a good title arises in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. This is almost precisely the language of Vice-Chancellor Grey in *Richards* v. *Knight,* 64 Eq. 196, and see *Lippincott* v. *Wikoff,* 54 Eq., 107, and *Fahy* v. *Cavanagh,* 59 Eq. 278. I have reached the conclusion that no construction which I can put upon this clause of the will is so free from doubt as to warrant this Court in decreeing specific performance. The contention of the respective parties is, the complainant, that the devise creates a fee simple defeasible upon the first taker dying without issue, and intestate, in which event the executory devise over would operate, and that the executory devisee being in *esse* and ascertained she may join in the deed and thereby transfer her interest, and that the testamentary power of disposal being a power in gross may be released and the result is a good title; the defendant, that, under the determination of the Court of Appeals in *Kellers* v. *Kellers,* 80 Eq. 441; *Castine* v. *Brown,* 46 Law, 599,

and *Kent* v. *Armstrong,* 6 Eq. 637, the devise is that of a life estate only with a power of testamentary disposition, and that inasmuch as the estate is one for life only, if the first taker dies without issue and intestate then the executory devise over would operate, and that if she dies with issue either the issue will take or the estate will fall into the residue of first testator's estate. Defendant further contends that in view of *Thompson's Executors* v. *Norris,* in the Court of Appeals, 20 N. J. Eq., p. 489, that there is at least dictum in this state which would indicate that the power of disposal is not such a power in gross as may be released with the result that the first taker might, notwithstanding her release, subsequently exercise her power of disposition by will. If the case of *Kent* v. *Armstrong* is to be given full force and effect then there is no doubt but that the estate created by this will is a life estate only. It is said that the force of the case is weakened because it rests, to some extent at least, upon the fact that the effect of the words "should die without heirs" was to create at common law a fee tail and under our law a life estate at the time of the decision, but that subsequent to that case, in 1851, a statute was passed, Vol. 4 C. S. of N. J., 1910, Wills, paragraph 27, p. 5870, which provides that in any devise or bequest of real or personal estate the words "die without issue" or "die without lawful issue" or "have no issue" shall be construed to mean a want or failure of issue, in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention should otherwise appear by the will, and that this statute has been considered in numerous cases, among

others, *Paterson* v. *Madden,* 54 N. J. Eq., 714; *Brazzale* v. *Diehm,* 86 N. J. Law 276; *Dean* v. *Nutley,* 70 N. J. Law 217; *Stewart* v. *Knight,* 62 N. J. Eq., 232; *Vreeland* v. *Blauvelt,* 23 N. J. Eq. 483; *Dilts* v. *Clayhoumee,* 70 N. J. Eq. 10; *Condit* v. *King,* 13 N. J. Eq. 375; *Davis, Administrator,* v. *Steel, Administrator,* 38 N. J. Eq.168; *McDowell* v. *Stiger,* 58 N. J. Eq. 124, and that such cases construe the statute as creating in the first taker a vested but defeasible fee simple estate the condition of the defeasance being the occurrence of the devisee dying without issue. *Cantine* v. *Brown,* 46 N. J. Law, p. 599, was decided, however, by the Court of Appeals subsequent to the passage of this statute. There the devise was to three daughters, their heirs and assigns, with a proviso that in case one should remain unmarried and should make no disposition of her estate by will her share should at her death be equally divided among her sisters, and the Court of Appeals said "The question presented is whether under that devise she takes a fee or merely a life estate with power of testamentary disposition of the property. The decision of this Court in *Kent* v. *Armstrong,* 2 Hal. Ch. 637, disposes of the question." Again the Court of Appeals in *Kellers* v. *Kellers,* 80 Eq. 441, where the devise was to testator's wife, her heirs and assigns, and should she acquire the estate and die without making a will then that his will should operate and his estate be divided between his children as therein provided, said again quoting *Kent* v. *Armstrong,* "It was held in that case that the primary devisee took a life estate only, with a power of testamentary disposition, and that in the event of her dying intestate the exe-

cutory devise over became operative. Thirty-five years later we again had before us in the case of *Cantine* v. *Brown,* 46 N. J. Law 599, the question of the construction of a devise similar to that under scrutiny in *Kent* v. *Armstrong,* and declared that the decision in the earlier case must be regarded as the law of construction in this state on such devises." If the estate taken by the first taker is merely a life estate, then if she dies with issue, but intestate, it would seem that either the issue take by implication or the property falls into the residue of the testator's estate. This result might be avoided by holding that the first taker took a fee defeasible upon the happening of the contingency, and I might be inclined if the matter was novel to so hold, but I can not conceive that such a holding would be so free from doubt as to permit me to require specific performance. The Court of Errors and Appeals must have given some effect to the words "and intestate" in determining the nature of the estate created.

So with respect to the power to release the right of testamentary disposition. I have considered the numerous cases cited by the complainant, and *Norris* v. *Thompson's Excutors,* 19 Eq. 307, in the Court of Chancery, and *Thompson's Executors* v. *Norris,* 20 N. J. Eq. 489, at page 524. Chief Justice Beasley in the latter case said that "I have not found any case in which it was maintained the power to appoint to strangers after the expiration of an interest given to the donee of the power was a power in gross." There was in existence at that time, Albany's case 1 Coke, 110 D.; 76 Eng. Reprint, 250, which has been cited in the case below by the Chancellor. To the same effect is *Smith* v.

Death, 56 Eng. Reprint, 937. In *Grosdenor* v. *Bowen,* 10 Atl. Rep. 589, there was a bill for specific performance the question of title being raised under a will which gave property to A for life, on his decease to such person as he might appoint by his will, and in default of such appointment to the heirs of testatrix; it was held that he might release his power to appoint to the tenants in remainder or to extinguish it by joining with the other complainants in a deed conveying the bargained lot to the defendant in fee simple and therein releasing the power to him. There is a full discussion of the law in this case. There may also be a very clear distinction between a power to appoint among designated strangers and a general power to appoint among all the inhabitants of the earth. In view of the dictum of Chief Justice Beasley in *Thompson's Executors* v. *Norris, supra,* it can not, I think, be said that the law is so well settled on this point as to permit a decree for specific performance.

I will advise a decree dismissing the bill.

Final Decree.

Final Decree.

Filed May 31, 1917.

This matter being opened to the Court by Richard Hartshorne, Esquire, of the firm of Riker & Riker, of counsel with complainants, in the presence of Arthur R. Denman, Esquire, of counsel with the defendant, and upon reading the proofs and pleadings filed in said cause, and the stipulation made by counsel therein, and the briefs submitted on behalf of said complainants and defendant; and it appearing to the Court therefrom that said complainants are not entitled to the relief prayed for in their bill of complaint filed in the above entitled cause,

It is, on this 29th day of May, 1917, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed that the complainants' bill of complaint filed in the above entitled cause be, and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully advised,

Merritt Lane,
V. C.

