Court of Appeals,

STATE OF NEW YORK.

IN THE MATTER
of the
Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, Late of the County of New York, Deceased.

Record on Appeal

DUER, STRONG & WHITEHEAD,
Attorneys for Appellant, Dorothy Elizabeth Smith,
43 Exchange Place, New York City.

EGERTON L. WINTHROP, JR.,
Special Guardian for Appellant, Kenneth Charles Smith, infant,
32 Liberty Street, New York City.

STANCHFIELD & LEVY,
Attorneys for Gertrude Frances Browne and Gladys Mary Baylies, Respondents,
120 Broadway, New York City.

A. PERRY OSBORN,
Special Guardian for Respondents Marjory Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants,
14 Wall Street, New York City.

JAMES W. PRENDERGAST,
Attorney for Stevenson Scott, as Executor and Trustee,
25 Broad Street, New York City.

CHARLES H. BECKETT,
Attorney for Respondent, Columbia Trust Co., Trustee,
135 Broadway, New York City.

The Ballou Press, Law Printers, 102-104 Fulton Street.

INDEX.

Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

2

Statement Under Rule 41.

This proceeding was commenced by the filing in the Surrogates' Court of New York County, on October 26, 1915, of a petition by Stevenson Scott, as executor and trustee under the will of Charles Frederick Fowles, deceased, pursuant to Chapter 18 of the Code of Civil Procedure, for a construction of the will of Charles Frederick Fowles, deceased.

3

All the persons named in said petition who were entitled absolutely or contingently or by operation of law to a share in the property held by the petitioner, were cited and required personally to attend before the Surrogates' Court on the 30th day of November, 1915, said citation having been duly returned and filed on the 29th day of November, 1915, with proof of due personal service thereof on the following, to wit: Gertrude

4 *Statement Under Rule 41.*

Frances Browne; Gertrude Frances Browne, on behalf of the infant, Majorie Frances Stewart Browne; Gertrude Frances Browne, on behalf of the infant, J. Clother Browne; Stevenson Scott and Columbia Trust Company, as trustees of the trusts created in and by the will of the said Charles Frederick Fowles, deceased; and Stevenson Scott, as executor of the will of Frances May Fowles, deceased; and with proof of due service thereof, by publication and mailing pursuant to an order duly made and filed herein, bearing date
5 October 28, 1915, on the following named persons:

Gladys Mary Maylies, Harry Lawrence Baylies, Jr., Charles Ripley Baylies; Dorothy Elizabeth Smith; Kenneth Charles Smith; Margaret E. V. Johnson, Florence M. D. Taylor and Lillian E. Minett.

The following named respondents duly appeared by their duly authorized attorneys, to wit:

Dorothy Elizabeth Smith, by Duer, Strong & Whitehead; Columbia Trust Company, by Charles H. Beckett; and Gertrude Frances Browne and Gladys Mary Baylies, by R. N. Baylies.

6 Subsequently and after the entry of a decree Stanchfield & Levy were substituted as attorneys in place and stead of R. N. Baylies, for said Gertrude Frances Browne and Gladys Mary Baylies.

Egerton L. Winthrop, Jr., was duly appointed Special Guardian for the infant, Kenneth Charles Smith, February 16, 1916.

A. Perry Osborn was duly appointed by the Surrogate as Special Guardian for the infants,

Statement Under Rule 41.

Marjorie Frances Stewart Browne, J. Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies.

The following respondents have fied answers to the petition of said Stevenson Scott:

Dorothy Elizabeth Smith, on or about the 28th day of December, 1915; Columbia Trust Company, testamentary trustee, on or about the 13th day of December, 1915; and Gertrude Frances Browne and Gladys Mary Baylies, on or about the 27th day of January, 1916.

No change of attorneys or parties other than as above stated has taken place since the filing of the petition.

10 **Notice of Appeal of Columbia Trust Company and Stevenson Scott as Trustees.**

SURROGATE'S COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the
11 County of New York, deceased.

SIRS:

Please take notice that Columbia Trust Company and Stevenson Scott, as Trustees of the trusts created in and by the last Will and Testament of Charles Frederick Fowles, late of the County of New York, deceased, having been requested by Gertrude Frances Browne and Gladys Mary Baylies, the *cestui que* trust, to join with said *cestui que* trust in an appeal to the Appellate
12 Division of the Supreme Court, First Department, from the decree dated June 15, 1916, and entered in the above-entitled proceeding in the office of the Surrogates' Court of the County of New York on the 16th day of June, 1916, do, acting upon such request, hereby appeal to the Appellate Division of the Supreme Court in and for the First Department, from so much of said decree as orders, adjudges and decrees that

> "the provisions of the subdivision designated 'Ninth' of the last Will and Testament of

Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the will of the said Charles Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said testator."

Dated at New York, July 17, 1916.

Yours, &c.,

CHARLES H. BECKETT,
Attorney for Columbia Trust Company,
as Trustee,
Office & Post Office Address:
No. 135 Broadway,
Borough of Manhattan,
City of New York, N. Y.

16 *Notice of Appeal.*

JAMES W. PRENDERGAST,
Attorney for Stevenson Scott,
as Trustee,
Office & Post Office Address:
No. 25 Broad Street,
Borough of Manhattan,
City of New York, N. Y.

To:

WILLIAM J. DOWDNEY, ESQ.,
17 Clerk of Surrogates' Court.

DUER, STRONG & WHITEHEAD, ESQRS.,
Attorneys for Dorothy Elizabeth Smith.

EDGERTON L. WINTHROP, JR., ESQ.,
Special Guardian for Smith infant.

A. PERRY OSBORN, ESQ.,
Special Guardian for Browne and
Baylies infants.

18

Notice of Appeal of Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants, by A. Perry Osborn, their Special Guardian. 13

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased. 14

Please take notice that Majorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants, by A. Perry Osborn, their Special Guardian, hereby appeal to the Appellate Division of the Supreme Court in and for the First Judicial Department from so much of the decree of this Court herein, dated June 15th, 1916, and filed and entered June 16, 1916, as orders, adjudges and decrees that 15

> "the provisions of the subdivision designated 'Ninth' of the last Will and Testatment of Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decendent to his wife, Frances May Fowles, deceased, passed by substitution

to Stevenson Scott, the executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the Will of the said Charles Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said testator."

Dated, July 17, 1916.

Yours, etc.,

A. PERRY OSBORN,
Special Guardian for Majorie Frances Stewart Browne, Jane Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants.

14 Wall Street,
New York City.

To:

STANCHFIELD & LEVY, ESQRS.,
Attorneys for Gertrude Frances Browne, and Gladys Mary Baylies, Appellants,
120 Broadway,
Boro. of Manhattan,
New York City.

Notice of Appeal.

JAMES W. PRENDERGAST, ESQ.,
Attorney for Stevenson Scott, as Executor and Trustee,
25 Broad Street,
New York City.

DUER, STRONG & WHITEHEAD, ESQS.,
Attorneys for Dorothy Elizabeth Smith,
43 Exchange Place,
New York City.

CHARLES H. BECKETT, ESQ.,
Attorney for Columbia Trust Company,
Trustee,
135 Broadway,
New York City.

EGERTON L. WINTHROP, JR., ESQ.,
Special Guardian for
Kenneth Charles Smith, an infant,
32 Liberty Street,
New York City.

CLERK OF THE SURROGATES' COURT,
New York City.

28 **Notice of Appeal of Gertrude Frances Browne and Gladys Mary Baylies.**

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES
29 FREDERICK FOWLES, late of the County of New York, deceased.

Please take notice that Gertrude Frances Browne and Gladys Mary Baylies, being parties aggrieved by the decree of this Court herein, dated June 15, 1916, and filed and entered June 16, 1916, hereby appeal to the Appellate Division of the Supreme Court in and for the First Judicial Department from so much of said decree of the Surrogates' Court of New York County dated June 15, 1916, and filed and entered June 16, 1916,
30 as orders, adjudges and decrees that

"the provisions of the subdivision designated 'Ninth of the last Will and Testatment of Charle Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the executor of the last Will and Testatment of the said Frances May

Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the Will of the said Charles Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said testator."

Dated, July 17, 1916.

Yours, &c.,

STANCHFIELD & LEVY,
Attorneys for Gertrude Frances Browne and Gladys Mary Baylies, Appellates,
120 Broadway,
Boro. Manhattan,
New York City.

To:

JAMES W. PRENDERGAST, ESQ.,
Attorney for Stevenson Scott,
as Executor and Trustee,
25 Broad Street,
New York City.

DUER, STRONG & WHITEHEAD, ESQRS.,
Attorneys for Dorothy Elizabeth Smith,
43 Exchange Place,
New York City.

34 *Notice of Appeal.*

CHARLES H. BECKETT, ESQ.,
Attorney for Columbia Trust Company,
Trustees,
135 Broadway,
New York City.

EGERTON L. WINTHROP, JR., ESQ.,
Special Guardian for Tenant,
Charles Smith, an infant,
32 Liberty Street,
New York City.

35

A. PERRY OSBORN, ESQ.,
Special Guardian for Majorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants,
14 Wall Street,
New York City.

CLERK OF THE SURROGATES' COURT,
New York County.

36

Decree Appealed From. 37

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City and State of New York, on the 15th day of June, 1916.

Present:

HONORABLE ROBERT LUDLOW FOWLER,
Surrogate.

38

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

STEVENSON SCOTT, as Executor of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, having presented to this Court, pursuant to the provisions of Section 2615 of the Code of Civil Procedure, an application for 39 the construction of certain provisions of the last Will and Testament of said decedent, and pursuant to an order of This Court, duly made and entered on the 27th day of October, 1915, a citation having issued requiring the proper parties to show cause before a Surrogate of this Court on the 30th day of November, 1915, why the validity, construction and effect of certain provisions of the last Will and Testament of the above-named decedent should not be determined, and satisfactory

40 *Decree Appealed From.*

proof having been made of due service of said citation on all the parties therein named; and James W. Prendergast, Esq., having appeared herein for the petitioner as sole executor of the last Will and Testament of the said decedent and also as sole executor of the last Will and Testament of Frances May Fowles, deceased; Messrs. Duer, Strong & Whitehead, Seldon Bacon, Esq., and Henry Seldon Bacon, Esq., of counsel, having appeared herein for the respondent Dorothy Elizabeth Smith, R. B. Baylies, Esq., having ap-
41 peared herein for the respondents Gertrude Frances Browne and Gladys Mary Baylies, Charles H. Beckett, Esq., having appeared herein for the respondent The Columbia Trust Company, Edgerton L. Winthrop, Jr., Esq., having appeared herein as Special Guardian for the respondent Kenneth Charles Smith, an infant, and A. Perry Osborn, Esq., having appeared herein as Special Guardian for the respondents Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants; and the matter having duly come on for hearing before this Court on the 30th day of
42 November, 1915, and having been duly adjourned to the 28th day of January, 1916, and on said last date the Surrogate having taken the proof and having heard the arguments of the respective parties through their counsel; and upon reading the said petition and the answers thereto, the last Will and Testament of Charles Frederick Fowles, the above-named decedent, and the last Will and Testament of his wife, Frances May Fowles, and it appearing that the will of the said Charles Frederick Fowles, deceased, and the will of the said Frances May Fowles, deceased, were exe-

43

cuted concurrently as to time and place and in view of, and a day prior to, the said Charles Frederick Fowles, deceased, and the said Frances May Fowles, deceased, taking passage on the Steamship "Luscitania," and that the said Charles Frederick Fowles, deceased, and Frances May Fowles, deceased, were drowned as the result of the sinking of the Steamship "Luscitania," which occurred on the 7th day of May, 1915; and no proof having been adduced as to whether the said Charles Frederick Fowles, deceased, and the said Frances May Fowles, deceased, died simultaneously or whether 44
one of the said decedent survived the other; and due consideration having been had thereon;

Now on motion of James W. Prendergast, attorney for the said petiitoner, it is

Ordered, adjudged and decreed that the provisions of the subdivision designated "Ninth" of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Fran- 45
ces May Fowles, deceased, passed by substitution to Stevenson Scott, the executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the will of the said Charles Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated "Second"; the personal property bequeathed by the subdivision thereof designated

46 *Decree Appealed From.*

"Fourth"; and one-half of forty-five per cent. of the residuary estate of the said testator. And it it further

Ordered, adjudged and decreed that the right of election in connection with the certain devise of the real estate known as "Fairmile" in Cobham, County of Surrey, England, to the said Frances May Fowles, deceased, by virtue of the provisions of subdivision deesignatd "Third" of the last Will and Testament of the said Charles
47 Frederick Fowles, deceased, was given to the said Frances May Fowles personally and was extinguished by her death, and that failure or incapacity on the part of the said Frances May Fowles to exercise such right of election defeated the devise and that the alternative disposition thereof as directed by the will of the said Charles Frederick Fowles, deceased, is effective, namely, that the real estate be sold and that the proceeds thereof be added to the residuary estate. And it is further

Ordered, adjudged and decreed that Stevenson
48 Scott, as executor of the last Will and Testament of Charles Frederick Fowles, deceased, be and he hereby is allowed the sum of one hundred and thirty-six dollars and sixty-three cents, as and for his costs and disbursements in this proceeding, and that Dorothy Elizabeth Smith be and she hereby is allowed the sum of seventy dollars, as and for her costs in this proceeding, and that Gertrude Frances Browne and Gladys Mary Baylies be and they hereby are allowed the sum of seventy dollars, as and for their costs and disbursements in this proceeding, and that The Columbia Trust

Company be and it hereby is allowed the sum of seventy dollars, as and for its costs and disbursements in this proceeding. And it is further

Ordered, adjudged and decreed that the sum of three hundred dollars be and the same hereby is awarded to A. Perry Osborn as and for his compensation as Special Guardian of the infant respondents Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, and that the sum of three hundred dollars be and the same hereby is awarded to Edgerton L. Winthrop, Jr., as and for his compensation as Special Guardian of the infant respondent Kenneth Charles Smith.

ROBERT LUDLOW FOWLER,
Surrogate.

52 **Petition.**

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the
53 County of New York, deceased.

To the Surrogates' Court of the County of New York:

The petition of Stevenson Scott respectfully shows:

FIRST.—Charles Frederick Fowles, late of the County and State of New York, deceased, died on the 7th day of May, 1915, he having perished at sea as the result of the sinking of the Steamship "Lusitania," which occurred on said date in the
54 Atlantic Ocean, off the Coast of Ireland, British Isles.

SECOND.—The said decedent left a last Will and Testament, dated April 30, 1915, which was duly admitted to probate as a will of real and personal property by the Surrogates' Court of the County of New York on the 23rd day of June, 1915. In and by the provisions of subdivision "Tenth" of said last Will and Testament, your petitioner and Frances May Fowles, the wife of said decedent (who died after the making of said will and before

the same was offered for probate, as is hereinafter set forth), were named as executor and executrix thereof. Letters testamentary under said last Will and Testament were duly issued by the said Surrogates' Court on the 8th day of July, 1915, to your petitioner, who duly qualified as such executor and who entered upon the discharge of his duties as such executor, in the performance of which he is still engaged.

THIRD.—Your petitioner annexes hereto a copy of said last Will and Testament, which is marked "A," and your petitioner begs leave to refer to the said last Will and Testament as if the same were herein set forth at length and constituted a part hereof.

FOURTH.—Frances May Fowles, the wife of said decedent, died on the 7th day of May, 1915, she having perished at sea as a victim of the same catastrophe which resulted in the death of her said husband, to wit, the sinking on said date of the Steamship "Lusitania" in the Atlantic Ocean off the Coast of Ireland, British Isles.

FIFTH.—The said Frances May Fowles left a last Will and Testament dated April 30, 1915, which was duly admitted to probate as a will of real and personal property by the Surrogates' Court of the County of New York on the 12th day of August, 1915. In and by the provisions of the subdivision designated "Sixth" of the last Will and Testament of the said Frances May Fowles, her husband, the said Charles Frederick Fowles, deceased, and your petitioner were named as executors thereof and as trustees of the trust thereby

58 *Petition.*

created. The said Charles Frederick Fowles died before the date of the probate of the last Will and Testament of the said Frances May Fowles, as hereinbefore alleged, and letters testamentary under said last Will and Testament were duly issued to your petitioner by the Surrogates' Court of the County of New York on the 13th day of August, 1915. Your petitioner duly qualified as such executor and entered up the discharge of his duties as such executor and is still engaged in the performance of such duties.

59

SIXTH.—Your petitioner further shows that to the said Frances May Fowles, deceased, certain legacies were bequeathed by the last Will and Testament of Charles Frederick Fowles, the abovenamed decedent, as follows.

By virtue of the provisions of the subdivision designaated "Second" of the said last Will and Testament the sum of $5,000.

By virtue of the provisions of the subdivision designated "Fourth" of the said last Will and Testament "All the personal property which may be contained at the time of my death in and upon
60 my said estate "Fairmile Court", including all household furniture, furnishings, silver, silverware, books, rugs, statuary (but excluding any and all oil paintings) and any and all horses, carriages, harness, motors, livestock, farm tools and implements and any and all the contents of the garages, stables, conservatories and other out-buildings, and any and all their equipment and appurtenances."

And further, by virtue of the provisions of the subdivision designated "Eighth" of the said last Will and Testament, forty-five per cent. of the

61

residuary estate of the said decedent was bequeathed in trust for the life of the said Frances May Fowles, deceased, and the provisions of the said subdivision "Eighth" conferred upon the said Frances May Fowles, deceased, the power to dispose by will of one-half of the said forty-five per cent. of the said residuary estate.

SEVENTH.—Your petitioner further shows that the said Frances May Fowles, deceased, exercised the power conferred upon her as aforesaid to dispose by will of one-half of the said forty-five per 62
cent. of the said residuary estate of Charles Frederick Fowles, the above-named decedent, as appears from the last Will and Testament executed by the said Frances May Fowles, deceased, as aforesaid. A copy of said will, which is marked "B", is hereto annexed and your petitioner begs leave to refer to the said will as if the same were herein set forth at length and constituted a part hereof.

EIGHTH.—Your petitioner further shows that in and by the subdivision designated "Ninth" of the last Will and Testament of Charles Frederick 63
Fowles, the above-named decedent, it was provided as follows:

> "NINTH.—In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my

64 *Petition.*

will and any and all its provisions shall be construed on the assumption and basis that I shall have predeased my said wife."

NINTH.—Your petitioner further shows that he has made diligent inquiry to ascertain any fact or facts which would indicate whether the death of the said Frances May Fowles occurred before or after the death of her said husband, but that your petitioner has not been able to ascertain any such fact or facts.

65

TENTH.—Your petitioner further shows that since entering upon the discharge of his duties as executor of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, your petitioner has proceeded with the administration of the estate of said decedent and has paid all the legacies bequeathed under said last Will and Testament excepting those bequeathed to the said Frances May Fowles, deceased; that your petitioner is unable to pay such legacies, is unable to proceed with the transfer tax proceeding which it is necessary should be instituted and brought to a conclusion in order that the amount
66 of such tax shall be determined and paid, and in fact is unable to proceed to do anything further in the administration of the estate of the said decedent for the reason that certain questions have arisen due to the death of Charles Frederick Fowles, the above-named decedent, and the said Frances May Fowles, deceased, on the same date and as the result of the same catastrophe, as hereinbefore alleged, and to the presence in the will of Charles Frederick Fowles, the above-named decedent, of the provisions contained in subdivision

67

designated "Ninth" thereof and hereinbefore set forth.

ELEVENTH.—Your petitioner further shows that the certain questions which have thus arisen are as follows:

1.—Are the provisions of subdivision designated "Ninth" of said will valid, and, if so, what is the true and full construction, force and effect of said provisions?

68

2.—If the provisions contained in subdivision designated "Ninth" of said will should be held to be null and void and of no force or effect, do all the various bequests and the certain trust bequeathed and created for the benefit of the said Frances May Fowles, deceased, lapse and fail, and, if so, does either the personal property which constituted the subject matter of the said attempted bequests or the personal property which constituted the subject matter of the said attempted trust and the remainder or reversionary interests limited thereon, pass under and pursuant to the provisions contained in subdivision designated "Eighth" of said will, or did the decedent die intestate as to any or all of the said personal property?

69

TWELFTH.—Your petitioner further shows that the proper disposition of the personal property which is the subject matter of the aforesaid bequests and the trust and the interests in remainder or reversion limited thereon, require that this Court should determine the validity, construction and effect of the certain provisions of the said

70 will as aforesaid; that your petitioner as executor under said will and as trustee of the trust therein created is interested in obtaining a determination as to the validity, construction and effect of the certain provisions of the said will as aforesaid, and that such determination is necessary in order that your petitioner as such executor may proceed to properly administer the estate and to distribute the personal property thereof, and to make and file a final accounting of his proceedings as such executor under said will.

71 THIRTEENTH.—Your petitioner further shows that the names and post-office addresses of all parties interested in the determination of the questions above stated and set forth are as follows:

Gertrude Frances Browne, a legatee under the last Will and Testament of the said Charles Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, and who resides at No. 355 West 145th Street, Borough of Manhattan, City and State of New York.

72 Gladys Mary Baylies, a legatee under the last Will and Testament of the said Charles Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, and who resides at No. 4800 Dorchester Avenue, City of Chicago, State of Illinois.

Marjorie Frances Stewart Browne, a legatee under the last Will and Testament of the said Charles Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, and who resides with her mother, the said Gertrude Frances

Browne, at No. 355 West 145th Street, Borough of Manhattan, City and State of New York.

Jean Clother Browne, a legatee under the last Will and Testament of the said Charles Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, and who resides with her mother, the said Gretrude Frances Browne, at No. 355 West 145th Street, Borough of Manhattan, City and State of New York.

Harry Lawrence Raylies, Jr., a legatee under the last Will and Testament of the said Charles 74
Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, who resides with his mother, the said Gladys Mary Baylies, at No. 4800 Dorchester Avenue, City of Chicago, State of Illinois.

Charles Ripley Baylies, a legatee under the last Will and Testament of the said Charles Frederick Fowles, deceased, and also under the last Will and Testament of the said Frances May Fowles, deceased, and who resides with his mother, the said Gladys Mary Baylies, at No. 4800 Dorchester Avenue, City of Chicago, State of 75
Illinois.

Dorothy Elizabeth Smith, a legatee under the will of the said Charles Frederick Fowles, deceased, and also under the last will of the said Frances May Fowles, deceased, and who resides at Worcester House Hotel, 127 and 129 Cromwell Road, London S. W., Emgland.

Kenneth Charles Smith, a legatee under the last Will and Testament of the said Frances May Fowles, deceased, and who resides with his mother, the said Dorothy Elizabeth Smith, at Worcester

House Hotel, 127 and 129 Cromwell Road, London S. W., England.

Margaret E. V. Johnson, a legatee under the last Will and Testament of the said Frances May Fowles, deceased, and who resides at No. 75 Lyons Terrace, Hettonhehole, Durham, England.

Florence M. D. Taylor, a legatee under the last Will and Testament of the said Frances May Fowles, deceased, and who resides at No. 46 Dryanston Road, Saint Michaels, Liverpool, England.

77 Lillian E. Minett, a legatee under the last Will and Testament of the said Frances May Fowes, deceased, and who resides at No. 21 Hamielwell Road, Putney, England.

Stevenson Scott and the Columbia Trust Company as Trustees of the trusts created in and by the will of the said Charles Frederick Fowles, deceased.

Stevenson Scott as executor of the will of the said Frances May Fowles, deceased, and as trustees of the trust created in and by the will of the said decedent.

All of the above-named are of full age and
78 sound mind excepting Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., Charles Ripley Baylies and Kenneth Charles Smith, who are infants under the age of fourteen years and who have no testamentary or general guardian to the best of your petitioner's information and belief.

There are no other persons than those above mentioned interested in this application or proceeding.

FOURTEENTH.—Your petitioner resides at No. 410 Park Avenue, Borough of Manhattan, City of New York.

Petition.

WHEREFORE, your petitioner prays that, pursuant to Section 2615 of the Code of Civil Procedure, a citation shall issue to all persons abovenamed, being all the parties interested in the questions to be determined by ths Court, to show cause why this Court should not determine the questions above stated and set forth and such other questions as may arise in connection therewith, and why your petitioner should not have such other and further relief as this Court may deem just and proper under the provisions of the said section of the Code of Civil Procedure, and why this Court should not make such decree as justice requires.

Dated at New York, October 26, 1915.

STEVENSON SCOTT,
Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

STEVENSON SCOTT, the petitioner named in the foregoing petition, being duly sworn, deposes and says that he has read the foregoing petition subscribed by him and knows the contents thereof; and that the same is true of his own knowledge except as to the matter therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

STEVENSON SCOTT.

Sworn to before me this 26th day of October, 1915.

J. A. DELATOUR,
Notary Public, Kings Co., No. 108
Kings Co. Register's No. 701.
N. Y. Co. Clerk's No. 39.
N. Y. Co. Register's No. 7033.

82 *Petition.*

Exhibit A.

I, Charles Frederick Fowles, residing in the Borough of Manhattan, City and State of New York, do hereby make, publish and declare the following as, for and to be my last Will and Testament.

FIRST.—I direct my executors, hereinafter named, to pay all my just debts and funeral expenses as soon as possible after my decease.

83

SECOND.—I hereby give and bequeath the following legacies to the several persons hereinafter named, to wit:

(1) To my mother, Susan Fowles, the sum of five thousand dollars $5,000). Should my mother predecease me, I give and bequeath in equal shares the legacy intended for her, to my sister, Emily Fowles, Mary Fowles and Millie Fowles, or to the survivors or survivor of them.

(2) To my sister, Emily Fowles, the sum of five thousand dollars ($5,000).

84

(3) To my sister, Mary Fowles, the sum of five thousand dollars ($5,000).

(4) To my sister, Millie Fowles, the sum of five thousand dollars ($5,000).

(5) To my sister, Kate Purser, and her husband jointly, or to such one of them as may be surviving at my decease, the sum of five thousand dollars ($5,000).

85

Petition.

) To my brother, Edward Thomas Fowles, his wife jointly, or to such one of them as be surviving at my decease, the sum of five ıusand dollars ($5,000).

(7) To my brother, William Fowles, and his ife jointly, or to such one of them as may be rviving at my decease, the sum of five thousand ollars ($5,000).

(8) To my wife, Frances May Fowles, the sum f five thousand dollars ($5,000). 86

(9) To my daughter, Gertrude Frances Browne, the sum of five thousand dollars ($5,000).

(10) To my daughter, Gladys Mary Baylies, the sum of five thousand dollars ($5,000).

(11) To the sister of my wife, Dorothy Elizabeth Smith, the sum of five thouand dollars ($5,000).

I direct my executors, hereinafter named, to pay the legacies hereinbefore given to the above-named legatees as soon as possible after my decease, but I declare that a sum equal in amount 87 to any and all such moneys as I may hereafter and during my lifetime give or advance to any of said legatees, shall be deducted from his, her or their respective legacies.

THIRD.—To my wife, Frances May Fowles, I give and devise all the real property and the dwelling house and out-buildings thereon erected, known as "Fairmile Court" and situated in Cobham, County of Surrey, England, provided, however, that my said wife shall elect to take the same

88 *Petition.*

on the basis of a valuation of eight thousand two hundred and fifty pounds (£8,250), which sum shall be charged against her share of my residuary estate as hereinafter provided. If my said wife should elect not to take the devise of my said estate "Fairmile Court" upon the basis of the valuation as aforesaid, the devise of same as hereinbefore made shall have no effect and my said estate "Fairmile Court" shall be sold by my executors hereinafter named, and the proceeds resulting from such sale shall fall into and become
89 a part of my residuary estate and shall be disposed of pursuant to the provisions of the article hereof designated "Eighth."

FOURTH.—To my wife I give and bequeath all the personal property which may be contained at the time of my death in and upon my said estate "Fairmile Court," including all household furniture, furnishings, silver, silverware, books, rugs, statuary (but excluding any and all oil paintings) and any and all horses, carriages, harness, motors, livestock, farm tools and implements and any and all the contents of the garages, stables, conservatories and other out-buildings, and any and all
90 their equipment and appurtenances.

FIFTH.—In the event that Stevenson Scott, the present President of the Scott & Fowles Company (a corporation organized and existing under the laws of the State of New York), should survive me, I direct that my executors, hereinafter named, shall offer for sale to the said Stevenson Scott all my shares of the capital stock of the said Scott & Fowles Company at the book value of same (as of the date of my death) as com-

puted by Messrs. Marwick, Mitchell, Peat & Company, Accountants (or any other accountants my said executors may select); and I direct that the said Stevenson Scott shall be allowed a period of six months from the date of my death in which to exercise the right to purchase the said stock at the book value of same as determined as aforesaid, and in the event that the said Stevenson Scott should exercise the right to purchase the said stock within the period aforesaid, I direct that my said executors shall extend to the said Stevenson Scott every possible consideration as to the terms of payment, and I authorize my said executors in such connection to accept in payment of fifty per centum of the purchase price of said stock, the promissory note or notes of the said Stevenson Scott, payable at such time or times and secured by such collateral as my said executors in the exercise of their discretion may determine.

SIXTH.—In the event that the said Stevenson Scott should not exercise the right to purchase the said stock within the period aforesaid, or should die within the period aforesaid without having exercised such right of purchase, I direct my said executors to immediately proceed to sell my said stock, and failing to effect a sale of same, to proceed to bring about the liquidation of the business of the said Scott & Fowles Company. It is my wish, in connection with either the sale of my said stock or the liquidation of the business of the said Scott & Fowles Company, that my said executors should co-operate in every way with the said Stevenson Scott or his personal representatives to the end that the utmost harmony shall

94 *Petition.*

prevail betwen my said executors and the said Stevenson Scott or his personal representatives

SEVENTH.—I give and grant to my said executors full, absolute and unrestricted power to sell at such times, in such manner and upon such terms as they may deem advisable, any and all the real property of which I may die seized.

EIGHTH.—A. All the rest, residue and remainder of my estate, both real and personal and where-
95 soever situate (including the proceeds resulting from the sale of my stock of the Scott & Fowles Company), I direct my executors to divide into three parts or portions, the first part or portion of which shall consist of forty-five per centum thereof, and the other two parts or portions of which shall each consist of twenty-seven and one-half per centum thereof. The said first part or portion consisting of forty-five per centum of my said residuary estate (subject to the possible deduction of eight thousand two hundred and fifty pounds (£8,250), as hereinafter provided), I give and bequeath to my Trustees, hereinafter named,
96 In Trust, Nevertheless, for the use and benefit of my wife, Frances May Fowles, to hold and invest the same and to collect and receive any and all the income, interest and increment accruing thereon and the same to pay over to my said wife semi-annually and for and during each year of the full term of the life of my said wife. Upon the death of my said wife, the said trust shall cease and determine and the corpus of same I direct my said trustees to then dispose of as follows:

One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my

said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testatmentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions "B" and "C" of this article of this my Will, one such portion passing under said subdivision "B" and one such portion passing under said subdivision "C."

One-quarter thereof to pay over pursuant to the povisions of the subdivision "B" of this article of this my Will.

One-quarter thereof to pay over pursuant to the provisions of the subdivision "C" of this article of this my Will.

In the event that my said wife should elect to take and devise of my said estate "Fairmile Court" and at the valuation thereof as provided in and by the provisions of article "Third" hereof, the said valuation being the sum of eight thousand two hundred and fifty pounds (£8,250), shall be deducted from the aforesaid forty-five per centum part of my said residuary estate and shall be added in equal portions to the aforesaid two twenty-seven and one-half per centum parts of my said residuary estate, to the end that, if my said wife should accept the devise of my said estate "Fairmile Court," as aforesaid, her share in my said residuary estate shall be reduced to the extent of eight thousand two hundred and fifty pounds (£8,250) and the shares of my two daughters in my said residuary estate shall each be in-

creased to the extent of four thousand one hundred and twenty-five pounds (£4.125).

