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New Jersey State Library

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

The complainants, George B. Bye, David C. Voorhees and William L. Hutchinson, all residents of the State of Pennsylvania, respectfully show unto your Honor: 10

1. That on the 30th day of December, 1925, one Lorenzo Bye of the City of Margate City, County of Atlantic and State of New Jersey, departed this life leaving a last will and testament bearing date September 21, 1925, which said paper was duly probated January 19, 1926, before the surrogate of Atlantic County and State of New Jersey. 20

2. That under the said will aforesaid the said testator nominated and appointed your complainants executors, which said executors have duly qualified under the statute and have assumed the duties of administration thereunder.

3. Among other provisions in the said will the testator provides as follows: 30

> "I give, devise and bequeath to my faithful and loyal friend, Martha H. Strasbourg, seventy per cent (70%) annually of the net income of the mortgages, which I hold at the time of my decease, and she shall also enjoy the use of my present home free of any rental, until such time

as she marry, with the provision that from and after her marriage or death as the case may be, I direct that my estate shall go to my cousins, namely: Elizabeth M. Hutchinson, Josephine F. Voorhees, Richard B. Bye, George B. Bye, Allen B. Bye, Frank B. Bye to be divided equally among them share and share alike. In the event that any of the above said cousins shall predecease Martha M. Strasbourg, or in 10 the event that any of them die before Martha H. Strasbourg marries, then the respective share or shares of those so dying shall descend to their children to be divided among them."

A copy of said will it attached hereto, made a part hereof and marked Exhibit "A."

4. A doubt has arisen touching the proper distribution of the balance or 30% of the net income annually from the mortgages under the said provision of 20 the will before and until the beneficiary, Martha H. Strasbourg, shall either marry or die, and, in fact, what becomes of the said 30% or balance described in said paper in the meanwhile and until such contingency, and further, what disposition of the said fund shall be made by your complainants. Your complainants are not clear as to what their duties are in respect to said bequest and seek the assistance of this Honorable Court directed to the construction of the said provision, and a decree setting forth what the testator means and intends by the said provision, and 30 ordering a proper distribution of the portions described above as befits equity and the administration of the estate as nearly as possible in conformity with testator's intent, meaning and desires.

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

1. That Martha H. Strasbourg, Elizabeth M. Hutchinson, Josephine F. Voorhees, Richard B. Bye, George B. Bye, Allen B. Bye, Frank B. Bye and Josephine Shoemaker, who are the defendants to this suit may answer this bill of complaint, without oath, and each statement therein made;

2. That the said will may be construed by this Honorable Court and particularly paragraph 3 of said paper, and complainants as executors under said 10 will be directed to whom and in what proportions the said fund or estate consisting of 30% of the net income from the mortgages be paid, as well as the income from the estate other than the net income from mortgages, and how distributed and disposed of before and until the beneficiary, Martha H. Strasbourg, shall either marry or die;

3. That a writ of subpœna may issue commanding said defendants to answer this bill of complaint and 20 to abide by such decree as this Court may make in the premises.

Cole & Cole,
Solicitors for and of Counsel with Complainants.

30

ANSWER AND COUNTER CLAIM.

IN CHANCERY OF NEW JERSEY.

Between
GEORGE B. BYE, DAVID C. VOORHEES and WILLIAM L. HUTCHINSON, Executors, etc.,
Complainants,
and
MARTHA H. STRASBOURG, *et als.,*
Defendants.

On Bill. Answer and Counter Claim.

The answer of the defendant, Martha H. Strasbourg and the counter claim of Martha H. Strasbourg against the complainants, and other defendants.

Paragraph one is admitted.

Paragraph two is admitted.

Paragraph three is admitted.

Paragraph four is admitted.

By way of counter claim against the complainants and against the defendants, Elizabeth M. Hutchison, Josephine F. Voorhees, Richard B. Bye, George B. Bye, Allen B. Bye and Frank B. Bye.

1. Defendant is uncertain as to the meaning of that part of the will quoted in paragraph three in complainants' bill, which reads as follows:

> "and she shall also enjoy the use of my present home free of any rental, until such time as she marry."

The home occupied by Lorenzo Bye at the time of his death was in block #431, Margate City, Atlantic County, New Jersey. That block is bounded by Monmouth, Jackson, Amherst and Monroe Avenues.

Lorenzo Bye was seized of lots numbers 17-19-21 and 23 and lots numbers 502-504-506-508-510 and 512 in said block #431. All of which lots are contiguous and adjoin.

The main house occupied by Lorenzo Bye was built on lot number 17 and extended over on lot number 19.

Upon lot number 506 a barn is erected, which was used by the testator, Lorenzo Bye, in his lifetime for storage purposes, and as an accessory to his house.

Upon lot number 502 a small one-room house is erected, which was rented to one Frank Singer for ten ($10.00) dollars per year.

On a part of lot number 19 a small separate house is erected, which is, however, adjoined to the house erected on lot number 17 by a boat house. The boat house between the two houses was appurtenant to the home of the decedent and was used by decedent for storage purposes. The dwelling, last referred to, erected on lot number 19 was by decedent rented to one William Singer for one hundred and fifty ($150.00) dollars per year.

Upon lots numbers 502 and 504 a grape arbor is planted.

Lorenzo Bye had planted pear trees, peach trees

and English walnut trees on all of the lots described above, during his lifetime, and all of said lots were used by decedent for the care of a large number of chickens maintained by him.

Between the barn and house is a coal house, which holds about fifty tons of coal.

2. Defendant believes that she is entitled to the use of the entire lands described herein, but is uncertain as to whether she is entitled to the rents derived from the two small houses rented to Frank and William Singer, referred to above.

The close relation of said tenant houses to the domicile of testator make it important that they be rented to tenants satisfactory to the occupant of testator's house.

This defendant therefore prays that the complainants, George B. Bye, David C. Voorhees and William L. Hutchinson, Executors, etc., and the defendants, Elizabeth M. Hutchinson, Josephine F. Voorhees, Richard B. Bye, George B. Bye, Allen B. Bye and Frank B. Bye may answer this counter claim and each statement herein made.

That said will may be construed by this Honorable Court in such manner as will inform this defendant and said executors what portion of said premises are available to defendant, Martha H. Strasbourg.

ENDICOTT & ENDICOTT,
Solicitors of Defendant,
Martha H. Strasbourg.

ANSWER OF JOSEPHINE SHOEMAKER.

IN CHANCERY OF NEW JERSEY.

Between
GEORGE B. BYE, *et al.*,
Complainants,
and
MARTHA H. STRASBOURG, *et al.*,
Defendants.

On Bill, &c.
Answer of Josephine Shoemaker.

The answer of Josephine Shoemaker, says that:

1. She is the sister of decedent, Lorenzo Bye, and one of his heirs at law and next of kin.

2. She joins in complainant's prayer for the construction of the will referred to in the bill of complaint.

THOMPSON & HANSTEIN,
Solrs. of Josephine Shoemaker.

WILL OF LORENZO BYE.