Notice of Appeal.

Filed June 1, 1917.

The complainants, Edna S. Wilson and William C. Wilson, her husband, and Mabel S. Schreiner and George J. Schreiner, her husband, hereby appeal from the decree made by this Court, in the above entitled cause, on May 29th, 1917, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, May 29th, 1917.

RIKER & RIKER,
Solicitors for Complainants.

RICHARD HARTSHORNE,
Of Counsel.

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

RICHARD HARTSHORNE,
Of Counsel with Complainants.

Petition of Appeal.

Filed June 1, 1917.

New Jersey Court of Errors and Appeals

Between EDNA S. WILSON and WILLIAM C. WILSON, her husband, and MABEL S. SCHREINER and GEORGE J. SCHREINER, her husband, *Complainants-Appellants,* and GEORGE L. VOGEL, *Defendant-Respondent.*	*On Bill, etc.* *On Appeal, etc.* *Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes.

The petition of Edna S. Wilson and William C. Wilson, her husband, and Mabel S. Schreiner and George J. Schreiner, her husband, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 29th day of May, 1917, wherein the said Edna S. Wilson and William C. Wilson, her husband, and Mabel S. Schreiner and George J. Schreiner, her husband, were complainants, and George L. Vogel was defendant, in this respect, to wit: that the said decree orders and adjudges that the complain-

ants are not entitled to the relief prayed for in their bill of complaint filed in said cause, and that said bill of complaint be dismissed.

And your petitioners humbly appeal from the said decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous for that (1) the Court of Chancery should have determined the ultimate rights of the parties and the validity of the title tendered by the complainants to the defendant; (2) in no way other than in the present proceeding can the complainants have determined the validity of the title tendered the defendant by them; and (3) the complainants tendered the defendant, in accordance with the agreement between the parties a valid fee simple title, and are, therefore, entitled to a decree for the specific performance of the contract by the defendant.

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

RIKER & RIKER,
Solicitors for Appellants.

RICHARD HARTSHORNE,
Of Counsel with Appellants.

Answer of Respondent, George L. Vogel, to Petition of Appeal.

Filed June 2, 1917.

The answer of the above named defendant-respondent, George L. Vogel, to the petition of appeal of the above named complainants-appellants, Edna S. Wilson and William C. Wilson, her husband, and Mabel S. Schreiner and George J. Schreiner, her husband.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a final decree was, on the 29th day of May, 1917, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said final decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

ARTHUR R. DENMAN,
Solicitor for and of Counsel with Defendant-Respondent.

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

New Jersey Court of Errors and Appeals

Between EDNA S. WILSON AND WILLIAM C. WILSON, her husband, and MABEL S. SCHREINER AND GEORGE J. SCHREINER, her husband, *Complainants-Appellants,* *and* GEORGE L. VOGEL, *Defendant-Respondent.*	*On Bill, &c.* *On Appeal from Chancery.*

Brief for Respondent.

In this bill for specific performance the respondent has refused to take title to certain real property which the appellants have attempted to convey to him. Such refusal on the part of the respondent is based upon the contention that the appellants cannot convey an estate in fee simple in the premises in accordance with their contract, the respondent having been advised by the Title Company that it would refuse to guarantee the title because of such defect.

The appellants derived their rights in the premises under the will of their mother, the Eleventh Paragraph of which will reading as follows:

> "I give, devise and bequeath to my said daughter Edna L. and my said daughter Mabel E., their heirs and assigns to be divided between them, share and share alike, my house, stable and lots of land, known as Numbers 99 and 101 Lincoln Park in the

City of Newark, New Jersey, where I now reside, together with all the fixtures, fittings, appurtenances, parts, furnishings, and decorations to the same belonging or in any way appertaining, and also the furniture, rugs, draperies, curtains, beds, bedding, and linen, wearing apparel and material for same, clocks, silver and plated ware, metal, glass and china ware, printed books and music, opera glasses, diamonds, watches and jewelry, statuary, bronzes, bric-a-brac and other works of art and virtu, paintings, engravings, photographs, and other portraits and their frames, safes, desks, fuel, family stores, horses, carriages, harness, robes, livery and all other useful and ornamental articles of what nature and kind soever, contained in and belonging to or used in and about the aforesaid house, stable and premises, with the exception of that part of my personal property which I have heretofore bequeathed. In case either of my said daughters dies without issue and intestate, her share in said house, lots and stable and contents thereof shall go to the survivor."

I.

The Appellants have merely a life-estate, plus a testamentary power of disposal of the remainder, plus an executory devise.

It would seem that this rule had been settled beyond dispute by the three cases of *Kent* v. *Armstrong,* 6 N. J. Eq., 637; *Cantine* v. *Bowen,* 46 N. J. L., 599, and *Kellers* v. *Kellers,* 80 N. J. Eq., 441.

It is true that the last two cases, those of *Cantine* v. *Bowen* and *Kellers* v. *Kellers,* are not on all fours, inasmuch as they do not construe the words "die without issue," and only construe words similar to those, viz: "and intestate"; but such cases reiterate the rule as laid down in the case of *Kent* v. *Armstrong, supra.*

It is also true, as argued in the brief for the appellants, that the case of *Kent* v. *Armstrong* was decided previous to the passage of Section 27 of the Wills Act, declaring that the words "die without issue" were to thereafter refer to a definite, rather than an indefinite, failure of issue; and that, therefore, the force of such case is to some extent weakened; but nevertheless the Court in such cases bases its opinion to a great extent at least upon the meaning of the words "and intestate," and the decision of such court has twice been affirmed by the highest court in this State in the above cases of *Cantine* v. *Bowen, supra,* and *Kellers* v. *Kellers, supra.*

It would, therefore, seem that such rule of law should not now be questioned.

II.

The children of Mabel and Edna have contingent remainders which cannot be conveyed by the deed tendered.

As stated in the will if the daughters die without issue and intestate the survivor takes the share of the one dying. If, however, a daughter should die with issue and intestate there is no provision in the will to cover such a contingency; and it would, therefore, seem that there would be a contingent remainder in such a case not to the other daughter, but either to the children of

the deceased daughter, or that the share of such deceased daugher would lapse into the residue under the will, which residue is held by trustees for not only the two daughters and their issue, but a son, neither which son nor the trustees joining in the conveyance which has been tendered. Nor would it seem that the daughters could convey the estates devised to them contingent upon the other daughter's dying without issue and intestate.

In Section 19 of the Conveyance Act, Vol. 2 C. S. of N. J., 1910, page 1539, it is provided that estates in expectancy may be conveyed "provided that no person shall have been or be empowered by this act to dispose of any * * * contingent estate or expectancy where the contingency is as to. the person in whom, or in whose heirs, the same may vest. * * *"

In this case it is, of course, obvious that the Court cannot tell which of the daughters will survive; and, therefore, there would seem to be a contingency as to the person in whom the estate in expectancy would ultimately exist.