B. The second part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my said trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gertrude Frances Browne, to hold and invest the same and to receive and collect any and all the income, interest and increment accruing thereon and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*.

C. The third part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my said trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gladys Mary Baylies, to hold and invest the same and to receive and collect any and all income, interest and increment accruing thereof and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*.

NINTH.—In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife.

TENTH.—I nominate, constitute and appoint as, for and to be the executors of this my last Will and Testament, my said wife, Frances May Fowles, and the aforesaid Stevenson Scott.

ELEVENTH.—I nominate, constitute and appoint the Columbia Trust Company (of the City and State of New York), the said Stevenson Scott and my said Wife, Frances May Fowles, as, for and to be the Trustees of the trusts created under and by virtue of this my last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of April, in the year One thousand nine hundred and fifteen.

CHARLES FREDERICH FOWLES, (L. S.)

As Witnesses:
EDWARDS S. SANFORD
JOSEPH A. DELATOUR.

The foregoing instrument was on the 30th day of April, in the year One thousand nine hundred and fifteen, at the Borough of Manhattan, City,

County and State of New York, subscribed by Charles Frederick Fowles, the Testator therein named, in the presence of each of us, and at the same time the said instrument was declared by the said Testator to us and to each of us to be his last Will and Testament, and thereupon we, at the request of the said Testator and in his presence and in the presence of each other, and at place aforesaid,
107 did sign our names as witnesses this 30th day of April, One thousand nine hundred and fifteen.

EDWARDS S. SANFORD, residing at Ridgewood Road and Luddington Road, South Orange, New Jersey.

JOSEPH A. DELATOUR, residing at 207 East 3rd Street, Borough of Brooklyn, City and State of New York.

Exhibit B.

108 I, FRANCES MAY FOWLES, the wife of Charles Frederick Fowles, do hereby make, publish and declare the following as, for and to be my last Will and Testament.

FIRST.—I direct my executors, hereinafter named, to pay all my just debts and funeral expenses as soon as possible after my decease.

SECOND.—I give and bequeath the following legacies to the several persons hereinafter named, to wit:

109

(1) To my step-sister, Margaret E. V. Johnson, the sum of five hundred pounds (£500).

(2) To Florence M. D. Taylor, of Liverpool, England, the sum of five hundred pounds (£500).

(3) To Lillian E. Minett, widow of Francis Edward Minett, formerly of Earith, Huntington, England, the sum of five hundred pounds (£500).

THIRD.—Any and all the rest, residue and remainder of my estate, real and personal and wheresoever situate (including any and all property as to which I may have power of disposition by will by virtue of the provisions of the last Will and Testament of my husband, Charles Frederick Fowles), I give and bequeath to my Trustees, hereinafter named, In Trust, Nevertheless, to hold and invest the same for the use and benefit of my sister Dorothy Elizabeth Smith, and to receive and collect the income, interest and increment accruing thereon and the same to pay over to the said Dorothy Elizabeth Smith in equal semi-annual installments during each year of the full term of the life of the said Dorothy Elizabeth Smith and for her sole use and benefit. Upon the death of the said Dorothy Elizabeth Smith the said trust shall cease and determine and I direct that my said trustees shall then pay over the corpus of said trust as follows: One-third thereof to Kenneth Charles Smith, the son of the said Dorothy Elizabeth Smith, or, if he should not then be living, in equal shares to the issue of the said Kenneth Charles Smith, *per Stirpes* and not *per capita;* one-third thereof to my said husband's daughter, Gertrude Frances Browne, or

110

111

112 *Petition.*

if she should not then be living, in equal shares to the issue of the said Gertrude Frances Browne, *per stirpes* and not *per capita;* and one-third thereof to my said husband's daughter, Gladys Mary Baylies, or, if she should not then be living, in equal shares to the issue of the said Gladys Mary Baylies, *per stirpes* and not *per capita.*

FOURTH.—In the event that I should predecease my said husband none of the povisions contained in the articles designated "Second" and "Third"
113 of this my Will shall be effective, and in such event I give, devise and bequeath any and all my estate, both real and personal, absolutely and forever, to my said sister, Dorothy Elizabeth Smith.

FIFTH.—To my executors, hereinafter named, I give and grant full, complete and unrestricted power to sell at such times, in such manner and upon such terms as they may deem advisable, any and all real property of which I may die seized.

SIXTH.—I nominate, constitute and appoint my said husband, Charles Frederick Fowles, and
114 Stevenson Scott, of the City and State of New York, as, for and to be the executors of this my Will and the Trustees of the trusts created hereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of April, in the year One thousand nine hundred and fifteen.

FRANCES MAY FOWLES.

115

As Witnesses:

EDWARDS S. SANFORD
JOSEPH A. DELATOUR

The foregoing instrument was on the 30th day of April, in the year One thousand nine hundred and fifteen, at the Borough of Manhattan, City, County and State of New York, subscribed by Frances May Fowles, the Testatrix therein named, in the presence of each of us, and at the same time the said instrument was declared by the said Testatrix to us and to each of us to be her last Will and Testament, and thereupon we, at the request of the said Testatrix and in her presence and in the presence of each other, and at the place aforesaid, did sign our names as witnesses this 30th day of April, One thousand nine hundred and fifteen.

116

EDWARDS S. SANFORD, residing at Ridgewood Road and Luddington Road, South Orange, New Jersey.

117

JOSEPH A. DELATOUR, residing at 207 East 3rd Street, Borough of Brooklyn, City and State of New York.

118 **Answer of Dorothy Elizabeth Smith.**

SURROGATES' COURT,

NEW YORK COUNTY.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the
119 County of New York, deceased.

Now comes the respondent Dorothy Elizabeth Smith, of 127 Cromwell Road, London, England, by her attorneys, Duer, Strong & Whitehead, and makes answer to the petition herein of Stevenson Scott, as follows:

This respondent admits and re-alleges all the allegations contained in paragraphs first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth and fourteenth of the said petition.

And this respondent further admits and re-
120 alleges that the question specified in the paragraph of the said petition numbered eleven, as numbers one and two, have arisen and require determination by the court.

This respondent further alleges on information and belief that a further question has arisen on the said will of said Charles Frederick Fowles and requires determination as follows: Whether or not by virtue of the ninth clause of the will all the provisions of the will of Frances May Fowles, of which a copy is annexed to the said petition,

121

exercising power of disposition by will by virtue of the provisions of the last will of said Charles Frederick Fowles are not to be incorporated into and treated as terms and provisions of the will of said Charles Frederick Fowles.

And this respondent further alleges on information and belief, that the said two wills were made and executed at the same time, and with the purpose and intent that they should be construed together and with knowledge on the part of the said Charles Frederick Fowles of the contents of the said will of said Frances May Fowles, and that

122

both said wills were made in contemplation of the possibility of such a disaster, in which both said Charles Frederick Fowles and said Frances May Fowles might perish together.

This respondent further alleges, on information and belief, that the said Charles Frederick Fowles and his said wife Frances May Fowles died as aforesaid in the wreck of the Lusitania off the Irish coast, and under such circumstances as have rendered it difficult and so far impossible to determine which one predeceased the other, save only, for the purpose of the will of said Charles Frederick Fowles, deceased, by virtue of the pro-

123

visions of the ninth clause of the will of said Charles Frederick Fowles.

This respondent further alleges upon information and belief that she is the Dorothy Elizabeth Smith referred to in the will of said Frances May Fowles as sister of said Frances May Fowles and under the will of said Charles Frederick Fowles as the "sister of my wife, Dorothy Elizabeth Smith."

This respondent further alleges on information and belief that under and by virtue of the pro-

visions of the said last will of Charles Frederick Fowles and the said last will of said Frances May Fowles, of which copies are annexed to the petition herein, she is entitled to all the benefits in the estate of said Charles Frederick Fowles, deceased, provided under the terms of the said will of said Frances May Fowles.

WHEREFORE this respondent joins in the prayer of the petitioner here for the determination and construction pursuant to section 2615 of the Code
125 of Civil Procedure of all the questions raised, or to be raised, respecting or concerning the meaning and effect of the provisions of the will of the said Charles Frederick Fowles, deceased, and particularly in connection with the provisions of the will of said Frances May Fowles, deceased, and for such other and further relief as may be just.

DUER, STRONG & WHITEHEAD,
Attorneys for respondent,
Dorothy Elizabeth Smith,
43 Exchange Place,
126 Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of New York, } ss.:

Selden Bacon, being duly sworn, deposes and says that he is a member of the firm of Duer, Strong & Whitehead, one of the attorneys for the above named respondent, Dorothy Elizabeth Smith, and that he has read the foregoing answer and knows the contents thereof, and that

the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Deponent further says that the reason why he makes this verification and not the said respondent Dorothy Elizabeth Smith in person is that she is absent from the State of New York, wherein deponent resides and has his office, in England, and that the sources of this deponent's information and the grounds of his belief are the petition herein the wills admitted to probate of said Charles Frederick Fowles and Frances May Fowles, and correspondence with R. Newton Crane, Barrister, of Middle Temple, London, England, who is the English counsel for the said Dorothy Elizabeth Smith.

SELDON BACON.

Subscribed and sworn to before me this 28th day of December, 1915..

WM. G. PHILLIPS,
Notary Public, Kings County.
Certificate filed in New York County,
No. 44.

[Seal.]

130 **Answer of Respondent Columbia Trust Company.**

SURROGATES' COURT,

NEW YORK COUNTY.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES
131 FREDERICK FOWLES, late of the County of New York, deceased.

The Columbia Trust Company, as testamentary trustee and under the last Will and Testament of Charles Frederick Fowles, deceased, a respondent herein, answering the petition herein of Stevenson Scott, alleges and states:

I.—That respondent is a domestic corporation organized and incorporated and carrying on business under the laws of this State, and is authorized and empowered thereby to accept the office
132 and appointment of trustee of trusts created by last Wills and Testaments and otherwise, and to become and act as such trustee.

II.—That respondent and Stevenson Scott (the petitioner herein) and Frances May Fowles, wife of said Charles Frederick Fowles, deceased, were nominated and designated by the said Charles Frederick Fowles, deceased, trustee of the trusts created by his last Will and Testament, which will was duly admitted to probate as in said petition stated, and a copy thereof is annexed to said petition.

133

III.—That respondent has accepted the appointment and office of trustee of the trusts created by said last Will and Testament of said Charles Frederick Fowles, deceased, and has entered upon the discharge of the duties of said office and is now acting as such trustee.

IV.—Respondent admits the allegations contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Eighth" and "Ninth" of the petition herein.

134

V.—That as to all the other allegations of said petition and the legal questions of construction thereby raised, this respondent submits the same to this Court alleging that it is the desire and intention of this respondent to carry out the real intention of the testator as found and adjudicated by the Court, and that it hereby raises issue as to all matters and things alleged in said petition which are in any wise in contravention of its said trusts under said will.

Respondent joins in the prayer of the petitioner herein for the determination and construction pursuant to §2615 of the Code of Civil Procedure, of all the questions raised or to be raised respecting the meaning and effect of the provisions of the will of the said Charles Frederick Fowles, deceased.

135

Dated, December 13, 1915.

CHARLES H. BECKETT,
Attorney for The Columbia Trust Company, as testamentary trustee.

136 *Answer.*

City of New York,
County of New York, } ss.:

J. E. Miller being duly sworn, says that he is an officer of the said Columbia Trust Company, to wit: the Vice-President; that he has read the foregoing answer signed by him and knows the contents thereof, and the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to
137 be true.

J. E. Miller.

Sworn to before me this 13th day of December, 1915.

Edwin C. Mulligan,
Notary Public,
N. Y. Co.

138

Answer of Gertrude Frances Browne and Gladys Mary Baylies. 139

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased. 140

Gertrude Frances Browne and Gladys Mary Baylies, two of the respondents in the above entitled proceeding, answer the petition herein as follows:

First.—Deny so much of the allegations contained in the subdivision designated "Seventh" of said petition as allege, "that the said Frances May Fowles, deceased, exercised the power conferred upon her as aforesaid to dispose by will of one-half of the said forty-five per cent. of the said 141 residuary estate of Charles Frederick Fowles, the above-named decedent, as appears from the last Will and Testament executed by the said Frances May Fowles, deceased, as aforesaid"; and admit each and every other allegation in said petition contained.

Second.—And your respondents further allege that they have been advised and believe that the provisions of subdivision "Ninth" of the last

142 *Answer.*

Will and Testament of the said Charles Frederick Fowles, deceased, are invalid and of no legal force or effect.

WHEREFORE, your respondents pray that the questions set forth in the petition herein may be heard and determined by this Court.

R. N. BAYLIES,
Attorney for Respondents
Gertrude Frances Browne
143 and Gladys Mary Baylies,
Office and Post Office Address,
No. 10 South La Salle Street,
Chicago, Illinois.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

GERTRUDE FRANCES BROWNE, being duly sorwn, deposes and says that she is one of the respondents above-named; that she has read the foregoing answer and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated to be
144 alleged upon information and belief and as to those matters she believes it to be true.

GERTRUDE FRANCES BROWNE.

Sworn to before me this 27th }
day of January, 1916. }

E. H. HUDSON,
Notary Public,
N. Y. County, 1609.
N. Y. Register 6038.

Evidence. 145

SURROGATES' COURT.

COUNTY OF NEW YORK.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased. 146

Before: Hon. Robert Ludlow Fowler, Surrogate.
Motion No. 10 on the Motion Calendar.

New York, January 28th, 1916.

APPEARANCES.

For the Executor and Trustee, JAMES W. PRENDERGRAST, ESQ.

For Dorothy Elizabeth Smith, MESSRS. DUER, STRONG & WHITEHEAD; HENRY SELDEN BACON, ESQ., of Counsel. 147

For Columbia Trust Company, Trustee, CHARLES H. BECKETT, ESQ.

For Gertrude Frances Browne and Glayds Mary Baylies, R. N. BAYLIES, ESQ.

Special Guardian for Charles Smith, Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, Infants, A. PERRY OSBORN, ESQ.

148 *Evidence.*

Mr. Prendergast: We may concede on the record that these wills were made on the same date and were signed in the presence of both Mr. Fowles and Mrs. Fowles—that is, Mrs. Fowles being present when Mr. Fowles executed his will, and vice versa, but beyond that there is no fact which we consider at all helpful * * *

I will ask the Court to hear Mr. Baylies, who is an ex-Justice of the Circuit Court of Illinois, who appears to present an argument in behalf of Mrs. Browne and Mrs. Baylies (the two daugh-
149 ters of the testator) and I would ask you to accept his answer which was filed today.

Mr. Bacon: On behalf of Dorothy Elizabeth Smith, a legatee under th ewill of Mrs. Fowles, we are of the opinion that the executor has not put the court in possession of quite all of the facts that are material upon the interpretation of Mr. Fowles' will, for the questions of Mr. Fowles' knowledge of his wife's estate and of his impending death, and of the execution by his wife of such a will as she made, are all matters of which the Court may properly be informed, and I shall call Mr. Prendergast as a witness upon those points.

150 Mr. Prendergast: We are entirely willing to stipulate the facts which we consider material. I would consider it unfortunate that I be called to the witness stand because of the provisions of the Code as to privilege and because of the fact that both Mr. and Mrs. Fowles being dead, and this contention being between the daughters of Mr. Fowles on the one hand and the sister of Mrs. Fowles on the other hand, I would consider questionable whether the executor of either will or both wills should waive that privilege; but I would

151

be very glad, speaking for the executor, to take your Honor's suggestion in that connection.

The Surrogate: They want to take some testimony on this hearing, and I think the hearing would be extremely incomplete if I were to deny them an opportunity to take any evidence that they want to take. Of course, as to your competency or as to your disability, I cannot pass upon that in advance. It must be after you are sworn or before you are sworn on an examination on the voir dire to raise that point, and then I will pass on it.

152

Mr. Prendergast: Our disposition is to put before the court all the facts. There is, however, this question as to the advisability of the executor, where this contest is pending, the same gentleman being the executor in both estates, as to whether he should waive the privilege.

The Surrogate: You are not an attesting witness to these wills?

Mr. Prendergast: No, but I drew both wills and was present at the time that both wills were executed.

153

JAMES W. PRENDERGAST, having been duly sworn, testified as follows:

By Mr. Bacon:

Q. You are an attorney and counselor at law and were the counsel for Mr. and Mrs. Fowles during their lives? A. Yes.

Q. About what time before the execution of these wills did Mr. and Mrs. Fowles come to see

you about the drafting of the wills? A. Two days. I beg your pardon, one day before the actual execution of the will, and two days before their sailing on the Lusitania.

Q. When you say they, were they both in the room with you? A. They were.

Q. And the instructions for both wills were given to you by each in the hearing of the other? A. Yes.

Q. Was the subject mentioned of the warning that had been published that the Lusitania might
155 be sunk? A. No.

Q. Was the subject of the danger of the Lusitania sinking, was that mentioned? A. Not by Mr. Fowles.

Q. Was it by yourself? A. It was indirectly.

Q. And by Mrs. Fowles? A. Not by Mrs. Fowles.

Q. And in connection with that was this clause, the ninth of the decedent's will discussed? A. Yes.

Q. Was the subject of Mrs. Fowles' estate and the amount of it mentioned by anyone in that conversation? A. Yes, but not as to the amount.

156 Q. Not as to the amount? A. No. If I may add, I would say that it was mentioned only to the effect that her estate would be small.

Q. That was by whom? A. By Mrs. Fowles.

Q. That is, that her estate would be small in the event that she died before her husband? A. Yes.

Q. What efforts had you made to establish the fact as to the priority of the death? A. We have been in communication with the persons in charge who of course were aboard, of the attempts to recover Mr. Fowles' body. We have

157

received their reports. We have received an affidavit from one of the passengers on board the steamship showing that Mr. Fowles was a passenger, and stating about the time and about the place he was last seen on the steamship. We have attempted to interview other passengers on the steamship and were unable to obtain, as the result of such attempt, any fact or circumstance which would indicate where Mrs. Fowles was or where Mr. Fowles was just prior to the accident, or at the time of the accident; that is to say, whether they were together at the time or in different parts of the steamship. We also endeavored to ascertain whether they reached the deck of the steamship, and whether they, or either of them, were able to find a place in the boats which were put off by the officers of the ship after the ship had been struck with the torpedo, which we understand caused the sinking. All our attempts in that connection have been without result.

158

Q. What have you learned with regard to the finding of the bodies? A. The body of Mrs. Fowles was found shortly after the catastrophe. Her body was in a good state of perservation, was identified by the relatives and friends, and was interred. Mr. Fowles' body was not found for several weeks after the accident. It was found finally off the west coast of Ireland, the head of Kinsale. It was found by a fisher boy, reported to the Life Station nearby in the vicinity, immediately given in charge of the chief constable, who made his report to his superiors. The Cunard Company took charge of shipping the body from the place where it was found to London, and the body was there surrendered to the relatives of Mr. Fowles, and a funeral was had

159

and interment took place in London. The body at the time it was found, as we have been informed, was not capable of identification because of the length of time the body had been in the water, but the initials found on the underclothing and some personal articles of Mr. Fowles, such as his card case, in which were found his cards, a pair of spectacles, and some memorandums in his pockets, his coat, were all indicative of the fact that the body was that of Mr. Fowles, and I may say that the proof in
161 that connection was accepted by the insurance company and that the moneys representing the amount due under two policies of insurance were paid by the company to the executors.

Q. To return to the instructions. At the time the instructions were given you, was anything said about the amount of Mr. Fowles' estate relative to Mrs. Wowles' small estate? A. Nothing.

By. Mr. Beckett:

Q. How long have you been at the bar? A. I was admitted in February, 1899.

162 Q. Where is your office? A. 25 Broad Street, New York City.

Q. Have you a law firm? A. I am practicing alone.

Q. You were formerly associated with Messrs. Bergen & Dykman? A. I was.

Q. In the same place? A. Yes.

Q. For how many years? A. Since my admission to the Bar with the exception of a short period when I did some work for the Law Department for the City in connection with the water litigation.

Q. You were asked by Mr. Bacon respecting the time after the sinking of the Lusitania when

these bodies were found. As a matter of fact, wasn't Mrs. Fowles' body found about three days after the disaster? A. I am unable to state the time more particularly than to say it was found shortly after the accident, and that I was informed that the body, when found was in such a state of preservation as to enable her relatives and friends to identify the body as hers. 163

Q. Can you now state approximately what the period of time was, whether it was hours or days? A. My best recollection is that it was a day or two. 164

Q. And the body of Mr. Fowles, as I understand, was found some weeks after the disaster? A. Yes, several weeks after.

Q. Can you not be more specific than several? A. If your Honor will permit me to speak with Mr. Scott a moment, I can give the exact date perhaps.

(Witness confers with Mr. Scott).

The Witness: Some five weeks after.

Q. Had Mr. Fowles been a client of yours for a considerable time? A. He had. 165

Mr. Bacon: That is all.

Mr. Prendergast: May I make this statement in view of the questions that have been put to me so that the fullest possible information may be before the court: I received the instructions for the preparation of the will of Mrs. Fowles and Mr. Fowles at the same time and the day before both instruments were executed. When the instructions were given me as both wills, both

Mr. Fowles and Mrs. Fowles were present and they both discussed the proposed provisions of their respective wills. The wills were executed in my office the day after. The clause under discussion, Subdivision 9, that is the survivorship clause, was placed in the will at the suggestion of Mr. Fowles. I directed his attention to the fact that in my mind there was substantial reason to doubt the validity of that clause, and he replied that if the insertion of the clause in the will would not invalidate the other provisions of the
167 will he preferred that clause should be inserted in the will even if a court should ultimately hold that the clause in question was invalid. I refer to that for the reason that it would appear to me to be the one fact bearing most closely on the intention of the testator.

The Surrogate: There is some question about the power of this court to receive extrinsic evidence in the construction of wills. The Court of Appeals has given us ample power to construe wills, but we are confronted with a very plain decision of the Court of Appeals that the Surrogate is not permitted to take extrinsic evidence as to
168 the construction of wills. It will be brushed away in the course of time, but that decision confronts us. Another point, I do not care to take any proof where there is any controversy as to the simultaneous death of the testator. In this state there is no presumption of survivorship. There is a very interesting case that I decided that went to the Court of Appeals where the two persons, Lafarge, were killed in the same railway accident, and I held a survivorship. That was affirmed afterwards in the Court of Appeals. It was a very close case, but after the affirmance I found

a very old case in England where two people were killed at the same moment, and they were closely related, and it was a question of succession, and one of the persons killed was seen to move slightly when the other was still, and the court upon that single instance held a survivorship, although there is a presumption in English law as well as in our law, that there is no survivorship in the case of a casualty of this kind where there is absolutely no proof. I mention those cases because if there was the slightest proof here of survivorship, that either Mr. or Mrs. Fowles was 170
seen on deck last, or anything of that kind, it would be a matter open for consideration, but as there is no proof of course there is no presumption of survivorship.

The Surrogate: Do you contend that this extrinsic evidence that has been given by Mr. Prendergast is important on the question of construction? * * *

Mr. Bacon: It is on two grounds. Your Honor will observe that the evidence brought out by me contained no expression of intention to illuminate the will. That I conceive to be subject to objection, but evidence as to the external situa- 171
tion, the amount of the estate and the knowledge of the existence of another document comes under a very different heading, and that was the evidence which I brought out.

Mr. Prendergast: Will your Honor recognize Judge Baylies in support of the daughters.

Mr. Baylies: Before proceeding with the discussion of these matters I desire to ask leave to file an answer for the daughters and heirs at law, not that I believe this is necessary, but I see it has been done by others and I think that the petition itself is broad enough—

172 *Evidence.*

The Surrogate: Does that answer make an issue of fact?

Mr. Baylies: It only raises an issue on one provision. That is, we simply deny what is alleged here, which I deem to be a conclusion of law, that Mrs. Fowles made a will. This is the part that refers to the seventh: "Your petitioner further shows that said Frances May Fowles, deceased, exercised the power conferred upon her, as aforesaid, to dispose by will of one-half of said 45 per cent. of said residuary estate of Charles F.
173 Fowles, above named testator, as appears from the last will and testament executed by the said Charles F. Fowles, deceased, as aforesaid." We put that in issue. That is, this is a conclusion of the pleader, that she did exercise that. It is true that the will is here and speaks for itself, but the conclusion of law he has drawn from that single one. That we think is proper to be considered. Now, the facts that are stated in this petition are stated broadly, and they are very important, and I think I can summarize them very briefly, for these are matters that require careful consideration and close analysis. * * *

174 Mr. Prendergast: I think the record should show that the executors have raised no question in connection with my testimony for the reason that having been——

The Surrogate: (Interrupting) You need not be alarmed about that. There will not be any question. You acted for both parties and both parties invoke your confidence, and nothing you testified could be regarded as confidential.

Mr. Prendergast: And the executors, feeling that all the facts should be before the court, have raised no question.

Briefs by February 11th, 1916.

Stipulation Settling Statement of Evidence. 175

SURROGATES' COURT,

NEW YORK COUNTY.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased. 176

It is hereby stipulated that the foregoing statement contains all the evidence adduced and proceedings had before the Surrogate on the petition and answers in the above-entitled matter, and that the same may be settled and filed and made a part of the record on appeal herein.

Dated, September 13, 1916.

CHARLES H. BECKETT,
Attorney for Columbia Trust Co.,
Trustee, 177
135 Broadway,
N. Y. C.

JAMES W. PRENDERGAST,
Attorney for Stevenson Scott, as
Executor and Trustee,
25 Broad Street,
N. Y. C.

178 *Stipulation Settling Statement of Evidence.*

A. PERRY OSBORN,
Special Guardian for Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants.
14 Wall St.,
N. Y. C.

STANCHFIELD & LEVY,
179 Attorneys for Gertrude Frances Browne and Gladys Mary Baylies, Appellants,
120 Broadway,
N. Y. C.

DUER, STRONG & WHITEHEAD,
Attorneys for Dorothy Elizabeth Smith,
43 Exchange Pla.,
N. Y. C.

EGERTON L. WINTHROP, JR.,
180 Special Guardian for Kenneth Charles Smith, an infant,
32 Liberty St.,
New York City.

Order Settling Statement of Evidence. 181

Upon the foregoing stipulation, it is hereby

Ordered that the foregoing printed statement containing all the evidence adduced and proceedings had upon the hearing on the petition and answers herein be and it is hereby settled and ordered on file.

Dated, New York, September 15, 1916.

JOHN P. COHALAN,
Surrogate.

182

Stipulation Waiving Certification.

Pursuant to §3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Division in and for the First Judicial Department, the decree appealed from, and all the papers and proceedings bfore the Surrogates' Court upon which said decree was founded, all of which are now on file in the office of the Clerk of the Surrogates' Court in and for the County of New York, and certification thereof, pursuant to §1353 of the Code of Civil Procedure, or otherwise, is hereby waived. 183

Dated, New York, September 13, 1816.

CHARLES H. BECKETT,
Attorney for Columbia Trust Co., Trustee,
135 Broadway,
New York City.

184 *Stipulation Waiving Certification.*

JAMES W. PRENDERGAST,
Attorney for Stevenson Scott,
as Executor and Trustee,
25 Broad St.,
New York City.

A. PERRY OSBORN,
Special Guardian for Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and
185 Charles Ripley Baylies, infants,
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New York City.

Opinion. 187

SURROGATE'S COURT,

NEW YORK COUNTY.

April, 1916.

James W. Prendergast, Esq., for petitioner Stevenson Scott; Duer, Strong & Whitehead, Esqs. (Seldon Bacon, Esq., and Henry S. Bacon, Esq., of counsel), for respondent Dorothy Elizabeth Smith; R. N. Baylies, Esq., of Chicago, Ill., for respondents Gertrude Frances Browne and Gladys Mary Baylies; Charles H. Beckett, Esq., for Columbia Trust Company; Egerton L. Winthrop, Jr., Esq., special guardian for Kenneth Charles Smith; A. Perry Osborn, Esq., special guardian for other infants. 188

FOWLER, S.—This proceeding is instituted, pursuant to chapter 18 of the Code of Civil Procedure now in force, for a construction of the will of Charles Frederick Fowles, deceased. The facts stated in the petition, instituted and filed by Mr. Fowles' executor, are not controverted, and are, therefore, for present purposes, to be taken as true. The various answers of the parties respondent do not raise issues of fact, but content themselves with recitals of the legal positions or claims of the respective respondents. 189

On the hearing Mr. Prendergast, the counsel who drafted the will of Mr. Fowles, and also the simultaneous will of his wife, was called to the stand without objection, and without objection or exception was permitted to testify. His testimony was, however, inconsequential, as it did not go beyond presumptions which the law itself

draws from Mr. Fowles' will and coverture. Whether, as an abstract question, the testimony of Mr. Prendergast is entitled to be taken into consideration by the Surrogate in this proceeding I must hereafter consider, as the range of extrinsic evidence permissible in proceedings of this character is very limited, and illegal evidence, even if offered without objection or exception, cannot be considered by the Surrogate in matters of construction. The Statute of Wills requiring wills to be in writing permits no other
191 evidence of their intention, purport or effect, except in certain well defined and special exceptions. I am very much opposed to innovations on this established principle in courts of construction, and for this reason shall not pass the testimony over without giving it further consideration.

It appears that the testator died on the 7th of May, 1915, while a passenger on board the transatlantic steamer Lusitania, which was sunk on that day in the Atlantic Ocean off the coast of Ireland. His wife, who accompanied him on the voyage, lost her life in the same disaster. No
192 evidence whatever has been submitted to show that testator survived his wife or that she survived him. The draftsman of Mr. Fowles' will testified that two days before the testator and his wife sailed on the Lusitania they called at his office and each of them made and executed a will. The several wills are set out *in extenso* in the petition. The testator, in the presence of his wife, gave instructions to the attorney as to the manner in which he wished to dispose of his property, and his wife gave similar instructions in the presence of the testator. At the time the

respective wills of the testator and his wife were being prepared, it appears that they discussed with their attorney the danger incident to sailing on the Lusitania, under the unusual international conditions existing at that time, and the risk which transatlantic voyagers then incurred. As a result of that discussion the will then prepared and executed by the testator contained the following paragraph: "Ninth.—In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who prede- 194
ceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife and that this will and any and all its provisions shall be construed on the assumption and bais that I shall have predeceased my said wife." The legal effect of this paragraph, and the disposition to be made of the 15 per cent. of the residuary estate given to his wife in the eighth paragraph of the will are the main questions presented to the Surrogate for determination. The estate is large and the questions raised are important.

I shall consider *in limine* the legal effect of the 195
testimony of the counsel drafting the several wills. It would seem neither to add nor detract anything from the text of the will, but in a matter of this importance I cannot forbear to point out that extrinsic evidence is never admissible in our courts of construction except (1) where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; or (2) to rebut a resulting trust (Man *v.* Ex'rs of Man, 1 Johns. Ch. 231, 234); (3) if a patent ambiguity may be obviated by extrinsic evidence

it is now admitted by the best authority to afford a third exception to the rule excluding such extrinsic evidence. The only patent ambiguity which may not be so explained is one incapable of resolution (Hawkins on Wills, 8; Phillips on Ev., p. 391, Edition 1852; Thayer's Prelim. Treatise Ev., 422, 473, 599, 601; Beale, Cardinal Rules, Interpretation, 580, 581; Colpoys *v.* Colpoys, Jacob 451, 53 R. R., 42; Note to Cockle, Lead. Cas. on Ev., 00; Matter of Phipps, 214 N. Y., at p. 381). It is often said that the circum-
197 stances surrounding a testator at the time of execution of the will may always be given in evidence in cases of construction. But I apprehend that this is true only when there is an equivocation or uncertainty as to the meaning of the will, or as to the persons or property referred to therein (Smith *v.* Smith, 1 Ed. Ch., 189; Bunner *v.* Storm, 1 Sandf. Ch., 357; Matter of Raab, 79 Misc., 185; Matter of Vosseler, 89 Misc., 674). In the will before me there is no equivocation; the words and meaning of Mr. Fowles' will perfectly coincide, and therefore extrinsic evidence was inadmissible. But the extrinsic evidence offered and
198 taken in this matter was entirely harmless and quite unnecessary in my judgment, as every fact testified to would be presumed by the court from the will and coverture of Mr. Fowles without extrinsic evidence. Whether instructions to an attorney for drawing a will are ever competent to explain the text of a will I doubt (Murray *v.* Jones, 2 V. & B., 318; cf. Webber *v.* Stanley, 16 C. B., N. S., 698). Indeed, whether Mr. Prendergast, the draftsman of the wills, should have been allowd in this State to testify to his instructions, is also open to doubt. I had occasion to consider

this point in Matter of Francis (73 Misc., pp. 153, 154). But the extrinsic evidence in this matter may be disregarded, without harm, by reason of the fact that it would inconsequential.