I, Lorenzo Bye, of the City of Margate City, County of Atlantic, and State of New Jersey, being of sound and disposing mind and memory, make and publish my last will and testament as follows:

First: I direct all my just debts and funeral ex- 10 penses to be paid as soon as may be reasonable after my decease.

Second: I direct that my entire estate of real, personal or mixed property be held in trust by my executors.

Third: I give, devise, and bequeath to my faithful and loyal friend, Martha H. Strasbourg, seventy per cent (70%) annually of the net income of the mortgages, which I hold at the time of my decease, and she shall also enjoy the use of my present home free 20 of any rental, until such time as she marry, with the provision that from and after her marriage or death as the case may be, I direct that my estate shall go to my cousins namely, Elizabeth M. Hutchinson, Josephine F. Voorhees, Richard B. Bye, George B. Bye, Allen B. Bye, to be divided equally among them share and share alike. In the event that any of the above said cousins shall predecease Martha H. Strasbourg, or in the event that any of them die before Martha H. Strasbourg marries, then the respective share or 30 shares of those so dying shall descend to their children to be divided equally among them.

Fourth: I am not unmindful of the existence of my sister, who might be of the opinion, that she has a moral right to benefit in the distribution of my estate, but since, I know that she is well provided for in her own right, I have chosen not to make her a beneficiary under my will.

Fifth: I direct that the amount of three hundred dollars ($300) be placed in trust forever for the keeping of my burial plot.

Sixth: It is my earnest wish and desire that upon the death of Martha H. Strasbourg, her body to be interred and lie in my burial plot.

Seventh: I direct that all taxes and other charges against my property be paid out of my estate, as they become due.

Eighth: I constitute and appoint, George B. Bye, 10 David C. Voorhees and William L. Hutchinson executors of my last will and testament.

In witness whereof, I have hereunto subscribed my name and set my seal this 21st day of September in the year of our Lord, A. D. 1925.

LORENZO BYE (L. S.)

Signed, sealed, published and declared by the said Lorenzo Bye as and for his last will and testament, in the presence of us, who at his request, in his presence, and in the presence of each other, have here- 20 unto subscribed our names as witnesses.

JAMES PARKER,
GURDON S. LENNIG.

30

CONCLUSIONS (Oral).

IN CHANCERY OF NEW JERSEY.

Between
10 GEORGE B. BYE, *et al.*, Executors, &c. *Complainants,* and MARTHA H. STRASBOURG, *et al.*, *Defendants.*

On Bill for Construction of Will.
On Final Hearing.
Conclusions (Oral).

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20 THESE CONCLUSIONS ARE NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

MESSRS. COLE & COLE for the complainants.
MESSRS. ENDICOTT & ENDICOTT for the defendant, Martha H. Strasbourg.
MESSRS. THOMPSON & HANSTEIN for the defendant,
30 Josephine Shoemaker.

INGERSOLL, V. C.

I think I can give my view on this will at the present time subject, of course, to an examination of the case which may be of assistance in the matter.

I think that, without doubt, it was the intention, and so expressed in the will by the testator, that the executors were to hold the entire estate: real, personal and mixed, in trust for the benefit of those named in the will. The entire estate in trust by the executors, first. From that, of course, the just debts and funeral expenses to be paid.

Of the income it is clear, and specifically set forth, that 70% of the net income of the mortgages should be paid to Martha H. Strasbourg during her life time, unless she sooner marries. So far there is no 10 argument nor question.

Against the thirty per cent, there is charged all taxes and other charges against the property to be paid as they become due. That from an academic viewpoint may or may not take all the thirty per cent, but, as a matter of fact, we all know that it would only take a very small portion thereof, and the other would remain,—a large percentage of that thirty per cent of the income remaining in the hands of the trustees. There is no direction by the will as 20 to what the trustees shall do with this remaining portion and I am convinced that the construction of the will which must be made is that that remaining part becomes a part of the *corpus* of the estate and is held in trust until such time as, by the terms of the will it, with the original *corpus*, shall be distributed. That, of course, is specifically set forth in the will as to how it should be divided.

The only point then remaining for me to consider would be what is meant by home in the clause which 30 gives to Martha H. Strasbourg the enjoyment of the use of "his present home free of any rental." I cannot see how there can be any other construction in this case, than that Bye meant not only his house and his outbuildings, but the surroundings as well.

I cannot see how I can say that land between the house and the barn is included and land on the other side of the barn is not included. I think he meant where he lived, the house, the outbuildings connected with it and the land contiguous thereto and a part of the land which he used as his home. I cannot see how I can say that any particular part of that, part of the block, was not meant as a part, excepting, of course, those parts the possession of which he had divested himself before his death; if he has rented any of the houses, as he had rented a house or a room or more, exclusive of the house in which he lived, there is no question but what they were not a part of his home in which he lived and the income from those properties certainly would become a part of the estate and Miss Strasbourg would not be entitled to it. So far as the closeness of other tenants is concerned and that argument, it may be that Miss Strasbourg is willing to pay as much for the use of these properties as any other tenant, the trustees would be just as well pleased to have her as a tenant and, therefore, avoid any trouble in that line, but that is entirely a matter of judgment on their part.

Now, gentlemen, that is my view without reference to any cases, or without any more careful consideration than I have been able to make here. If Mr. Hanstein desires to give me any memorandum that might assist me on the question——

Mr. Cole: I haven't been able to find any cases. Your Honor will probably not be able to find any cases to fit the Lorenzo Bye will.

Heard and determined: Sepfember 1st, 1926.

MEMORANDUM.

IN CHANCERY OF NEW JERSEY.

Between
GEORGE B. BYE, *et al.*,
Executors, &c.
Complainants,
and
MARTHA H. STRASBOURG,
et al.,
Defendants.

On Bill, &c.
Memorandum.

THIS MEMORANDUM IS NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

MESSRS. COLE & COLE for the complainants.
MESSRS. ENDICOTT & ENDICOTT for the defendant, Martha H. Strasbourg.
MESSRS. THOMPSON & HANSTEIN for the defendant, Josephine Shoemaker.

INGERSOLL, V. C.

I have considered the brief filed by the solicitor of the defendant, Josephine Shoemaker, and do not consider it necessary to make any change in the conclusion as expressed orally.

October 25th, 1926.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between GEORGE B. BYE, *et al.*, Executors, &c. *Complainants,* and MARTHA H. STRASBOURG, *et al.*, *Defendants.*	On Bill for Construction, &c. Final Decree.

This matter coming on to be heard on the 1st day of September, 1926, in the presence of C. L. Cole, of counsel with complainants, Walter Hanstein, of counsel with Josephine Shoemaker, and Allen B. Endicott, Jr., of counsel with Martha H. Strasbourg, on the pleadings and proofs in open court, and the Court having read and considered the pleadings and having heard and considered the proofs together with the argument of respective counsel, and after due consideration having construed the questions,

It is on the 9th day of September, 1926, on motion of Cole & Cole, solicitors of complainants, ORDERED that the said will be, and the same is construed as follows:

(1) Martha H. Strasbourg is entitled to receive 70% annually of the net income of the mortgages

which the testator held at the time of his death, and she is also entitled to enjoy the use of the home of the testator free of any rental for and during the term of her natural life, or until such time as she may marry. The property which she is entitled to enjoy being all the property in Margate which was actually used and occupied by testator in his lifetime, except that which he rented and from which he received an income; provided, however, that said Martha H. Strasbourg is not to lease the premises or receive income therefrom.