III.

Nor can the daughters release their temporary powers of disposal.

The only case which can be found in this State upon the subject of the releasing of powers of disposal is that of *Thomson* v. *Norris,* 19 N. J. Eq., 307 (affirmed in 20 N. J. Eq., 489).

It is true that in the lower court the Chancellor lays down the rule and cites cases in support thereof to the effect that where the donee of the power has himself an estate in the property over which he has such power, that such power is

then one in gross and may be released, whereas when the donee has no estate in the property over which he has the power, such power is collateral, and cannot be released; and it is, of course, obvious that the donees of the power in the case at bar have an estate in the property over which the power exists.

This doctrine of the lower court is, however, subjected to severe criticism by Chief Justice Beasley in such case on appeal as follows:

> "This branch of the case was disposed of by the Chancellor, on the technical distinction which, in the doctrine of powers, exists between a power in gross and a power simply collateral. The power of appointment contained in the clause of the will now alluded to, was regarded as belonging to the former class, and, consequently, as extinguishable by the donee of the power. This question seems to me to be one of great nicety in the application of the decisions to the present case. *I have not found any case in which it was maintained that a power to appoint to strangers, after the expiration of an interest given to the donee of the power, was a power in gross.* The decisions referred to by counsel are mostly cases of settlement on a parent, with a power of appointment among his children. In such instances, there is some reason to say the power is not simply collateral, because it is not a naked authority, the father having an interest in the distribution of the estate among his children. Under such circumstances, such a power may not inaptly, in the expression of Sir Edward Sugden, be called 'an emolument of his own estate.' But, on the contrary, when an interest, for life or for years,

> is given to A, with direction, by will or otherwise, to appoint between B and C, who are strangers to A, why such an authority should be considered anything more than an authority simply collateral, it seems difficult to imagine."

The Chief Justice thus asserts that a power in gross only exists where the donee of the power has an interest in the estate, plus a power to appoint amongst relations.

The power in this case is an unlimited one to appoint either amongst relations or to any other parties whom the donee may choose. It would seem that this opinion of Chief Justice Beasley should be authoritatively regarded by this court.

IV.

If there is a doubt as to what the law is, the rule is that equity refuses to decree specific performance.

If in the above points it should be decided that the law is the other way, still the *dicta* and opinions and cases above cited show sufficiently well that there is such a doubt as to what the rule of law is, that equity will not decree specific performance.

Vice-Chancellor Grey in *Richards* v. *Knight*, 64 N. J. Eq., 196, at page 198, says:

> "If the doubt raised depends only upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in the suit for specific performance. In such cases the doctrine is that specific performance should not be decreed if there is reasonable

> ground for saying that the question is not settled by previous decisions, or if there are *dicta* of weight which indicates that courts might differ as to the determination of the point involved. Lippincott *v.* Wikoff, 9 Dick., Ch. Rep., 120. One of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to carry a good title arises in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. Alexander *v.* Mills, 6 Ch. App. 131."

To the same effect are the cases of *Lippincott* v. *Wikoff,* 54 N. J. Eq., 107.

Fahy v. *Cavanagh,* 59 N. J. Eq., 278, cited by the learned Vice-Chancellor in the case below.

This case is surely one which comes under the category mentioned by Vice-Chancellor Grey in the above excerpt. The question is one of legal title as derived from an instrument—in this case a will.

V.

Sections 8 and 9 of the 1915 Chancery Act do not change the rule of law stated in Point IV.

It is true that these sections make it mandatory that the Court of Chancery decide a question of law when it is raised before it, even though the question be one ordinarily determinable in the Court of Law. But this does not make nugatory the law in equity as laid down by the cases in Point IV. that where there is such a doubt as to what the law is, equity will refuse to grant a decree for specific performance.

In conclusion we would say that since the doctrine has been laid down by the Court of Errors of this State that words very similar to those used in the case at bar, create a life-estate, plus an appointing power, plus an executory devise, that since neither such appointing power or such executory devise can be released or conveyed, and since there is in addition a contingent remainder to third parties who have not, nor can join in a conveyance at the present time, that an estate in fee simple has not, and cannot be conveyed by the ~~complainants~~ *appellants*.

Furthermore, we would say that should the law be *contra* to what we have urged, still there is such doubt attached to its being the other way, that the Court of Equity will refuse to decree specific performance.

Respectfully submitted,

ARTHUR R. DENMAN,
Solicitor for Respondent.

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

New Jersey Court of Errors and Appeals

Between

EDNA S. WILSON AND WILLIAM C. WILSON, her husband, and MABEL S. SCHREINER AND GEORGE J. SCHREINER, her husband,
Complainants-Appellants,

and

GEORGE L. VOGEL,
Defendant-Respondent.

On Bill, etc.

On Appeal from Chancery.

Brief for Appellants.

This is on appeal from a decree dismissing a bill for specific performance brought by the vendors to compel the defendant-respondent to accept a conveyance of the premises known as Nos. 99 to 101 Lincoln Park, in the City of Newark, New Jersey. Such decree was advised by the Vice-Chancellor on the ground that there was a reasonable doubt as to what the rule of law concerning the facts in question was.

To call this a "familiar friendly suit in specific performance," as the learned Vice-Chancellor does in his conclusions (C. p. 24) is to do so without foundation in fact.

The defendant-respondent refuses to accept the conveyance for the reason that the Fidelity Trust Company refused to guarantee the title to the said premises because of the alleged defect in title. The facts are agreed upon between the parties, see the stipulations (C. pp. 12 and 21), but the question at issue is a rule of law.

Appellants derived their title from Esther G. Selby, their mother, who left a will which provided in paragraph 11 as follows (C. p. 16):

> "I give, devise and bequeath to my said daughter Edna L., and my said daughter Mabel E., their heirs and assigns to be divided between them, share and share alike, my house, stable and lots of land, known as Numbers 99 and 101 Lincoln Park in the City of Newark, New Jersey, where I now reside, together with all the fixtures, fittings, appurtenances, parts, furnishings, and decorations to the same belonging or in anyway appertaining, and also the furniture, rugs, draperies, curtains, beds, bedding, and linen, wearing apparel and material for same, clocks, silver and plated ware, metal, glass and china ware, printed books and music, opera glasses, diamonds, watches and jewelry, statuary, bronzes, bric-a-brac and other works of art and virtu, paintings, engravings, photographs, and other portraits and their frames, safes, desks, fuel, family stores, horses, carriages, harness, robes, livery and all other useful and ornamental articles of what nature and kind soever, contained in and belonging to or used in and about the aforesaid house, stable and premises, with the exception of that part of my personal property which I have heretofore bequeathed. In case either of my said daughters dies without issue and intestate, her share in said house, lots and stable and contents thereof, shall go to the survivor" (C. p. 16).