Let me next refer for moment to the general law governing successions from *commorientes* who perish in a common disaster. Te principle of the common law, that in the absence of all proof of actual survivorship there is no presumption of survivorship among those who perish in a common disaster, and no presumption of simultaneous death was referred to at length by me 200
in my decision in a proceeding in this court involving the deaths in a common disaster of the Laffargue family (Matter of Hermann, 75 Misc., 599, 601 seq., 136 N. Y., Supp., 944). My decision was affirmed by a divided court (Matter of Laffargue, 155 App. Div., 923). The Laffargue case, however, ultimately turned on slight proof of actual survivorship, reinforced by circumstantial proof. Singularly enough, long after the formal confirmation of my judgment, I happened to read a very old case, now part of our common law, in the absence of conflicting domestic authority (A. D. 1596, Broughton *v.* Randall, Cro. Eliz., 503). 201
This old case, precisely in point, would have been conclusive of the Laffargue case, but fortunately my decision conformed in every respect with the old decision stating the common law. That the common law of England and this State, unlike the civil law, raises no presumption of survivorship, in the absence of all proof of the fact is familiar to us all (Underwood *v.* Wing, 19 Beav., 459; Newel *v.* Nichols, 12 Hun., 604, 75 N. Y., 98; Wing *v.* Angrace, 8 Ho. L. Cas., 183). In some other States of the Union, while there is no pre-

sumption of survivorship, there is a presumption of simultaneous death where perons ars shown to have perished in a common disaster and there is no proof forthcoming of survivorship or moment of death (Johnson *v.* Merithew, 80 Me., 111; In re Wilbor, 20 R. I., 126). In those States having this modified rule the property is distributed as if the deaths were simultaneous (Johnson *v.* Merithew, supra, and In re Wilbor, supra). At common law and in this State where there is no presumption of even simultaneous deaths, if
203 the claimant cannot make out actual survivorship, the gift over fails, and the property in controversy either passes into the residuum or by intestacy (Elliot *v.* Smith, 22 Ch. Div., 236; In re Alston, 1892, P. 142; Wing *v.* Angrave, 8 Ho. L. Cas., 183; Newell *v.* Nichols, 75 N. Y., 78, 90; St. John *v.* Andrews Institute, 191 N. Y., at p. 272), unless there is a substitution over.

That the common law raises no presumptions whatever in cases of this character is, perhaps, not always an advantage in the administration of justice. In Matter of Laffargue I referred to the unjust criticism of the presumptions of sur-
204 vivorship entertained in the Civil Law, with proper reference to the texts of the Pandects, and I attempted to show that in some instances the Civil Law presumptions were entirely reasonable and logical. Had the common law presumed simultaneous death, it would not have been a violent presumption, and there would have been at least one established premise for our courts of construction to work on. As it is, there is none in this State. The common law of England and the common law of this State treat survivorship or time of death as absolutely insoluble in the ab-

sence of proof. The result is that the *onus* at common law is placed on those asserting either the survivorship or the simultaneous death of one of two persons who perish in a common disaster. As a generality, the fact of death in a common disaster is susceptible of proof, but the relative time of the individual deaths of *commorientes* is not often susceptible of proof. Thus it is in this case: Whether Mrs. Fowles perished at the same moment as her husband, or before or after him, stands without proof, and under the circumstances the common law raises no presumption 206
whatever. Whether there is a tendency to recede from this doctrine in this State I shall not presume to consider. But I observe in St. John *v.* Andrews Institute (191 N. Y., p. 272) the court said: "In such cases the question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous."

The effect of the ninth clause of Mr. Fowles' will will now be considered. It will be regarded first as a direction to a court of construction to reverse and accepted rule of the common law and thus reverse a rule of construction based on that 207
rule. What effect, if any, can this direction contained in the ninth clause of Mr. Fowles' will have, regarded only as a direction to the court? This point, while insisted on, is not much argued in the briefs, and then without citations of authority. In my judgment the direction in question can have no effect, regarded as a direction to a court of construction. Presumptions prescribed by the common law and rules of construction based thereon are fixed and immutable and cannot be thus directed to be altered by the court

to meet particular cases. In the French law it is said, according to my own translation, that a testator may in his will impose no condition which wounds the law or good morals (Troplang, Donations et Testaments, vol. 1, sec. 272). It seems to me that this author expresses with the usual Gallic clearness the propeer limitation on testamentary directions of all testators. Our system of jurisprudence is not different on this point. Directions in wills in order to be upheld must contravene neither the law nor good
209 morals. The effect of an unauthorized imposition on testamentary gifts I had occasion to review in Matter of Anonymous (80 Misc., 110, reported as Anonymous in order to save an obscure child from publicity, obloquy and threatened expulsion from school). The unlawful direction in that case was, however, a condition subsequent and not a direction for construction, but, *mutatis mutandis,* I find myself unable to add more to the reasons there assigned for the invalidity of the unlawful direction contained in Mr. Fowles' will if it is to be construed as a testamentary mandate to the court to alter a legal presumption
210 and a resulting rule of construction.

But it seems to the Surrogate that the ninth clause of Mr. Fowles' will is not to be taken as a direction by testator to a court of construction to alter an established presumption or canon of construction. It is susceptible of another meaning. In the construction of wills an illegal intendment on the part of a testator will not be presumed if another construction is possible (Roe *v.* Vingut, 117 N. Y., 204, 218; Smith *v.* Edwards, 88 N. Y., 92, 102; Matter of De Bolet Peraza, 72 Misc., 577, 581). Words which admit of a two-

fold construction—one valid, the other invalid—will always be given the sense which validates them (Pond *v.* Bergh, 10 Pai., 140; Butler *v.* Butler, 3 Barb. Ch., 302). It is hardly worth while to waste time in citing authorities for such an elementary rule of construction of all written instrument as, "*Ut res magis valeat quam pereat.*"

Nor is it necessary to do more than refer to that cardinal principle of construction (not peculiar to wills alone, but common to all other writings) that the intention of the makers is always 212
to govern construction. But I must not forbear to notice that in the interpretation of wills a will is to be regarded as a unilateral instrument and not a bilateral juristic act. In the course of the development of our own system of jurisprudence —the common law—a devise, as contrasted with a testament, was at one time regarded as a conveyance. During the prevalence of this conception there was a tendency for a time to regard a will of lands as a bilateral juristic act, and the earlier canons of construction applicable to devises were somewhat influenced by this tendency. But that time has long passed, and a last will and 213
testament in our laws is now regarded as a unilateral instrument for the purpose of interpretation. Interpretations of will doubtful passages must be construed in the sense in which the testators desired them to be understood, and not in the sense which the takers or beneficiaries desire. This is a fundamental canon in all systems of law. The Civil Law is most express on this point (D., 28, 1, 1; D., 50, 17, fr. 96), and the common law of this State not less so. Mr. Fowles' will is to be construed only in the sense intended

214 *Opinion.*

by him and not in the sense it was understood by Mrs. Fowles. It would be highly fallacious to take into consideration the sense in which Mrs. Fowles understood her husband's will. I cannot help thinking that the vice of that position has been obviated by my disregard of the extrinsic evidence offered and taken without objection.

It is to me obvious that Mr. Fowles' real intention by the ninth clause of his will was to prevent a lapse in the event of Mrs. Fowles' incapacity in any way to take under his will. In
215 that event Mr. Fowles intended that there should be a substitution of someone else in her place. There is nothing contrary to any rule of law in this intention. Shifting uses and executory limitations, freely allowed at common law, were largely matters of substitution. Whenever there is in a will an intention to substitute another in the place of a legatee or devisee dying during the lifetime of a testator, or at the same time as testator, or immediately after testator, so as to be unable to take and hold, then that other named as substitute will take by substitution, if vesting is concurrent and there is no perpetuity. No rule
216 of law is then violated by this principle, and it enables us to give effect to the obvious intention of the testator. Substitution is a common remedy for lapse. In order to meet the difficulties of the common law in the instances of *commorientes* nearly allied by blood, affinity or consanguinity, there seems to be a tendency in the United States to hold that a gift over, if principal legatees " die before testator," is substitutional (Young Woman's Christian Home *v.* French, 187 U. S., 401; Matter of Piffard, 111 N. Y., 410, 413; St. John *v.* Andrews Institute,

N. Y., 254). In Matter of Mayo (76 Misc., 420) I gave effect to this principle, although order to support the substituted gift over I s compelled to adjudge that under the Statute Powers in this State the power of appointment nated by the principal will never vested. This st point I decided on our domestic law of pows. In the application of rules of property I rely seek authorities or analogies out of our wn jurisdiction. The Revised Statutes are now early a century old and our domestic law of roperty is generally independent of the aid of 218
nalogies afforded in foreign states. But I am, however, happy to observe from the briefs submitted in this cause that my decision in the Mayo case precisely accorded with the analogous decisions on powers taking effect under the old Statute of Uses (Sharpe *v.* McCall, 1 Irish Reports, Chan. & Land Com., 1903, p. 179; Jones *v.* Southall, 32 Beav., 31).

In testaments the wishes of testators are to be very liberally expounded in all courts of construction. "*In testamentis plenius voluntates testantium interpretantur*" Paulus, ff. 50, 12). This rule of the Civil Law was long since adopted 219
by our courts, as may be seen in Emerton's admirable treatise entitled "*De conjecturis ultimarum Voluntatum*" (p. 68, Oxford, 1884). Mr. Emerton reviews the Civil Law principles generally taken over by courts of construction operating under the common-law system. Unfortunately for its popularity, Mr. Emerton's treatise is written in Latin. But it makes evident that a principle of construction which is 2,000 years old is still in *viridi observantia*. A principle so old is certainly entiled to every consideration in

courts of this character. The rule of construction cited means that the lawful intention of the testator should be supported fully by every solid and reasonable conjecture. It is self-evident that Mr. Fowles knew that his wife could take no personal benefits under his will if she perished before him or at the same time or even immediately after him. Knowig all this, as he must have known it, his will provides in substance that in any of these events the provisions for his wife shall inure to the benefit of her successors. This can only mean that Mrs. Fowles' personal represesentatives were to have the benefit by substitution of the provisions of his will intended primarily for her. Inartificially perhaps, but to my mind clearly, he expressed his testatmentary intention that his legacies to his wife should not lapse but pass by substitution to those who in law were the successors of her person. In effect Mr. Fowles said plainly enough that in the event of his wife's incapacity from any cause those who represented her in law should be substituted in her place in so far as was consistent with the rest of his own will.

That the courts of this State are inclined to construe gifts for the benefit of a person if he die before testator, as substitutional, in order to defeat a lapse where that is the expressed intention of testator, is disclosed by Matter of Piffard (111 N. Y., 410). In principle that case is decisive of this, although the facts differ. But it is not the similarity of the facts which causes a decision to be a precedent, but the relevancy of the principle laid down. According to the doctrine of *stare decisis,* which is a fundamental of the common law system, the only thing in a decis-

ion binding as an authority is the right principle upon which the case was decided and not the application of such principle (Matter of Tod, No. 1, 85 Misc., 298, 303, 304). This is so obvious to all persons familiar with the development of the common law that it needs no citation of authority. In Matter of Piffard the legatee Sarah predeceased the testator, and in that event her share was directed to be paid over to her executors. The gift over was sustained as substitutional in order to prevent a lapse. Every argument urged against the conclusion reached by the court is 224 identical with those urged here.

Who was intended by Mr. Fowles to take by substitution in the event that his wife could not take is not ambiguous or doubtful. It is obviously those persons who in law continued her legal existence, viz, her executors. Who these are is a mere matter of identity, and it determined by Mrs. Fowles' will, which is proper extrinsic evidence for that purpose. Her executors take by substitution, but they take as her executors for the uses and purposes prescribed by her will. They do not take individually. That this was Mr. Fowles' express intention I have no doubt, 225 and I can detect no illegality in such intention to carry the primary donations to Mrs. Fowles over to her executors by substitution in the events which have actually occurred. This was the conclusion and principle established by Matter of Piffard. It is this principle which under the doctrine of *stare decisis* controls this case now before me.

That common law courts are inclined to a large and liberal construction in order to carry out the expressed intentions of testators is evident from

226 *Opinion.*

such famous cases as that of Masters *v.* Masters (1 P. Wms., 421), where a legacy to a Mrs. Sawyer was held to be intended for a Mrs. Swapper, as testator knew no such person as Mrs. Sawyer. The court properly held in that case "*id certum est quod certum reddi potest.*" The identification of legatees may be aided by extrinsic evidence.

The principle of exclusion applies in interpretation of wills. From the ninth clause of Mr. Fowles' will it is apparent that testator intended
227 to exclude or segregate from his general estate the legacies given to the use of his wife. These he appropriated to her in all the events which occurred or could have occurred. In no event did he intend that these legacies should accrue by his will to his own next of kin. When this is certain beyond all peradventure, the court should not be astute to find reasons for benefiting directly those whom in no event testator himself wished to be benefited. To benefit by construction those not intended by testator to be benefited is contrary to all systems of jurisprudence, except possibly our own. Both Lord Mansfield and the Eng-
228 lish civilian, Phillemore, are justified in criticising those rules of construction defeating testators' expressed intention. Phillemore in particular has no words too harsh for canons of construction which defeat a testator's expressed intention. If Mr. Fowles' expressed intention that the legacies to his wife should not lapse is so defeated, the criticism of our principles of interpretation will be justified.

My conclusion is that the executors of Mrs. Fowles are entitled by substitution to the sum of $5,000, bequeathed by the testator to his wife

in sub-division eight of paragraph second of the will, to the bequest of personal property contained in paragraph fourth thereof, and to one-half of 45 per cent. of the residuary. The devise of testator's real estate at Cobham, County Surrey, England, was made upon the condition that the devisee elect to take it at a valuation of £8,250. The right of election was given to her personally and is extinguished by her death; it cannot be exercised by her executors. Her failure or incapacity to exercise the election per se defeated the devise and the alternative disposition directed by the testator takes effect, namely, that the real estate be sold and the proceeds added to the residuary. 230

The manner in which the executors of Mrs. Fowles' estate should pay over this property cannot be determined by the court in this proceeding, as her will is not properly before the court for construction. The surrogate will not consider in this proceeding a construction of the will in its relation to the proceeding now pending to determine the transfer tax upon the estate of the testator as the State Comptroller is not a party to this proceeding. A decree may be entered on notice in accordance with this decision. 231

Order Filing Record in Appellate Division.

It is hereby ordered that the within record thereof be filed in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department.

Dated, New York, September 15, 1916.

JOHN P. COHALAN,
Surrogate.

232 **Notice of Appeal of Dorothy Elizabeth Smith.**

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES
233 FREDERICK FOWLES, late of the County of New York, deceased.

SIRS:

PLEASE TAKE NOTICE that Dorothy Elizabeth Smith, one of the parties to the above entiled proceeding, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, made in the above entitled proceeding, dated the 9th day of March, 1917, and entered an filed in the office of the Clerk of said
234 Appellate Division on the 23rd day of March, 1917, which said order reversed the decree of the Surrogates' Court of the County of New York in the above entiled proceeding, dated June 15th, 1916, and filed and entered in the office of said Surrogates' Court on the 16th day of June, 1916, and from each and every part of said order of the Appellate Division.

Notice of Appeal of Dorothy Elizabeth Smith. 235

Dated April 5th, 1917.

Yours &c.,
DUER, STRONG & WHITEHEAD,
Attorneys for Dorothy Elizabeth Smith,
No. 43 Exchange Place,
Borough of Manhattan,
New York City.

To:

STANCHFIELD & LEVY,
Attorneys for Gertrude Frances Browne and Gladys Mary Baylies, respondents, 236
No. 120 Broadway,
New York City.

JAMES W. PRENDERGAST, ESQ.,
Attorney for Stevenson Scott,
as Executor and Trustee,
25 Broad Street,
New York City.

CHARLES H. BECKETT, ESQ.,
Attorney for Columbia Trust Company,
Trustee,
135 Broadway,
New York City.

EGERTON L. WINTHROP, JR., ESQ., 237
Special Guardian for Kenneth Charles Smith, infant,
32 Liberty Street,
New York City.

A. PERRY OSBORN, ESQ.,
Special Guardian for Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants,
14 Wall Street,
New York City.

238 **Notice of Appeal of Kenneth Charles Smith.**

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the
239 County of New York, deceased.

SIRS:

PLEASE TO TAKE NOTICE that the undersigned, special guardian for the infant, KENNETH CHARLES SMITH, in the above entitled proceeding, hereby appeals to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court, First Department heretofore made in the above entitled proceeding and dated herein on the 9th day of March, 1917, and filed and entered in the office of
240 the Clerk of the said Appellate Division on the 23rd day of March, 1917, modifying the decree heretofore made and entered herein in the office of the Clerk of the Surrogates' Court of the County of New York, on June 16th, 1916, and from each and every part of the said order of the Appellate Division, which modifies the said decree.

Notice of Appeal of Kenneth Charles Smith. 241

Dated, April 12, 1917.

Yours &c.,

EGERTON L. WINTHROP, JR.,
Special Guardian for Kenneth
Charles Smith, infant,
Office and Post Office address:
No. 32 Liberty Street,
Borough of Manhattan,
New York City.

To: 242

DANIEL J. DOWDNEY, ESQ.,
Clerk of the Surrogates' Court of New
York County,
Hall of Records,
Borough of Manhattan,
New York City.

MESSRS. DUER, STRONG & WHITEHEAD,
Attorneys for Dorothy Elizabeth Smith,
No. 43 Exchange Place,
Borough of Manhattan,
New York City. 243

MESSRS. STANCHFIELD & LEVY,
Attorneys for respondents Gertrude Frances
Browne and Gladys Mary Baylies,
No. 120 Broadway,
New York City.

244 *Notice of Appeal of Kenneth Charles Smith.*

JAMES W. PRENDERGAST, ESQ.,
Attorney for respondent Stevenson Scott as Executor and Trustee,
No. 25 Broad Street,
New York City.

CHARLES H. BECKETT, ESQ.,
Attorney for respondent Columbia Trust Company, Trustee,
No. 135 Broadway,
New York City.

245

A. PERRY OSBORN, ESQ.,
Special Guardian for Majorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants,
No. 14 Wall Street,
New York City.

246

Order of Reversal. 247

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, in the County of New York, on the 9th day of March, 1917.

PRESENT—

HON. JOHN PROCTOR CLARKE, P. J.
HON. FRANCIS M. SCOTT,
HON. ALFRED R. PAGE,
HON. VERNON M. DAVIS,
HON. CLARENCE J. SHEARN, JJ. 248

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

Appeals having been taken to this Court by Gertrude Frances Browne and Gladys Mary Baylies, by the Columbia Trust Company as Trustee, 249 by Stevenson Scott as Trustee, and by A. Perry Osborn as Special Guardian of Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants, from so much of the decree of the Surrogates' Court of New York County, dated June 15, 1916, and filed and entered herein in the office of the Surrogates' Court of the County of New York on June 16, 1916, as ordered, adjudged and decreed that

250

"the provisions of the subdivision designated 'Ninth' of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the Executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use
251 and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the will of the said Charles Frederick Fowles, deceased, are as followss the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal properety bqueathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said tetator."

And said appeals having been argued by George
252 L. Ingraham, of counsel for the appellants Gertrude Frances Browne and Gladys Mary Baylies, by Charles H. Beckett, of counsel for the appellant Columbia Trust Company as Trustee, by James W. Prendergast, of counsel for the appellant Stevenson Scott as Trustee, by A. Perry Osborn, Special Guardian for appellants Marjorie Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr., and Charles Ripley Baylies, infants, and by Selden Bacon, of counsel for the respondent Dorothy Elizabeth Smith, and by Egerton L. Winthrop, Special Guardian for

253

the respondent Kenneth C. Smith, an infant; and due deliberation having been had; it is hereby

ORDERED AND ADJUDGED, that so much of the decree of the Surrogates' Court of the County of New York, dated June 15, 1916, and filed and entered herein in the office of the Surrogates' Court of the County of New York on June 16, 1916, as ordered, adjudged and decreed that

> "the provisions of the subdivision designated 'Ninth' of the last Will and Testament of 254
> Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the Executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and the legacies which passed as aforesaid by virtue of the will of the said Charles 255
> Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said testator,"

be and the same is hereby reversed; and it is

FURTHER ORDERED AND ADJUDGED, that the Surrogates' Court of the County of New York be

256 *Order of Reversal.*

and it is hereby ordered and directed to enter a decree modifying the said decree dated June 15, 1916, and filed and entered June 16, 1916, by striking therefrom the provisions thereof set forth above from which this appeal was taken, and by inserting in place of said provisions the following:

"That the provisions of the paragraph designated 'Ninth' of the last Will and Testament of Charles Frederick Fowles, the
257 above-named decedent, are invalid and of no force and effect;

"That in default of proof that the testator's wife, Frances May Fowles, survived the testator, the property which constitutes the one-half of the corpus of the attempted trust for the benefit of the testator's wife, Frances May Fowles, (said one-half of said corpus being one-half of forty-five per centum of the net residuary estate) as to which one-half there was, in terms, conferred upon the testator's said wife, by paragraph 'Eighth' of the testator's will, the power to dispose by
258 last Will and Testament duly executed by her, passes by virtue of and pursuant to the further provisions of said paragraph 'Eighth', to wit,

"'In the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions, and such two equal portions to pay over pursuant to the povisions of subdivision 'B' and 'C' of this article of this my will, one such portion passing under

259

said subdivision 'B' and one such portion passing under said subdivision 'C';

"That, in default of proof that the testator's wife, Frances May Fowles survived the testator, the legacy of $5,000 bequeathed by subdivision 8 of the paragraph designated 'Second' of the testator's will and the personal property bequeathed by the paragraph designated 'Fourth' of the testator's will become a part of said net residuary estate of the testator by operation of law.

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and it is

FURTHER ORDERED AND ADJUDGED, that the decree provide for the payment to each of the appellants of the costs and disbursements of this appeal out of the estate, together with such allowances to the Special Guardians, for their services on this appeal, as may be fixed by the Surrogate.

Enter

J. P. C.

261

262 **Opinion of Shearn, J. on Reversal.**

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

February, 1917.

JOHN PROCTOR CLARKE, P. J.
FRANCIS M. SCOTT,
ALFRED R. PAGE,
VERNON M. DAVIS,
CLARENCE J. SHEARN, JJ.

263

IN THE MATTER

of the

Application to construe the Last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

Appeal from decree of Surrogate's Court construing decedent's will.

264 George L. Ingraham, for appellants Browne, et al.

Charles M. Beckett, for appellant trustee, Columbia Trust Company.

James W. Prendergast, for appellant Scott, trustee.

A. Perry Osborn, Special Guardian for infant appellants Marjorie F. S. Browne, et al.

Seldon Bacon, for respondent Dorothy E. Smith.

Egerton L. Winthrop, Special Guardian for infant respondent Kenneth C. Smith.

SHEARN, J.:

The decree appealed from was made by the Surrogate's Court, construing the will of Charles Frederick Fowles, deceased, in a proceeding under Section 2615 of the Code of Civil Procedure. The decree so far as appealed from relates solely to the disposition of (1) a legacy of $5,000 and of 266 certain personal property, and (2) one-half of a trust fund comprising forty-five per cent. of the residuary estate. The appellants, Gertrude Frances Browne and Gladys Mary Baylies, are the testator's daughters. Their mother died during the life time of the testator and he married again, his second wife being Frances May Fowles. There were no children of such second marriage. The testator and the second wife died in a common disaster when the "Lusitania" was sunk on May 7, 1915, both leaving wills dated April 30, 1915. The testator's will contained, among other provisions, a general legacy of $5,000 to his wife, 267 and also contained a direction to his executors to divide his residuary estate into three parts, the first of which should consist of forty-five per cent. thereof, and the other two parts of which should each consist of twenty-seven and one-half per cent. thereof. It directed his executors to pay over to certain trustees named in the will the forty-five per cent. of the residuary estate as a trust fund, the income of which should go to the testator's wife during her life, and it in terms

conferred upon her a power to dispose by her will of one-half of the corpus of such trust. The will contained an alternative provision that in the event that the testator's wife did not exercise the power, the portion of the trust fund to which the power related should be divided into two equal parts, which should be respectively paid into two other trust funds which the will created for the benefit respectively of his two daughters during their lives, and upon their death to their children. The will further provided that the second
269 and third parts of the residuary estate, each consisting of twenty-seven and one-half per cent, should be paid over to said trustees in two separate trusts respectively; one trust for the benefit of one of his two said daughters, Gertrude Frances Browne, to receive the income during her life, the principal on her death to go to her children; the other trust for the benefit of his other daughter, Gladys Mary Baylies, to receive the income during her life, the principal on her death to go to her children. The terms conferring upon the wife the power to dispose by her will of one-half of the corpus of her trust
270 estate, together with the alternative provision in the event that the power was not exercised, are as follows:

> "Upon the death of my said wife, the said trust shall cease and determine and the corpus of same I direct my said trustee to then dispose of, as follows:
>
> "One-half thereof to pay over pursuant to the provisions of such last Will and Testamen as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and

Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two qual portions and such two equal portions to pay over pursuant to the provisions of subdivision 'B' and 'C' of this article of this my will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C'."

The provisions "B" and "C" referred to are 272
those providing for the payment of the second and third parts of the residuary estate, each consisting of twenty-seven and one-half per cent., to trustees for the benefit of the testator's two daughters. By paragraph Ninth, the testator attempted to create a presumption to be binding upon the Court in the event of his death and that of his wife under such circumstances that it should be difficult or impossible to determine which died first. This paragraph reads as follows:

"NINTH.—In the event that my said wife 273
and myself should die simultaneously or under such circumstances as to render it impossible or difficut to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

The will of the testator's wife, Frances May Fowles, contained a provision by which the testatrix attempted to exercise the power conferred upon her by her husband's will, in part as follows: "Any and all the rest, residue and remainder of my estate, real and personal and wheresoever situate (including any and all property as to which I may have power of disposition by will by virtue of the provisions of the last Will and Testament of my husband, Charles Frederick Fowles), I give and bequeath to my trus-
275 tees, hereinafter named, In Trust, Nevertheless, to hold and invest the same for the use and benefit of my sister, Dorothy Elizabeth Smith," to receive and pay over the income to said Dorothy Elizabeth Smith during her life, and upon the death of Dorothy Elizabeth Smith to pay over the corpus of the trust, one-third to the son of Dorothy Elizabeth Smith, or to his issue, one-third to Gertrude Frances Browne, the daughter of the husband of the testatrix, or to her issue, and one-third to the other daughter, Gladys Mary Baylies, or to her issue.

Both wills were duly admitted to probate in
276 New York County. It is conceded that no facts have come to light from which any inference can be drawn as to whether Mr. and Mrs. Fowles perished at the same moment or one predeceased the other, nor as to the sequence of their deaths. The learned Surrogate consequently, following the established rule in this State, correctly held that there was no presumption that Mrs. Fowles survived her husband; also that as the power did not come into being until the death of Mr. Fowles, and could not be exercised until it did so come into being, and as the will of Mrs. Fowles could

not be effective as an exercise of the power given by her husband's will unless she did survive him, it followed that her will did not constitute an exercise of that power. The Surrogate also correctly held that under well settled principles of law and from considerations of public policy, the ninth paragraph of Mr. Fowles' will could not be given effect, either as an attempt to change the substantive law applicable in the event of the simultaneous deaths of the testator and his wife, or as an attempt to create a presumption to bind the Court in the absence of evidence as to 278
which of the two died first, and that notwithstanding paragraph Ninth the rule of law as to the effect of simultaneous deaths and the rule as to the pesumption, in the absence of evidence as to priority of death, was the same as if paragraph Ninth had not been contained in the will. Notwithstanding these rulings, the learned Surrogate held that paragraph Ninth of the will of Mr. Fowles, in order to prevent an assumed lapse and to carry out what the Surrogate considered to be the intent of the testator, should be given effect as a "substitutional" provision, and should be construed as though it had provided that in the event 279
of the simultaneous deaths of Mr. and Mrs. Fowles, or in the event of their deaths under such circumstances that the respective priority of their deaths could not be ascertained, the $5,000 legacy and the beneficial interest under the forty-five per cent trust should go to the executor named in Mrs. Fowles' will, to be disposed of in accordance with the terms of her will. Accordingly, it was

"Ordered, adjudged and decreed that the provisions of the subdivision designated

'Ninth' of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the executor of the last Will and Testament of the said Frances May Fowles, for the use and purposes prescribed in and by the will of the
281 said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the will of the said Charles Frederick Fowles, deceased, are as follows: the sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth' and one-half of forty-five per cent. of the residuary estate of the said testator."

The underlying and basic grounds for the construction adopted by the learned Surrogate are
282 the supposed intent of the testator, to be gathered from the instrument itself, and the assumption that this construction is necessary to avoid a lapse. For any intent on the part of Mr. Fowles that any part of his estate should go to his wife's sister, Dorothy Elizabeth Smith, or to any child of his wife's sister, the testament will be scanned in vain. A few simple words would have effectuated such an intention, but any such words are carefully omitted. The only possible way of finding any such intent is to incorporate into the testator's will the provisions of the wife's will,

which is contrary to the established rule in this State forbidding the incorporation into a will, by reference, of any extraneous instrument containing provisions of a testamentary character (Booth *v.* Baptist Church, 126 N. Y. 215, 247; Matter of O'Neil, 91 N. Y. 516, 523; Matter of Emmons, 110 App. Div. 701). But, says the learned Surrogate:

> "In no event did he intend that these legacies should accrue by his will to his own next of kin. When this is certain beyond all pre- 284
> adventure, the Court should not be astute to find reasons for benefiting directly those whom in no event testator himself wished to be benefited."