(2) The executors are to pay the taxes on said premises which may accrue from time to time.

(3) The remaining income from testator's estate after the payment of said 70% of the net income of the mortgages, taxes and other expenses incident to the administration of the estate shall be and remain part of the *corpus* of said estate until the death or marriage of said Martha H. Strasbourg, and then to be distributed and disbursed as in the will provided.

Pursuant to the prayer of the bill the executors are hereby directed to dispose of the income of the estate and the *corpus* thereof as said will is herein construed.

It is ordered and decreed that complainants be allowed their costs to be taxed and a counsel fee of five hundred dollars to be included in the taxed costs and to be paid by the executors.

EDWIN R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between GEORGE B. BYE, *et al.*, Executors, &c. *Complainants*, and MARTHA H. STRASBOURG, *et al.*, *Defendants.*	On Bill for Construction, &c. On Final Decree. Notice of Appeal.

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The defendant, Josephine Shoemaker, hereby appeals from that part of the final decree, advised by Vice-Chancellor Robert H. Ingersoll, made in this Court in the above-stated cause, on the ninth day of September, A. D. 1926, which provides that the remaining income from testator's estate after the payment of said 70% of the net income of the mortgages, taxes and other expenses incident to the administration of the estate shall be and remain part of the *corpus* of said estate until the death or marriage of said Martha H. Strasbourg, and then to be distributed and disbursed as in the will provided, to the Court of Errors and Appeals, in the last resort in all causes.

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THOMPSON & HANSTEIN,
Solicitors for Defendant,
Josephine Shoemaker.
GEO. A. BOURGEOIS,
Of Counsel.

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

GEO. A. BOURGEOIS,
Of Counsel with Defendant,
Josephine Shoemaker.

Dated: February 4th, 1927.

To:
COLE & COLE, ESQS.,
Solicitors for and of Counsel with Complainants.
ALLEN B. ENDICOTT, JR., ESQ.,
Solicitors for and of Counsel with Defendant, Martha H. Strasbourg.

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[Endorsed.]

Feb. 7th, 1927.
Service of copy of the within notice of appeal is hereby acknowledged.
Cole & Cole,
Sols. for Complainants.
Endicott & Endicott,
Sol. for Defendant,
Martha H. Strasbourg.

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PETITION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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10 Between
GEORGE B. BYE, *et al.*,
Executors, &c.,
Complainants-Respondents,
and
MARTHA H. STRASBOURG,
Defendant-Respondent,
20 and
JOSEPHINE SHOEMAKER,
Defendant-Appellant.

On Appeal.
Petition.

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

30 The petition of Josephine Shoemaker, appellant, respectfully shows, that your petitioner finds herself aggrieved by that part of the final decree made in the Court of Chancery of this state, by his Honor, Edwin Robert Walker, Chancellor, bearing date the ninth day of September, A. D. 1926, wherein the said

George B. Bye, *et al.*, Executors, &c. were complainants, and Martha H. Strasbourg, *et al.*, were defendants, in this respect, to wit, that the said decree adjudges that the remaining income from testator's estate after the payment of said 70% of the net income of the mortgages, taxes and other expenses incident to the administration of the estate shall be and remain part of the *corpus* of said estate until the death or marriage of said Martha H. Strasbourg, and then to be distributed and disbursed as in the 10 will provided.

And your petitioner hereby appeals from that part of said decree upon the ground that the same is erroneous, and that it should have been determined and decreed that the remaining income from the testator's estate, after the payment of said 70% of the net income of the mortgages, taxes and other expenses incident to the administration of the estate, should have been paid to the said Josephine Shoemaker until the death of the said Martha H. Strasbourg. 20

Your petitioner therefore prays that said decree may in the particulars aforesaid be in all respects reversed, set aside and for nothing holden.

And your petitioner shall have such relief in the premises as to this Honorable Court shall seem meet.

THOMPSON & HANSTEIN,
Solicitors for Appellant.
GEO. A. BOURGEOIS,
Of Counsel. 30

[Endorsed.]

Feb. 7, 1927.
Service of copy of the within petition is hereby acknowledged.
Cole & Cole,
Sols. for Complainants.
Endicott & Endicott,
Sol. for Defendant, Martha H. Strasbourg.
Answer in usual form by
Cole & Cole,
Sols. for Complainants and Respondents.
Endicott & Endicott,
Sol. for Martha H. Strasbourg.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
George B. Bye, *et al.*, Executors, &c.,
Complainants-Respondents,
and
Martha H. Strasbourg,
Defendant-Respondent,
and
Josephine Shoemaker,
Defendant-Appellant.

On Appeal.

BRIEF OF BOURGEOIS & COULOMB, SOLICITORS FOR AND OF COUNSEL WITH JOSEPHINE SHOEMAKER

The appeal in this case is to review a decree of the Court of Chancery, advised by Vice-Chancellor Ingersoll, construing the will of Lorenzo Bye, deceased, late of Margate City, County of Atlantic and State of New Jersey. The appeal is prosecuted by Josephine Shoemaker, a sister of the testator and his nearest of kin.

STATEMENT.

The bill in this cause was filed to have construed certain provisions of the will of Lorenzo Bye, who died domiciled in Atlantic County, New Jersey.

Josephine Shoemaker, a sister, and the next of kin of Lorenzo Bye, was made a party to the proceedings. It is her contention that as to 30% of the income from the mortgages, and as to the whole of the income from the real estate, Bye died intestate, and that she, as next of kin, and heir-at-law, is entitled to the 30% of the income from the mortgages and all the income from the real estate, until the *corpus* of the estate vests at the marriage or death of Martha H. Strasbourg.

The third paragraph of the will is the particular paragraph involved in her contention. It reads as follows:

> "THIRD: I give, devise and bequeath to my faithful and loyal friend, Martha H. Strasbourg, seventy per cent. (70%) annually of the net income of the mortgages, which I hold at the time of my decease, and she shall also enjoy the use of my present home free of any rental, until such time as she marry, *with the provision that from and after her marriage or death as the case may be, I direct that my estate shall go to my cousins namely: Elizabeth M. Hutchinson, Josephine F. Vorhees, Richard B. Bye, George B. Bye, Allen B. Bye, Frank B. Bye to be divided equally among them share and share alike. In the event that any of the above said cousins shall predecease Martha H. Strasbourg, or in the event that any of them die before Martha H. Strasbourg marries, then the respective share or shares of those so dying shall descend to their children to be divided equally among them.*" (Italics ours.)

Two other paragraphs of the will which may perhaps be considered in construing the effect of the third paragraph are the second and fourth, which read as follows:

> "SECOND: I direct that my entire estate of real, personal or mixed property be held in trust by my executors."
>
> "FOURTH: I am not unmindful of the existence of my sister, who might be of the opinion, that she has a moral right to benefit in the distribution of my estate, but since, I know that she is well provided for in her own right, I have chosen not to make her a beneficiary under my will."