It is stipulated that a contract for the sale of the said premises has been duly entered into; that the appellants have duly and legally tendered a deed to the respondent; that Esther G.

Selby departed this life leaving a last will and testament duly probated, under which will the appellants derived their title (C. pp. 12 and 13); and that releases of powers of disposal, which Edna S. Wilson (formerly Edna L. Selby) and Mabel S. Schreiner (formerly Mabel E. Selby), two of the appellants, had were duly executed by them, and their husbands, to each other (C. p. 21).

It is contended, therefore, that the following question should have been decided by the Court of Chancery, "Whether the appellants could, with the aid of such releases, convey a fee simple title to the respondent."

I.

The Court of Chancery should have determined the ultimate rights of the parties and the validity of the title tendered by the Appellants to the Respondent.

On the hearing below Vice-Chancellor Lane, in his conclusions, says (C. p. 25):

> "The rule appears to be settled that if a doubt raised depends upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in a suit for specific performance, but that in such cases specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous decisions, or if there are dicta of weight which indicates that courts might differ as to the determination of the point involved, and that one of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to convey a good title arises

in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. This is almost precisely the language of Vice-Chancellor Grey in *Richards* v. *Knight,* 64 Eq., 196, and see *Lippincott* v. *Wikoff,* 54 Eq., 107, and *Fahy* v. *Cavanagh,* 59 Eq., 278."

We insist that this rule has been changed by the Chancery act of 1915 (P. L. 1915, pages 185 and 186); sections 8 and 9 of which are as follows:

8. Jury Trial. If any question, ordinarily determinable at law and requiring jury trial, arise in a suit of which the Court of Chancery has jurisdiction, a jury trial, if required, may be ordered, but shall be deemed to be waived unless demanded in the pleadings. In case of such demand, if the issue be one requiring a jury trial, the Court shall send such issue of fact to a court of law for trial according to the existing practice.

But in all cases referred to in this section the Court of Chancery shall retain the cause until the legal question shall be determined, or until an adequate opportunity to determine the same shall have been given, unless justice or the public interest requires a dismissal of the cause.

9. Questions of Law to be Determined. Any question, *ordinarily determinable at law,* arising in a suit of which the Court of Chancery has jurisdiction, other than a question requiring a jury trial or a determination upon certiorari, mandamus or *quo warranto, shall be determined by the Court of Chancery in that suit.*

It is evident from a reading of the above that section 8 is intended to cover all cases where

questions ordinarily determinable at law and also requiring a jury trial arise in equity; and such section states that if a jury trial is not demanded in such a case, even though the case is ordinarily determinable at law that the Court shall retain the cause; but on the other hand, if a jury trial is required that even then while permitting such jury trial to be had in a Court of Law the Court of Chancery shall retain the cause until the legal question shall be determined, and shall, of course, give its ultimate opinion therein.

We, therefore, find that such section makes it necessary for the Court of Chancery to retain jurisdiction of all causes ordinarily determinable at law, even where a jury trial is demanded. It would seem, *a fortiori,* that the Court of Chancery should retain jurisdiction of causes where questions ordinarily determinable at law do arise and do not necessitate a jury trial, and such condition is expressly covered by the next section, No. 9. In that section the statute is that "*Any question* ordinarily determinable at law * * * other than a question requiring a jury trial * * * shall be determined by the Court of Chancery in that suit."

By this section it is made mandatory for the Court of Chancery thus to retain jurisdiction, and to itself determine all questions ordinarily determinable at law which do not require a jury trial.

The question in the case at bar, one of title arising from the construction of a will—a written instrument—is, of course, one ordinarily determinable at law, but is equally clearly not one requiring a jury trial. This is so for the reason that the construction of a written instrument is the sole matter in dispute. Furthermore, even if a jury trial were required, such, under section

8, "shall be deemed to be waived unless demanded in the pleadings." Therefore, under either alternative, the statute has directed that the question in this case "shall be determined by the Court of Chancery."

II.

In no other way than in the present proceeding can the Appellants have determined the validity of the title tendered by them to the Respondent.

(a) THE QUESTION OF LAW IN THIS CASE CANNOT BE CERTIFIED TO THE SUPREME COURT FOR DECISION.

This was the procedure followed in *Kent* v. *Armstrong,* 6 N. J. Eq., 637, and is authorized by section 79 of the Chancery act of 1902 (Compiled Statutes 1910, page 440, section 79).

However in this case the decree advised by the Vice-Chancellor has already been filed (C. p. 32); the bill has been dismissed, and it is too late now to certify the said question of law to the Supreme Court for its opinion.

(b) THE APPELLANTS CANNOT FILE A BILL TO QUIET TITLE.

3 Pomeroy's Equity Jurisprudence, 2d Ed., page 2142, says:

> "The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, *when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title.*"

The act to quiet titles in this State (P. L. 1870, page 720) Compiled Statutes of New Jersey, 1910, page 5399, Section 1, reads as follows:

> "1. SUIT TO QUIET TITLE BY PERSON IN POSSESSION: PERSONS PRESUMED TO BE IN POSSESSION OF WILD LANDS, ETC.—That when any person is in peaceable possession of lands in this state, claiming to own the same and his title thereto or to any part thereof is denied or disputed, or any other person claims or is claimed to own the same or any part thereof, or any interest therein, or to hold any lien or incumbrance thereon, and no suit shall be pending to enforce or test the validity of such claim or incumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up all doubts and disputes concerning the same; the bill of complaint in such suit shall describe the lands with certainty, and shall name the person who claims, or is claimed or reputed to have such title or interest in or incumbrance on said lands, *and shall call upon such person to set forth and specify his title, claim or incumbrance, and how and by what instrument the same is derived or created* * * *."

In the case at bar the facts are such that the appellants could not, either under the statute or under the general equitable powers of the court, bring a bill to quiet title. First, there were no successive actions at law brought against the appellants nor are there any persons claiming equitable title against the appellants; and secondly, there is no person upon whom the appellants can call to set forth and specify his title, claim or incumbrance.

Even if the facts were such that the appellants could maintain a bill to quiet title, yet under the 1915 Chancery Act it would have to determine the question of law. It is, therefore, submitted that it should have been determined in this specific performance proceeding. There is no reason why in one sort of suit a Court of Equity should be allowed to say a rule of law is doubtful, and it will not decide it for that reason, and say in another sort of a suit that it will decide the question and apply to the facts the doubted rule of law.

(c) THE APPELLANTS CANNOT FILE A BILL FOR THE CONSTRUCTION OF THE WILL.

The rule of law is that equity "cannot be compelled to construe a will, except as incident to some relief which may be afforded by a decree." It has been expressly held that the court will not construe wills for the sake of giving counsel and advice to the parties, but only for the purpose of giving positive directions for the action of the trustee.