On the contrary, the testator expressly provided that in the event that his wife should fail to make testamentary disposition of the one-half of the trust fund, as to which the power was given, it should be divided into two equal portions and paid over to trustees for the benefit of the testator's two daughters. The plain intent of the testator was that his wife should have the power to dispose of one-half of the trust fund by will 285
and that she should consult her own wishes in so doing, not that she should dispose of it to any persons in the mind of or selected by the testator or to the exclusion of any persons in the testator's mind. The testator accordingly, and perfectly naturally, contemplated that his wife might fail to make a valid will and also that, if she made a will, she might change her mind and destroy the will. In either of such contingencies,

it is only fair to assume that the testator intended what he so plainly expressed, namely, that the one-half of the trust fund should go to his daughters. Least of all is there any intimation of intent in the will that one-half of the trust fund should go to the executors named in any will that his wife might make. Not only are the executors of Mrs. Fowles not mentioned in the testator's will, but the express provision of paragraph Eighth is that one-half of the trust fund should be paid over "pursuant to the provis-
287 ions of such last Will and Testament as my said wife may leave." But as such a provision could only be given effect by incorporating the wife's will in that of Mr. Fowles, which is illegal, it is assumed that the testator must have known that if the property did go in accordance with the wife's will (although a provision to that effect was invalid), it would necessarily go to the executors and trustees named therein. Accordingly, it is concluded that the intention of the testator was to devise the property to the executors and trustees under the wife's will. This strains "construction" beyond permissible limits, where there
288 are no words in the will expressing any such intent and where the only purpose of such a construction and the effect of it is to dispose of the testator's property in accordance with the provisions of some other will, a result that is not sanctioned by the law. This is not will construction but is tantamount to making for the testator a new will. If it be asked, what then was the purpose of the testator in adding paragraph Ninth to his will, the answer is that it was an attempt to incorporate in his will the

provisions of any will that his wife might leave, whatever they might be with respect to one-half of the trust fund, the objects of her bounty being indifferent to the testator. In other words, in such event, the disposition of this one-half of the trust fund was to accord with the intent of the wife as expressed in her will, and was not to be governed by any expressed intent or wish of the testator. But any such purpose could only be effected by the wife's exercise of the power conferred and was utterly ineffective and inoperative so far as dependent upon an incorporation of the 290
terms of the wife's will into that of the testator. Seeking the objects of the testator's bounty from the will itself, as we must, and without resort to extraneous writings, there is not a line in it pointing either to the sister of the testator's second wife or to the wife's executors.

So far as concerns the assumption of a lapse or partial intestacy which this construction is adopted to avoid, there is no basis for it whatever. In the first place, the aassumption of a lapse presupposes an intent on the part of the testator that a part of the corpus of the trust estate should go to Dorothy Elizabeth Smith, the 291
wife's sister, and there was no such intent expressed or intimated. The other basis for the assumption of a lapse or partial intestacy is that if the imaginary legacy to Dorothy Elizabeth Smith failed, such part of the trust fund would lapse into the residuary estate, but (as pointed out above, the Eighth paragraph of the will expressly provides that if Mrs. Fowles should fail to make testamentary disposition of the one-half of the trust fund (and she did fail, because she did

not exercise the power conferred), this part of the trust fund passed to the testator's trustees for the benefit of his two daughters. Clearly, therefore, the supposed lapse, to prevent which such an artificial construction has been given to the will, is non-existent.

The learned Surrogate based his decision upon Matter of Piffard, 111 N. Y. 410, which was regarded as controlling and decisive. A careful consideration of the case will demonstrate that it affords no authority for the construction given
293 by the Surrogate to the will of Mr. Fowles. The will of the testator in the Piffard case contained an express devise of his property to the executors named in his daughter's will. This provision was reaffirmed in a codicil executed by the testator after the daughter's death. Further, it appears from the opinion of Judge Finch that the Court of Appeals regarded the decision as extending to the utmost limits the rule of so construing a will as to avoid intestacy and that the decision was reached only to avoid intestacy. In the Piffard case, the will provided:

294 "I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters in the case of the death of them or either of them in my life time instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally as now provived in and by my said will."

295

In a codicil the testator affirmed this bequest:

> "I do hereby direct that my said daughters Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will; and to that end I direct that such share or shares shall be paid over to my said executors to the executors or trustees
296
named in and by the several wills of my said daughters in case of the death of them or either of them in my life time, instead of to my daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally, as now provided in and by my said will."

Subsequently the daughter Sarah Piffard dies and the testator, with knowledge of her death, reaffirmed his will by two further codicils. The Court of Appeals, admitting that the power conferred upon the daughter to dispose of the share
297
of the estate bequeathed to her had failed, held that the bequest passed to her executors, as distinctly provided in the will. The Court said, per Finch, J.

> "While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father

a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of
299 the death of the daughter in his life time. What she would have done by her will but could not, that he did for her by his own will."

Previously in his opinion it appears that Judge Finch laid great emphasis on the codicil:

"Yet—the further language of the codicil shows its intent to be that, in case of the death of the daughter in the life time of the father, the latter intended to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in
300 such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct, in the disposition of her own property; and 'to that end', in aid of that result, he explicitly declares that the one-fifth given to her shall be paid over to her executors for the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property

at her death, and had become distributable as such by force of her will."

The difference between the Piffard case and the case at bar are fundamental. In the Piffard case, the testator knew who would benefit under the daughter's will because she pre-deceased him, and with such knowledge the testator thereafter by codicil reaffirmed his will. In the Piffard case, but for the construction given the will, intestacy would have resulted. This factor, as we have shown, is not present in the case at bar, for the 302
testator provided for an alternative gift to the trustees for the benefit of his daughters upon the failure of the power. In the Piffard case, the testator, in the event that his daughter pre-deceased him, made his bequest directly to her executors instead of to the daughter. In the case at bar, the testator has not only provided against intestacy, but did not make his bequest to his wife, in the event of her death, in the alternative to her executors, but according to the provisions of her will. The Piffard case should not be extended, for to do so would change the law of the State and open the door to the rejected doctrine 303
of incorporation by reference. Three years after the decision of the Piffard case, Judge Finch wrote the opinion of the Court of Appeals in Booth v. Baptist Church, supra, in which there was restated and reaffirmed the rule that the provision of another instrument cannot be incorporated by reference in a will. In his opinion in the Booth case, Judge Finch did not refer to the Piffard case, and it is evident that he did not regard the Piffard case as involving the question of incorporation by reference.

304 *Opinion of Shearn, J. on Reversal.*

Two other cases cited in the Surrogate's opinion to support his construction of this will are Young Women's Christian Home v. French, 187 U. S. 401, and St. John vs. Andrews Institute, 191 N. Y. 254. In the first of these two cases, the terms of the will showed clearly that the intent of the testatrix was to devise her property to the Young Women's Christian Home, in the event of the contingency which actually occurred. The only difficulty presented was that through an obvious inadvertence, apparent upon the face of
305 the will and in no way obscuring the intent of the testatrix, there was a failure to use the precise language which would meet the situtaion which actually occurred. In order to prevent a lapse, the court construed the will as though the words thus inadvertenty omitted had been contained in the will. The St. John case turned upon the validity of the testator's gift to a charitable corporation to be created after the testator's death under directions contained in his will, and did not involve the questions presented in the case at bar.

In Condit v. DeHart, 62 N. J. Law, 78, a power
306 of appointment was given the son by a first codicil to his father's will. The son subsequently died first, leaving a will containing an attempted execution of the power. After the son's death, the father executed a second codicil in which he said of the power previously given the son by the first codicil, 'which codicil I do now in all respects ratify and confirm.' Respondents cite this case in support of the Surrogate's decision, but its force is destroyed by the fact that after the death of the son the testator reaffirmed his first codicil;

also by the policy of our law with respect to incorporating in a will extraneous writings.

It seems to us, therefore, that the construction given to the will in the case at bar was unwarranted either in principle or by authority.

It is further contended that the two bequests of the 22½% of the residuary estate to trustees for the testator's two daughters and their issue in case Mrs. Fowles failed to make testamentary disposition thereof could become effective only on affirmative proof that Mrs. Fowles failed to make such testamentary disposition. In other words, 308
it is claimed that the burden of proof is upon the daughters to show that Mrs. Fowles predeceased her husband. This contention is not well founded. By the will, as we have seen, the testator expressly provided that if the wife failed to exercise the power, the bequest should go to trustees for his two daughters. Under that provision of the will, it was necessary for those claiming under the wife's will to prove that the wife had exercised that power. In the absence of such proof, the alternative provision in the testator's will took effect. The appellants are not basing any claim upon the fact that the wife 309
did or did not survive the testator. In the absence of any proof of the exercise of the power of appointment by the wife, the will of the testator itself disposed of the property, and the burden was on any person claiming under the exercise of the power to establish that the power was executed.

In so far as the validity of any devise of real estate in England is concerned, the law of England will govern, and, at least on this record, the courts of this State have no concern with it.

310 *Opinion of Shearn, J. on Reversal.*

With respect to the specific legacy of $5,000 to the testator's wife, and the personal property bequeathed by the fourth paragraph of the will, consisting of the personal property of the testator upon his English estate, these legacies, in default of any proof that Mrs. Fowles survived the testator, become a part of the residuary estate by operation of law.

The decree of the Surrogate is, therefore, reversed, with costs to the appellants payable out of the estate, with instructions to the Surrogate's
311 Court to enter a decree directing the executors to transfer to the trustees one-half of 45% of the residuary estate pursuant to the eighth paragraph of the will.

Clarke, P. J.; Scott & Davis, J. J., concur.

312

SUPREME COURT,

APPELLATE DIVISION, FIRST DEPARTMENT,

February, 1917.

John Proctor Clarke, P. J.
Francis M. Scott.
Alfred R. Page.
Vernon M. Davis.
Clarence J. Shearn, JJ.

314

IN THE MATTER

OF

The application to construe the Last Will and Testament of Charles Frederick Fowles, late of the County of New York, deceased.

PAGE, J.:

I dissent. The "ninth" clause of the will of Charles Frederick Fowles is in my opinion neither 315
an attempt by the testator to change the law applicable to deaths by common disaster by creating a presumption binding upon the courts, nor an attempt to incorporate into the will by reference the provisions of another will. The provision is merely a clearly expressed declaration of the testator's intention with respect to the disposal of his property in the event named, which event has come to pass. The will states: "Ninth:

In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other * * * it shall be deemed that I shall have predeceased my said wife.' In other words, the testator said, if my wife and I should die in a common disaster and it cannot be determined which of us died first, I direct that my property be disposed of in the same manner in which the law would have disposed of it had I died first. He does not enjoin
317 the courts to indulge in a presumption as to who died first. On the contrary, he recognizes that the Courts could not legally adopt such a presumption, and requests them to indulge in a fiction for the purpose of effectuating his intention with respect to his property. The creation of a fiction is not an uncommon method of testamentary expression. We frequently find and give effect to such provisions as, for example, that a testator's property be distributed in certain events and at a time long subsequent to his death as if he "had then died intestate and without issue," or provisions that a child of the testator
318 shall in a certain event "be deemed to have survied" him for the purpose of distributing his estate. To execute such directions, we must assume a situation which is contrary to the actual facts and contrary to the result which would flow as a matter of law from the facts as they actually exist, and apply the law as if the fiction created by the testator were fact. This we frequently do in order to give effect to the right of every man to dispose of his property in accordance with his intention clearly expressed by will, provided such intention does not contravene

either a rule of law or of public policy. The provison of the "ninth" clause of the testator's will in the present case does not create a result which is contrary to public policy or good morals. The rule of law applicable to the actual facts is not material, for the testator does not request the court to apply a presumption to the actual facts, but to assume, in construing his will and distributing his property, a state of facts contrary to the actual facts and founded in pure fiction. This I think the court should do in accordance with the directions of the will. 320

If it be deemed that the testator's wife, Frances May Fowles, survived him, then her will, which in express terms purports to execute the power of appointment granted to her by the will of the testator, Charles Frederick Fowles, is a proper instrument in execution of the said power of appointment. The fact that at the time when her will was executed the power had not then vested in her is immaterial (Hirsch v. Bucki, and authorities therein cited and discussed, 162 App. Div. 658-665).

Therefore, though I do not concur in the opinion of the learned Surrogate of New York County, 321 nor in the reasoning whereby he derived his result. I think the property which was subject to the appointment of Frances May Fowles by will should be transferred to the executors named in her will for distribution in accordance with her testamentary directions.

322 **Stipulation Waiving Certification.**

IT IS HEREBY STIPULATED, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notices of appeal of Dorothy Elizabeth Smith and Kenneth Charles Smith, the final order of the Appellate Division appealed from, and the record on appeal in the said Appellate Division upon which said Court acted in making the order appealed from, and of the whole thereof, all on file in the office of the Clerk of the County of New York, and of the opinions of the Appellate Division, and certification thereof, pursuant to Section 1353 of the Code
323 of Civil Procedure, is hereby waived.

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Special Guardian for Kenneth Charles Smith, infant.

STANCHFIELD & LEVY,
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A. PERRY OSBORN,
Special Guardian for Marjorie
324 Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr. and Charles Ripley Baylies, infants.

JAMES W. PRENDERGAST,
Attorney for Stevenson Scott, as Executor and Trustee.

CHARLES H. BECKETT,
Attorney for Columbia Trust Co. Trustee.

COURT OF APPEALS

STATE OF NEW YORK.

IN THE MATTER

of

The Application to Construe the last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

DOROTHY ELIZABETH SMITH, and KENNETH CHARLES SMITH, by his Guardian EGERTON L. WINTHROP,
Appellants,

MARJORIE F. S. BROWNE, JEAN C. BROWNE, HENRY L. BAYLIES and CHARLES R. BAYLIES, by their guardian A. PERRY OSBORN, GERTRUDE F. BROWNE, GLADYS M. BAYLIES, THE COLUMBIA TRUST COMPANY, as Trustee, and STEVENSON SCOTT, as Executor and Trustee,
Respondents.

BRIEF FOR APPELLANT DOROTHY ELIZABETH SMITH.

This is an appeal from a decision of the Appellate Division for the First Department reversing (by a divided Court) a decision of the Surrogate's Court for New York County construing a will in a proceeding to construe the will instituted by the

executor under the provisions of Section 2615 of the Code of Civil Procedure.

STATEMENT OF FACTS.

The provisions and conditions out of which the controversy has arisen are as follows:

The testator, Charles Frederick Fowles, of New York, and his wife, Frances May Fowles, on April 29th, 1915, two days before sailing for England on the Lusitania, went to the office of their attorneys in New York and gave instructions in each other's presence for drafting their respective wills. On the following day in each other's presence and before common witnesses they executed their respective wills. Each was thus familiar with the terms of the other's will.

The following day they sailed on the Lusitania and both perished in the destruction of the Lusitania on May 7th, 1915. Despite careful investigation no facts have come to light from which any inference can be drawn as to whether they died at the same instant or one predeceased the other or as to the sequence of their deaths.

The parts of the will of Mr. Fowles material to the controversy are:

1. In paragraph Second a direct legacy to his wife of $5,000.

2. In paragraph Fourth a direct legacy to his wife of the personal property situate on his English estate of Fairmile Court, except oil paintings.

3. In paragraph Eighth a bequest to his testamentary trustees of 45 per cent. of his residuary estate,

> "In trust, nevertheless, for the use and "benefit of my wife, Frances May Fowles, to "hold and invest the same and to collect and

"receive any and all the income, interest and "increment accruing thereon and the same to "pay over to my said wife semi-annually and "for and during each year of the full term of "the life of my said wife. Upon the death "of my said wife, the said trust shall cease "and determine and the corpus of same I di- "rect my said trustees to then dispose of as "follows:

"One-half thereof to pay over pursuant to "the provisions of such last Will and Testa- "ment as my said wife may leave (hereby con- "ferring upon my said wife the power to dis- "pose of the said one-half by last Will and "Testament duly executed by her), and in the "event that my said wife should fail to make "testamentary disposition of the said one- "half thereof, the same to divide into two "equal portions and such two equal portions "to pay over pursuant to the provisions of "subdivisions 'B' and 'C' of this article of "this my Will, one such portion passing under "said subdivision 'B' and one such portion "passing under said subdivision 'C' " (fols. 95-97).

Subdivision B, so referred to, created a trust for his daughter Mrs. Browne for life with remainder to her issue, while subdivision C created a trust for his other daughter Mrs. Baylies for life with remainder to her issue.

Then followed the Ninth clause of the will which has given rise to the different opinions, and which reads as follows:

"NINTH: In the event that my said wife "and myself should die simultaneously or un- "der such circumstances as to render it im- "possible or difficult to determine who pre- "deceased the other, I hereby declare it to be "my Will that it shall be deemed that I shall "have predeceased my said wife, and that this "my Will and any and all its provisions shall

"be construed on the assumption and basis "that I shall have predeceased my said wife" (fol. 103).

An important item of the residuary estate consisted of the English real estate Fairmile Court, which the testator authorized his widow to take (at her election) at a valuation of £8,250. As Mrs. Fowles never exercised this election, that special provision in favor of Mrs. Fowles disappears. But the existence of this English real estate, which becomes a part of the residuary estate, presents, under the Appellate Division decision, a special question, owing to the English law permitting the incorporation of the provisions of other instruments into a will by reference.

Mrs. Fowles' will, after making three small bequests, gave the residue of her estate in trust to pay the income to her sister, this appellant, for her life and then in equal thirds to this appellant's son (or his issue) and to Mrs. Fowles' two children, Mrs. Browne (or her issue) and Mrs. Baylies (or her issue). These provisions expressly included any and all property over which she was given a power of disposition by Mr. Fowles' will (fols. 109-112).

By an alternative clause Mrs. Fowles provided that if she predeceased her husband the foregoing provisions of her will should not be operative but her entire estate should go to Mrs. Smith (fols. 112-113).

Both wills have been probated in New York County.

The Surrogate held that the Ninth clause of Mr. Fowles' will could have no effect as a direction altering recognized rules of law or legal presumptions; that the clause was not to be regarded as such a direction but as providing, in the case speci-

fied, against lapse; and that the property directly bequeathed to Mrs. Fowles and also the 22½ per cent. of the residue over which she was given the power of appointment should, in this specified case, be turned over to her executors for distribution in accordance with her will. In reaching this conclusion the Surrogate placed much reliance on the decision of this Court in *Matter of Piffard*, 111 N. Y., 410 (fols. 187-230).

In the Appellate Division, Justice Page (in his dissenting opinion) reached an identical result by a different course of reasoning, which is not too long to quote *in extenso*:

> "The 'Ninth' clause of the will of Charles "Frederick Fowles is in my opinion neither "an attempt by the testator to change the law "applicable to deaths by common disaster by "creating a presumption binding upon the "courts, nor an attempt to incorporate into "the will by reference the provisions of an- "other will. The provision is merely a clearly "expressed declaration of the testator's in- "tention with respect to the disposal of his "property in the event named, which event "has come to pass. The will states: 'Ninth: "'In the event that my said wife and myself "'should die simultaneously or under such "'circumstances as to render it impossible "'or difficult to determine who predeceased "'the other * * * it shall be deemed that "'I shall have predeceased my said wife'. "In other words, the testator said, if my "wife and I should die in a common disaster "and it cannot be determined which of us "died first, I direct that my property be dis- "posed of in the same manner in which the "law would have disposed of it had I died "first. He does not enjoin the courts to in- "dulge in a presumption as to who died first. "On the contrary, he recognizes that the "courts could not legally adopt such a pre-

"sumption, and requests them to indulge in "a fiction for the purpose of effectuating his "intention with respect to his property. The "creation of a fiction is not an uncommon "method of testamentary expression. We "frequently find and give effect to such pro- "visions as, for example, that a testator's "property be distributed in certain events "and at a time long subsequent to his "death as if he 'had then died intestate and "'without issue', or provisions that a child "of the testator shall in a certain event 'be "'deemed to have survived' him for the pur- "pose of distributing his estate. To execute "such directions, we must assume a situation "which is contrary to the actual facts and "contrary to the result which would flow as "a matter of law from the facts as they actu- "ally exist, and apply the law as if the fiction "created by the testator were fact. This we "frequently do in order to give effect to the "right of every man to dispose of his prop- "erty in accordance with his intention "clearly expressed by will, provided such in- "tention does not contravene either a rule "of law or of public policy. The provision "of the 'ninth' clause of the testator's will "in the present case does not create a result "which is contrary to public policy or good "morals. The rule of law applicable to the "actual facts is not material, for the tes- "tator does not request the court to apply "a presumption to the actual facts, but to as- "sume, in construing his will and distrib- "uting his property, a state of facts con- "trary to the actual facts and founded in "pure fiction. This I think the Court should "do in accordance with the directions of the "will" (fols. 315-319).

Justice Shearn, with whom the other three Justices of the Appellate Division concurred, discussed the case at great length and the substance

of his opinion may be briefly summarized as follows:

1. There was no presumption of survivorship.
2. That, inasmuch as there was no proof that Mrs. Fowles survived her husband, her will did not constitute an exercise of the power of appointment.
3. That the ninth clause could not legally be given effect as changing the substantive law applicable in the case of simultaneous deaths, or as an attempt to create a presumption of survivorship to bind the court. That the rule of law as to the effect of simultaneous deaths and the presumption in the absence of evidence of priority was the same as if paragraph Ninth had not been contained in the will.
4. That no intent was declared *in Mr. Fowles' will* that any part of his estate should go to his wife's sister or to her son (the appellants here), but the only way to find such intent was to incorporate Mrs. Fowles' will by reference, and this would be contrary to our statute.
5. That Mr. Fowles' intent was that if his wife failed to make a testamentary disposition of the 22½ per cent., it should go to his trustees for his own daughters and their issue.
6. That no intent is even intimated that the 22½ per cent. instead of lapsing should be paid over to his wife's executors.
7. That, there being no proof that Mrs. Fowles survived her husband, there was the *failure* to exercise the power contemplated by the alternative provision in the Eighth clause of the will.

8. That the Piffard decision rested on different principles because there was there an express devise to the daughter's executors, and because the alternative was partial intestacy.

9. That the Courts of this State have no concern with the effect of the will on the English realty.

10. That the legacies of $5,000 and of the Fairmile Court personalty to Mrs. Fowles lapsed under the circumstances and became part of the residuary estate (fols. 265-311).

Upon these doctrines the Appellate Division reversed the order of the Surrogate and ordered that no part of Mrs. Fowles' estate should pass to the executors or trustees under Mrs. Fowles' will, or so enure to the benefit of Mrs. Smith or her son.

From that order this appeal has been taken by Mrs. Smith and a like appeal has been taken by her son.

POINT I.

Concerning the evidence taken upon the hearing.

As no objections were taken to the admissibility of any of the evidence offered by the respondent, no question can now be raised. Nor has any point of that character been raised by any appellant. Even if objections had been made, that testimony would have all been competent as well as relevant. For it related exclusively to the surrounding circumstances under which Mr. Fowles executed his will. The following author-

ities, we believe, govern every feature of possible objection, and establish the propriety of this testimony:

Morris v. Sickly, 133 N. Y., 456;
Stuart v. Brown, 11 A. D., 492;
Bumpus v. Bumpus, 79 Hun, 526.

The only testimony, as to which question could have been raised, was that brought out by the respondent Scott, without objection. Even this the Surrogate disregarded as irrelevant. The surrounding circumstances attending the execution of the will are thus properly before this Court.

POINT II.

The ninth clause of the will of Mr. Fowles makes express provision for the case that has arisen, of deaths of himself and his wife under such circumstances that it is difficult or impossible to determine which died first. And the intention of the testator as to the disposition of his property under such circumstances must be sought in that clause, whether its directions be valid or void.

It is generally of great assistance in solving legal complexities to sift out the matters over which there can be no dispute from those open to question. On the present appeal we think this is peculiarly the case.

The category of possible conditions as to priority of deaths of Mr. and Mrs. Fowles provided for in his will is exhaustive. The will provides for three cases, as follows:

1. Ascertained prior death of Mr. Fowles.

2. Simultaneous deaths or deaths under circumstances rendering it impossible or difficult to determine which died first.

3. Ascertained prior death of Mrs. Fowles.

In the first case the will of Mr. Fowles leaves nothing to surmise. Its provisions are direct, clear and positive. The same is true of the third case.

There is no claim by any one that there is any direct evidence establishing either the first or the third case except as the Ninth clause may require admission and finding of the fact, or that there is any presumption indulged by our Courts tending to establish the existence of any actual priority or anything equivalent thereto, aside from the provisions of the Ninth clause of the will.

In our courts the rule against any legal presumption of priority is settled:

> "There is no legal presumption which "courts are authorized to act upon that there "was a survivor any more than that there "was a particular survivor. * * * The "rule is that the law will indulge in no pre-"sumption on the subject. It will not raise "a presumption by balancing probabilities "either that there was a survivor or who it "was."
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> *Newell v. Nichols*, 75 N. Y., 78;
> *Y. W. C. Home v. French*, 187 U. S., 401;
> *St. John v. Andrew's Inst.*, 191 N. Y., 254, 272;
> *Southwell v. Gray*, 35 Misc., 740;
> *Matter of McInness*, 119 A. D., 440.

It is only the second case provided for in the will and the result therefrom required by the

will, that is possible either in point of fact or of application of law. For this case of uncertainty as to priority of death provision was expressly made by the testator in the Ninth Clause of his will, which reads:

> "NINTH: In the event that my said wife "and myself should die simultaneously or un- "der such circumstances as to render it im- "possible or difficult to determine who pre- "deceased the other, I hereby declare it to "to my will that it shall be deemed that I "shall have predeceased my said wife, and "that this my will and any and all its pro- "visions shall be construed on the assump- "tion and basis that I shall have predeceased "my said wife."

We are not, for the moment, discussing the legality, or the effect of the provision the testator so made. Those questions we shall take up hereafter under separate points. The point we make now is simply that Mr. Fowles did declare expressly *an* intention (whatever it was or is to be construed to have been, and whatever its legality or illegality), as to the disposition to be made of his property in the particular case that has arisen. And this provision clearly precludes the imputation to him, by construction of the Eighth clause, of a contrary intent in the case that has arisen and for which he expressly provided.

In this respect the opinion of Justice Shearn at an important point seems to us to run counter to one of the most firmly established rules of construction of wills. If we correctly understand the course of his opinion, he first holds that the ninth clause is invalid, and then construes the eighth clause, as if paragraph ninth had not been contained in the will; holding that the words "in "the event that my said wife should *fail to make* "testamentary disposition of the said one half "thereof" cover and include the case of impossi-

bility of determining whether she survived the testator or not, on the theory that a failure of affirmative proof of exercise of the power, because priority of death cannot be established by evidence, is equivalent to proof of a failure to exercise it.

This method of construction of the Eighth clause we believe to be directly contrary to the settled law of this State. As we understand the law the intent and purpose of the will should first be gathered from the entire instrument, and not merely from those clauses whose validity and operative effect are sustained by the court. Whether it be valid or void the provisions of the Ninth clause may not be ignored in construing the provision of the Eighth clause covering the case of *failure* of Mrs. Fowles to make testamentary disposition of the 22½ per cent. of the residue. In a well-known case this court held:

> *"Our duty is to ascertain the testator's "intent from an inspection of the will, and "for this purpose we must read the whole "instrument, including the provisions admit- "ted to be void. Those provisions, though "ineffectual to dispose of the property, can- "not be obliterated when examining it for "the purpose of ascertaining the testator's "intention."*
>
> *Tilden v. Green,* 130 N. Y., 29, 55.

Nor was this doctrine any novelty. It has been the settled law of the State for more than three-quarters of a century.

Van Kleeck v. Dutch Church, 20 Wend., 457, 497;
Wetmore v. Parker, 52 N. Y., 450, 464;
Kiah v. Grenier, 56 N. Y., 220;
Catt v. Catt, 118 A. D., 742, 750;
Marks v. Halligan, 61 A. D., 179, 181;
Martin v. Pine, 79 Hun, 426, 431.

The provisions of the Eighth clause may not be made applicable to cases to which they were expressly made inapplicable by the Ninth clause, even though the affirmative disposition of the property made by the Ninth clause under the conditions there specified be held invalid.

POINT III.

The intention (irrespective of all questions of valiidity or legality of such disposition), which the testator actually declared was: That, under the conditions that have arisen, his property should go as it would have gone had his wife been shown to have survived him, and not otherwise.

The alternative bequests in the eighth clause in case of his wife's *failure* to make testamentary disposition were statedly intended to become operative only in case of her *actual failure* to make testamentary disposition of such property and not in case of mere uncertainty as to whether she had survived the testator.

The Ninth clause of the will reads:

> "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other,
>
> *"I hereby declare it to my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."*

The testator has here expressly stated that the provisions of the Eighth clause covering the case of failure on the part of Mrs. Fowles to make testamentary disposition of the 22½ per cent. of the residue are to be construed as not applicable to the case of a constructive failure arising solely from lack of proof as to priority of his death.

The testator had the power and the right, if he so chose, to impose this limitation on his own phraseology in the Eighth clause. He might have done this even had the words themselves in good English been susceptible of but one proper meaning, and that not the meaning he chose to give them.

> *De Kay v. Irving,* 5 Den., 646, 655;
> *Hone v. Van Schaick,* 3 N. Y., 538, 540-541.

But here we are dealing with words which, by themselves, apart from the Ninth clause, might be construed in either of two ways. In the strictest sense, the words used, "in the event "that *my said wife should fail* to make testamen- "tary disposition," provide only for the case of an actual failure *on the part of the wife* to *do* something and certainly not for that of a failure of proof whether she had survived him. The Appellate Division has, however, given the words the broader meaning: "If it shall not be established that she made a testamentary disposition."

The words are certainly susceptible of the stricter meaning. And it is at this point that

the testator stepped in and said: If this case of uncertainty of prior death ever arises, the Eighth clause shall *not* be construed to apply to it as a case of failure to make testamentary provision; but "shall be construed on the basis and assumption" that it is not a case of failure on my wife's part to make disposition but one of my prior decease. It would be difficult to be more specific than the will itself is. The words are peculiarly apt to this feature of *construction* of the Eighth clause. The testator expressly prohibited the construction which the Appellate Division has given to the phrase "in the event that my said "wife should fail to make testamentary disposi-"tion" and expressly directed that the other construction should be given, and that the alternative bequest should *not* be operative under the circumstances that have arisen.

There is no obscurity about Mr. Fowles' *actual* intention as disclosed in the Ninth clause. It is absolutely clear and definite. If those circumstances arise, he says, I want my property to go just as it would have gone were it shown that my wife had survived me for a few moments. I do not wish its disposition to be determined by complex rules which will defeat what I have planned. I want it to go as it would have gone if proof had been supplied that I had died first.

This fact of the testator's clearly declared intention is the central and cardinal fact in the case.

That this intention was declared by the Ninth clause is not denied in Justice Shearn's opinion. He has only veiled its existence from his own perception, when he comes to draw deductions, by saying in his opinion:

> "For any intent on the part of Mr. Fowles "that any part of his estate should go to his

> "wife's sister, Dorothy Elizabeth Smith, or "to any child of his wife's sister, the testa- "ment will be scanned in vain. A few sim- "ple words would have effectuated such an "intention, but any such words are care- "fully omitted. The only possible way of "finding any such intent is to incorporate "into the testator's will the provisions of "the wife's will" (fol. 282).

It is, of course, true that Mr. Fowles' will does not mention Mrs. Smith in connection with this 22½ per cent. But it is also true that Mr. Fowles in his will said he did *not* intend, in the case that has arisen, that his property should go as if he had died last or died simultaneously, but that he *did* intend that it should go as it would have gone had he died first. And that fact Justice Shearn veiled from himself by saying he could not find any language in Mr. Fowles' will giving this property to Mrs. Smith. He therefore obliterated the Ninth clause from his consideration contrary to the established rule.

Whether the provision of the Ninth clause is a legally operative provision is another question. But it certainly renders unsound, in the case that has arisen, the proposition advanced in the opinion below that:

> "The Eighth paragraph of the will ex- "pressly provides that if Mrs. Fowles should "fail to make testamentary disposition of "the one-half of the trust fund (and she did "fail, because she did not exercise the power "conferred), this part of the trust fund "passed to the testator's trustees for the "benefit of his two daughters" (fols. 291-292).

That conclusion, that uncertainty as to which died first is a failure on Mrs. Fowles' part to

exercise the power, is in direct conflict with the intention declared in the Ninth clause. And that conclusion was obviously arrived at by first holding the affirmative disposition made by the Ninth clause invalid and legally inoperative, and then, having held it illegal, "obliterating" from consideration its positive prohibition against giving to the Eighth clause the construction that has been given to it by the majority of the Justices of the Appellate Division.

If we are right in this, the alternative legacy in the Eighth clause clearly did not become operative. The condition precedent, clearly limited by the testator by the Ninth clause to actual failure to exercise the power, established by proof, has not occurred.