Upon the argument, Vice-Chancellor Ingersoll delivered an oral opinion, in which, referring to the surplus income, he said (p. 11, l. 20):

> "There is no direction by the will as to what the trustees shall do with this remaining portion and I am convinced that the construction of the will which must be made is that that remaining part becomes a part of the corpus of the estate and is held in trust until such time as, by the terms of the will it, with the original corpus, shall be distributed. That, of course, is specifically set forth in the will as to how it should be divided."

ARGUMENT.

The legal position of the appellant is based upon the following propositions:

1. The devise of the testator's estate to his cousins is not a remainder but a springing use or executory devise, there being no disposition of the estate until the marriage or death of Martha H. Strasbourg, who has a life interest in a certain portion thereof.

2. If the estate devised to the cousins is a remainder, it is contingent and not vested because the words directing the time of enjoyment of the estate are coupled with the gift itself and are not merely directions to pay or divide the estate at a future period.

3. The devise or bequest to the cousins is to individuals and not to a class.

4. The fact that there is a devise and bequest of the entire estate to trustees does not affect the character of the estate devised or bequeathed to the testator's cousins.

5. There is no residuary clause in the will. Therefore, any failure to dispose of the income from 30% of the mortgages and from all of the real estate creates an intestacy as to such portion.

6. The testamentary disinheritance of the testator's sister, the appellant in this cause, does not prevent her from taking under the intestate laws.

7. Under a springing use, executory devise, or a

contingent remainder of the character herein discussed, the intermediate income and profits between the time of the death of the testator and the actual possession of the estate by the devisees and legatees goes to the heirs-at-law or next of kin.

I.

THE DEVISE OF THE TESTATOR'S ESTATE TO HIS COUSINS IS NOT A REMAINDER BUT A SPRINGING USE OR EXECUTORY DEVISE, THERE BEING NO DISPOSITION OF THE ESTATE UNTIL THE MARRIAGE OR DEATH OF MARTHA H. STRASBOURG, WHO HAS A LIFE INTEREST IN A CERTAIN PORTION THEREOF.

It is significant that the will does not dispose of any of the *corpus* of the estate until after the death or marriage of Martha H. Strasbourg. None of the real estate excepting the testator's home is disposed of, and none of the personal property, other than the 70% income from the mortgages, is disposed of. There is no precedent estate of any character whatsoever sufficient to support the estate of the cousins, either as a vested or as a contingent remainder.

Concerning remainders, Blackstone says:

> "The whole estate passes at once from the grantor to the grantees, and the remainderman is seized of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

"As no remainder can be created without such a precedent particular estate, therefore, the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder."

Blackstone says:

"A second rule to be observed is this: That the remainder must commence or pass out of the grantor at the time of the creation of the particular estate."

Vol. 1, *Sharswood's Blackstone's Commentaries,* p. 166.

Kent says:

"There must be a particular estate to precede a remainder, for it necessarily implies, that a part of the estate has been already carved out of it, and vested in immediate possession in some other person. The particular estate must be valid in law, and formed at the same time, and by the same instrument with the remainder. The latter cannot be created for a future time, without an intervening estate to support it."

Kent's Commentaries, Vol. 4, 5th Ed., p. 232.

It would, therefore, seem that the estate limited to the cousins is not either a vested or contingent remainder, because it is not supported by any precedent estate of any character, whatsoever.

The estate, however, may be considered as an executory devise.

"It is well settled that chattels and even money may be so limited by will as to take effect by way of executory bequest."

Hull v. Eddy (14 N. J. L. 169).

Speaking of executory bequests or devises of personal property, Chancellor Kent, in his commentaries says:

"At common law, as was observed in a former volume, if there was an executory bequest of personal property, as of a term of years to A. for life, and after his death to B., the ulterior limitation was void, and the whole property vested in A. There was, then, a distinction between the bequest of the use of a chattel interest, and of the thing itself; but that distinction was afterwards exploded, and the doctrine is now settled, that such limitations over of chattels real or personal, in a will, or by way of trust, are good. The executory bequest is equally good, though the ulterior devise be not at the time *in esse;* and chattels, so limited, are not subject to the demands of creditors beyond the life of the first taker, who cannot pledge them, nor dispose of them beyond his life interest therein."

4 *Kent's Commentaries,* 5th Ed., 268-*269.

Concerning the distinction between executory bequests and devises and remainders, Kent says the following:

"An executory devise differs from a remainder in three very material points. (1) It needs not any particular estate to precede and support it, as in the case of a devise in fee to A.

upon his marriage. Here is a freehold limited to commence *in futuro,* which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens the fee passes, in the usual course of descent, to the heirs-at-law. (2) A fee may be limited after a fee, as in the case of a devise of land to B. in fee, and if he dies without issue, or before the age of twenty-one, then to C. in fee. (3) A term of years may be limited over, after a life estate created in the same."

4 *Kent's Commentaries,* 5th Ed., 269-*270.

We have suggested that the estate in the testator's cousins might arise by way of a springing use. Kent says of springing uses:

"*Springing uses* are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest."

4 *Kent's Commentaries,* 5th Ed., 279-*298.

Upon a consideration of the differences between a vested and contingent remainder, and an executory devise or springing use, it must be conceded that the estate granted by the will to the testator's cousins is not a remainder. It may be either a springing use or an executory devise. We submit, however, that in the present case, it is an executory devise. In any event, the intermediate profits go to the heir or next of kin.

It may be contended that the gift of the income of 70% of the mortgages amounts to the gift of a life estate of the mortgages themselves and that, therefore, the gift-over to the cousins having a preceding estate to support it is a remainder and not either an executory devise or a springing use. Even if this contention be sound, which we do not conceive, it can not affect the character of the estate with respect to the remaining 30% of the mortgages.

It may also be contended that the provision in the will whereby Martha H. Strasbourg is permitted to occupy the testator's home is likewise a life estate. Again we say that even if this contention be sound, it cannot affect the testator's remaining real estate.

II.

IF THE ESTATE DEVISED TO THE COUSINS IS A REMAINDER, IT IS CONTINGENT AND NOT VESTED BECAUSE THE WORDS DIRECTING THE TIME OF ENJOYMENT OF THE ESTATE ARE COUPLED WITH THE GIFT ITSELF AND ARE NOT MERELY DIRECTIONS TO PAY OR DIVIDE THE ESTATE AT A FUTURE PERIOD.

The general rule is that if futurity be annexed to the substance of the gift, the vesting is suspended, but where the gift is absolute and the time of payment only is postponed, the gift is not suspended, but vests at once. Out of this general rule has grown the following corollary: That where the only gift is in the direction to pay or distribute or convey at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred; but is one in which time is of the essence of the gift.

L. R. A. 1918-E, p. 1105.

This rule is approved in our State in the case of *Acken v. Osborne* (45 N. J. Eq. 377), in which Chancellor McGill said (p. 380):

> "It is an established rule of interpretation of a testator's intention, that where the time specified in a bequest is annexed to the payment only, as where a legacy is given, payable when the legatee reaches a certain age, the legacy vests immediately upon the testator's death * * But where the time specified is annexed to the gift itself, as where the legacy is given to the legatee at twenty-one 'if' or 'when' he attains that age, the legacy is contingent upon his reaching that age, and does not vest until then. If he does not reach that age, it never vests."