Hoagland v. *Cooper,* 65 N. J. Eq., 407;
Bevans v. *Bevans,* 69 N. J. Eq., 1.

This is a statement by Vice-Chancellor Howell in *Kellogg* v. *Burnett,* 74 N. J. Eq., 304, on page 309.

To the same effect are:

Hewitt v. *Green,* 77 N. J. Eq., 345.
Ogden v. *McLane,* 73 N. J. Eq., 159.
Gillen v. *Hadley* (Ct. of Errors & Appeals), 75 N. J. Eq., 602.
Northrup v. *Ackerman,* 84 N. J. Eq., 117.

Schreve v. *Wilkins,* 82 N. J. Eq., 18, the Court holds that since an administratrix with the will annexed has no trust to perform in rela-

tion to real property, and is not concerned with the devolution thereof, she may not have a construction of a will as to devolution of the testator's real estate.

In the case at bar any possible claimants under the will would not as yet be entitled to the premises in question, since the first devisees (the appellants) are still *in esse*. Furthermore, the executors in the first place are not willing to file a bill, and even if they were willing they could not do so under the cases cited above.

III.

The Appellants have in the property in question a defeasible fee simple estate, subject to being divested upon their dying without issue and intestate.

A. THE WORDS "DIE WITHOUT ISSUE" NOT ONLY BY STATUTE, BUT BY AN UNBROKEN LINE OF DECISIONS IN THIS STATE, ARE CONSTRUED TO GIVE A DEFEASIBLE FEE, SUBJECT TO BEING DIVESTED UPON THE OCCURRENCE OF THE CONDITION.

As noted in the clause of the will covering the premises in question the testatrix gives, devises and bequeaths "to my said daughter Edna L., and my said daughter Mabel E., their heirs and assigns to be divided between them, share and share alike (the real and personal property in question) * * *. In case either of my said daughters dies without issue and intestate, her share in said house, lots and stable and contents thereof shall go to the survivor."

In 1851 the Legislature of this State expressly provided—

> "That in any devise or bequest of real or personal estate in the will of any person

> dying after this act shall take effect, the words 'die without issue,' or 'die without lawful issue,' or 'have no issue,' or any other words which may import a want or failure of issue of any person in his lifetime, or at his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue, in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention shall otherwise appear by the will.'' (See Vol. 4, C. S. of N. J., 1910, WILLS, Par. 27, page 5870.)

This statute has been construed in numerous cases, including:

Patterson v. *Madden,* 54 N. J. Eq., 714 (Ct. of Errors & Appeals);

Brazzalle v. *Diehm,* 86 N. J. L., 276 (Ct. of Errors & Appeals);

Dean v. *Nutley,* 70 N. J. L., 217 (Ct. of Errors & Appeals);

Steward v. *Knight,* 62 N. J. Eq., 232;

Vreeland v. *Blauvelt,* 23 N. J. Eq., 483;

Dilts v. *Clayhounce,* 70 N. J. Eq., 10;

Condit v. *King,* 13 N. J. Eq., 375;

Davies's Administrator v. *Steele's Administrator,* 38 N. J. Eq., 168;

McDowell v. *Stiger,* 58 N. J. Eq., 125;

Shreve v. *Wilkins* (*supra*).

All of these cases have, without exception, construed such statute regarding such a devise to the effect that such devise creates a vested but defeasible fee simple estate, such condition of defeasance being the occurrence of the devisee's dying without issue.

The rule has also been settled by such cases that the time when such death without issue is

deemed to refer shall be determined from the remainder of the will.

In the case of *Patterson* v. *Madden* (*supra*), the Court sums up the law on the subject on page 723, as follows:

> "First. If land be devised to A. in fee and a subsequent clause in the will limits such land over to designated persons in case A. dies without issue, *and A. so dies,* and the substituted devisees are *in esse* at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A. takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.
>
> Second. Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance, the distribution of the testator's estate or the postponement of the enjoyment of the property devised until the devisee reaches the age of twenty-one or until the exhaustion of a prior life estate), such limitation over will be construed to refer to the happening of such event or to the death of the devisee, according as the Court may determine from the context of the will and the other provisions thereof, that the limitation clause is set in opposition to the event specified or is connected with the devise itself."

Such case was also a bill for the specific performance of a contract to purchase lands.

In the case of *Brazzalle* v. *Diehm* (*supra*), property was left to the widow for life, remainder to John and Margaret, but if John and Margaret died without lawful issue their shares were

to go to the other one, and if both should so die to a third child. The heirs of the third child joined in a conveyance to the widow, John and Margaret; and the widow, John and Margaret thereupon conveyed to the defendant. The question was whether the defendant obtained a good title to the land. In that regard the Court said:

> "The gift to John and Margaret vested at the death of the testator subject to defeasance in the event of the death without lawful issue, with right of survivorship if one should die without issue, and also to the life estate of the widow. Whether the survivor takes the share of the other child absolutely is not necessary to be decided in this case because if absolute, it would pass by their deed to the defendant. * * * The deed of the heirs-at-law of Elsie conveyed whatever of the title Elsie would have taken to the widow, John and Margaret, and their deed passed to the defendant an absolute title discharged from all contingencies or executory devises."

This is exactly the contention in the case at bar as will be seen more at length hereafter, to wit: that the conveyance by Mabel and Edna of their vested interests, plus the conveyance of their contingent interests and plus the release of their powers passes the entire fee of the estate.

Without the use of the words "and intestate" it is, therefore, clear beyond peradventure that the words "die without issue" signify a definite failure of issue. In other words, a failure of issue at the time of the death of the first daughter.

It is equally clear that the addition of the words "and intestate" merely adds to the force of this construction, inasmuch as such intestacy

itself refers to the date of the death of the first daughter, and that, therefore, far from the rest of the will showing a contrary intention, the other words in the will bear upon the words "die without issue," and merely reinforce and make certain the doctrine settled by the unvarying decisions of the Court of Errors and Appeals to the effect that the daughters have a defeasible fee simple.

The above doctrine is thus seen to be absolutely settled by the unvarying decisions of the Court of Errors and Appeals of this State.

B. THE ADDITIONAL WORDS "AND INTESTATE" MERELY CREATE AN ADDITIONAL CONDITION OF DEFEASANCE AND EMPOWER THE DEVISEES TO DEFEAT THE LIMITATION OVER.

It will, of course, be noted that by the main provision of the testatrix's will in devising the premises in question, such premises are devised to the daughters, "their heirs and assigns to be divided between them, share and share alike." No clearer words could be used to evidence the intention of the testatrix to give an estate in fee. Moreover, after such language the testatrix continues to bequeath all the personal property in such premises, including, beds, bedding, linen, wearing apparel and material for same, fuel, family stores, etc. Since all of such articles are of the most perishable nature it would also seem clear that it was the testatrix's intention to give, as far as possible, an absolute estate therein to the devisees, and not to require such devisees to hold them intact during their lives with a limitation over to other persons thereafter. Such being the main provisions of the will as to the property in question, showing the intention of the testatrix to give the devisees absolute control

thereof, let us turn our attention to the clause in the will containing the limitation over.