The disposition of the property in question directed by the Appellate Division is thus in any event unauthorized. The construction adopted by the majority of the Appellate Division conflicts with the declared intent of the testator and is, therefore, neither a tenable nor the true construction of the will. One of the buttresses of Justice Shearn's argument against this appellant has fallen. The order appealed from is in conflict with the expressly declared intent of the testator, and not, as the Appellate Division held, a carrying out of an alternative intention clearly declared by him for such a case as the present; for he had declared plainly and expressly that such was not his intent in that case.

The issue as to the 22½ per cent. of the residue is, between, on the one hand, sustaining and enforcing the Ninth clause, and, on the other, intestacy.

POINT IV.

As to the legacies of $5,000 and of the Fairmile Court personalty, the intent of the testator that these should not lapse under the circumstances of uncertain survivorship that have arisen, but should survive and be paid over to Mrs. Fowles' executors, is fully declared in the ninth clause, and is clearly operative, whatever difficulties may be found to affect the provisions affecting the 22½ per cent. of the residue.

It would seem on perusal of the conflicting opinions of the Judges below, that the Surrogate approached the case from the angle of these direct legacies, and, on examining them, found, no difficulty whatever in adopting the view that the will showed that the testator intended that these should not lapse under the circumstances that arose, but survive, and be payable to Mrs. Fowles' executor.

From this basis he would seem to argue that the law would not permit the technical character of a power of appointment to stand in the way of carrying out in like manner the equally clearly declared intent of the testator as to the 22½ per cent. of the residue, on the technical claim that by doing so either a power might be exercised before it was possessed or the statutory rule against incorporating non-testamentary instruments be infringed.

Justice Page approached the subject from an angle which meets all objections to both legacies and power by the plain and simple doctrine that

the testator had the right to require the courts to "indulge in a fiction for the purpose of effectuating his intention with respect to his "property" (fols. 317-319), and his simple theory applies equally to each case and removes all difficulty in each case.

Justice Shearn, on the other hand, has approached the case from the angle of the power of appointment over the 22½ per cent., and finds technical difficulties arising from the law of powers and from our statute of wills, which he deems insuperable. He then, without pausing to observe that the objections he has been considering have no application to the direct legacies, and without considering those legacies on their independent merits, holds, as a mere corollary, that they, too, lapsed and fell into the residue.

If, as the majority of the Appellate Division seem to have held, the direct legacies and the 22½ per cent. of the residue stand on the same footing, there is certainly no impropriety (and certainly greater facility) in proceeding to consider the simple case of the direct legacies on their merits and then to dispose of the matter of the 22½ per cent. of the residue as a corollary. On the other hand, if the two cases differ, the direct legacies are entitled to separate consideration on their own merits.

Before proceeding to the general argument of the true consideration and validity of the Ninth clause we wish to discuss separately the case of the two direct legacies to Mrs. Fowles. The decision of the Appellate Division seems clearly wrong as to those.

We are unable to find that the elaborate discussion by Justice Shearn of the difficulties affecting the power anywhere discloses or refers

to any objection or difficulty that applies to the case of the direct legacies in the face of the declared intention of the testator that they should not lapse.

There could be no legal objection or difficulty surrounding a direction of the testator that if he and his wife died under such circumstances that it could not be ascertained which died first, the legacies to her should not lapse but should be paid over to her executor, just as they would have been had she died five minutes after he died.

The testator did not say this in those identical words. He did not have to. It is sufficient to prevent lapse of a direct legacy that the court can see from the will that such was the intention of the testator. No words of bequest to the executor are needed.

Sibthorp v. Moxom, 1 Ves. Sr., 49;
Rivers v. Rivers, 36 So. Car., 302;
Turner v. Martin, 7 De G. M. & G., 429;
Davis v. Taul, 6 Dana (Ky.), 51;
Kimball v. Story, 108 Mass., 382.

The doctrine seems to be unquestioned in the books. Is there any difficulty in finding that intention of this testator clearly declared by the Ninth clause? Could he have made that intention of his any more clear? He might have used more precise and technical words against lapse, but could he have made his *meaning and intention* any more *clear* than he has done that these legacies should not lapse and should be paid over to his wife's executor?

Justice Shearn would seem to answer that Mr. Fowles could have expressly mentioned paying

them over to her executor; that these words were in the Piffard will, and distinguished that case from the present by not making the legacies there dependent on exercise of the power (fols. 292-303).

We respectfully question the soundness of this answer. These direct legacies are not affected by any of the difficulties attending exercise of a power. To declare a testamentary intention a testator does not have to use technical words. It is sufficient that he uses expressions that imply a gift. The non-technical clauses may not be as express or as precise as the technical words of gift, but their implication may be quite as clear and quite as definite an expression of testamentary intent and quite as effectual.

If, under the circumstances that have arisen, Mr. Fowles' directions, that it should be deemed that he predeceased his wife and that all the provisions of his will should be construed on the assumption and basis that he died first, were followed out, what would be done with these legacies? The very conditions which he postulates show that the legacies could not be turned over to Mrs. Fowles herself. She would be dead. They would then, to carry out his wishes, have to be "paid over" to her executor, (which was the precise direction in the Piffard case), thus preventing lapse. Payment, of these direct legacies at least, to Mrs. Fowles' executor is absolutely and necessarily implied in the direction in the Ninth clause.

Suppose the testator had simply said that under the circumstances specified in the Ninth clause the two direct legacies to my wife "*shall not lapse* but be treated on the basis and assumption that I died first," and said nothing

about her executor, would an objection that it did not mention her executor be given any attention?

What difference in intention, as to these direct legacies, can be found between such a direction and the actual provisions of the Ninth clause? Is the testator's intention any less clear? And is there any statute or positive rule of law forbidding his expressing that intention in the form of words he adopted? If not, his clearly declared intention must control as to these direct legacies.

St. John v. Andrew's Institute, 191 N. Y., 254, 267.

It seems clear that the disposition made by the Appellate Division of the $5000 legacy and of the Fairmile Court personalty is directly opposed to the testator's clearly declared intention, and that there is no arguable legal objection to carrying out his clearly declared intent that those direct legacies should not lapse, but should be paid over to Mr. Fowles' executor as if Mr. Fowles had died first and she immediately after him.

Incidentally, too, it has appeared in this discussion that the distinction sought to be drawn below between the directions in the Piffard will and those in the will at bar, while ingenious, is a distinction not of substance, but only in the form of words. The direction to "pay over" the legacies to the executor, expressed in the Piffard case (and there held by this Court to be not an alternative legacy but a prevention of lapse of the legacy to the daughter), is here absolutely and necessarily implied by the very terms of the Ninth clause. That which is there directed to be done can be done only by paying to the executor of Mrs. Fowles. The implica-

tion here shows the intention of the testator as clearly as the direction there. The attempted distinction is one without a difference, at least as to the crucial point of declared intention of the testator. And the Courts are astute, not to find means of defeating the intention of the testator, but to find means of carrying it into effect. (See Point VII, infra, for authorities.)

POINT V.

The 9th paragraph of the will is valid and the directions contained therein are binding upon the executor and all persons interested in the testator's estate.

We have in Point III set forth the intention of the testator which appears clearly from the provisions of his Will.

So far as his intentions relate to his wife he bequeathed to her a legacy of five thousand dollars, the personal property (excluding oil paintings) at "Fairmile Court," and the right to purchase the estate called "Fairmile Court."

By Paragraph 8 he made his wife the beneficiary for life of the income of a trust fund which was to consist of forty-five per cent. of his residuary estate, and he gave to her a power to dispose of one-half thereof by her last Will and Testament.

There is nothing in the 9th paragraph of the Will which conflicts with or is inconsistent with the provisions we have referred to.

The testator clearly contemplated that his wife might die before him, in which case the legacies would lapse and the power would be un-

executed. He clearly contemplated that she might survive him and not execute the power. In that event the 22½ per cent. which was subject to her disposal was to be added to the trust funds created for the benefit of his two daughters.

In the event, therefore, that the deaths of the testator and his wife should occur in the natural and ordinary way, the testator had provided for all the conditions which would probably arise.

There was, however, one other condition which he clearly anticipated might arise and for which, if it did arise, he intended to provide.

He and his wife were about to sail upon a voyage which was surrounded with danger. He foresaw that what actually did happen might happen; that he and his wife might be drowned at sea and that it might not be possible to ascertain which one predeceased the other.

If that event happened the provisions which he intended to make for his wife and which he had so carefully provided for would be defeated although the fact might be that she survived him.

Hence he inserted in his Will the 9th paragraph to the effect that if both he and his wife died under such circumstances as to render it impossible to ascertain which one predeceased the other, in the construction of his Will and necessarily in the distribution of his estate, it should be deemed that he predeceased his wife.

That one fact is all that is contained in Paragraph 9. In no other respect did the testator interfere with the provisions of Paragraph 8.

In the administration of the estate under Paragraph 8 it would be necessary to determine the fact whether the testator died before or after his wife. In the event only that it was impossible to determine that fact would paragraph 9 be operative, and in that event it was the tes-

tator's will that the estate should be administered and distributed as if he predeceased his wife.

Paragraphs 8 and 9 must be read together, and the import and meaning of Paragraph 9 will be more clearly seen and understood if it is inserted in and made a part of Paragraph 8 so as to read as follows:

> "One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my Will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C'. Provided, however, that in the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

Reading the two paragraphs together as above written, the intent of the testator is clear and plain, and the only question is whether he had the legal right to prescribe that it should be deemed and taken as a fact in the administration of his estate that he predeceased his wife, if it should prove impossible to determine the priority of their respective deaths by testimony.

We submit that this direction of the testator was perfectly lawful and one which he had full power to make.

No authority has as yet been cited by counsel or court holding that such a provision in a will is invalid.

> "A competent testator may devise his property as to him seems best, providing always that in so doing he does not violate a statute or a rule of law."
>
> *St. Johns v. Andrews Institute,* 191 N. Y., page 267.

Paragraph 9 of the Will violates neither statute nor rule of law.

No other person was interested in the testator's property. It was his alone to dispose of as he saw fit. He could give it to whomsoever he pleased upon such terms and conditions as he chose to prescribe, limited only by the fact that the estates created and the gifts made violated no statute or rule of law.

No public policy of the State is violated by such a provision. The State is not interested if its statutes or rules of law are not violated. In this case no individual has any standing to complain of any disposition which the testator made of his property, providing that disposition was lawful.

It will be conceded that the testator might have directed that, in the event that it was impossible to determine whether or not he predeceased his wife, the 22½ per cent. of the residuary estate over which Mrs. Fowles had the right of disposal should be paid to the executors named in her Will to be administered and distributed as a part of her estate. (*In re Piffard,* 111 N. Y., 410.) The result which would be accomplished by such a direction would be the same as that intended to be

accomplished by the testator under the provisions of the 9th paragraph. If the provisions contained in the Will considered in the *Piffard* case were valid it is impossible to hold that the 9th paragraph of the testator's Will was invalid.

The legality of Paragraph 9 must be determined by the result intended to be accomplished by the testator, and it cannot be made to depend upon the particular form of expression used in the Will.

> "What the testator has imperfectly done by way of expression is effectuated by the application of well known legal rules. In the construction of a testamentary disposition where the language is unskilled or inaccurate, but the intent can be clearly collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is thereby violated." (1 R. S., 748, Section 2; Purdy v. Haight, 92 N. Y., 454.)
>
> Masterson v. Townshend, 123 N. Y., 462.

In the case at bar, as has been already pointed out, the testator's intent is clear. He gave to his wife the income of the trust fund of 45 per cent. of the residuary estate with the power to dispose of one-half thereof by her last Will and Testament. He recognized that she might predecease him, in which case the gift would lapse, or that she might survive him and not execute the power. He intended that she should have and enjoy the right to exercise the power if she survived him, and that if it could not be determined whether she had survived him that that fact should be assumed by his executor and his estate be distributed accordingly. It might be that his wife would leave no Will, or that if she did she might not exercise this power. The testator did not attempt to interfere with such conditions

by paragraph 9. He made no reference to these facts, but left his wife free to execute or not to execute the power if she chose.

That the testator had the right to make these provisions we submit is undoubted. His intention, which is plain and undisputed, must be given effect unless it is unlawful. All general rules of construction must give way when their application would defeat the intention of a testator. (*Goebel v. Wolf*, 113 N. Y., at page 412; *Miller v. Gilbert*, 144 N. Y., at page 73.)

The Surrogate and the Appellate Division have, however, held that the provisions of Paragraph 9 were illegal. These conclusions are based upon two propositions: (1) That Paragraph 9 alters the legal presumption which the Court would make from the fact that the priority of the death of the testator and his wife was not ascertainable: (2) That to give effect to the provisions of Paragraph 9 is to incorporate the wife's Will into testator's Will.

FIRST:

Neither of these propositions are sound. There is no presumption which the Court can draw from the fact that the priority of deaths of the testator and his wife is not ascertainable. Surrogate Fowler in his opinion at page 70 of the record cites from a French writer "That a testator may in his will impose no condition which wounds the law or good morals."

This French writer is the only authority which has been cited by the Court or counsel during the progress of this case to sustain the claim that Paragraph 9 is illegal. We do not deny the general rule that a testator can impose no condition upon his gifts which are illegal or immoral. Surrogate Fowler's decision in the case (*Matter of Anonymous*, 80 Misc., 110) which he refers to il-

lustrates a proper application of that rule. The case was one where a testator had imposed as a condition subsequent to a gift the performance of an act by the legatee which was not only immoral but against public policy.

If Mr. Fowles had attempted to create estates or trusts which were not authorized by law they would, of course, be decided to be illegal. If he had directed his executor or his wife to do any act which was immoral or against public policy they would be justified in refusing to carry out the direction and the Court would undoubtedly hold such provisions to be illegal. But Paragraph 9 does none of those things. It directed the executor to assume a fact in the distribution of the testator's estate. The assumption might be in accordance with the actual fact, or it might not: no one could tell because the truth was not ascertainable, and it was because the real fact was not ascertainable that the testator directed the assumption to be made so that the provisions which he had made for his wife should not fail. The doubt which he foresaw might surround the relative time of the deaths of himself and his wife he intended, if that event should arise, should be solved in favor of his wife. The testator was not only providing against a possible result or a threatening danger, but he also knew the contents of his wife's will, and while it was possible that she might alter or destroy her will before her death, the testator knew when he executed his own will the disposition which his wife had made of the share of his estate over which he had given her the power of disposal, and it must be presumed that he approved that disposition and desired that it should be carried out.

In the Appellate Division opinion at page 93

of the record it is said: "The Surrogate also correctly held that under well settled principles of law and from considerations of public policy, the ninth paragraph of Mr. Fowles' will could not be given effect, either as an attempt to change the substantive law applicable in the event of the simultaneous deaths of tht testator and his wife, or as an attempt to create a presumption to bind the Court in the absence of evidence as to which of the two died first, and that notwithstanding paragraph Ninth the rule of law as to the effect of simultaneous deaths and the rule as to the presumption, in the absence of evidence as to priority of death, was the same as if paragraph Ninth had not been contained in the will."

In the Surrogate's opinion he said at folio 209 of the record, after referring to Matter of Anonymous 80 Misc., 10). "The unlawful direction in that case was, however, a condition subsequent and not a direction for construction, but, *mutatis mutandis*. I find myself unable to add more to the reasons there assigned for the invalidity of the unlawful direction contained in Mr. Fowles' will if it is to be construed as a testamentary mandate to the court to alter a legal presumption and a resulting rule of construction."

These quotations we submit are not correct statements of the law. There is no "substantive law" applicable in the event of simultaneous deaths of parties, and here is no legal presumption or rule of construction applicable to such condition. This is made plain from the opinion of this Court in *Newell v. Nichols,* 75 N. Y., 78, which has been referred to in a previous point. In that case Chief Judge Church said "There is no legal presumption which Courts are authorized to act upon that there was a survivor, any

more than that there was a particular survivor," (page 88.) * * * The rule is that the law will indulge in no presumption on the subject. It will not favor a presumption by balancing probabilities either that there was a survivor or who it was, (page 89). After referring to the expressions of certain judges in certain decided cases to the effect that there was a presumption of simultaneous deaths, that learned judge said "These expressions only mean that as the fact is incapable of proof, the one upon whom the onus lies fails, and persons thus perishing must be deemed to have died at the same time for the purpose of disposing of *their* property," (page 90).

It is clear that there could be no rule of law where the facts are not known. There could be no legal presumption from facts not ascertained or ascertainable.

The case at bar is not different from what it would have been had Mrs. Fowles not sailed on the "Lusitania" but had died at her home in New York at such an hour on May 7, 1915, that it could not be ascertained whether or not she survived her husband. Under such circumstances it will not be disputed that if paragraph 9 was not contained in Mr. Fowles' Will the burden would lie upon those claiming a part of Mr. Fowles' estate through Mrs. Fowles to prove that she survived her husband.

Paragraph 9, therefore, does not alter any legal presumption or rule of construction which would be applicable to the facts of the case. The directions contained therein are not addressed to the Court as to what it shall hold the the law to be, but to the testator's executors as testamentary dispositions directing that for the purpose of determining his intention and in the dis-

tribution of his estate the fact shall be assumed to exist that Mrs. Fowles predeceased him, if the fact is incapable of proof by testimony.

SECOND:

It was argued at the Appellate Division by counsel for Mrs. Browne and Mrs. Baylies that even if Paragraph 9 of the Will was lawful, effect could not be given to it because the result would be to incorporate Mrs. Fowles' will into that of the testator.

This is palpably unsound. All that is provided for in Paragraph 9 is that the fact must, under the circumstances therein stated, be assumed that the testator predeceased his wife. That fact being established, reference must be made to paragraph 8 of the testator's Will to ascertain the disposition which he made of his residuary estate. Paragraph 8 contains the directions for the creation of the trust funds and in that paragraph is given to the testator's wife the power to dispose of 22½ per cent. of the residuary estate. The argument of counsel ignores the power of disposal which the testator gave to his wife. Assuming paragraph 9 to be legal and valid the case presented is precisely the same as it would be if it had been proven by competent testimony that Mrs. Fowles survived her husband. If that was the case there would be no question that she was vested with legacies and the power to dispose of 22½ per cent. of the residuary estate at the time of her own death.

The power granted by the testator to his wife was a general beneficial power and is by our statutes expressly authorized to be exercised in a last Will and Testament. (Real Property Law, Sections 134, 136, 167, 176; Decedent's Estate

Law, Section 14; *Cutting v. Cutting*, 86 N. Y., 522; *Hume v. Randall*, 141 N. Y., 499, 503; *Deegan v. Wade*, 144 N. Y., 573, 578; *Hirsch v. Bucki*, 162 App. Div., 659; and cases cited in opinion.

In the Appellate Division opinion it is said at folio 286 of the record, "The express provision of paragraph Eighth is that one-half of the trust fund should be paid over 'pursuant to the provisions of such last Will and Testament as my said wife may leave.' But as such a provision could only be given effect by incorporating the wife's will in that of Mr. Fowles, which is illegal, it is assumed that the testator must have known that if the property did go in accordance with the wife's will (although a provision to that effect was invalid), it would necessarily go to the executors and trustees named therein." This statement, it is apparent from the context of the opinion, is based upon the assumption that the testator's wife did not execute the power granted to her. (See folio 290.)

The question whether the power was executed is discussed in the next point.

We submit, however, that the question whether Mrs. Fowles exercised the power of appointment granted to her does not arise in this proceeding. Whether she exercised the power or not is a fact to be proven and determined by the Surrogate upon testimony. The Surrogate made no findings of fact and construed the testator's Will solely upon the language used therein. The question whether the power was exercised does not arise upon the face of the Will and it is not a question which is involved in the construction of the Will. The only questions arising in this proceedings which is one to construe the Will of

Mr. Fowles are: 1, Whether there was a power granted to Mrs. Fowles to dispose of 22½ per cent. of the residuary estate, and as to this there is no dispute, and; 2, Was paragraph 9 valid. If these questions are determined in accordance with our contention then the power granted by the Will vested in Mrs. Fowles prior to her death. That is all that can be determined upon the construction of Mr. Fowles' will. Whether Mrs. Fowles executed the power or not is a fact wholly apart from the construction of Mr. Fowles' Will and which occurred after his death, and is not embraced in the general question of the proper construction of Mr. Fowles' Will nor in the particular questions stated and set forth in the petition (folio 68).

POINT VI.

The power granted to Mrs. Fowles to dispose of the 22½ per cent. of the residuary estate of Mr. Fowles by her last will and testament duly executed was duly and lawfully executed by her.

This question has been considered and decided both by the Surrogate and the Appellate Division. The appellants have no objection to its being decided in this proceeding. It will require decision at some stage during the administration of Mr. Fowles' estate and might as well be decided now as at any other time. While conceding so much, however, we insist upon our contention in the preceding point that it is not a fact

to be considered in the construction of Mrs. Fowles' Will, and it cannot be referred to or taken as a fact for the purpose of showing that by the execution of the power her Will was incorporated as a part of the testator's Will.

If Mrs. Fowles survived her husband, although her Will was executed before his death, it must be taken as a valid execution of the power.

A Will expressly executing a power executed before the death of the donor of the power, to become operative only after the death of the donor by subsequent death of the donee of the power, is a valid and effective execution of the power.

Hirsch v. Bucki, 162 App. Div., 659;
Chaplin on Express Trust Powers, Sections 627, 653;
U. S. Trust Co. v. Chauncey, 32 Misc., 358;
Cutting v. Cutting, 86 N. Y., 522;
In Re Piffard, 42 Hun, 34, 37.

This question was very fully discussed in the case of *Hirsch v. Bucki,* and was decided in accordance with our contention by a unanimous Court. In that case Judge Clark summed up the conclusion of the Court as follows:

> "It seems clear therefore that although at "the time Charles Lloyd Bucki executed his "Will his mother was still living and there- "fore her Will had not become effectual nor "had Charles become vested with any real "or personal property thereunder or entitled "to exercise any power of appointment given "thereby, nevertheless, as he outlived his "mother whatever he took upon her death "by the provisions of her Will became vested "in him and passed by his own Will although "executed prior to her death. This is true

"of personal and real property. I think it "also true as to the exercise of a power of "appointment."

Hirsch v. Bucki, 162 App. Div., 659, 665.

Assuming, therefore, as the Court must, that Mrs. Fowles survived her husband, she was vested at the time of her death with the legacies given to her by his Will with the right to buy "Fairmile Court" upon the terms stated in the Will, and with the power to dispose of 22½ per cent. of the testator's residuary estate.

The legacies were, therefore, a part of Mrs. Fowles' estate and must be collected by her executor and disposed of under her Will. The power was exercised and the 22½ per cent. which was subject to it must be disposed of in accordance with the direction of Mrs. Fowles' Will.

We desire to call the attention of the Court to certain additional considerations which seem to lead by independent lines to the same conclusion that not only the $5,000 and the Fairmile Court personalty but also the 22½ per cent. of the residue must pass as they would have done had it been affirmatively shown that Mrs. Fowles survived the testator, in accordance with his declared intention.

POINT VII.

Where the intention of a testator is clear and declares no purpose forbidden by law, any inadequacy of expression of means for carrying out that purpose will be supplied by the courts, which will be astute in finding means to carry out the declared intention of the testator.

There is a marked distinction between an illegal disposition of property and inadequacy of words in a will, after declaring a lawful intended disposition, to provide legal means for carrying it into effect.

In the case of a disposition itself illegal no effort will be made to evade the prohibition by twisting the testator's intention into something else. The Court will first ascertain the actual intent and, if it is an illegal one, will hold the disposition void.

Simpson v. Trust Co., 129 A. D., 200;
Jacoby v. Jacoby, 188 N. Y., 124;
Haynes v. Sherman, 117 N. Y., 433;
Sears v. Russell, 74 Mass., 86.

But even in such cases, if there be two possible constructions of the testator's intent, the court will give the instrument the possible construction which is lawful and sustain the will.

Seitz v. Faversham, 205 N. Y., 197, 202-203;
Roe v. Vingut, 117 N. Y., 204;
Trask v. Sturges, 170 N. Y., 482;
Jacoby v. Jacoby, 188 N. Y., 124;
Hopkins v. Kent, 145 N. Y., 363.

In the other class of cases, where there is nothing against the policy of the State in the disposition which the testator has declared he intends to make, but the testator has merely failed to provide in words the necessary steps to carry this intention into effect, such defects or omissions in the language used by the testator are constantly supplied by the courts to effectuate his actually declared intention. The courts are astute to find means of carrying out the will in such cases.

Where the intended disposition is a lawful one, but the expressions for carrying it into effect are technically inadequate, if the Court ascertains from the will an intended disposition not itself prohibited by law, it will endeavor in every way to carry it into effect, even at times going so far as to imply words of bequest not expressed in the will, or provide trustees, or even to declare a substitution of legatees by implication, if necessary to carry out the declared intention of the testator.

Woodward v. James, 115 N. Y., 356;
Whitney v. Whitney, 63 Hun, 59, 78;
In re Piffard, 111 N. Y., 410;
Matter of Vowers, 113 N. Y., 569;
Masterson v. Townshend, 123 N. Y., 458, 462;
Phillips v. Davis, 92 N. Y., 199;
Jackson v. Bellinger, 18 Johns., 368;
Atwater v. Russell, 49 Minn., 22;
Sibthorp v. Moxom, 1 Ves. Sr., 49;
Rivers v. Rivers, 36 So. Car., 302;
Turner v. Martin, 7 De G., M. & G., 429;
Finlay v. King, 3 Peters, 346, 377;
Davis v. Taul, 6 Dana (Ky.), 51;
Richardson v. Noyes, 2 Mass., 58;

Hodgson v. Ambrose, 1 Doug., 341;
Homer v. Shelton, 2 Met., 194, 199;
Dodge v. Williams, 46 Wisc., 70, 90-91.

In the first of the above cases this Court said:

> "It is true that the testator does not, in "direct words, devise to her such an estate, "or use the expression 'trusts' or 'trustee'. "That fact is one to be noted and weighed, "but does not prevent the creation of a trust "by implication where the exigencies of the "situation require it, and such an intention "is indicated."
>
> *Woodward v. James,* 115 N. Y., 346, 356.

In the second of the above cases Judge Martin wrote at the General Term:

> "Although a gift by express terms is not "made in a will, a legacy by implication may "be upheld where the words of the will leave "no doubt of the testator's intent, and can "have no other reasonable interpretation."
>
> *Whitney v. Whitney,* 63 Hun, 59, 78.

These doctrines unquestionably apply to prevent lapse of the direct legacies of $5,000 and of the Fairmile Court personalty; and they also seem to us directly applicable to the matter of the 22½ per cent. of the residue. The testator's intention being clear and the disposition he sought to make one not forbidden by law, the Court will be astute in finding methods to carry his will into effect and will supply by implication any machinery necessary to that result.

POINT VIII.

The order of the Surrogate is clearly sustained upon the grounds assigned in his opinion.

The Surrogate regarded the decision in *Matter of Piffard,* 111 N. Y., 410, as a controlling precedent. The majority of the Appellate Division Justices took an opposite view, holding that the *Piffard* case was to be differentiated from the case at bar for two reasons: first, because, "in the *Piffard* case, "but for the construction given the will, intestacy "would have resulted"; second, because in the *Piffard* case "the testator, in the event that his "daughter predeceased him, made his bequest di- "rectly to her executors instead of to the daugh- "ter" (fols. 301-302).

We have already seen (Point III, supra), that the first of these supposed distinctions is untenable. Mr. Fowles expressly provided by the Ninth clause of his will that the alternative bequest under the Eighth clause should not become operative under the condition of uncertainty whether he or Mrs. Fowles died first. Intestacy would, therefore, be the only alternative if the Ninth clause is not effective to carry the bequests. And we have also seen (Point II, supra) that, *for the purpose of ascertaining the meaning of the Eighth clause, the Ninth clause cannot be obliterated from the will,* even though the directions given there by the testator as to what should be done with his property, in the case specified, be entirely invalid and inoperative. The Ninth clause still declares that the alternative bequest of the 22½ per cent. in the

Eighth clause does not come into effect under the present conditions.

The second distinction drawn seems to us also untenable.

It is doubtless a nice distinction in terms, but it is one which this Court itself drew in the *Piffard* case, holding that it was not a case of alternative legacy to the daughter's executor but a preservation of the legacy to the daughter from lapse.

If the *Piffard* will had contained an alternative bequest to the daughter's executors where would have been the difficulty in that case? Why should Judge Finch, if it were merely a case of an alternative bequest to the executor, have (to use Justice Shearn's expression) "regarded the de-"cision as extending to the utmost limits the rule "of so construing a will as to avoid intestacy" (fol. 293)? If there had been there such an alternative bequest how was it a case of avoiding intestacy?

The answer is that in the *Piffard* case there were no words of *bequest* to the daughter's executors but only instructions to "pay over" the legacy made to the daughter, to her executors *"to that end"*; i. e., of having it disposed of *according to her exercise of the power by her will.* And Judge Finch's conclusion was:

> "It is possible to see in the will of the "father *a clear intent to prevent a lapse and "avoid a partial intestacy* by carrying over "the one-fifth she did not take through her "executors to those whom she should name "as devisees and legatees of her property, "and in the proportions by her directed" (111 N. Y., 414-415).

This Court in deciding the *Piffard* case, thus did not consider that it was dealing with the

simple case of an alternative bequest to the daughter's executors, but with the case of a direction that the legacy to the daughter should not lapse, although it was a legacy by way of a power to dispose by will; and that the legacy running to and via the daughter should be handed over to her executors to dispose of as if she had died last.

The distinction then between the *Piffard* will and the one at bar is simply that in the *Piffard* case the direction to "pay over" to the daughter's executor was express, while in the case at bar it is *necessarily* involved and implied in the provision of the Ninth clause, that, in the case of uncertainty of priorities of death, his property is to be treated as if he had predeceased his wife. That distinction under the doctrines of the cases cited under Point VII would seem to be immaterial. The necessary implication is equivalent to express direction. The supposed distinction would seem to come under the ruling of the United State Supreme Court in the Young Women's Christian Home case:

> "This is not a case of supplying some-
> "thing omitted by oversight, but of inten-
> "tion sufficiently expressed to be carried out
> "on the actual state of facts."
>
> *Young Women's Christian Home v. French,* 187 U. S., 401, 418.

The central point of the decision in the *Piffard* case was that it carried out the declared intentions of the testator.

That certainly cannot be said of the decision of the Appellate Division here. It holds that the intention Mr. Fowles did declare cannot be carried out because of inadequacy and invalidity

of his machinery; and it imputes to him an intention which he expressly said he did *not* entertain in the circumstances that have arisen, by obliterating the Ninth clause in construing the Eighth, contrary to the long established rule that this may not be done.

Tilden v. Green, 130 N. Y., 29, 55;
Van Kleck v. Dutch Church, 20 Wend., 457, 497;
Wetmore v. Parker, 52 N. Y., 450, 464;
Kiah v. Grenier, 56 N. Y., 220;
Marks v. Halligan, 61 A. D., 179, 181;
Martin v. Pine, 79 Hun, 426, 431.

On the other hand, if the theory of Justice Page, or the theory of the *Piffard* case is controlling, or if any other theory that carries the Ninth clause into full active effect be sustained, the intentions of the testator will, unquestionably, be carried out.

Treating the *Piffard* case as such a case as Judge Finch, writing for this court, held it to be, one of prevention of lapse and not of mere alternative bequest, it seems to be a direct authority that the property is to go in accordance with the terms of the exercise of the power in Mrs. Fowles' will.

The facts in the *Piffard* case in their legal aspect and in the bearing upon the question under discussion are the same as in the case at bar.

Mr. Piffard made his will in the lifetime of his daughter Sarah and bequeathed to her one-fifth of his estate with power "to dispose of, devise and bequeath" the share given her by the will.