In the case of *Post v. Herbert* (27 N. J. Eq. 540), it was held that:

> "A legacy to a person at a given age or 'when,' or 'from and after' his attaining a given age, is, *prima facie,* contingent; but when it appears that such postponement of the gift is for the convenience of the estate, the rule does not apply."

Chief Justice Beasley, speaking for the Court of Errors, said (p. 543):

> "It is an observable feature of the clause to be here construed, that it does not contain, in express terms, any immediate gift of the reversionary interest in this fund. The only gift to the children is embodied in the order that it be divided among them, and that division is to be made on the happening of the future event of the youngest child reaching twenty-one. Such a disposition, standing by itself, could not pass a present interest, but would leave the legacy itself contingent. A bequest to A. 'at' a given age or marriage, or 'when' or 'from and after' his attaining a given age, is *prima facie* contin-

> gent. Nor does the circumstances that the gift is to a class affect the result. In Locke v. Lamb (L. R. 4 Eq. 373), a bequest of a sum of stock to be divided between all the children of B. as they should attain his or her age of twenty-one years, was adjudged to go only to such of the children as attained the prescribed age; and in the leading case of Leake v. Robinson (2 Merivale, 363), the rule was treated as unquestionable, that by a mere direction to transfer or divide 'from and after' a given event, the vesting would be postponed until the event had happened. There are very many cases to the same purpose, but it would be altogether useless to refer to them, for admitting the rule to be as here stated, and which is putting the case in the aspect most favorable for the appellant, there are other considerations which I think must obviously control the result."

In the present case, it cannot be claimed that postponement of the gift is for the convenience of the estate, even if this were true, because the executors have to pay 70% of the income from a certain portion of the estate to a life-tenant. This consideration would not affect the remaining 30%, of which no disposition is made.

III.

THE DEVISE OR BEQUEST TO THE COUSINS IS TO INDIVIDUALS AND NOT TO A CLASS.

The survivors of testator's cousins do not take the shares of cousins who died prior to the death

or marriage of the life tenant. Such shares go to the children of such deceased cousins, if they have any children. If not, then as to such share, Bye died intestate.

In the case of *Stetson v. Kinch* (92 Eq. 362), the provision of the will was as follows:

> "FIFTH: All the rest, residue and remainder of my estate, I give, devise and bequeath unto Catherine Reybold, wife of Edward Reybold, Margaret Mathews, widow of James Matthews, Ruth Blair, wife of Matthew Blair, children of George Kerrick and Mary Ann Kerrick, Ruth Dean, Margaret Thompson, Elizabeth K. Brown, Lucinda Squires, children of my sister, Susan Darling, deceased, and to Joseph Darling, Francis Arnold and John Darling, their heirs and assigns, to be divided equally between them, share and share alike."

Lucinda Squires died before the testatrix, childless. Her administrator was in doubt as to whether her share lapsed. Vice-Chancellor Backes said:

> "The residuary bequest is to the legatees individually, in common, not to them as a class. Collins v. Bergen (42 N. J. Eq. 57), rules the point. It was there said:
>
> 'The rule is that where an aggregate fund is given to several *nominatim,* to be divided among them in equal shares, if one of them die before the testator, the share of such decedent will lapse. The gift in this case is to six persons by name, to each one-third of one-half of the residuary estate in remainder.'
>
> It is true that the mere fact that the testator, in a devise or bequest to persons, mentions them by name is not conclusive upon the question whether the gift is to those persons as a

> class or as individuals. But the rule is as above stated, and there is nothing in this case to take it out of the rule."

In the case of *Pennsylvania Co. v. Riley* (89 N. J. Eq. 252), the two provisions of the will to be construed are as follows:

> "6. I direct that out of the proceeds of the sale of my house or other property, one thousand dollars shall be set apart and held in trust by my executor, for the education of Robert Lewis Read, child of my granddaughter, Mrs. Florence S. Read, nee Riley, and in case of his death, the said sum shall be divided equally between my grandchildren, Frank A. Riley, Mary Riley, Joseph H. Riley, Robert Riley, Fietta J. Alsfelt, Knight Alsfelt, Robert Alsfelt and Rachel Alsfelt.
>
> 7. I direct that the twenty-six thousand dollars coming to my estate from the sale of the Norwood, shall be held in trust by my executor, and the income therefrom shall be divided equally between my children, Mrs. Mary Riley and Mr. William H. Alsfelt, during their lifetime; and after their death, the principal shall be divided equally between my grandchildren, Frank S. Riley, Robert Riley, Joseph H. Riley, Mary Riley, Fietta J. Alsfelt, Knight Alsfelt, Robert Alsfelt and Rachel Alsfelt and Robert Lewis Read, son of Florence S. Read—nee Riley, or the survivors or heirs of them."

It will be observed that by these provisions, the bequest was to the testator's children, naming them, and after their death, between his grandchildren, naming them. Vice-Chancellor Leaming, in construing this will, said (p. 255):

"The direction contained in the will is to 'divide equally between' the persons specifically named. All the persons named are grandchildren of testatrix, except one, who is a great-grandchild; the enumeration of persons includes all of the grandchildren of testatrix and her only great-grandchild; the several grandchildren named are the children of the respective life tenants; the great-grandchild is a child of a deceased granddaughter of testatrix. Where a gift is to several persons by name, a presumption arises, in the absence of a contrary intent apparent on the face of the will, that the persons named are to take in their individual, and not in their collective capacity, even though the persons named constitute a class or classes. Dildine v. Dildine (32 N. J. Eq. 78). It follows that the manner of distribution of the *corpus* of the trust fund as contemplated by the will is *per capita* as distinguished from *per stirpes.*"

In the case of *Dildine v. Dildine* (32 N. J. Eq. 78), cited by Vice-Chancellor Leaming, the paragraph of the will to be construed is as follows:

"I do give and devise unto my beloved sisters, Martha and Abegail, and to my brothers Ralph and Abraham T., all the lands situate in Ogle County, Illinois, share and share alike, and all my personal property of every kind and description except the bank stock heretofore mentioned, which is left in trust for my wife."

Vice-Chancellor VanFleet, writing the opinion of the Court, said:

"It appeared that Martha and Abegail predeceased the testator. The two brothers, Ralph and Abraham T. survived. It was their contention that the gift was to a class, and, therefore, they took the share of their deceased sisters."

Vice-Chancellor VanFleet said (p. 80):

"But it is urged in behalf of the brothers in this case that the gift to the sisters and brothers, though *nominatim,* was intended as a gift to a class, and, therefore, under the circumstances the brothers take the whole. The rule is, that a gift by will to individuals described by name, though they may constitute a class, indicates the testator's intention to give to them only as individuals. If it appears by other parts of the will that it was the testator's intention that the persons so named should take as a class and not as individuals, the will will be construed accordingly."