The three cases of *Kent* v. *Armstrong,* 6 N. J. Eq., 637; *Cantine* v. *Bowen,* 46 N. J. L., 599, and *Kellers* v. *Kellers,* 80 N. J. L.,441, unite in holding that where an absolute devise has added thereto the power to the devisee to dispose of the property devised by will, but in the event of her not disposing of the same by such will adding a limitation over, that such devise would give the primary devisee a life estate with a power of disposition by will, and in the event of her dying intestate the executory devise over would become operative.

This is unquestioned, but such is not the case at bar, for in the case at bar not only does the will provide for a general devise apparently in fee, and a temporary power with a limitation over in the event of a default of the execution of such power, but such will also provides that such limitation over is contingent upon the first devisee's dying without issue; and it has been seen above that such words not only are absolutely controlled by a statute of this State, but have been uniformly construed by a long line of cases in the Court of Chancery, Supreme Court and Court of Errors and Appeals.

True the case of *Kent* v. *Armstrong, supra,* provides that the limitation over is dependent as well upon the primary devisee's dying without issue, but the will in that case was executed in 1827, before the passage of section 27 of the statute of wills alluded to above, upon the basis of which our courts have uniformly held, as seen *supra,* that such a clause meant a definite failure of issue, and not an indefinite failure of issue, and gave a defeasible fee simple, and not a life estate as contended in *Kent* v. *Armstrong.* Such

section of the statute of wills was passed in 1851. That the enactment of such statute radically changed the state of the law may be seen by glancing at the case of *Davies's Administrator* v. *Steele's Administrator, supra,* on page 170.

> "There can be no doubt that, prior to the enactment of the statute of 1851 (Section 27 of the Statute of Wills) it was perfectly well settled that a bequest over to a second legatee, limited to take effect in case the primary legatee should die without issue, standing alone, without anything to show that the word 'dying without issue' were used otherwise than in their legal sense, was to be construed as a limitation founded on a general, indefinite failure of issue. * * * The question must be decided by the law as it stood in 1834."

The Court, therefore, decides contrary to the contention that the failure of issue was made definite by the statute, and, therefore, contrary to the decision of all of the cases decided after the enactment of the statute, but in accordance with the decision in the case of *Kent* v. *Armstrong,* which case was also decided prior to the enactment of the statute.

It is clear that the Court in the case of *Kent* v. *Armstrong* construes the words "dying without issue" as meaning an indefinite failure of issue, for it says on page 644 that such words create an estate tail which by force of our statute (Descent Act, Section 11; 2 C. S. of N. J., 1910, page 1921) is converted into a life estate with the remainder; but it is, of course, obvious that if the statute of 1851 had been in effect such words "die without issue" could not be construed as creating a definite failure of issue, and that such could, therefore, not be an estate tail;

and, therefore, could not be converted by the Descent Act into a life estate.

This very argument was also advanced in the cases of *Patterson* v. *Madden, supra,* Court of Errors and Appeals, and *Steward* v. *Knight, supra.*

In the Patterson case the Court of Errors says:

> "I cannot concur in the view expressed by the Vice-Chancellor as to the true construction of this will. He considered that the estate devised to the appellant was cut down to a life estate, by the provision of the will last cited, on the theory that the words 'die without leaving issue' imported an indefinite failure of issue and consequently created an estate tail at common law; and that such an estate, as soon as it was created, was transmuted by the eleventh section of our statute of descents into an estate for life. But this view of the effect to be given to the words 'die without issue' can only be sustained, it seems to me, by ignoring the provision of the fourth section of the supplement to the act concerning wills (Section 27), approved March 12th, 1851, which was in force at the time of the execution of the will under consideration. * * * The rule applied by the court below in construing the words 'die without leaving lawful issue,' and determining that they imported an indefinite rather than a definite failure of issue, was that established by the common law. * * * The will now before us, as has already been stated, was not executed until the year 1866, and consequently the question to be determined in the case now before us is not what estate the devisee

> took in the lands devised, at common law, *but what estate he took by the rule established by the act of* 1851, *which is just the reverse of the common-law rule.* Giving to the words 'die without leaving lawful issue' the effect required by the statute, they import a definite and not an indefinite failure of issue and consequently do not operate to cut down the fee-simple estate devised to the appellant by his father's will into an estate-tail."

It thus appears, to quote the language of the Court of Errors and Appeals in the Patterson case, that the case of *Kent* v. *Armstrong* was decided when the law was "just the reverse" of the law at the present time.

Moreover in the *Kent* v. *Armstrong* case the Court argues that if the words in question do not give the devisee merely a life-estate, plus an executory devise, that the devisee would take a fee simple which, with the power of alienation, would make the executory devise void; and that to thus avoid such executory devise would be quite contrary to the manifest intention of the testatrix. But this does not follow, or at least is not true in the case at bar according to the long line of unvarying decisions of the Court of Errors and Appeals cited in the first sub-division of this brief, for if the words in the case at bar are construed as giving the daughters a defeasible fee simple, such title may yet be divested upon the occurrence of the conditions which the testatrix has laid down under which she desired the property to go over to the surviving of the two daughters.

Furthermore, the case of *Den D. Trumbull* v. *Gibbons,* 117, at page 155, holds that a devise to A, but "if he should die without any lawful

issue and without making a last will and testament," then over, gives A a defeasible fee simple.

In addition, the holding in this case that the devise in question merely gives the daughters a life-estate, plus an executory devise, would be quite contrary to the manifest intention of the testatrix. Not only does she by the earlier provisions of her will concerning the property in question direct that such property shall be divided between the daughters, their heirs and assigns, share and share alike, as above stated, and devises most perishable property in the same terms, thus showing a clear intention that more than the life-estate was intended to be given them, but the use of the clause in question shows clearly that she intended that such property should benefit her daughters, and their issue, and them alone. "In case either of my said daughters dies without issue and intestate, her share * * * shall go to the survivor." She thus attempts to forefend against the possibility of such property going into the hands of any third party, except where such daughters should themselves will it. She apparently tried to prevent the property dropping into the residue of her estate where her son, for whom she had otherwise amply provided and who before her death had by his marriage contracted large financial connections, would have shared.

Again assuming that this will should be construed as giving the daughters only a life-estate, plus an executory devise, if one died the other would then hold a fee in one-half of the property, but a mere life-estate in the other one-half.

This in itself would be rather an anomalous situation, and would become more anomalous still upon the death of such daughter entitled to

one-half, but having no interest at all in the remaining one-half of the property, which would then go to various other parties undesignated by the will.