Mr. Fowles made his will in the lifetime of his wife and gave to her the income of forty-five per cent. of the residuary estate with power to

dispose of one-half thereof by her last will and testament.

Miss Piffard died in the lifetime of her father, leaving a last will which disposed of the property given to her by her father's will.

Mrs. Fowles, in the view of the case now taken, must be assumed to have died in her husband's lifetime leaving a last will and testament which disposes of the share of her husband's estate over which she had the power of disposition.

So far the facts of the two cases are precisely alike. The only difference is to be found in the language of the two wills.

In Piffard's will, after authorizing his daughter to dispose of, devise and bequeath the share of the estate devised to her by said will the provision is "to that end I direct that such share * * * shall be paid over by my said executor to the executor and trustee named in and by" the will of my said daughter in case of her death during my lifetime.

In Fowles' will appears paragraph nine, which has already been quoted.

The intent of the testators in each case was the same and no distinction can be drawn in the construction of the two wills.

In Piffard's will this Court said as follows:

> "It was clearly intended to reach and "cover a contingency which has actually oc- "curred, and to prevent a lapse of the lega- "cies by the death of a daughter in the tes- "tator's lifetime. To that event the provi- "sion of the codicil was confined, and only "in that event could it be consistent with the "absolute devise and bequest and essential "to make it effectual. And while to reach "this result, the testator gave a power of ap- "pointment, which, as a power, the donee "could not execute in her father's lifetime,

"because she could not herself dispose of "what remained wholly in another's power "and ownership, yet the further language of "the codicil shows its intent to be that, in "case of the death of the daughter in the life-"time of the father, the latter intended to de-"vise and bequeath by force of his own will "the daughter's one-fifth to such person or "persons and in such shares and propor-"tions as by an existing will, made before or "after the date of the codicil, she had deter-"mined and directed or should determine and "direct in the disposition of her own prop-"erty; and 'to that end,' in aid of that re-"sult, he explicitly declares that the one-fifth "given to her shall be paid over to her execu-"tors for the evident purpose of passing to "her devisees and legatees that share pre-"cisely as if it had been her property at her "death, and had become distributable as such "by force of her will."

Matter of Piffard, 111 N. Y., 411, 414.

The exact language used by Judge Finch may be applied to the construction of the ninth paragraph of Mr. Fowles' will. The testator in the present case clearly intended to devise and bequeath by the force of his own will the share of his estate, the income of which he had given to his wife and over which he had given her the power of disposition, to those to whom his wife should give it by her will and "to that end" he provided that his will and all of its provisions should be construed on the assumption and basis that he should have predeceased his wife.

As Judge Bradley said in the *Piffard* case, at the general term: "This view effectuates the apparent intent of the donor and, as we think, violates no rule of construction or of law."

We submit that the case at bar cannot be distinguished from the *Piffard* case and that the Sur-

rogate was right when he said in his opinion (fol. 222): "In principle that case is decisive of "this, although the facts differ."

In Justice Shearn's opinion at the Appellate Division some weight appears to be given to the fact that in the *Piffard* case "the testator knew who would benefit in the "daughter's will because she died before him" and with such knowledge the testator thereafter confirmed his will.

The fact of knowledge by Mr. Fowles of the provisions of his wife's will is present in this case as has already been pointed out. No weight whatever was given by this Court or the General Term in *Piffard's* case to the fact that the testator modified his will by a codicil after his daughter's death. All that was said of that by Judge Finch after he had considered the will and the first codicil was as follows: "And *this view* "is very greatly *strengthened by the fact* that af- "ter her death leaving a last will, the testator, "with full knowledge of the existing situation, "made two other codicils, confirming his will and "the provisions contained in it now in question." The Court's decision was confined solely to the construction of the will and the first codicil.

POINT IX.

The bequest to his own trustees to pay over to beneficiaries named in Mrs. Fowles' will and pursuant to the directions therein contained is, even although Mrs. Fowles died first or simultaneously with the testator, a valid bequest to the trustees and the trust will be enforced. Such a bequest does not contravene the rule against incorporating by reference, provisions of a testamentary character contained in an extraneous instrument.

The Appellate Division has given no attention to the fact that the provision of Mr. Fowles' will as to this 22½ per cent. of the residue is a direct bequest of it to his own trustees upon trust to pay the income of it to Mrs. Fowles for her life, and "upon her death to dispose of it (the principal) as follows:" "To pay (it) over pur-"suant to the provisions of such last will and tes-"tament as my said wife may leave" (fols. 96-97).

It is our contention that the *bequest* to the trustees is found in the will; that it is only the terms and beneficiaries *of the trust* that are in the extraneous instrument; and that this does not contravene the rule against incorporation by reference.

Bequests to trustees on trusts declared and for beneficiaries named in other instruments, not testamentarily executed, are valid bequests to the trustees; and the trusts will be enforced though

their terms be not attested in accordance with the law of wills.

Jay v. Lee, 41 Misc., 13.

"It is not necessary," wrote Justice Gaynor in that case, "that the beneficiaries be named in the "will; it suffices that they are so designated that "they are ascertainable." And to sustain this proposition he cited three decisions of this court. *Holland v. Alcock,* 108 N. Y., 312; *People v. Powers,* 147 N. Y., 104; and *Fairchild v. Edson,* 154 N. Y., 199 (41 Misc., p. 14).

In *Gross v. Moore* the same doctrine was approved but the trust failed because there was no extraneous evidence to show who were the beneficiaries of the trust.

Gross v. Moore, 68 Hun, 412.

The case was affirmed by this court on the decision of the General Term.

Gross v. Moore, 141 N. Y., 559.

In *Jay v. Lee* (*supra*), Justice Gaynor further wrote:

> "There seems to be no doubt that evi- "dence *dehors* the will may be resorted to "to identify the beneficiaries designated by "the will. It is true that a bequest can only "be made by a will. But the bequest here is "made by the will, i. e., to the trustees. The "evidence *dehors* is not to make a bequest, "but to ascertain and identify the benefici- "aries designated by the trust clause of the "will. If this testator had written the "names of beneficiaries on a piece of pa- "per, and deposited it in a strong box, and "then said in her will that these trustees "should distribute this property among the

"persons on such list, the case would be no "different to the present one. The desig- "nated beneficiaries being ascertainable, the "trust would be valid."

Jay v. Lee, 41 Misc., 13, 15.

If a testator by a trust deed had during his life-time created a trust of certain funds for certain beneficiaries, and, by his will, bequeathed additional funds to those trustees "to take hold and finally distribute in accordance with all the terms of the trust created by that deed and as part of the trust fund thereunder," could the validity of the bequest be questioned because the beneficiaries of the trust were ascertainable only by reference to the trust deed?

In what way does the bequest of the 22½ per cent. to Mr. Fowles' trustees "to pay over pur- "suant to the provisions of such last Will and "Testament as my said wife may leave" (fols. 96-97) differ from such a bequest, if she died first or simultantously, so that her last will was a definitely fixed instrument when Mr. Fowles' will came into operation by his death?

These cases of *Jay v. Lee* and *Gross v. Moore,* and the *Piffard* case seem to be direct authority for the proposition that if the testator provided a power of appointment by will by his wife over this 22½ per cent., as he did, and had then gone on and said in his will: "If my wife attempt to "exercise this power by will and die before me "then I bequeath this property to my trustees "in trust for the persons she shall have named "as beneficiaries of it in her will in attempted "exercise of the power," it would be an entirely valid bequest and an entirely valid trust.

Wherein can the provision of the Ninth clause be distinguished to its disadvantage from such a

provision? The fact that its application is not general, but limited to the condition of uncertain priorities of death that has actually arisen in this case, does not create a difference in validity but only in extent of applicability.

POINT X.

All other theories of the ruling in the Piffard case still leave it a precedent governing the case at bar.

The *Piffard* case might possibly be thought to rest on the proposition that there is nothing in the law of powers that affirmatively prohibits a testator from expressly authorizing his wife or daughter to exercise the power by will and further providing that: "If she die before me "and leave a will attempting to exercise this "power I ratify and confirm such attempted ex- "ercise of the power, as an exercise thereof."

There is no express rule of law that we know of that prohibits such a ratification. It may not be the theory of the *Piffard* case, but, if it were, the decision would still be equally applicable to the facts at bar.

Any theory on which the *Piffard* case may be supposed to rest is equally applicable to the case at bar, if we are right in our contention that the decision in the *Piffard* case rests, not on an alternative bequest, but on the point stated by Judge Finch that "it is possible to see in the "will of the father (husband) a clear intent to "prevent a lapse and avoid a partial intestacy "by carrying over the one fifth (22½ per cent.) "which she did not take, through her executors "(the trustees), to those whom she should name

"as devisees and legatees of her property, and "in the proportions by her directed" (111 N. Y., 410, 415).

That this clear intent is likewise shown on the face of the Fowles will, we have, we think, demonstrated under Point III, *supra*. That partial intestacy would result from holding the bequest in the Ninth clause inoperative, we have we think established under Point IV, *supra*.

The distinctions attempted to be drawn between the *Piffard* case thus failing, we think the conclusion drawn by Judge Finch for this court in the *Piffard* case will apply to and sustain the clear intent of the testator in the case at bar:

> "Her will, therefore, is referred to, not "as transferring the property by an appoint- "ment, but to define and make certain the "persons to whom and the proportions in "which the one-fifth (22½ per cent.) should "pass by the father's (husband's) will in "case of the death of the daughter (wife) "in his lifetime. What she would have done "by her will but could not, that he did for "her by his own will."
>
> *In re Piffard*, 111 N. Y., 410. 415.

POINT XI.

As against any claimants under the will of Mr. Fowles the fact must be held established that Mr. Fowles died first.

A further ground against the respondents is afforded by the doctrine of election.

The decision of the Appellate Division awards the property directly bequeathed to Mrs. Fowles

and the 22½ per cent. of the residue to the residuary legatees under the *eighth* clause of the will, on the ground that the case must be dealt with as though it were found as a fact that Mrs. Fowles did not survive her husband.

Justice Shearn urges as a prime reason for not applying the *Piffard* case that:

> "In the Piffard case, but for the construc-
> "tion given the will, intestacy would have re-
> "sulted. This factor, as we have shown, is
> "not present in the case at bar, for the tes-
> "tator provided for an alternative gift to the
> "trustees for the benefit of his daughters
> "upon the failure of the power" (fols. 301-302).

And he elsewhere says that the decision in the *Piffard* case "was reached only to avoid intestacy" (fol. 293).

While, for reasons stated above (Point II), we believe that the ruling, that there is here an alternative bequest in the case of uncertain survivorship, is contrary to long settled rules of construction, and that the issue here is between sustaining the Ninth clause and partial intestacy, we desire also to meet the theory, that there is here an alternative bequest to the trustees for the daughters and their issue, even on the assumption that that ruling is sound, and that there is no intestacy and the alternative legatees therefore take.

That theory contains within itself, as we believe, the seeds of its own destruction.

Few doctrines of the law of wills are better established than the law of election. He who elects to take under a will must assent to the conditions of the will. "He cannot both accept and reject it, "or avail himself of its benefits as to a part, and "defeat its provisions as to other parts" (1 Pom. Eq. Jur., Sec. 395).

The testator in this case had a perfect right to impose a condition on any legacy he gave, that if the legatee wanted to claim the legacy, and could produce no proof that Mrs. Fowles died first, he must come admitting and assuming that Mrs. Fowles died last.

Whether the testator could impose that assumption, of fact or fiction as the case might be, *on the court* or not, he certainly had the power to impose that assumption and admission on every claimant under his will.

There is a clear distinction between imposing that assumption on the court and imposing it on any claimant under the will, just as courts of equity have for hundreds of years recognized a distinction between enjoining another court from proceeding and enjoining the suitor from instituting proceedings in that other court.

We submit that the testator in this case, when he said in the Ninth clause of the will:

> "I hereby declare it to be my will that it "shall be deemed that I shall have prede- "ceased my said wife and that this my will "*and any and all its provisions* shall be con- "strued on the assumption and basis that I "shall have predeceased my said wife,"

attached to every legacy in the will the acceptance and admission of that fact (in the absence of affirmative proof to the contrary) *as a condition* of the legacy.

Any legatee who desires to take under the Eighth clause must before he can lay claim to any legacy thereunder and as a condition precedent thereto, assent to this requirement of the Ninth clause and assume and admit as a fact that Mr. Fowles predeceased his wife, unless affirmative evidence of her prior death is produced.

The claimants under the Eighth clause cannot accept the benefits under that clause and at the same time repudiate the requirements of the Ninth clause.

The *next-of-kin,* claiming by intestacy, might claim to reject the will *in toto;* but any one who elects to take under the will also elects to submit to the requirement of the Ninth clause that in construing his claimed legacy it must be assumed and he must admit that Mr. Fowles predeceased his wife.

It follows that, coming to claim the legacy without proof that Mrs. Fowles died first, the alternative legatee under the Eighth clause proffers to the court his admission that Mr. Fowles died first. And that admission entitled these appellants, as against every claimant as a legatee, to a finding of fact that Mr. Fowles predeceased his wife.

Nor do we concede that the testator could not make this assumption of fact binding on the court itself.

If some such provision as this appeared in an ordinary contract executed by the testator, for instance a bond to make payment in certain contingencies, it would certainly bind him and all claimants under him, and any court would give it effect. Is there any reason why it should not be equally binding in a will? A will certainly partakes of the nature of a contract, for the legatee takes by purchase.

If A signed a deed containing a power to B, *to be executed* by deed; and B at the same time, at the same table, signed a deed executing the power in favor of C, and the lawyer of A and B in their presence, and with their approval, picked up both papers and handed them together to C saying: "Here are your deeds." Would any court tolerate

the claim that the power was not executed because these two papers were *simultaneously* delivered and the deed executing the power had to be subsequent? *A fortiori,* would a court do so if A had then stated that B's deed should be considered as delivered second though the hand of the lawyer passed them over together? Could not a testator say the same in his will of the hand of death?

We urge that the decision below against giving such effect to the Ninth clause is due to the assumption that the testator was attempting to impose a rule of law on the court, whereas it was a stipulation of a *fact* (in the absence of contrary proofs) that he was imposing on all claimants under him, particularly on his legatees.

We submit that such a stipulation of fact, subject to correction by production of affirmative evidence, the testator had a right to impose and did impose on all claimants under him, and the court, there being nothing in it forbidden by law, was bound to accept that stipulation of fact made in the case by the testator himself to bind all claiming under him, and especially any person claiming under his will.

We see no reason why it would not also bind his next-of-kin as they also claim under him. But the doctrine of election reinforces the doctrine of priority in the case of the legatees.

POINT XII.

Even though affirmed in all other respects, the order should be modified so as to direct that the English real property should pass pursuant to the Ninth clause and the will of Mrs. Fowles.

In the opinion of Justice Shearn it is stated:

> "In so far as the validity of any devise of "real estate in England is concerned, the law "of England will govern, and, at least on this "record, the courts of this State have no con- "cern with it."

The doctrine that the English law will control that real estate is unquestionable, but the doctrine that it is not included in this case, and, therefore, the decree may speak generally, is we think erroneous.

This is not a proceeding *in rem,* or a proceeding to distribute specified property, being the property here in New York. It is, on the contrary, a proceeding *in personam* to construe the will, in which the court has acquired jurisdiction of the persons of the various claimants, and while the original court is a Surrogate's court, it has for this purpose the powers of a court of equity, and it is familiar law that a court of equity will act on the whole subject matter and will even reform or compel a deed of foreign lands, through its action on the person. The court, therefore, had jurisdiction both of the persons and of the subject matter to construe the whole will; and unless its decree is specifically limited by the terms of the decree so as not to apply to the English real estate it will bind the English real estate.

But we may go a step further. The power of the court having been invoked to construe the will, we think it should declare and apply the English law on the subject of the English realty, which is the common law. By that common law, incorporation of the will of Mrs. Fowles by reference was permitted, and under that law there could be no question of the entire sufficiency of the Ninth clause to pass the property in the direction desired by the testator.

Molineux v. Molineux, Cro. Jac., 144;
Smith v. Milford, 4 Mod., 132;
Smart v. Prujean, 6 Ves. Jr., 560;
Dickinson v. Stidolph, 11 C. B., N. S., 341;
Allen v. Maddock, 11 Moore, P. C., 427;
Goods of Sunderland, 1866, L. R. 1, P. & D., 200;
Condit v. DeHart, 62 N. J. Law, 78, 80-81;
40 *Cyc.*, p. 1094, *Title Wills,* Subd. VII, B 8, and cases there cited.

The question of this English real estate has become of some special importance here and peculiarly subject to determination here, by the fact that since the hearing of the petition, the real estate has been sold and the proceeds turned over to the executors, amounting to something like $40,000. Although the estate is so large that this sum will not amount to anything like 22½ per cent. of the residue, still we suggest that in the marshalling of the estate, under the doctrine of the *James* case (144 N. Y., 6), the proceeds of this real estate might well be used as part of the 22½ per cent., over which Mrs. Fowles was given the power of appointment, in order to carry out the

purposes and intents of the testator.

While there was no direct proof offered below of the English law, that law is presumed to be the common law.

1st Nat. Bank v. Nat. Broadway Bank, 156 N. Y., 459, 472;
Debevoise v. N. Y. L. E. & W. R. R. Co., 98 N. Y., 377;
Vanderpoel v. Gorman, 140 N. Y., 563, 568.

Several of the English cases cited above antedate the Revolution, and as such, show that the common law of England was a matter of judicial notice here; and the presumption is that that law continues, and, that that continuance is in this case entirely in accordance with the presumption, is shown by the later decisions. The cases cited in 40 Cyc., 1094, show how universal that construction of the common law is. Our New York rule is dependent solely on the New York Statute, which has never been adopted in England.

The Surrogate's decree sustained the Ninth clause and gave it full effect, so that no such provision was necessary, and if this court should reverse the decision of the Appellate Division generally and on any theory restore the result reached by the Surrogate, it would not be necessary to make any special provision on this point; but if this court should sustain the decision of the Appellate Division as to the 22½ per cent., so far as made up from New York property, we think it should modify the decree by providing that the estate should be so marshallel that this English real estate and its proceeds should be used, as far as they would go, to make up the 22½ per cent. over which Mrs. Fowles was given a power of

appointment enforcing her will, to that extent, as lawfully incorporated into the will of the testator, thus carrying out the will of the testator, at least to that extent. The *power* to so marshal the assets would seem to be implied in the decision of the *James* case, 144 N. Y., 6, and if it exists, such power should certainly be exercised in this case and the will construed in that way.

POINT XIII.

The order appealed from should be reversed and the Ninth clause declared effective to prevent lapse of the direct legacy of $5,000 and the personalty at Fairmile Court (except oil paintings); and also to carry over the 22½ per cent. of the residue through the testator's trustees and Mrs. Fowles' executor and trustee to those whom she named as legatees and devisees of her property, and in the proportions by her directed.

Respectfully submitted,

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Attorneys for Dorothy Elizabeth Smith.

CHARLES F. BROWN,
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To be argued by
EGERTON L. WINTHROP, JR.

Court of Appeals,

STATE OF NEW YORK.

IN THE MATTER

OF THE

Application to Construe the Last Will and Testament of CHARLES FREDERICK FOWLES, deceased.

DOROTHY ELIZABETH SMITH and KENNETH CHARLES SMITH, an infant,
Appellants,

GERTRUDE FRANCES BROWNE, GLADYS MARY BAYLIES, MARJORY FRANCES STEWART BROWNE, JEAN CLOTHER BROWNE, HARRY LAWRENCE BAYLIES, Jr., CHARLES RIPLEY BAYLIES, STEVENSON SCOTT, as Executor and Trustee under the Last Will and Testament of Charles Frederick Fowles, deceased, and COLUMBIA TRUST COMPANY, as Trustee under the Last Will and Testament of Charles Frederick Fowles, deceased,
Respondents.

BRIEF ON BEHALF OF THE INFANT APPELLANT KENNETH CHARLES SMITH.

Statement.

This is an appeal by the undersigned, as Special Guardian for the infant appellant Kenneth Charles

Smith, from an order of the Appellate Division, First Department, reversing the decree of the Surgates' Court of New York County.

The proceeding was brought for the purpose of the construction of the last will and testament of Charles F. Fowles, deceased. The provisions of the will of the testator, Charles Frederick Fowles, and of his wife Frances May Fowles, which outline the controversy, and the circumstances attending the execution of these wills, are briefly as follows:

Two days before the sailing of the steamer *Lusitania* on her last voyage the testator executed his last will and testament (Case on Appeal, fols. 82–107) at the office of Mr. James W. Prendergast At that time his wife also executed her will (Case on Appeal, fols. 108–117). By the eighth article of his will the testator directed that 45 per cent. of his residuary estate be held by his trustees for his wife for life and after her death he directed his trustees to then dispose of one-half of the principal of this 45 per cent. as follows:

> "One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C'" (Case on Appeal, fols. 97–98).

Then presumably anticipating the danger which he and his wife were running in crossing the ocean at that time, and the possibility of their death by common disaster, he added article Ninth to his will, which is as follows:

> "In the event that my said wife and myself should die simultaneously or under such cir-

> cumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife." (Case on Appeal, fol. 103.)

By her will executed on the same day Mrs. Fowles indicated what disposition she wanted made of the property which the testator wished her to have the right to dispose of. This disposition appears in article Third of her will (fols. 110–111 of Case on Appeal). By this disposition the infant appellant whom the undersigned represents was given a remainder interest after the death of his mother, the appellant, Dorothy Elizabeth Smith, in one-third of one-half of the 45 per cent. of the testator's residuary estate.

The testator and his wife were both lost on the sinking of the *Lusitania* and there is no evidence whatever to show the order of their deaths.

Surrogate Fowler held that the intention of the testator, in the events which have come to pass, as clearly expressed by the portions of his will above quoted, could be given legal effect. The theory upon which the Surrogate proceeded was that the testator intended to give to his wife a power of appointment by her will as to this property, should she survive him, and that he intended, in the event that they died in a common disaster, that this gift should not lapse. Accordingly, the surrogate held that this property should be transferred to the executor named in Mrs. Fowles's will, to be distributed in accordance with the terms of her will, to the end that the property should pass in precisely the same way as it would have passed had Mrs. Fowles survived the testator and the power of appointment vested in her.

By this holding the disposition appearing in article Third of Mrs. Fowles's will was rendered effective.

If the surrogate is sustained by this court the infant appellant, Kenneth Charles Smith, will be entitled to a vested one-third interest in said remainder.

The opinion of the majority of the Appellate Division (Case on Appeal, fols. 265-311) refused to give effect to the intention of the testator as to the disposition of this property in the events that have occurred, and held that article Ninth of the testator's will above quoted was void and accordingly decided that the gift over contained in the second paragraph of article Eighth above quoted to the testator's daughters Gertrude Frances Browne and Gladys Mary Baylies "in the event that my said wife should fail to make testamentary disposition" took effect.

Mr. Justice Page dissented from the opinion of the majority of the Appellate Division and handed down an opinion (Case on Appeal, fols. 314-321) in which he expressed the view that the testator's intention could be carried into effect by treating article IX of the testator's will as a direction, in the events that have occurred, to the court to assume that the testator predeceased his wife and to dispose of his property as though such assumed state of affairs actually existed.

In the following points, all of the above views will be discussed.

POINT I.

The testator intended in the events that have transpired to enable his wife to dispose of one-half of the 45 per cent. of his residuary estate set apart for his wife for her life.

The second paragraph of Article Eighth of the testator's will commences as follows:

> "One-half thereof to pay over pursuant to the provisions of *such* last will and testament as my said wife may leave (hereby *conferring* upon my said wife the *power to dispose* of the said one-half by last will and testament duly executed by her)". (Italics mine.)

By saying "such last will and testament" as my wife may leave, the testator expressed his intention to make effective any disposition of this property which his wife might see fit to make by such last will and testament as she should leave. He had no reference to her will which, as appears from the record in this case, was executed by Mrs. Fowles on the same day that the will under construction was executed. Had she revoked this will and executed another, changing the disposition of this property, it was his intention to render effective such new disposition.

Furthermore, the testator said, "hereby conferring upon my said wife the power to dispose of the said one half". Had he intended merely to adopt the testamentary provisions of her will, executed on the same day as his own, and make such provisions a part of his will, he would not have so expressed himself. He would have said merely, "one-half thereof to pay over pursuant to the provisions of the will of my wife executed on the same day as this my will". That his intention was broader, and that he wished to confer an unrestricted power of

testamentary disposition which his wife could execute, revoke and re-execute at any time prior to her death, appears unmistakably from the language which he has used. In short, the testator did not desire to himself determine the ultimate disposition of this property; he desired rather that its ultimate disposition should rest in the independent discretion of his wife.

It therefore appears from the above examination of the second paragraph of Article Eighth that the testator intended to confer upon his wife the power to dispose of this property by her will in any way which she might choose prior to her death. If Mrs. Fowles should die leaving a duly executed will purporting to dispose of this property and if the testator predeceased her, it was the testator's desire that "such last will and testament as she should leave" should govern the disposition of this property. As appears from the record, Mrs. Fowles has died leaving a duly executed will purporting to dispose of this property (case on appeal, fol. 110), but there is no evidence to show whether the testator or his wife died first.

The possibility that he and his wife might die in such circumstances that it would be impossible to determine who predeceased the other was foreseen by the testator, and Article IX of his will is directed toward such a contingency.

He said, "In the event that my said wife and myself should die . . . under such circumstances as to render impossible . . . to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife". If the testator predeceased his wife, and she subsequently died leaving a duly executed will purporting to dispose of this property, it will, of course, be conceded, as I have stated, that Mrs. Fowles' will should determine

the disposition of this property. This is because in such circumstances it was the testator's desire as expressed by the second paragraph of Article Eighth of his will to confer upon his wife the power to dispose of this property. By Article Ninth of his will the testator has directed that should he and his wife die in such circumstances as to render it impossible to determine who died first, he wished it to be deemed that he died first. It is just as though he had said: "I understand that if I die first this property will pass in accordance with the power of appointment which I have conferred upon my wife. As I realize that we may die in such circumstances as to render it impossible to determine the order of our deaths, I declare it to be my intention that, in the absence of evidence with respect to the order of our deaths, this property shall be disposed of in the same way that I have directed that it should pass should I predecease my wife, that is, in accordance with such last will and testament as she shall leave."

POINT II.

The Court should carry into effect the testator's intention, if this can be done, without contravening any established rule of law.

The majority opinion of the Appellate Division nowhere questions the proposition that the testator intended to enable his wife to dispose of this property by her will. The holding in the Appellate Division was simply to the effect that the Ninth Article of the testator's will could not be given effect, because, to give it effect, would be to enable a tes-

tator to change the established rule of law that in the case of deaths by common disaster where there is no evidence as to survivorship there can be no presumption as to survivorship.

In considering the Ninth Article two principles should be borne in mind by the Court. The first of these is well expressed by Chief Judge Davies in the case of *DuBois* v. *Ray*, 35 N. Y., at page 166, in referring to the opinion of Chancellor Walworth in *Butler* v. *Butler*, 3 Barb. Ch. 310. He there says:

> ". . . In the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual."

The second of these principles is declared by Judge Allen in the case of *Terry* v. *Wiggins*, 47 N. Y., at page 517, as follows:

> "But the will must, if possible, be so interpreted as to reconcile its different provisions, and give effect to every part of it."

It is to be noted that the Appellate Division in this case, in failing to give any effect to the Ninth Article of the testator's will, decided that this article was illegal and void. In the light of the above principles, if it can be shown that the Ninth Article of the testator's will can be given effect without violating any established rule of law, the decision of the Appellate Division should be reversed.

The two principles just referred to,—that the Court favors that construction of a clause of a will which will result in upholding such clause as legal and will always attempt to give effect to every article of a will, are merely corollaries of the cardinal principal of will construction that when the

intention of the testator is plain upon the face of the will, the Court will effectuate such intention if this can be accomplished consistently with established rules of law. The Ninth Article of the testator's will which the Court below has refused to give effect to, expresses the intention of the testator in the precise events which have come to pass. In failing to give effect to this article the Court below has failed to effectuate the plain intention of the testator. If, therefore, this intention can be carried into effect without contravening any established rule of law, or violating any principle of public policy or good morals, the decision of the Court below is wrong and should be reversed.

If the testator had transferred all his right, title and interest in the property now in litigation to his wife in his lifetime, there would be no conceivable objection to the beneficiaries under Mrs. Fowles' will taking such property. This clearly shows that there is nothing contrary to public policy or good morals in the result contended for by the appellants. The only question, therefore, which this Court has to decide is whether effect can be given to the testator's intention without contravening any established rule of law.

As the intention of the testator to enable his wife to dispose by her will of this property is perfectly clear the endeavor in this case, as was said by Judge Gray in giving the opinion of this court in the case of *Greene* v. *Greene*, 125 N. Y., at page 512, should be "to find a way of upholding a will not of breaking it down"; and to effectuate ". . . the inherent purpose . . . through what legal channels of construction may be open".

The Surrogate, in upholding the will in this case, effectuated the intention of the testator by construing the second paragraph of the Eighth Article of the testator's will taken in connection with the Ninth Article of his will as a gift to the estate of Mrs. Fowles in the events that have transpired. The

Appellate Division, while it did not question the proposition that the testator intended to enable his wife to dispose of this property, said that the will nowhere disclosed a specific intention to give this property to the estate of Mrs. Fowles and failing to find such specific intention decided that the gift over to the daughters of the testator in the event that Mrs. Fowles should fail to make testamentary disposition of this property should take effect.

It is submitted that in so holding, the Appellate Division missed the distinction pointed out by Judge Gray in the case of *Greene* v. *Greene*, *supra*. The Appellate Division has confused the testator's intention with a "legal channel of construction" through which that intention can be effectuated. There can be no doubt as to the intention of the testator in this case to enable his wife to dispose of this property by her will. The only question is can a legal channel of construction to effectuate such intention be found.

Positively stated, the rest of this brief will be devoted to showing that there are at least two legal channels of construction through which the clear intention of the testator can be given effect. Negatively stated, the various rules of law invoked by our opponents to defeat this intention will be considered with a view to showing that they do not prevent the Court from carrying out the testator's intention.

POINT III.

The testator's intention can be carried into effect without contravening the rules (1) that a will cannot speak until the testator's death, (2) that no power of appointment can vest in the donee of the power unless, as a matter of fact, the donee is living at the death of the donor of the power, and (3) that in cases of death by common disaster where there is no evidence as to survivorship there can be no presumption as to survivorship.

It is conceded that the property in litigation belonged to the testator at the time of his death and that, therefore, it is necessary to look to his will in the first instance to determine to whom this property should be transferred by his trustees. I shall therefore pass immediately to a consideration of the question whether to give effect to Article Ninth of the testator's will involves a violation of the rule that no power of appointment can vest in the donee of the power unless, as a matter of fact, the donee is living at the death of the donor of the power or of the rule that in the absence of evidence of survivorship there can be no presumption as to survivorship.

Both of the above rules are rules of law to be applied to a given state of facts, actual or hypothetical. The actual state of facts in the case at bar is that there is no evidence to determine whether the testator or his wife survived the other. The state of facts which the testator has directed his trustees to assume in distributing his estate in the event that there should be no evidence bearing on sur-

vivorship is that he predeceased his wife. If this Court shall be of opinion that it is proper for his trustees to make this assumption then neither of the above rules, invoked by the respondents to defeat the testator's intention, have any application to this case, and they will therefore not be violated by effectuating the testator's clearly expressed intention.