In the case of *Treverso v. Treverso* (4 Adv. Rep. 1157—P1.26), Justice Parker, speaking for the Court of Errors and Appeals, said:

"A bequest to members of the family is not presumed to be to them as a class; so that the survivors would take upon the death of a member before distribution, when the legatees are named, and the legacy is to them, share and share alike."

There is, of course, no other provision in the Bye will touching the gift to these cousins, other than the one in the third paragraph, and that, in view of the cases above cited, must be construed as a gift to individuals, and not to a class.

IV.

THE FACT THAT THERE IS A DEVISE AND BEQUEST OF THE ENTIRE ESTATE TO TRUSTEES DOES NOT AFFECT THE CHARACTER OF THE ESTATE DEVISED OR BEQUEATHED TO THE TESTATOR'S COUSINS.

The language of the paragraph is as follows:

> "I direct that my entire estate of real, personal or mixed property to be held in trust by my executors."

The fact that the devise or legacy is given through the intervention of a trustee is without bearing on the question as to whether it is vested or contingent. It has been held that the same rules of construction apply whether the conveyance is direct or through the intervention of trustees.

Mercantile Bank v. Bullard (83 Ky. 482—4 Am. St. Rep. 100).

It makes no difference as to the vesting, whether the legal estate is devised to trustees who are required to convey according to the direction of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arises.

Taylor v. Mosher (29 Md. 443).

The fact that a gift is in the form of a direction to a trustee, to convey or transfer at the termination of the trust, is of but little significance, inasmuch as such a direction is necessary or suitable, in order to terminate the trust estate, and to convert

the equitable estate of the ultimate beneficiaries into legal estates.

Minor v. Tappan (122 Mass. 535);
Weston v. Weston (125 Mass. 268).

It will be observed that the estate under the third paragraph is to go to the cousins, upon the death or marriage of Martha H. Strasbourg. The trust ends at that period, and, therefore, it cannot be said, even if it were significant, that the executors hold the property in trust for the said cousins.

In this connection, it must also be observed that so far as the cousins are concerned, the executors owe them no duty whatever; they are not to pay any part of the income, either of the real or personal property, to the cousins.

It is further to be observed in this connection that the minute the estate of the cousins comes into being, namely, after the death or marriage of Martha H. Strasbourg, the estate in the trustees ends.

Therefore, so far as the cousins are concerned, the trust is a mere passive or negative one, the title merely resting in the trustees until the death or marriage of Martha H. Strasbourg.

Under the authorities above cited, the mere fact that the naked legal title is in the trustees can neither add to or detract from the character of the cousins' estate. The character of that estate must be determined and gathered from the language contained in the third paragraph.

V.

THERE IS NO RESIDUARY CLAUSE IN THE WILL. THEREFORE, ANY FAILURE TO DISPOSE OF THE INCOME FROM 30% OF THE MORTGAGES AND FROM ALL OF THE REAL ESTATE CREATES AN INTESTACY AS TO SUCH PORTION.

Therefore, the income from the 30% of the net income of the mortgages and the income from all of the real estate must go to Josephine Shoemaker, the testator's sister and next of kin. If it be held that the word "gift" or "bequest" to the testator's cousins, as contained in the third paragraph, is in substance, though not in form, a residuary clause, the result must be the same. It is a well-known principle that where there is a lapse of a part of the residuary estate, the lapsed part does not go into any furth[illegible]siduary estate, but as to that, the testator d[illegible]s intestate. This, in effect, was what occurred in the case of *Colville v. Kinsman* (60 Atl. Rep. 959); *Sandford v. Blake* (45 Eq. 247).

In the case of *Garthwaite v. Lewis* (25 N. J. Eq. 351), the Court said (p. 353):

> "These shares are shares of the residue itself, and though the rule is that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue itself, which fails. Hawkins on Wills, 40, 42; Bagwell v. Dry (1 P. W. 700); Page v. Page (2 P. W. 489); Skrymsher v. Northcote (1 Swanst. 570); Humble v. Shore (7 Hare 247). The principal of these shares is still undisposed of in case of the death of any of the sons without issue."

VI.

THE TESTAMENTARY DISINHERITANCE OF THE TESTATOR'S SISTER, THE APPELLANT IN THIS CAUSE, DOES NOT PREVENT HER FROM TAKING UNDER THE INTESTATE LAWS.

In the case of *Potter v. Watkins* (99 N. J. Eq. 538), Vice-Chancellor Backes said:

> "The right to take under the statute of distribution in case of partial intestacy is not defeated by the words of disinheritance in the will." Citing *Nagel v. Conrad* (79 N. J. Eq. 124).

In *Nagel v. Conrad* (79 N. J. Eq. 124), above cited, Vice-Chancellor Howell said (p. 135):

> "A recent textwriter on this subject has declared that the courts are nearly unanimous in holding that where the testator does not by will dispose of the whole of his estate, no negative words of exclusion can prevent the remainder of the property from passing under the statute of descent and distribution; that it not infrequently happens that the testator by name specifically provides that certain of his relatives shall not receive any part of his estate, and that in such cases a provision is entirely ineffectual to intestate property. Page on Wills, Sec. 467. An early case on the subject is Cresswell v. Cheslyn (1762—2 Ed., 124). There the testator by his will gave his residuary personal estate to his three children in equal shares as tenants in common. Subsequently, by a codicil he declared that C., one of the children, should

not be one of the residuary legatees, and he gave to C. a pecuniary legacy instead. It was held that as to the 1/3 of his estate he died intestate, and that this share did not go to the other two, but went according to the statute of descent and distribution. Lord Northington, L. C., says that the reason for the decision was that the testator had made no devise over of the share of which he had deprived one of his children, and that therefore the other two could have no greater interest than they had in the original will. He says: 'I must, therefore, declare that the clear residue of the testator's personal property, not specifically bequeathed, must be divided into three equal parts.' The decree in this case was affirmed in the House of Lords."

VII.

UNDER A SPRINGING USE, EXECUTORY DEVISE, OR A CONTINGENT REMAINDER OF THE CHARACTER HEREIN DISCUSSED, THE INTERMEDIATE INCOME AND PROFITS BETWEEN TIME OF THE DEATH OF THE TESTATOR AND THE ACTUAL POSSESSION OF THE ESTATE BY THE DEVISEES AND LEGATEES GOES TO THE HEIRS-AT-LAW OR NEXT OF KIN.

"When there is an executory devise of the real estate, and the freehold is not, in the meantime, disposed of, the inheritance descends to the testator's heir until the event happens. So, where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits between the determination

of the first estate and the vesting of the limitation over, will go to the heir-at-law, if not otherwise appropriated by the will. The same rule applies to an executory devise of the personal estate; and the intermediate profits, as well before the estate is to vest, as between the determination of the first estate, and the vesting of a subsequent limitation, will fall into the residuary personal estate."

4 *Kent's Commentaries,* 283-*284.