It would, therefore, seem that the sole way to effect the intention of the testatrix is to hold that the appellants take a fee simple estate, defeasible upon their dying without issue and intestate, and that such holding is strictly in accordance with the settled decisions of the Court of Errors and Appeals as cited above.

Of course this holding in no way affects the doctrine of the cases of *Kellers* v. *Kellers, supra*, *Cantine* v. *Bowen, supra,* and *Kent* v. *Armstrong, supra,* as to the implied grant of power of disposition by the use of the word "intestate," but this brings us to our fourth point.

IV.

The Powers of Disposition in this case are Powers in Gross and may be released.

There is no question but that the use of the words "and intestate" in the present will give the daughters the power to dispose of the premises held by them by their wills; but it is also beyond question that they, each of them, have a present interest in such premises. Such powers of disposal are, therefore, powers in gross, and may be released.

The only case in this State on such point is that of *Norris* v. *Thompson,* 19 N. J. Eq., 307 (affirmed by the Court of Errors and Appeals in *Thomson's Executors* v. *Norris,* 20 N. J. Eq., 489).

In the Norris case the Chancellor below says on page 314:

> "It is a settled rule, that where a life interest or other estate is given to the person who is authorized to devise or appoint the property, the person authorized to appoint can release and extinguish the power. This is called a power in gross. But where the power to appoint is given to one who has no estate or interest in the property to be distributed, which is called a power simply collateral, the person entrusted with the power cannot release or extinguish it, but may exercise it, nothwithstanding any covenant or agreement to the contrary. 4 *Kent,* 346; 1 *Sug. on Powers,* 80, 90, 93, 100; *Smith* v. *Death,* 5 Madd., 371; *Albany's case,* 1 Rep. 111;*West* v. *Berney,* 1 Russ. & Mylne, 431; *Bickley* v. *Guest,* Ibid, 440; *Horner* v. *Swann,* 1 Turn. & Russ., 430; *Hillyard* v. *Miller,* 10 Harr., 326; *Miles* v. *Knight,* 12 Jurist, 666."

This is what we contend is the law on the subject of powers.

This case was affirmed on appeal in the Court of Errors, the Court there discussing, and not deciding, the above question as to the power to release a power in gross or collateral in dictum to the following effect:

> "This branch of the case was disposed of by the Chancellor, on the technical distinction which, in the doctrine of powers, exists between a power in gross and a power simply collateral. The power of appointment contained in the clause of the will now alluded to, was regarded as belonging to the former class, and, consequently, as extinguishable by the donee of the power. This question seems to me to be one of great nicety in the application of the decisions to the present

case. *I have not found any case* in which it was maintained that a power to appoint to *strangers,* after the expiration of an interest given to the donee of the power, was a power in gross. The decisions referred to by counsel are mostly cases of settlement on a parent, with a power of appointment among his children. In such instances, there is some reason to say the power is not simply collateral, because it is not a naked authority, the father having an interest in the distribution of the estate among his children. Under such circumstances, such a power may not inaptly, in the expression of Sir Edward Sugden, be called 'an emolument of his own estate.' But, on the contrary, when an interest, for life or for years, is given to A, with direction, by will or otherwise, to appoint between B and C, who are strangers to A, why such an authority should be considered anything more than an authority simply collateral, it seems difficult to imagine. *I have found no case which determines this question either way;* those cases in which the fund, on failure of appointment, is given to the donee of the power, resting obviously on a different principle; and *I shall pass the question without the expression of any opinion upon it.''*

Inasmuch as the Court, therefore, expresses no opinion on this question, such dictum can hardly be considered as authority contrary to our contention; but inasmuch as the point is one which has involved much discussion in the courts, particularly in England, we would call the Court's attention to the law as settled in that country, and as commented upon in this country, to show clearly that the opinion of our Court of Chancery is the correct one, and that there are

cases where a power to appoint to *strangers* has been declared a power in gross and releasable by the donee of the power.

The leading case on this question is *Albany's case,* 1 Coke, 110 B; 76 Eng. Reprint, 250, cited by the Chancellor in the Norris-Thomson case.

In Albany's case it was expressly held that a power to appoint to *strangers,* plus an interest in the property in the donee of the power created a power in gross, and could be released.

In the English Reprint of this report a clear and comprehensive note of the authorities on this question is appended (251, 252 and 253) which summarizes the rule on this question. In this note the learned Editor, citing *Sugden on Powers,* Chapter 1, says:

> "Powers are distributed into two classes, viz: Those which relate to the land, and those which are collateral to it. First, Powers relating to the land, are those which are limited to some person having an estate or interest in the land; and are either appended or in gross; the former being, where a person has an estate in land with a power of creating an estate, to take effect in possession during the continuance of his estate, as in the instance of a tenant for life having a power of making leases in possession; the latter, where a person has an estate in land, with a power of creating an estate, to commence after the determination of his own. Second, Powers simply collateral are those which are given to mere strangers, to whom no estate is granted, and the power is for the benefit of others; as where powers of sale and exchange are given to trustees in a marriage settlement. * * * Such powers, whether appendant or in gross, may be released to

> any person having an estate in possession, remainder, or reversion in the lands; for the exercise of the power is considered as a species of property advantageous to the person to whom it is given, and he may therefore depart with, or exclude himself from the benefit of it. * * * Powers, simply collateral, are construed strictly as being bare authorities; and as these powers are given to strangers for the benefit of some third person who would be prejudiced by their extinction, it is held, that the donee cannot by fine, feoffment, or release, destroy his power."

To the same effect is *Digges's case,* 1 Coke, 73 A; 76 Eng. Reprint, 373, and the doctrine laid down by the learned authority Cruise in 4 Greenleaf-Cruise C. 19, sec. 4, as follows:

> "Powers relating to land whether appended or in gross, may be destroyed by a release to any person having an estate of a freehold in possession, remainder, or reversion in the lands to which the power relates; for where powers are given to a person having an estate or interest, either present or future, in the land, the exercise of them is considered as a species of property advantageous to him; and there is no reason why he should not be allowed to part with or exclude himself from the benefit of it."

The case of *Smith* v. *Death,* 56 Eng. Reprint, 937, is practically on all fours with the present one. It is upon bill for the specific performance of a contract for sale. The question was one of title in the vendor, such title depended upon a will, and such will, as the will in the present case gave property to one Brown for life, remainder to such children as Brown should ap-

point, and in default of appointment to a certain son of the said Brown. In this case Mr. Sugden, the learned author upon the question of powers, appeared and the question was directly raised as to whether the power to appoint was in gross or collateral, such power having been released by recovery suffered by Brown and the son in question. This case was reported as follows:

> "The Vice-Chancellor said that in *West* v. *Berney* it appeared to him, as the result of the authorities, that every power reserved to a grantee or devisee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, might be extinguished. That such a grantee or devisee could deal with the estate in respect of his freehold interest; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power must extinguish his power upon the general principle that a person is not permitted to defeat his own grant. That it made no difference that here the power was a particular power in favor of children; that *King* v. *Melling,* (1 Ventr. 225) was a particular power in favor of the wife; that such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it, and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option."