That it is entirely proper to assume a state of facts founded on fiction for the purpose of effectuating a testator's intention is so ably pointed out in the dissenting opinion of Mr. Justice Page in the Court below that I quote at length from it. Mr. Justice Page said:

> "The creation of a fiction is not an uncommon method of testamentary expression. We frequently find and give effect to such provisions as, for example, that a testator's property be distributed in certain events and at a time long subsequent to his death as if he 'had then died intestate and without issue', or provisions that a child of the testator shall in a certain event 'be deemed to have survived' him for the purpose of distributing his estate. To execute such directions, we must assume a situation which is contrary to the actual facts and contrary to the result which would flow as a matter of law from the facts as they actually exist, and apply the law as if the fiction created by the testator were fact. This we frequently do in order to give effect to the right of every man to dispose of his property in accordance with his intention clearly expressed by will, provided such intention does not contravene either a rule of law or of public policy. . . . *The rule of law applicable to the actual facts is not material, for the testator does not request the Court to apply a presumption to the actual facts, but to assume, in construing his will and distributing his property, a state of facts contrary to the actual facts and founded in pure fiction.* This I think the Court should do in accordance with the directions of the will." (Italics mine.)

The above indicates a "channel of construction" through which the Court, without disturbing any rule of law, can effectuate the intention of the testator.

Surrogate Fowler, in his opinion in this case, pointed out another way in which the testator's intention could be carried into effect without running counter to any established rule of law. His decision was based largely upon the decision of this Court in the case of *Matter of Piffard*, 111 N. Y. 410.

In that case the testator gave part of his residuary estate to his daughter and then provided by a codicil to his will that, should his daughter predecease him, the property which he had by his will bequeathed to her should be paid over to the executor or trustee named in her will "heretofore or hereafter executed" to be distributed by such executor or trustee pursuant to the provisions of such will of his daughter. The Court held in that case that the testator intended to give the property to his daughter if she survived him and should she predecease him to give it to his daughter's personal representative as a substitute for the gift to her, so that, although his daughter would be unable herself to enjoy the property, nevertheless her testamentary disposition of it would be effective, and accordingly directed the testator's executor to transfer this property to the personal representative of his daughter.

In this case, as I have shown, the intention of the testator was to enable his wife, in the events that have occurred, to dispose of this property by her will. If his wife survived him, he wanted a power of appointment with respect to this property to vest in her. If they died in a common disaster, he realized that, unless her survivorship could be established, no power of appointment could vest in his wife and so he added Article Ninth to his will, so that his ultimate intention that his wife should have the power to dispose of this property by will might be carried out. In other words, should he and his

wife die in such circumstances as to render it impossible to show who survived, he wanted his wife's personal representative to take this property as a substitute for the gift of a power of appointment to her. In this way he would accomplish by means of a gift by way of substitution to her estate precisely the result which he wished.

Both the Piffard case and the case at bar rest upon the principle that to carry out the testator's intention the Court will sanction a gift by way of substitution to the personal representative of a legatee who at the time of distribution of the testator's estate is dead, and consequently unable to take the legacy. Under the doctrine of *stare decisis* the principle established by this Court in the Piffard case is controlling here. It is submitted that the Appellate Division was in error in failing to follow the principle heretofore established by this Court.

The majority opinion of the Appellate Division attempts to distinguish the Piffard case from the present case. It points out several respects in which the facts of the Piffard case differ from the facts in the present case, but it fails to supply any reason why the principle of the Piffard case is not applicable and controlling here. The controlling effect of the Piffard case on the present case was clearly pointed out by Surrogate Fowler in his opinion. He said (Case on Appeal, fols. 222, 223):

> "In principle that case is decisive of this, although the facts differ. But it is not the similarity of the facts which causes a decision to be a precedent, but the relevancy of the principle laid down. According to the doctrine of *stare decisis*, which is a fundamental of the common law system, the only thing in a decision binding as an authority is the right principle upon which the case was decided and not the application of such principle."

In the case of *Matter of Peiser*, 79 Misc. at page 671, Surrogate Fowler gave a very clear statement of the entire doctrine of *stare decisis*, which so

clearly shows the error into which, it is submitted, the Appellate Division has fallen that I quote it in full. He said:

> "It is a very trifling conception of the doctrine of *stare decisis* to affirm that it applies only when the identical facts are again shown and the court must render a precisely similar judgment. If that were the true limitation of the doctrine of *stare decisis*, the difficulty would be that in all human probability the facts of one cause could never again be precisely repeated in any future cause. All logicians concede that identity, or coexistence, or coinherence, is a relative term or figure of speech. Identity exists only in mathematical science or in the abstract, if at all. The doctrine of *stare decisis* relates to legal principles, not to facts. At common law the only thing in a decision binding as authority under the rule *stare decisis* is the right principle upon which the case was decided—*ratio decidendi*—and not the application of such principle."

The "channel of construction" just outlined following Matter of Piffard, *supra*, does not depend upon the vesting of a power of appointment in Mrs. Fowles. It merely shows that the testator's will contains a gift by implication to the personal representative of Mrs. Fowles. It, therefore, does not in any way conflict with the rule of law that no power of appointment can vest in the donee of the power unless the donee is living at the death of the donor, nor does it ask the Court to draw any presumption as to the order in which the testator and his wife died.

It is, therefore, apparent that, whether the testator's intention is given effect in the way pointed out by the dissenting opinion of Mr. Justice Page, or whether it is given effect in accordance with the view of Surrogate Fowler, in either event none of the above rules cited by our opponents to defeat the intention of the testator are violated.

POINT IV.

To carry out the expressed intention of the testator does not involve incorporating by reference the provisions of the will of Mrs. Fowles with respect to the property in litigation into the will of the testator.

As I have pointed out, the majority opinion of the Appellate Division did not deny that the testator intended to enable his wife to dispose of the property in question by her will, but the Appellate Division held that the only way by which effect could be given to such intention would be to incorporate by reference the will of Mrs. Fowles into the testator's will. This position, it is submitted, is unsound.

In the first place, as I have shown in Point I, the testator did not intend to incorporate into his will the provisions of such last will and testament as his wife might leave. He intended rather to confer upon her, in the events that have occurred, the power to dispose of this property as she saw fit.

When it is clear that the testator intended to enable his wife to make independent testamentary disposition of this property, it becomes clear that he could not have intended to incorporate into his will the provisions of her will with respect to such property. The idea of conferring independent testamentary power excludes the idea of incorporation by reference. If the provisions of Mrs. Fowles' will are to be incorporated into the will of the testator, any independent testamentary disposition on her part would be destroyed, and the provisions of her will with respect to this property would become, by the force of the doctrine of incorporation, just as much a part of his will as its other provisions.

Not only did the testator not intend to incorporate the provisions of his wife's will into his will, but it is entirely possible to give effect to the provisions of his wife's will without incorporating them. There are two "channels of construction" through which this result can be attained.

The first of these was indicated by Mr. Justice Page and has already been suggested. If this Court shall be of opinion that it is proper to assume a fictitious state of facts—*i. e.*, that the testator predeceased his wife—in accordance with the direction of the testator, then it will follow that the power of appointment conferred by the will of the testator vested in his wife in her lifetime. If this be the case, then of course it cannot be argued that the rule forbidding incorporation by reference of documents testamentary in nature is applicable. This view has been fully presented in the brief submitted on behalf of the appellant Dorothy Elizabeth Smith.

But even assuming that, as it cannot be shown as a matter of fact that Mrs. Fowles survived the testator, her will cannot operate as an instrument in exercise of a power of appointment, still her will can operate independently upon this property. Following the "channel of construction" outlined by Surrogate Fowler the trustees of the testator's will should transfer the property to the executor named in Mrs. Fowles' will, because under this theory the property was given by the testator to his wife's estate in the event that the testator and his wife should die in such circumstances that it would be impossible to determine who predeceased the other. When this transfer has been made the duty of the testator's trustees will have been discharged. Thereafter, they will not be responsible for what disposition the executor named in Mrs. Fowles' will makes of this property. By such transfer, full effect will have been given to the provisions of the testator's will. This proceeding being a proceeding merely to construe the last will and testa-

ment of the testator, is not concerned with the ultimate disposition of this property.

But as this court will undoubtedly, to avoid unnecessary litigation, determine the ultimate disposition of the property so transferred to Mrs. Fowles' executor, it is necessary to consider what disposition should be made of it by Mrs. Fowles' executor. In attempting to dispose of this property by her will Mrs. Fowles indicated what disposition she wanted to be made of this property. If it should prove to be the fact, or should be assumed that she survived her husband, then her will would operate as an instrument in exercise of a power of appointment. If on the other hand this should prove not to be the fact and the court should hold that it could not be assumed, then nevertheless her will still indicates the disposition which she desired to be made of this property which would accrue to her estate and be transferable to her executor should the testator die without revoking his will. In short, the testator's will in the events that have occurred gives this property to his wife's estate. Thereafter, the executor named in his wife's will should dispose of this property in accordance with the will of Mrs. Fowles, which expressly referred to such property in its residuary clause.

The views just outlined do not violate any of the rules invoked by the respondents to defeat the testator's intention. They precisely accord with such intention as they enable Mrs. Fowles to make independent testamentary disposition of this property. They carry out the direction contained in the second paragraph of Article Eighth of the testator's will "to pay over pursuant to such last will and testament" as Mrs. Fowles should leave.

It is, therefore, submitted that, as the testator's intention is clear and can be carried into effect without contravening any established rule of law through either of the "channels of construction" just pointed out, it is the duty of the Court to uphold such intention.

POINT V.

The order of the Appellate Division in so far as it reverses the decree of the Surrogates' Court, dated June 15, 1916, should be reversed, and said decree of the Surrogates' Court should be in all respects affirmed, and it should be adjudged that the infant Kenneth Charles Smith is entitled to a vested remainder in one-third of one-half of forty-five per cent. of the testator's residuary estate and in one-third of the property mentioned in paragraph Fourth of his will.

Respectfully submitted,

EGERTON L. WINTHROP, JR.,
Special Guardian for the Infant Appellant, Kenneth Charles Smith.

Dated, October 5th, 1917.

To be argued by
CHARLES H. BECKETT.

In the Court of Appeals

OF THE STATE OF NEW YORK.

IN THE MATTER OF The application to construe the last will and testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.	Brief of the Columbia Trust Company, Respondent.

Appeal from an order of the Appellate Division of the Supreme Court, First Department, reversing a decree of the Surrogates' Court, County of New York, construing the will of the late Charles Frederick Fowles, who, with his wife, was drowned in the common disaster of the sinking of the "Lusitania."

After giving certain legacies, aggregating $55,000, decedent bequeated the income of 45 per cent. of his residuary estate to his said wife for life with power to dispose of the corpus of 22½ per cent. of his residuary estate by her will. He also bequeathed to his wife certain personal property and a $5,000 legacy. If his wife did not validly and effectually dispose of the corpus of 22½ per cent. by her will, then it was devised and bequeathed to the decedent's two daughters by his first wife (Will, Petition, fols. 94–102).

The provision in decedent's will that if (for any reason) his wife failed to exercise her testamentary power of disposal of 22½ per cent. of the residue of his estate, such 22½ per cent. should go to the de-

cedent's two daughters by his first marriage, reads (Will, fols. 96–8) :

> " One-half thereof " (22½%) " to pay over pursuant to the provision of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half, by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions ' B ' and ' C ' of this article of this my Will, one such portion passing under said subdivision ' B ' and one such portion passing under said subdivision ' C.'
>
> " One-quarter thereof to pay over pursuant to the provisions of the subdivision ' B ' of this article of this my Will.
>
> " One-quarter thereof to pay over pursuant to the provisions of the subdivision ' C ' of this article of this my Will."

And further (Will, fols. 100–102) :

> " B. The second part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my said trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gertrude Frances Browne, to hold and invest the same and to receive and collect any and all the income, interest and increment accruing thereon and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*.
>
> " C. The third part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my said trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gladys Mary Baylies, to hold and invest the same

and to receive and collect any and all income, interest and increment accruing thereof and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*."

The "Ninth" clause of the decedent's will purported to lay down a rule of construction different from that provided by law, in the event of both decedent and his wife perishing in a common disaster, in the following terms:

> "NINTH. In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who pre-deceased the other, I hereby declare it to be my will that it shall be deemed that I shall have pre-deceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have pre-deceased my said wife" (Will, Petition, fol. 103).

The will of decedent's wife purported to exercise the power of appointment of the 22½ per cent. by creating a life estate therein in favor of the wife's sister, with remainder to her sister's son and decedent's two daughters of his former marriage; and in case of any remainderman's death to his or her issue *per stirpes* (Mrs. Fowles' Will, fols. 109–112).

Surrogate FOWLER held that the law could not be defeated by a provision in a will which, if enforced, would be, in substance, an unauthorized imposition or unlawful direction contrary to law, directing the court to reverse an accepted rule of the common law (Opinion, fols. 206–8). He then held that the "Ninth" clause of the decedent's will should be construed as a substitutionary bequest in favor of the executors of the deceased wife when she perished in the common disaster of 22½% of the corpus of the residue as well

as the $5,000 legacy (Surrogate's Opinion, fols. 210-231; Decree, fols. 44-46).

So that the Surrogate did indirectly what could not be done directly. In effect the will has been construed as if decedent had added words which, after due reflection, he decided not to use. Decedent, having given the residue to his daughters in the event which has occurred, and having failed to provide a legal substituted gift to his wife's executors upon her death, no substituted gift is necessary to prevent a partial intestacy and none should be implied.

The majority of the Appellate Division say (Opinion, fols. 282-3, 284-8):

> "For any intent on the part of Mr. Fowles that any part of his estate should go to his wife's sister, Dorothy Elizabeth Smith, or to any child of his wife's sister, the testament will be scanned in vain. A few simple words would have effectuated such an intention, but any such words are carefully omitted. The only possible way of finding any such intent is to incorporate into the testator's will the provisions of the wife's will, which is contrary to the established rule in this State forbidding the incorporation into a will, by reference, of any extraneous instrument containing provisions of a testamentary character (Booth v. Baptist Church, 126 N. Y., 215, 247; Matter of O'Neil, 91 N. Y., 516, 523; Matter of Emmons, 110 App. Div., 701)."
>
> * * * * * *
>
> "The plain intent of the testator was that his wife should have the power to dispose of one-half of the trust fund by will and that she should consult her own wishes in so doing, not that she should dispose of it to any persons in the mind of or selected by the testator or to the exclusion of any persons in the testator's mind. The testator accordingly, and perfectly naturally, contemplated that his wife might fail to make a valid will and also that, if she made a will, she might change her mind and destroy the will. In either of such contingencies, it is only fair to assume that the testator intended what he so plainly expressed, namely, that the one-half of the trust fund should go to his daughters. Least of all is there any

intimation of intent in the will that one-half of the trust fund should go to the executors named in any will that his wife might make. Not only are the executors of Mrs. Fowles not mentioned in the testator's will, but the express provision of paragraph Eighth is that one-half of the trust fund should be paid over 'pursuant to the provisions of such last Will and Testament as my said wife may leave.' But as such a provision could only be given effect by incorporating the wife's will in that of Mr. Fowles, which is illegal, it is assumed that the testator must have known that if the property did go in accordance with the wife's will (although a provision to that effect was invalid), it would necessarily go to the executors and trustees named therein. Accordingly, it is concluded that the intention of the testator was to devise the property to the executors and trustees under the wife's will. This strains 'construction' beyond permissible limits, where there are no words in the will expressing any such intent and where the only purpose of such a construction and the effect of it is to dispose of the testator's property in accordance with the provisions of some other will, a result that is not sanctioned by the law. This is not will construction but is tantamount to making for the testator a new will."

POINTS.

I. There is no presumption of law arising from age or sex as to survivorship among persons who perish by a common disaster. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The onus probandi is on the person asserting the affirmative. In the absence of any proof there is an intestacy.

(1860) Wing v. Angrave, 8 House of Lords, Cases, 183.
(1878) Newell v. Nichols, 75 N. Y., 78, 87-91.
(1903) Young Women's Christian Home v. French, 187 U. S., 401, 410, 413-9.
(1908) St. John v. Andrews Institute, 191 N. Y., 272.
(1910) Dunn v. New Amsterdam Casualty Co., 141 App. Div., 478-481.

In St. John v. Andrews Institute, 191 N. Y., 254, the court say (191 N. Y., 272):

> "The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution. In such case the question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous (Young Women's Christian Home v. French, 187 U. S., 401; Newell v. Nichols, 75 N. Y., 78)."

In Newell v. Nichols, 75 N. Y., 78, the court say (75 N. Y., 91):

> "All the common law authorities are substantially the same way, and the rule, which I think is

wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstance that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix."

In Young Women's Christian Home v. French, 187 U. S., 401, the court say (187 U. S., 410):

> "The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous."

II. A provision in a will contrary to the principles of the common law or the operation of which would reverse a rule of construction based on those principles is illegal and invalid.

1. The law of New York forbids the incorporation into a will, by reference of any extraneous instrument containing provisions of a testamentary character, such as a devise or bequest contained in the will of decedent's wife in favor of the wife's sister or in favor of the sister's son (Appellate Division Opinion, fols. 282–4).

Booth v. Baptist Church, 126 N. Y., 216, 247–8.
Re O'Neil, 91 N. Y., 516, 523–4.
Re Emmons, 110 App. Div., 701, 703–4.
Re Andrews, 162 N. Y., 1, 11.
Vogel v. Lehritter, 139 N. Y., 223, 235–6.
Re Conway, 124 N. Y., 455, 457–62.

2. A testamentary power of appointment by a will to be "heretofore or hereafter" executed is invalid unless executed after death of donor of power, because the donee could not dispose by will of what remained wholly in another's power and ownership.

Re Piffard, 111 N. Y., 410, 414.
Re Mayo, 76 Misc., 417, 420.

Curley v. Lynch, 206 Mass., 289, 292.
Condit v. De Hart, 62 New Jersey Law, 78, 80–81.
Jones v. Southall, 32 Beavan, 31, 38–39.
Sharpe v. M'Call, 1 Irish R. (1903), 179, 184.

In Re Piffard, 111 N. Y., 410, decedent's will gave his daughters power of appointment "by their several wills heretofore or hereafter duly made and executed." One of the daughters died before testator leaving a will.

The court say (111 N. Y., 414):

> "The testator gave a power of appointment, which, as a power, the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership."

In Curley v. Lynch, 206 Mass., 289, the court say (206 Mass., 292):

> "And the power of appointment given to her fell with the life estate which preceded it. That power did not and could not come into existence until the death of Lynch himself. And as his wife, the only person who could have exercised the power, was dead before that time, the power itself never came into existence. It is as if no such power had been created by the will of Lynch (Jones v. Southall, 32 Beav., 31; Griggs v. Gibson, 35 L. J. [N. S.] Ch., 458; Sharpe v. M'Call [1903], 1 Ir., 179)."

In Sharpe v. M'Call [1903], 1 Irish, 179, the court say (p. 184):

> "The power here under which only the wife could act was given by the will of the husband, and he did not die till several years after the death of the wife. Consequently she was not the donee of the power, and the gift of the power to the wife lapsed, in my opinion, by her death in the testator's life time, and she therefore never had authority to nominate the persons to take."

3. A condition that a bequest or devise to testator's daughter shall not be effective unless within six months of testator's death her legal adoption of an illegitimate child of which testator was the father, shall be annulled, is a void condition as contrary to law.

Re Anonymous (FOWLER, S.), 80 Misc., 10, 13–16.

4. Letters of instruction referred to and in legal effect comprising part of a deed of trust the rights under which vest upon the settlor's death, take effect only and as of settlor's death.

Van Cott v. Prentice, 104 N. Y., 45, 55, 56.

LASTLY. The judgment should be affirmed.

Respectfully submitted,
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To be argued by
A. Perry Osborn.

Court of Appeals

STATE OF NEW YORK.

In the Matter

of

The Application to construe the last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

BRIEF ON BEHALF OF RESPONDENTS, MARJORY FRANCES STEWART BROWN AND OTHERS, INFANTS.

Statement.

This is an appeal from an order of the Appellate Division, First Department (fol. 247), reversing a decree of the Surrogate's Court, construing the Will of the late Charles Frederick Fowles (fol. 37).

The opinion of the Surrogate appears at fols. 187-231. The opinions of the Appellate Division appear at fols. 262-321.

(Italics are by counsel, unless otherwise noted.)

Facts.

The facts are, briefly, these: Mr. and Mrs. Fowles each executed Wills in New York City, April 30th, 1915. Immediately thereafter they sailed on the steamship Lusitania and perished in the loss of that vessel on May 7th, 1915. Absolutely no evidence regarding the survivorship of one or the other has yet appeared. Their bodies, widely separated, were recovered and identified (fols. 158-161).

Mr. Fowles' Will contained the following provisions (fols. 82-105):

1. Legacies aggregating fifty-five thousand dollars.

2. Legacy of certain personal property and five thousand dollars to his wife.

3. Devise of 45 per cent. of his residuary estate to Trustees for Mrs. Fowles for life, with power in her to dispose of one-half (½) thereof, or 22½% of his residuary estate by her Will.

4. Remainder of residuary estate including 22½% thereof devised to his wife for life in trust in equal separate shares for his two daughters for life, with remainder to their children. (This special guardian represents the infant children of the two daughters.)

5. An alternative provision that, in the event his wife failed to dispose of the portion of the residuary estate subject to her power of appointment, this should go in equal shares in trust for his two daughters for life, with remainders over to their children.

6. Clause "Ninth" in Mr. Fowles' Will attempted to create a conditional assumption or presumption that, in certain events, he predeceased his wife.

Mrs. Fowles' Will contained the following provisions (fols. 108-114):

1. Gift of certain legacies.

2. Devise of her residuary estate (in which was included by specific reference the property *"as to which I may have power of disposition by virtue of the provisions of the last Will and Testament of my husband, Charles Frederick Fowles"*) to Trustees for her sister, Mrs. Smith, for life, remainder over, in equal thirds to the two daughters of Mr. Fowles, or their children, and the infant, Kenneth Charles Smith.

Question in Case.

Assuming that the legacies to Mrs. Fowles became part of Mr. Fowles' residuary estate (which cannot be seriously questioned), the entire question is: whether the residuary estate over which Mrs. Fowles was specifically granted the power of appointment passed to the persons named in Mrs. Fowles' Will, or to the persons named in Mr. Fowles' Will under the provision devising such property for his daughters and grandchildren, in the event that Mrs. Fowles' Will should fail to dispose of the same.

Inasmuch as the question of construction turns on the gift over in clause Eighth, of Mr. Fowles' Will, and the legal effect of clause Ninth of Mr. Fowles' Will, it is well to set these out in full (fols. 95-104):

"Eighth.—A. All the rest, residue and remainder of my estate, both real and personal and wheresoever situate (including the proceeds resulting from the sale of my stock of the Scott & Fowles Company), I direct my executors to divide into three parts or portions, the first part or portion

of which shall consist of forty-five per centum thereof, and the other two parts or portions of which shall each consist of twenty-seven and one-half per centum thereof. The said first part or portion consisting of forty-five per centum of my said residuary estate (subject to the possible deduction of eight thousand two hundred and fifty pounds [£8,250], as hereinafter provided), I give and bequeath to my Trustees, hereinafter named, In Trust, Nevertheless, for the use and benefit of my wife, Frances May Fowles, to hold and invest the same and to collect and receive any and all the income, interest and increment accruing thereon and the same to pay over to my said wife semi-annually and for and during each year of the full term of the life of my said wife. Upon the death of my said wife, the said trust shall cease and determine and the corpus of same I direct my said trustees to then dispose of as follows:

One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions "B" and "C" of this article of this my Will, one such portion passing under said subdivision "B" and one such portion passing under said subdivision "C."

One-quarter thereof to pay over pursuant to the provisions of the subdivision "B" of this article of this my Will.

One-quarter thereof to pay over pursuant to the provisions of the subdivision "C" of this article of this my Will.

In the event that my said wife should elect to take the devise of my said estate "Fairmile Court" and at the valuation thereof as provided in and by the provisions of article "Third" hereof, the said valuation being the sum of eight thousand two hundred and fifty pounds (£8,250), shall be deducted from the aforesaid forty-five per centum part of my said residuary estate and shall be added in equal portions to the aforesaid two twenty-seven and one-half per centum parts of my said residuary estate, to the end that, if my said wife should accept the devise of my said estate "Fairmile Court," as aforesaid, her share in my said residuary estate shall be reduced to the extent of eight thousand two hundred and fifty pounds (£8,250) and the shares of my two daughters in my said residuary estate shall each be increased to the extent of four thousand one hundred and twenty-five pounds (£4,125).

B. The second part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinafter provided), I give and bequeath to my said trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gertrude Frances Browne, to hold and invest the same and to receive and collect any and all the income, interest and increment accruing thereon and the same to pay over to my said daughter in equal semi-annual instalments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*.

C. The third part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my

said Trustees, In Trust, nevertheless, for the use and benefit of my daughter, Gladys Mary Baylies, to hold and invest the same and to receive and collect any and all income, interest and increment accruing thereof and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, *per stirpes* and not *per capita*.

Ninth. In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

The Decision of the Surrogate.

The Surrogate held that there is no presumption of the survivorship of Mrs. Fowles—that the property in question did not pass under Mrs. Fowles' Will through exercise of the power granted—that Article "Ninth" was null as affecting survivorship —that it indicated an intention on the part of Mr. Fowles to prevent a lapse in the event of Mrs. Fowles' incapacity to take—that the testator intended a gift to the executors of Mrs. Fowles in substitution for her—that the property in question passed, perforce of Mr. Fowles' Will to the persons named in Mrs. Fowles' Will (fols. 187-231).

The Decision of the Appellate Division.

All the Justices of the Appellate Division concurred in overruling the Surrogate's interpretation that the testator intended a gift to the executors of Mrs. Fowles in substitution for her (fols. 265-311, 313-321). The prevailing Justices concurred in the other grounds of the Surrogate's decision, excepting the conclusion that the property passed perforce of Mr. Fowles' Will to persons named in Mrs. Fowles' Will (fols. 265-311). They held that effect must be given to the expressed provision in his Will in favor of the testator's daughters and their children (the children being represented by the special guardian), arising from a failure of Mrs. Fowles to dispose of the property by the provisions in her Will in favor of her sister and her sister's children (fols. 282-291). The dissenting Justice held that the power in Mr. Fowles' Will came into effect and was duly executed, by reason of the testator's declaration in the "Ninth" Article of his Will (fols. 319-321).

Position of Special Guardian.

1. There is no presumption of the survivorship of Mrs. Fowles, either on the facts, or as a matter of law.

2. The Will of Mr. Fowles merely gave his wife a power of appointment over the property in dispute.

3. The power of appointment was never legally operative, in the absence of proof that Mr. Fowles survived Mrs. Fowles.

4. Mrs. Fowles' Will cannot be incorporated into that of Mr. Fowles by reference.

5. Mr. Fowles' testamentary scheme is clear and unambiguous and is unaffected by any supposed declaration of intentions.

6. In legal effect, Article "Ninth" of Mr. Fowles' Will was an attempt to alter the law affecting wills, powers and survivorship, by his own declaration, and was, therefore, a nullity.

7. There can be no gift by substitution to the persons named in Mrs. Fowles' Will.

8. The property passes in accordance with the specific provision of Mr. Fowles' Will for his two daughters and their children; the event of the failure of Mrs. Fowles to dispose having arisen.

1 to 4 (*supra*) inclusive, are ably and exhaustively covered in the briefs submitted by the daughters of Mr. Fowles, and the Columbia Trust Company. Accordingly, the special guardian will consider only the questions involved in 5, 6, 7 and 8.

POINT I.

Mr. Fowles' testamentary scheme is clear and unambiguous, and is unaffected by any supposed declaration of intention.

The testator intended:

(1) The incorporation into his Will of the provisions in Mrs. Fowles' Will, by the reference thereto.

(2) The creation of a power in favor of Mrs. Fowles, which could take effect only upon his death and which could be exercised solely by her Will, taking effect only upon her death.

(3) The substitution of fiction for fact, in order to overcome, if possible, the law applicable to the

undisputed facts, affecting wills, powers and survivorship.

Much sympathetic atmosphere is created in appellants' favor by the evidence to the effect that both Wills were prepared and executed about the same time in the presence of both the husband and wife and in anticipation of their fateful voyage on the "Lusitania." The strictures of the learned Surrogate on this extraneous evidence were well founded (fols. 193-200). The extraneous evidence should be ignored. The testator's intentions must be ascertained solely from the Will executed by him, *regardless of the fact that he was aware* of the provisions in Mrs. Fowles' Will.

The testator was presumed to know the law. He was aware that both Wills were ambulatory. He was aware that a Will must take effect upon an actual death, not a fictitious death;—least of all a fictitious death attempted to be created by the testator's own declaration. He was aware that estates vest subject to the existence and execution of powers, and that persons making claims by virtue of powers must prove their existence and execution. He was aware that the testamentary power in favor of his wife could not take effect unless she survived him. He was aware that the provisions in his wife's Will could not be incorporated into his by the reference thereto. He was aware that his wife's Will could not dispose of his property. He was also presumed to know that he could not by a declaration of intention alter the law of this State on these or any other subject.

With such knowledge, the testator expressly provided that, in the event of his wife's failure to dispose of a portion of the property affected by his own Will, such portion should be distributed under

subdivisions "B" and "C" of the Eighth Article of his Will. Thus, the testator contemplated that the law might condemn the course which he attempted to adopt. Yet he adopted that course, despite the law; whereas any one of the following courses could have been adopted, in anticipation of the dangerous voyage of himself and his wife, viz.:

He could have made a certain devise conditioned upon a simple event, their death from a common disaster,—a not uncommon condition.

He could have provided that the portion of the remainder, upon his wife's death, should go to his wife's sister and his wife's sister's children, as was provided in her Will, instead of attempting to incorporate such provisions into his own by reference thereto.

He could have made a Will conferring power of appointment as to the portion of the remainder upon his wife, to be exercised by her deed to take effect upon his decease, and she could have executed a deed; so that survivorship between them would have been eliminated and the ambulatory effect of double Wills avoided.

He could have made a Will providing that, in the event that he and his wife should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, the portion of the remainder, upon his wife's death, should go to her personal representatives.

To overcome the ambulatory effect of their respective Wills, they could have made joint or mutual Wills or deeds.

The testator elected not to pursue any of the above indicated courses. Even upon the extraneous evidence relied on by the appellants, he was aware

that the provisions of his wife's Will referred solely and explicitly to a *power* in his Will (fol. 110). Likewise, he was aware that, as expressly provided in his own Will, the trust for his wife was to "cease and determine" upon his wife's death (fols. 96-97). The provision, referring to the "corpus" of the trust, then directs his trustees to dispose of the property in accordance with the provisions following (fols. 96-97). Then immediately follows the provision for the payment over of one-half of the residuary estate "pursuant to the provisions" of Mrs. Fowles' Will, and containing a power to dispose of the same by her Will (fols. 96-98). The testator expressly provided that the trust should cease and determine. Hence, the direction to the trustees to "dispose of" or "pay over" the remainder, was not a devise of the remainder to the trustees, as appellants contend.

To render the power operative or Mrs. Fowles' disposition effective, no devise by testator to his trustees was necessary, nor was any made. On the contrary, a devise of the remainder was expressly made to the trustees for the benefit of his children and grandchildren (fols. 100-102) upon the termination of the trust for his wife by her death (fol. 96), subject to operation of the testamentary power given to his wife (fols. 97-98).

The *remainder upon Mrs. Fowles' death,* was vested, not in the trustees for Mrs. Fowles, but in the persons designated to take by the testator himself. The remainder was vested by virtue of the Will and by operation of law, not by virtue of any acts of the trustees. It was vested subject to an exercise by Mrs. Fowles of the testamentary power, which could operate only upon his death prior to that of his wife. An unexecuted power could not postpone vesting. Persons claiming by virtue of a power must prove the existence and exercise of the power.