"At common law, executory interests, like contingent remainders, are not considered technically as estates. The right may be fixed and certain in the owner of such an interest; but, in cases where it is not preceded by any other interest, the entire fee remains in its maker or in his heirs or residuary devises, until the happening of the event which causes such future interest to cease to be executory and become vested. Thus, if land be devised to A., his enjoyment of it not to begin, however, until next Christmas, the fee simple remains in the heirs of the testator, after his death, and until next Christmas, when A. may take possession; and they have all the income and emoluments in the meantime."

Reeves on Real Property, Vol. 2, p. 1251, Sec. 953.

The rule is the same, even if the estate were vested or contingent remainder.

Jarman on Wills, 6th Ed., Vol. 1, *614.

In the case of *Gutherie v. Walrond* (L. R. Ch. Div. 22, 1883, p. 573), the Court held:

"The interim income subject to the interim

burden of a contingent specific legacy until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be."

In the case of *Hopkins v. Hopkins* (Cases T. Talbot 44 - 25 Eng. Reprint, 653-656), the Court said:

"Where the whole legal estate is given to trustees, and but part of the trust disposed of, as in this case; and where the part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law."

In the case of *Bullock v. Stones* (2 Ves. 521 - 28 Eng. Reprint, p. 333), it was held:

"Where there is an executory devise, whether of a legal estate or a trust estate in this Court, the rents and profits go to the heir-at-law; because the legal estate in the one case, or the trust in the other, descends in the meantime to the heir-at-law."

The New Jersey authorities are uniform in holding that the income does not accumulate for the benefit of the estate, but that the testator, as to such income, either dies intestate or that such income falls into the residuary estate.

In the case of *Sandford v. Blake* (45 N. J. Eq. 247), the clause of the will under consideration was as follows:

"FIFTH: I give and bequeath to my executors hereinafter named, and the survivor of them, the sum of twelve thousand dollars, in trust, to invest the same in safe and profitable investments, and to collect the interest and income thereof and apply one-half of the same, from time to time, as received, to the use of my brother, Charles E. Swift, for and during his natural life; and the other half thereof to the use of my brother, Henry Swift, for and during his natural life; and upon the death of either, to apply the whole of said income to the use of the survivor for and during his natural life; and *upon the death of such surviving brother, one-half of the principal so held in trust shall be paid over to such person or persons and in such shares and proportions as my cousin, Eleanor Sandford, wife of Thomas Sandford, shall, by her last will and testament, direct and appoint; and if she should die without making such will, then the same shall be divided equally among her children;* and the other half of said principal sum shall be divided equally between Lucretia and Adelaide Sandford, children of the aforesaid Thomas H. Sandford, and Susan and Mary, children of John P. Boyde, of Portland, Maine; and if either of these four persons should die before such event, then such sum shall be divided equally among the survivors.

SIXTH: I give, devise and bequeath all the rest, residue and remainder of my estate, whatsoever and wheresoever, unto my said executors, and the survivor of them upon trust, nevertheless, to sell and convert the same into money, and to invest the proceeds thereof in safe and profitable investments and to collect the interest and income thereof and apply the same, from time to time, as received, to the use of my aforesaid cousin, Eleanor Sandford, for and during her natural life, and upon her death, to transfer, deliver and pay over the principal of my estate, in this clause mentioned, to such

person or persons and in such shares and proportions as she shall, by a last will and testament, direct and appoint; and in case she should die without making such will, then to divide the same equally between her children, share and share alike."

Mr. Justice Depue, speaking for the Court of Errors and Appeals, said (p. 250):

"The fund put in trust to answer the purposes of the fifth clause of the will is the specific sum of $12,000. The gift over to Eleanor's children is equally specific—the 'one-half of the principal so held in trust.' The income being given to Henry and Charles, and the survivor of them during life, and the limitation over of the principal being to take effect on the death of Eleanor, and, there being no directions for the accumulation of income to increase the *corpus* of the fund, the income accruing between the death of the surviving life-tenant and the death of Eleanor is undisposed of and falls into the residue. Wyndham v. Wyndham (3 Bro. C. C. 58); Shawe v. Cunliffe (4 Bro. C. C. 153, 155). A residuary bequest of personal estate carries not only everything not in terms disposed of, but everything that in the event turns out not to be well disposed of. A presumption arises in favor of the residuary legatee against every one except the particular legatee; for a testator is supposed to have given his personalty away from the former only for the sake of the latter. 1 Jarm. on Wills, 762; Schoul. Wills 519; Tindall v. Tindall (9 C. E. Gr. 512): Woodward v. Dunster (12 C. E. Gr. 84). The only contest that can arise is, whether the income so

falling into the residue remains income or becomes principal."

Again, after referring to certain cases, he says (p. 253):

"I think the principle on which the rule rests is, that the fund required to answer legacies payable *in futuro,* as was said by Vice-Chancellor Wood, 'is residue until wanted,' and, being an income-producing fund, the income, whilst it is residue, is as essentially income of the residue as if derived from funds permanently and unconditionally residue, and that the rule applies as well as legacies vested in interest but payable on the happening of a future event as to legacies purely contingent. There is no appreciable distinction between a fund held for the payment of a legacy at an indeterminate time in the future and a fund held for a legacy that may or may not be payable on a future contingency, with respect to the income arising from it whilst it is being held. In either case the fund is set apart from the bulk of the estate, and in neither case will it be required to pay the legacy when it should happen to become payable.

This rule is eminently appropriate in this case. The testator gave his entire estate to trustees for investment. The income of the $12,000 was set apart for the benefit of the testator's two brothers and the survivor during life. On the death of the surviving brother the one-half of the principal sum was given immediately to the four children of Thomas H. Sandford and John P. Boyde; the other half of the said principal was put in abeyance until the death of Eleanor, and then given to her children in case of her failure to exercise her power of

appointment, the income meanwhile being undisposed of. The income of the residue is given to Eleanor for life, with the same power to appoint the principal and the same limitation over to her children in default of the appointment. The testator converted his whole estate into an income-producing fund until the principal should be divided. He excluded the idea that any income of the $12,000 should accumulate for the benefit of those who might take either under the execution of the power or under the limitations over, by making to them a gift of the principal only. He evinced no intent that income should accumulate to swell the *corpus* of the residue; and in the absence of an intent that income should accumulate, the Courts, from considerations of public policy, incline against such accumulations—a principle applicable as well to residuary bequests as to specific legacies, especially where the will contains a gift of income.

If the gift had been of a life-estate to Henry and Charles, and the survivor for life, in land instead of money, with a limitation over by way of an executory devise to the children of Eleanor at her death, the lands, on the death of the survivor in the lifetime of Eleanor, would have dropped into the residue, and the rents and profits would have gone to Eleanor, as life-tenant, and not into the residue to swell the *corpus* of the residuary estate. Whether the subject of the gift be real or personal estate can make no difference."

Sandford v. Blake is followed by Vice-Chancellor Backes in *In re. Rowland's Trustees* (87 N. J. Eq. 307), wherein he says (p. 310):

"A clear distinction, however, is drawn between the application of income on a fund applied to the payment of a vested legacy and acumulations on the principal of an estate from which contingent legacies, or those payable at an indeterminate time in the future, may be payable. In the latter instances, the income falls into the residue as income of the residue. The reason for this is the uncertainty as to whether the estate will ever be called upon to pay such legacies, and until it is the whole of the principal in 'residue until wanted,' and the income thereof is, of course, income of residue."