In other words, such court in this case, when the most learned authority on powers appeared as counsel, and when the English cases in general were brought up for discussion not only decided

that where the donee of the power had an interest in the land such was a power in gross and could be released, but also decided that the mere fact that the power was in favor of children did not create a trust where it was admitted that a power in favor of third parties generally would not create such trust. That is to say, that the rule has been laid down by the English courts directly contrary to the intimation given by the upper court in *Norris* v. *Thomson, supra,* that a power to appoint to children might be released where a power to release to third parties generally might not be.

It will, of course, be remembered that the Court of Errors there said that it did not desire to express any opinion upon the point.

In the further cases of *Edwards* v. *Slater,* Hardres, 410; *King* v. *Melling,* 1 Vent., 225, and *Tomlinson* v. *Dighton,* 1 P. William, 149, it was held in like manner that powers in the devisees to appoint for the benefit of others could be released.

This unified doctrine in the courts of England has been followed directly in this country.

See *31 Cyc.,* 1054;
Grosvenor v. *Bowen,* 10 Atl. (R. I.), 589;
Learned v. *Talmadge,* 26 Barb., 443.

The rule is laid down in Cyc. as follows:

> "Powers appendant, appurtenant, or in gross may be released or extinguished by the donee or grantee, but in the absence of a statute, where the power is given to one who has no estate or interest in the property, that is, where the power is simply collateral, the person intrusted with the power cannot release or extinguish it, and may exercise

it notwithstanding any agreement to the contrary."

The Grosvenor case is one on all fours with the present case. Such was a bill for specific performance on the part of the vendors; the question of title being raised under a will which gave property to A for life, on his decease to such person as he might appoint by his will, and in default of such appointment to the heirs of the testatrix. No distinction in principle between that case and this can be seen. The Court there says:

> "We think it was competent for John G. Mason (the devisee for life) to release the power to the tenants in remainder, or to extinguish it by joining with the other complainants in a deed conveying the bargained lot to the defendant in fee simple, and therein releasing the power to him." (Citing the excerpt from Cruise, on page 23 of this brief; Digges's case, *supra;* Albany's case, *supra;* Sugden on Powers, *supra,* and the various English cases above quoted.)

In the Learned case the Court draws the same distinction between a power in gross and one in collateral.

We thus find that while the upper Court in *Norris* v. *Thomson* stated that it found no case in which it was maintained that a power to appoint to strangers was a power in gross, nevertheless there are many of such cases, and that not only such cases, but the settled doctrine on the question in England and in the United States generally, is directly in accordance with the rule laid down in the sole New Jersey case on the subject, that of *Norris* v. *Thomson, supra.*

In the Norris case the higher court further

raises the point in dictum as to whether the donee in that case should be allowed to personally benefit herself by the release by bargaining with the persons designated as those among whom she may appoint, citing the case of *Cunynghame* v. *Thurlow,* 1 Russ. & M. 436, in support.

Admitting that this rule is correct, although the same is not laid down as a rule by the Court, this case is not one where the donees bargain with the appointees and gain a benefit from their position.

In the Cunynghame case, as the Vice-Chancellor there says: "The power was extinguished by the release, but that the Court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power." In other words, the donee by his release there received a direct interest in the estate from such release, which it naturally was inequitable for him to do.

But that is not this case for the reason that the donees here received no pecuniary consideration for the release of their power; there are no persons designated as beneficiaries under the power with whom they may bargain; and in fact they may legally appoint each other as the beneficiaries. Furthermore the Cunynghame case has been distinguished in the case of *Smith* v. *Houblon,* 26 Beav. 482 (53 Eng. Reprint, 984) to the effect that an indirect benefit might be obtained by the donee of the power in releasing the same, and that such would not prevent such release. In that case the donee released his power as security for a loan of eleven thousand pounds about to be made to him in consideration therefor.

Therefore, inasmuch as the donees of the power in this case obtain no direct benefit from the estate by releasing the same, nor obtain any benefit at all other than they would ultimately obtain by virtue of their power to appoint each other, it would seem that the rule as to releases in order to obtain beneficial interests would not apply; and that such releases would consequently act to cut out other interests in the premises in question than the defeasible fee simple and estates in expectancy held by the two daughters.

V.

The two daughters can convey their estates in expectancy, thus creating a fee simple.

In the Cantine case, above cited, the Court of Errors and Appeals holds that certain persons could not perfect their title by a conveyance, since there were certain contingent interests outstanding, the persons in whom the contingency vested being unascertained, and citing what is now section 19 of the Conveyance Act (C. S. of N. J. 1910, Vol. 2, page 1539) to that effect. That statute allows the conveyance of any contingent or executory interests, except where the person in question is, one, the heir of a living person; two, the contingency is as to the person in whom the estate may vest, or three, the contingent estate arises from a deed to be thereafter executed or the will of a living person.

Since the mother of the two daughters is deceased it is clear that they do not hold their contingencies as heirs of a living person. Moreover, the words of the will are "in case either of my said daughters dies * * * her share * * * shall go to the survivor."

The survivor can, of course, be only one of two persons, Edna L. Selby or Mabel E. Selby. Nor as to the estate which the survivor shall take is there any alternative even between the two, for if Edna dies her share can go to Mabel only, while if Mabel dies her share can go to Edna only.

It is, therefore, clear that the persons having the estate in expectancy are ascertained.

Brazzalle v. *Diehm, supra;*
Dilts v. *Clayhounce, supra;*
Wilkinson v. *Sherman,* 45 N. J. Eq., 413 (affirmed in Court of Errors & Appeals in 47 N. J. Eq., 324).

It is equally clear that since Edna L. Selby and Mabel E. Selby obtained their estates in expectancy under the will of their mother, who is dead, that they are not entitled under a deed to be executed, or under the will of a living person.

Therefore, the estates in expectancy of the two daughters do not come within any of the provisos of the above statute, and can, therefore, be lawfully conveyed.

In conclusion we would, therefore, say first, that the Court of Chancery should have determined the ultimate rights of the parties and the validity of the title tendered by the appellants to the respondent under Sections 8 and 9 of the Chancery Act of 1915; second, that in no other way than in the present proceedings can the appellants have determined the validity of the title tendered to the respondent by them; and third, that while it is settled that the daughters in this case have a defeasible fee simple, with powers to dispose and estates in expectancy in themselves; nevertheless, since such estate in

expectancy has been legally conveyed, together with their defeasible title by the tendered deed, and since the powers of disposal have been legally released the appellants have duly and legally tendered a fee simple title to the respondent, and a decree of specific performance should have been entered,

Respectfully submitted,

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