In the case of *Colville v. Kinsman,* (60 Atl. Rep., 959), it was held:

"A contention that the deceased beneficiary's share of the income on her death and thereafter became a part of the principal of the estate, and should, as each payment of income fell due, be added to the corpus, and, on the death of the life tenants, should be finally divided between the ultimate legatees of the principal, as provided in the will, was also untenable; there being nothing in the will indicating that testatrix intended any increase of the principal from any source."

It was further held that the income went to the nephew, as next of kin of testatrix. Vice-Chancellor Gray said (p. 962):

"The contention in behalf of the defendant William D. Squires is that Miss England's share of the income of the residuary estate became, upon her death and thereafter, a part of the principal of the estate, and should, as each payment of income falls due, be added to the cor-

pus, and upon the death of the life tenants should be finally divided as provided in the will, one half to heirs of Edgar Kinsman and the other half to the defendant Squires. It should be noticed that the testatrix contemplated the residue of her estate as a principal fund, which should be used to produce an income. The quantity of the principal is, by the terms of the will, fixed at the time of the testatrix's death. Nothing in the will indicates that the testatrix intended any accession to or increase of this principal fund after her death from any source. After creating the income-producing fund, she invariably in the will deals with the estate in separate portions, as principal and as income therefrom. She finally disposes of the corpus of the fund, describing it as 'the principal of my estate,' evidently meaning the same fund originally created, and without increase. This accords with the view taken by the Court of Errors and Appeals in *Sandford v. Blake*, 45 N. J. Eq., 254—17 Atl., 812), interpreting a similar will. The testatrix dealt with the income by giving the whole of it in certain aliquot portions to named legatees for life. She probably expected the other life legatees to die before the time of the death of her nephew Edgar Kinsman, on the happening of which event (if her brother Henry Kinsman had previously died) she directed the principal fund to be divided between the heirs of Edgar and the defendant Squires. If this ultimate gift over is forceful against any life tenant of income who may survive Edgar Kinsman, it will necessarily defeat that life tenant's estate in the income. It is, I think, quite plain that the purpose of the testatrix in making these bequests was to provide

during their lives for the named legatees the proportionate sum of income which she gave to each. If the life tenant of income shall die in such an order of succession that Edgar Kinsman shall be the last survivor, then on his death the principal fund can be divided without affecting the interests of any life tenant, though the testatrix deals with her gifts to the life tenants exclusively as shares of income to be produced by a principal fund, which upon the death of Edgar Kinsman she directs to be divided, she has failed to express any testamentary purpose disposing of the share of income of any life tenant who might die before the death of Edgar Kinsman. Without such expression from the testatrix in her will, there is nothing which enables the Court to ascertain what she intended should be done with any shares of income which she has directed to be paid to named legatees during life, in case that legatee dies before the end of the income-producing period. This is what has happened regarding Miss England's share of income. There was no lapse of the gift to Miss England for at the time of the death of the testatrix Miss England was living, and the bequest to her then became effective. It was not for any reason a void or illegal gift. Nor has it failed to operate, for Miss England survived the testatrix and received her portion of income for several years and during her life, according to the terms of the will. This gift of the income from the residue is equivalent to a gift of a limited use in the residue itself. The will devotes to the production of income the whole residue, at least during Edgar Kinsman's life, which income the testatrix divides into portions and gives to named legatees during their

several lives. Whether all or any of them live or die, however, if Edgar Kinsman lives, the whole principal trust fund must go on producing income, for the testatrix has so directed. The share of income arising from the residuary estate in favor of any life tenant who dies during the income producing period does not, under the terms of this will, become converted into and a part of the principal fund, which produces the income. The gift of the income, as the testatrix has expressed her will, is itself in the nature of a residuary gift. She gives over the principal to ultimate legatees, but not the income. In such cases, to the extent that the gift of the residue falls, because of the death of the life tenant, the will becomes inoperative, and the testatrix to that extent dies intestate. *Garthwaite's Executors v. Lewis* (25 N. J. Eq., 351); *Hand v. March* (28 N. J. Eq., 59); *Burnet v. Burnet* (30 N. J. Eq., 599) and cases there cited; *Sandford v. Blake, ubi supra.*"

In the case of *Swetland v. Swetland* (Vol. 4, N. J. Adv. Reports, pamphlet No. 45, 1788 and 134, Atl. Rep., 822), it was said:

> "Where practically entire estate was given to trustees, with direction to apply income, and no mention was made of surplus income, testator will be held to have died intestate as to it; whether surplus income from trust estate, as to which testator died intestate, should be accumulated until principal is distributable, in absence of any indication in will itself, depends on circumstances from which intention of testator can be inferred; where testator made substantial provision for children in his lifetime, and trustees had discretionary power to increase annuities, surplus income from trust estate, as to which testator died intestate, will be accumulated until principal is distributable."

The above case arose on a bill for the construction of a will, the opinion being written by Vice-Chancellor Berry. From the will, it appears that the testator devised practically all of his estate to the trustees with instructions to pay certain definite portions of the income to his half-sister and to his wife, with enlarged discretion in the trustees to increase this income if the necessity arose due to the "misfortune of either." The principal of his estate was to be distributed at the death of his wife and at the death of his half-sister. The income was such, that after providing the specific annuities for the wife and half-sister, there was a surplus. The Court held that as to this surplus, the testator died intestate, and this, notwithstanding, that there was a residuary clause in the will.

The resemblance between the cases is quite pointed. In the Swetland case, the widow was given the use of the home for life and an income of $15,000 per year, with a direction to the trustees to increase the same. The half-sister was given an income of $1,200 per year, with instructions to increase the same if necessary. The will then provided that upon the death of both of these persons or either of them, the portion of the estate necessary to provide the income should be distributed between certain persons.

Neither in the present case nor in the Swetland case was there any disposition of the *corpus* excepting to the trustees until after the death of the annuitants.

The Court said (134 Atl. Rep., 830, and Vol. 4, N. J. Adv. Rep., Pamphlet No. 45, 1808).

> "It is conceded by all parties that the testator died intestate as to the surplus income, and this is plainly apparent from a reading of the will. The only dispute is as to when this income is distributable and to whom it should be distributed."

While it is true Vice-Chancellor Berry says: "It is conceded by all parties that the testator died intestate as to the surplus income," nevertheless, the case being one for the construction of the Will, the Vice-Chancellor must and did construe the Will independent of that concession.

From a reading of the above cases, it would seem clear that where there is no vesting of the estate until the period subsequent to the testator's death, the intermediate profits and income from real and personal property go to the heir-at-law and next of kin.

We respectfully contend that as to 30% of the income from the mortgages, of which the testator died seized, and the whole income from the real estate, with the exception of testator's home, after deducting administration expense, etc., the testator died intestate, and such surplus income goes to Josephine Shoemaker, the testator's sister and next of kin.

It is, therefore, submitted that the decree of the Court of Chancery to the extent that it declares that the surplus income accumulate and be added to the *corpus*, etc., should be reversed.

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