The remainder could not vest in the persons named in Article "Third" of Mrs. Fowles' Will by a mere reference in his Will to the dispositions in her Will, under all the decisions. It could not vest solely by virtue of the presence of the power in his Will and an attempt to exercise it in hers. An operation of the power required, as a matter of law, which could not be altered by the testator, that Mr. Fowles should first have predeceased, in order to bring the power into existence, and that Mrs. Fowles should have survived him, in order to bring its exercise by her Will, which could take effect only upon her decease, into existence.

As will develop more fully, Article "Ninth" of Mr. Fowles' Will involved an attempt to alter the law itself, in the guise of a declaration of intention for construing the Will, which, being clear and unambiguous, required no declarations affecting construction.

POINT II.

The provisions of article "Ninth" of Mr. Fowles' Will would alter or evade the law, and are a nullity.

A testator cannot, solely by his own declaration, affect the time of his own death, much less the time of the death of another person.

A testator cannot, solely by his own declaration, alter the law that a Will takes effect only upon death,—an actual, not a fictitious, death.

A testator cannot, solely by his own declaration, alter the law that there is no presumption of survivorship.

A testator cannot, solely by his own declaration, alter the law affecting the existence and exercise of testamentary powers.

A testator cannot, solely by his own declaration, alter the law that the provisions in another person's Will cannot be incorporated into his own by reference thereto.

A testator cannot, solely by his own declaration, alter the law affecting lapsed and substitutional devises and legacies.

Upon all these subjects the law itself is sovereign. No man can alter the law by his own declaration. At bar, the testator's declaration, in guise bespeaking his intention, in substance and effect was an attempted declaration of the law itself affecting wills, powers and the vesting of estates thereunder. As will develop from the testator's language, he even *intended* to alter the law.

Upon the aspect that a testator cannot by his own declaration affect the time of his own death and that of another person, and cannot affect the law that there is no presumption of survivorship, an analogy seems pertinent. The law itself prescribes a presumption of death in certain cases. Sec. 841, C. C. P., provides that a person upon whose life an estate in real property depends, who remains without the United States or absents himself in the State or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time.

Under both the common and civil law, a person was presumed living for a period of one hundred years after his birth. This was modified *by 19 Car. II C., 6 (1667)*, from which *1 R. S., 749* and *Sec. 841, C. C. P.*, were adopted.

In cases not covered by the said statute, the common law, effective from *19 Car. II C., 6*, prescribes the seven-year presumption. In no case does the law raise any presumption as to the precise

time of the death of a person. Hence, since survivorship would depend upon a presumption of the precise time *affecting the death of two persons,* the law, being consistent, also prescribes that there shall be no presumption of survivorship.

Re Board of Education of N. Y. (173 N. Y., 321, 323-326);
Re Smith (77 Misc., 76), per FOWLER, S.;
Re Benjamin (155 App. Div., 233);
King vs. Paddock (18 Johns., 141);
Cerf vs. Diener (210 N. Y., 156).

An assumption or presumption of survivorship involves an assumption or presumption of death itself. The basic fact of survivorship is death, involving a co-relation of time. A testator could not determine the fact of his own death by his testamentary declaration to the effect that in event of an unexplained absence for one year he should be deemed dead. No more could he determine a fact of survivorship, involving the facts as to another person's death and his own. It is not the function of Wills to create fiction.

The circumstance that statutes have been enacted dealing with a presumption of death demonstrates that, if there be any real problem affecting the law of survivorship, the subject is one that should be dealt with by the Legislature. It is not a problem that could be solved by declarations of a single individual.

In substance and effect the provisions of Article "Ninth" attempted to prescribe a conditional, but conclusive assumption that the testator predeceased his wife, contrary to the law that there should be no presumption whatever. That attempt is now invoked as a medium for overruling the law upon the other aspects before mentioned.

Article "Ninth" provides (fols. 103-104):

> "In the event that my said wife and myself should die simultaneously *or under such circumstances as to render it impossible or difficult to determine who pre-deceased the other*, I hereby declare it to be my Will that it shall be deemed that I shall have pre-deceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have pre-deceased my said wife."

The dissenting Opinion below states (fols. 319-320):

> "The provision of the 'ninth' clause of the testator's will in the present case does not create a result which is contrary to public policy or good morals. The rule of law applicable to the actual facts is not material, *for the testator does not request the court to apply a presumption to the actual facts, but to assume, in construing his will and distributing his property, a state of facts contrary to the actual facts and founded in pure fiction.* This I think the court should do in accordance with the directions of the will."

The testator's *ipse dixit* was conditional. This is ignored in the dissenting Opinion (fols. 317-321). Until every survivor of the Lusitania has been examined, it cannot be said to be *impossible* to determine the fact of survivorship. So far as the evidence shows, but one survivor was examined, though some sort of an attempt was made to examine others (fols. 156-158). Hence, it cannot even be said to be difficult to determine the fact of survivorship. Difficulty in a *"determination"* is not to be measured merely, *if at all,* by expense and trouble. Thus, the Courts are also asked to accept the appellants' *ipse dixit* that it is impossible or difficult to determine a fact upon which they rely to obtain the property.

The testator does not use the word "presumption." He uses the synonymic words *"deemed"* and *"assumption."* It is said he does not ask the Court to apply a presumption. He does more. A presumption is merely the tentative assumption of a fact, which may be rebutted. The testator asks that a fact be conclusively assumed, although the assumed fact be a pure fiction. He asks that the fiction be assumed, even though the circumstances simply rendered it *"difficult to determine who pre-deceased the other." To do so would oust the Courts of jurisdiction to determine the facts affecting survivorship, except by the tenuous test of difficulty. It follows that the testator even intended to substitute his own declaration for the law itself.*

A testator must cast his will, his dispositions, his intentions, in the mould of the law. It is not the function of a will to determine fact or law. A will, taking effect upon death, cannot create a fact affecting the testator's life; much less, a fiction affecting his life; still less, a fiction affecting the life of another person.

The law should not compromise itself with a paradox,—a will, from its nature taking effect only upon death, itself determining the happening of that event. Make the paradox a precedent,—what would it lead to? No jurist could foresee. But it might put a laugh in the law,—the doctrine of dead men's bootstraps, to lift themselves in and out of the grave at will.

The dead man's *ipse dixit* on law and fact must be held abortive, a nullity.

Assume that the testator was entitled to insert in his Will a declaration of intention as an aid to the Courts in determining the intention of testamentary provisions that would be otherwise am-

biguous. If that were the only effect of the "Ninth" Article it would not be in contravention of the law. But its intention and effect is to contravene the law affecting the provisions of a Will which are clear and unambiguous. Hence, the Courts cannot accept the testator's declaration of a fiction as a substitute for the law applicable to the undisputed facts. The declaration is a nullity, because it cannot have any effect.

The provisions of a Will can be invoked only when their application is conformable to the law. They cannot be invoked when, to give them effect, would contravene the law. This is true of provisions purporting to declare testator's intention, but really operative to alter or evade the law otherwise applicable to undisputed facts. In this sense, the provisions of Article "Ninth" are a nullity, and, therefore, void. To assert that they are not contrary to public policy or good morals is not enough to render them effective.

The four prevailing Justices in the Appellate Division held the testator's declaration to be a nullity (fols. 277-279).

The Surrogate regarded the testator's declaration as a nullity, so far as it attempted to alter the law itself (fols. 207-210). He treated it solely as a declaration of an intention to substitute Mrs. Fowles' *executors as such,* as though the testator had provided that, in the event that testator and his wife should die simultaneously or under such circumstances as to render it impossible or difficult to determine who pre-deceased the other, then his wife's personal representatives should take. The testator did not so declare, but expressly provided that the property should be disposed of by his trustees "*pursuant to the provisions" of his wife's Will,* conferred a power upon her, and then made an alterna-

tive devise for his own children and grandchildren (fols. 96-97). We call attention to the reasoning of the learned Surrogate (fols. 224-225):

> "Who was intended by Mr. Fowles to take by substitution in the event that his wife could not take is not ambiguous or doubtful. *It is obviously those persons who in law continued her legal existence, viz, her executors.* Who these are is a mere matter of identity, and is determined by Mrs. Fowles' will, which is proper extrinsic evidence for that purpose. *Her executors take by substitution, but they take as her executors for the uses and purposes prescribed by her will. They do not take individually.* That this was Mr. Fowles' express intention I have no doubt, and I can detect no illegality in such intention to carry the primary donations to Mrs. Fowles *over to her executors by substitution in the events which have actually occurred.*"

The fallacy underlying the reasoning is that it assumes an intention on Mr. Fowles' part that Mrs. Fowles' personal representatives, which would include administrators, should take, and disregards the testator's own express provisions to the contrary.

The testator clearly intended that the property should go, not to his wife's personal representatives, but to the persons designated to take it pursuant to the provisions of her Will and, if her disposition failed, to his own daughters and their children. The provisions of her Will purport to exercise the power by appointing the persons named as her trustees (fol. 110). It is a mere coincidence that these persons were also named by her as executors (fol. 114). Had Mr. Fowles intended that Mrs. Fowles' executors should take the property in the event that she left a Will, he could have readily so provided, instead of providing that the property was to be disposed of "pursuant to the

provisions" of her Will, and otherwise for his daughters and grandchildren. He intended just what he said, but attempted to make his declaration of a fiction a means of evading the law.

Four of the Appellate Division Judges disapproved of the reasoning of the Surrogate (fols. 282-293). The dissenting Opinion ignores the theory (fol. 321).

POINT III.

The persons named in Mrs. Fowles' Will do not take by substitution.

It is submitted that, wherever the doctrine of substitutional gift, in order to prevent a lapse, applies in this State, either by virtue of statute or common law, in every case the object of the testator's bounty is defined and determined by the testator. It is the testator, himself, who chooses who shall take the substituted gift.

The New York Decedents' Estates Law (Laws of 1909, Chap. 18, Sec. 29, as amended, Laws of 1912, Chap. 384), provides:

> "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

This is the statutory provision for lapse and in making a will with this statute in force, *the tes-*

tator knows the exact persons who will benefit by this provision against lapse. The persons are identified by the law.

In the *Matter of Wells,* 113 N. Y., 396, it was held that the common law rules with regard to lapse in case of the death of the legatee before the testator are still in force except as modified by the statutory provision.

The common law upon the subject of lapse and substitution of gifts would seem to be somewhat as follows:

That if a specific devise or legacy lapses it falls into the residuary estate—that where property is devised subject to a charge and the charge lapses, the devisee or legatee of the property takes the same—that where real property is given by way of remainder to persons in succession and the gift to one of them lapses, the remainders are accelerated—that where property is given in trust with a gift over and a lapse occurs as to the *cestui,* the gift over holds—and finally that where the testator has clearly provided by nomination for a substitution in the event of the pre-decease of the devisee or legatee, that the property goes to the persons substituted. *It will be noted that the principle suggested that it is the testator who makes the selections for substitution clearly appears in all these cases.* If this is so, then to regard the persons named in an unexecuted power of appointment as taking by substitution falls without the principle back of substitutional gifts, for in the case of powers it is not the testator, but the donee of the power who makes the selection as to what particular persons are to benefit by the testator's bounty. Therefore, it is submitted that the persons named in an unexecuted power of appointment cannot benefit under the doctrine of substitutional gift. This appears to be the law in Eng-

land. The great authority, Jarman, in his book on Wills, rejects the idea that Sec. 33 of the English Wills Act which is the same in principal as Sec. 29 of the New York Decedents' Estates Law, applies to an unexecuted power of appointment:

> "It has been suggested that Sec. 33 of the Wills Act might apply to powers so that if the testator gave one of his children a power of appointment and the child died in the testator's lifetime, leaving issue, and having made a will, which, in turn would be an exercise of the power, the appointment thus made would take effect. It is submitted that this is not so, because the gift of the power of appointment is not a devise or bequest of real or personal estate, or any estate or interest within the meaning of Sec. 3."
>
> *Jarman Wills,* 6th Ed., Vol. 1, p. 843.

This ruling would seem to be upheld in *Griggs vs. Gibson,* 35 L. J. Ch., 458, Wood, V. C.

In the decision of Surrogate FOWLER, 158 New York Supp., page 463, the learned Surrogate says:

> "Who was intended by Mr. Fowles to take by substitution in the event his wife could not take is not ambiguous or doubtful. It is obviously those persons who in law continued her legal existence, viz: her executors. Who these are is a mere matter of identity, and it is determined by Mrs. Fowles' will, which is proper extrinsic evidence for that purpose. Her executors take by substitution, but they take as her executors for the uses and purposes prescribed by her will."

While it is true that the persons named in Mrs. Fowles' Will can be determined by reference thereto, *the particular persons named could never be within the certain knowledge of the testator* Fowles, for a Will is ambulatory in nature and Mrs. Fowles could have made another Will, as to

which Mr. Fowles could have had no knowledge and over which he could have had no control, and thus, persons of whom Mr. Fowles had no knowledge whatsoever would have become objects of his bounty. This is of course entirely proper under a power of appointment, for, as has been pointed out, under a power it is the donee who exercises the right of selection for the donor, but as a substitutional gift, to permit an unexecuted power to define the objects of testator's bounty is to subvert and overthrow the entire principle applying to lapse and substitution. It would also be subversive of the law affecting powers.

The decision of the learned Surrogate was opposed to the law of the state, that it is the testator who must clearly provide for the substitution.

> *Irish vs. Huested,* 39 Barb., 411;
> *King vs. Woodall,* 3 Edwards Chancery, 79;
> *Kerr vs. Dougherty,* 79 N. Y., 327.

It is further submitted that the clear rejection in this state of the doctrine of incorporation by reference is authority for the rejection of the extension of the doctrine of substitutional gift to the case at bar. To give the residuary estate of Mr. Fowles to the persons named in Mrs. Fowles' Will is to incorporate an outside *ambulatory* instrument into the Will of Mr. Fowles. That the learned Surrogate justified such action by calling it a case of substitutional gift cannot alter the true nature of the act.

The authority for the decision of the learned Surrogate would seem to be the *Matter of Piffard,* 111 N. Y., 410. In this case the testator Piffard provided:

> "I direct that such share or shares shall be paid over by my said executors *to the execu-*

tors or trustees named in and by the several wills of my said daughters in the case of the death of them or either of them in my lifetime instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally as now provided in and by my said will."

In a codicil Piffard affirmed this gift:

"I do hereby direct that my said daughters Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will; and to that end I direct that such share or shares shall be paid over to my said executors to the executors or trustees named in and by the several wills of my said daughters in case of the death of them or either of them in my lifetime, instead of to my daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally, as now provided in and by my said will."

Subsequently Sarah died and the testator with knowledge of her death reaffirmed his Will by two codicils.

The Court by Judge FINCH held that the gift passed to Sarah's executors. The learned Judge admitted that the power failed, but held that the property passed to the persons named in Sarah's Will—to quote the opinion,—

"While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-

> fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime. What she would have done by her will but could not, that he did for her by his own will."

Previously in his opinion it appears that Judge FINCH laid great emphasis on the codicil:

> "yet—the further language of the codicil shows its intent to be that, in case of the death of the daughter in the lifetime of the father, *the latter intended to devise and bequeath by force of his own will the daughter's* one-fifth to such person or persons and in such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct in the disposition of her own property; and 'to that end,' in aid of that result, *he explicitly declares* that the one-fifth given to her shall be paid over *to her executors* for the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property at her death, and had become distributable as such by force of her will."

Matter of Piffard was a hard case in view of the intestacy which would necessarily have resulted from a failure to pass the one-fifth in accordance with Sarah's Will.. And a careful reading of the case fails to disclose or even suggest any rule of law upon which the decision of the Surrogate could rest herein. It is strikingly similar to the case at bar, but there are three fundamental differences:

First.—The testator *knew* who would benefit under Sarah's Will *because she had predeceased him, and her Will had ceased to be ambulatory.* Her Will therefore *identified the precise persons* intended to be benefited by testator's Will *and codicils.*

Second.—The Court sought to avoid an intestacy. This factor is not present in the case at bar; for the testator Fowles provided for an alternative gift upon the failure of the power.

Third.—The testator in the event that Sarah predeceased him *expressly* made his gift to her executors, instead of to Sarah. As Judge FINCH said:

> "It is possible to see in the will of the father a clear intent to prevent a lapse and *avoid a partial intestacy* by carrying over the one-fifth which she did not take *through her executors* to those whom she should name as devisees and legatees of her property."

In the case at bar, the testator has provided against an intestacy and did *not* make his gift to his wife in the event of her death in the alterative to her executors, but "pursuant to the provisions" of her Will.

The fact that Judge FINCH *had the opportunity to avoid intestacy, the fact that Sarah predeceased her father and that the persons benefitting under her Will were thus unconditionally determined to the certain knowledge of Piffard, and the further fact that Piffard's gift was to the executors of his daughter Sarah,* seem to be the controlling factors for a decision which on the merits carried out the intention of the testator Piffard. None of these factors are present in the case at bar.

It is submitted that to extend the Piffard case to the case at bar is entirely subversive of the principle which lies at the back of substitutional gifts. It is further submitted that such extension would

change the law of the State and open the door to the rejected doctrine of incorporation by reference. *To extend the Piffard case would remove the great protection afforded to testators under the law of this State, by which, either they choose the persons they wish to benefit, or others, under a valid exercise of a power of appointment, choose for them.*

POINT IV.

The disposition provided for by the testator in the Eighth paragraph of his Will in the event of the failure of his wife to dispose of part of his residuary estate should be given effect.

The learned Surrogate did not consider the alternative provision in Paragraph "Eighth" of Mr. Fowles' Will which reads:

> "* * * and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions, and such two equal portions to pay over, pursuant to the provisions of subdivisions "B" and "C" of this Article of this my will, one such portion passing under such subdivision "B" and one such portion passing under such subdivision "C."

As heretofore noted, "B" and "C" divided the remainder of the residuary estate between Mr. Fowles' two daughters in trust, remainders over to the children represented by the special guardian. In fact, the Surrogate seems to have entirely overlooked the alternative gift, for his opinion reads as follows (fol. 227):

> "From the ninth clause of Mr. Fowles' Will, it is apparent that the testator intended to exclude or segregate from his general estate the legacy given to the use of his wife. These he appropriated to her in all the events which occurred or could have occurred. *In no event*

did he intend that these legacies should accrue by his Will to his own next of kin. When this is certain beyond all peradventure, the court should not be astute to find reasons for benefiting those who in no event the testator himself wished to be benefited."

Quite to the contrary,—the testator considered the possibility of his wife failing to legally dispose of the residuary estate, and in such event provided for the alternative gift above quoted. Conceding that it was the intention of the testator to have the power of appointment granted to Mrs. Fowles govern the disposition of part of his residuary estate, yet he clearly recognized the possibility that there might be the very legal defect which occurred. It seems a case of primary and secondary intent on the part of Mr. Fowles—the primary intent being to have the power govern if the same could be given effect by law, the secondary intent being that, if the power failed, to provide for his own blood, in accordance with subdivisions "B" and "C." Again, the special guardian would point out that the Court is not confronted with the possible intestacy which was present in *Matter of Piffard,* and there is not that great reason to call an unexecuted power of appointment a substitutional gift, since the testator himself has provided for the event of the power failing.

All the Justices of the Appellate Division concurred in overruling the theory of the learned Surrogate.

POINT V.

The order appealed from should be affirmed, with costs.

New York, November 9, 1917.

Respectfully submitted,

A. PERRY OSBORN,
Special Guardian for Respondents Marjory Frances Stewart Browne, Jean Clother Browne, Harry Lawrence Baylies, Jr. and Charles Ripley Baylies, infants.

STEPHEN P. ANDERTON,
of Counsel.

Stillman Appellate Printing Co., 51 Broad St., N. Y.

Court of Appeals,

STATE OF NEW YORK.

In the Matter

of the

Application to construe the Last Will and Testament of Charles Frederick Fowles, late of the County of New York, deceased.

Dorothy Elizabeth Smith and Kenneth Charles Smith, by his Guardian, Egerton L. Winthrop,

Appellants,

Marjorie F. S. Browne, Jean C. Browne, Henry L. Baylies and Charles R. Baylies, by their Guardian, A. Perry Osborn, Gertrude F. Browne, Gladys M. Baylies, The Columbia Trust Company, as Trustee, and Stevenson Scott, as Executor and Trustee,

Respondents.

BRIEF ON BEHALF OF GERTRUDE FRANCES BROWNE AND GLADYS MARY BAYLIES, RESPONDENTS.

This is an appeal from an order of the Appellate Division of the Supreme Court in the First

Judicial Department entered on the 9th day of March, 1917, reversing the decree of the Surrogates' Court of the County of New York construing the will of Charles Frederick Fowles, deceased, in a proceeding brought for that purpose under Section 2615 of the Code of Civil Procedure (fol. 79).

The decree of the Surrogates' Court (page 13) adjudged that the provisions of the subdivision designated "Ninth" of the Last Will and Testament of Charles Frederick Fowles, the above named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitution to Stevenson Scott, the executor of the Last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes described in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the will of the said Charles Frederick Fowles, deceased, are as follows: The sum of $5,000 bequeathed by the subdivision thereof designated "Second"; the personal property bequeathed by the subdivision thereof designated "Fourth"; and one-half of forty-five per cent. of the residuary estate of the said testator.

Upon appeal to the Appellate Division that decree was reversed, and it was further ordered and decreed that the Surrogates' Court be, and hereby is, ordered and directed to enter a decree modifying the said decree dated June 16th, 1916, by striking therefrom the provisions thereof set forth above and by inserting in place of said provisions the following:

> "That the provisions of the paragraph designated 'Ninth' of the last Will and Testa-

ment of Charles Frederick Fowles, the above-named decedent, are invalid and of no force and effect;

"That in default of proof that the testator's wife Frances May Fowles, survived the testator, the property which constitutes the one-half of the corpus of the attempted trust for the benefit of the testator's wife, Frances May Fowles (said one-half of said corpus being one-half of forty-five per centum of the net residuary estate) as to which one-half there was, in terms, conferred upon the testator's said wife, by paragraph 'Eighth' of the testator's will, the power to dispose by last Will and Testament duly executed by her, passes by virtue of and pursuant to the further provisions of said paragraph 'Eighth' " (fols. 256-258).

From this order of the Appellate Division Dorothy Elizabeth Smith appeals to this Court.

It does not appear by the record that the Surrogates' Court ever entered a judgment or decree from the decision of the Appellate Division, and so far as appears no appeal is before the Court from such a decree (see Notice of Appeal, p. 78 of the Record, where the appeal is only from the order of the Appellate Division).

The opinion of the Surrogates' Court is found at page 63 of the Record, and the opinion of the Appellate Division is found at page 88 of the Record. One of the Justices of the Appellate Division, Mr. Justice Page, dissented, and his opinion is found at page 105 of the Record.

The respondents Gertrude Frances Browne and Gladys Mary Baylies, on whose behalf we appear, are the testator's daughters.

Their mother died during the lifetime of the testator, and he married again, his second wife being Frances May Fowles. There were no chil-

dren of such second marriage. The testator and the second wife, Frances May Fowles, died in a common disaster on May 7, 1915, both leaving wills dated April 30, 1915. The testator's will contained a general legacy of $5,000 to his wife, Frances May Fowles, and also provided that his executors should set aside and pay over to certain trustees named in the will a specified proportion (45%) of his residuary estate as a trust fund, the income from which should go to his wife during her life. The testator's will also in terms conferred a power upon her to dispose by her will of one-half of the corpus of such trust. As the wife did not survive the testator, this power never vested in her, and could not be exercised. The testator's will contained an alternative provision that in the event that his wife did not exercise the power, the portion of the trust fund to which the power related should be divided into two equal parts, which should be respectively paid into two other trust funds which the will created for the benefit respectively of his two daughters, the appellants, during their lives, and upon their death to their children.

The Surrogate, in the decree appealed from, refused to give effect to this alternative provision, and instead, directed in effect that the will of the wife, Frances May Fowles, be incorporated into that of the testator, and that the one-half of the trust fund and the general legacy of $5,000 should be disposed of in accordance with the provisions of her will. The theory on which the Surrogate reached this conclusion was, that the will could be construed to contain a legacy *to the executor of Mrs. Fowles,* although as a matter of fact the will neither contained any express provision to that effect nor any provision which could by any reasonable construction be strained into such a bequest.

The Facts.

This proceeding to construe the will was instituted by the petition of Stevenson Scott, the executor named in the will. The facts set forth in his petition were not controverted by the answers filed by any of the parties to the proceeding, and stand wholly undisputed. Such facts may be briefly stated as follows:

The will of Mr. Fowles, which forms the basis of this proceeding, was executed on April 30, 1915, in New York City. On the same day the testator's wife, Frances May Fowles, executed a will which is annexed to the petition and will be referred to hereafter. Immediately thereafter and early in May, 1915, Mr. and Mrs. Fowles sailed for England on the *Lusitania*. Both were involved in the disaster which overtook that steamer and were drowned. Their wills, executed as above stated, have been duly admitted to probate in New York County. No facts have come to light from which any inference can be drawn as to whether both Mr. and Mrs. Fowles perished at the same moment or one predeceased the other, nor as to the sequence of their deaths.

The will contained among other provisions a general legacy of $5,000 to the testator's wife, Frances May Fowles (paragraph Second, subdivision 8 of will of Charles Frederick Fowles, fol. 77). It also contained a direction to his executors to divide his residuary estate into three parts, the first of which should consist of forty-five per cent. thereof and the other two parts of which should each consist of 27½ per cent. thereof. The second and third parts, each consisting of 27½ per cent., he gave by subdivisions "B" and "C" of the Eighth paragraph of his will (fols. 91-93) to certain trustees named in the will, in two separate

trusts respectively; one trust for the benefit of one of his daughters, the appellant, Gertrude Frances Browne, to receive the income during her life, the principal on her death to go to her children; the other trust for the benefit of his other daughter, the appellant, Gladys Mary Baylies, to receive the income during her life, the principal on her death to go to her children.

The provision in regard to the first part consisting of 45 per cent. of the residuary estate is contained in subdivision "A" of the Eighth paragraph, and is as follows:

> "The said first part of or portion consisting of forty-five per centum of my said residuary estate (subject to the possible deduction of eight thousand two hundred and fifty pounds (£8,250), as hereinafter provided), I give and bequeath to my Trustees, hereinafter named, In Trust, Nevertheless, for the use and benefit of my wife, Frances May Fowles, to hold and invest the same and to collect and receive any and all the income, interest and increment accruing thereon and the same to pay over to my said wife semi-annually and for and during each year of the full term of the life of my said wife. Upon the death of my said wife, the said trust shall cease and determine and the corpus of same I direct my said trustees to then dispose of as follows:
>
> *"One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay*

over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my Will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C'." (Paragraph Eighth, subdivision A of Charles Frederick Fowles' Will, fols. 86-89).

The possible deduction of £8,250 referred to was to take effect in case the wife elected to take the testator's dwelling house and land known as "Fairmile Court" in England, which case the value of that real property, which the testator fixed at £8,250, was to be charged against the trust fund. (See paragraph Third of Will of Charles Frederick Fowles, fols. 79-80.) Mrs. Fowles' death, of course, precluded her from making such election, and the provision for such a possible deduction has become inoperative (fol. 41).

Mrs. Fowles' will contained the following provision, by which she attempted to exercise the power thus in terms conferred upon her by sub-division A of the Eighth paragraph of her husband's will quoted above:

"Any and all the rest, residue and remainder of my estate, real and personal and wheresoever situate (*including any and all property as to which I may have power of disposition by will by virtue of the provisions of the last Will and Testament of my husband, Charles Frederick Fowles*), I give and bequeath to my Trustees, hereinafter named, In Trust, Nevertheless, to hold and invest the same for the use and benefit of my sister, Dorothy Elizabeth Smith, and to receive and collect the income, interest and increment accruing thereon and the same to pay over to the said Dorothy Elizabeth Smith in equal semi-annual installments during each year of the full term of the life of the said Doro-

thy Elizabeth Smith and for her sole use and benefit. Upon the death of the said Dorothy Elizabeth Smith the said trust shall cease and determine and I direct that my said trustees shall then pay over the corpus of said trust as follows: One-third thereof to Kenneth Charles Smith, the son of the said Dorothy Elizabeth Smith, or, if he should not then be living, in equal shares to the issue of the said Kenneth Charles Smith, *per stirpes* and not *per capita;* one-third thereof to my said husband's daughter, Gertrude Frances Browne, or, if she should not then be living, in equal shares to the issue of the said Gertrude Frances Browne, *per stirpes* and not *per capita;* and one-third thereof to my said husband's daughter, Gladys Mary Baylies, or, if she should not then be living, in equal shares to the issue of the said Gladys Mary Baylies, *per stirpes* and not *per capita.*" (Paragraph Third of Mrs. Fowles' will, fols. 100-103.)

By paragraph Ninth of his will Mr. Fowles attempted to create a presumption to be binding upon the Court in the event of his death and that of his wife *under such circumstances that it should be difficult or impossible to determine which died first.* This paragraph of the will reads as follows:

> "Ninth: In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife" (fol. 94).

The will of Mr. Fowles was admitted to probate in the Surrogates' Court, New Yorg County, on June 23, 1915, and Letters Testamentary were issued to Stevenson Scott, one of the executors named in the will (the other executor named in the will being Mrs. Fowles). Thereafter Scott filed his petition setting forth the facts which have already been referred to, annexing copies of the respective wills of Mr. and Mrs. Fowles, and alleging that the following questions had arisen as to the validity, construction and effect of certain provisions of the will of Charles Frederick Fowles:

> "1.—Are provisions of subdivision designated 'Ninth' of said will valid, and, if so, what is the true and full construction, force and effect of said provisions?
>
> "2.—If the provisions contained in subdivision designated 'Ninth' of said will should be held to be null and void and of no force or effect, do all the various bequests and the certain trust bequeathed and created for the benefit of the said Frances May Fowles, deceased, lapse and fail, and if so, does either the personal property which constituted the subject matter of the said attempted bequests or the personal property which constituted the subject matter of the said attempted trust and the remainder or reversionary interests limited thereon, pass under and pursuant to the provisions contained in subdivision designated 'Eighth' of said will or did the decedent die intestate as to any or all of the said personal property?" (fols. 60-61).

Proceedings under the Petition.

Special guardians were appointed by the Court for the Browne, Baylies and Smith infants. Answers were interposed by the various parties in

interest, but the answers, as already stated, did not controvert the facts set forth in the petition. A hearing was had before the Surrogate at which the Surrogate permitted Mr. Prendergast, the attorney who drew the will of Mr. Fowles and that of his wife, to testify as to the circumstances surrounding the drafting and execution of the wills and as to such facts as he had been able to learn in regard to the circumstances of the death of Mr. and Mrs. Fowles. The Surrogate permitted the examination of Mr. Prendergast, although the latter expressed reluctance to testify because of the provisions of the Code of Civil Procedure relating to privileged communications between attorney and client. The Surrogate, in deciding the case, however, stated that he disregarded the evidence thus taken, first, because such evidence was only admissible to obviate an ambiguity, and the will at bar was entirely free from ambiguity, and, second, because the evidence was without material importance and did not change the inferences which the Court would in any event have drawn from the provisions of the will itself and the coverture of Mr. Fowles, without extrinsic evidence. (Opinion of Court, fols. 177-186.)

The evidence taken is printed in the record, fols. 122-162. It is in substance to the effect that Mr. and Mrs. Fowles consulted Mr. Prendergast about the drafting of their wills one day before the execution of the wills and two days before their sailing on the *Lusitania* (fol. 141); that the instructions were given by each of the testators in the hearing of the other (fol. 142); that the subject of the warning that had been published that the *Lusitania* might be sunk, or of any danger of the *Lusitania* sinking, was not mentioned by either Mr. or Mrs. Fowles (fol. 142); and that the only mention of the amount of Mrs. Fowles' estate was

a statement by her that it would be small in the event that she died before her husband (fol. 143). That Paragraph Ninth of Mr. Fowles' will was placed in the will at the suggestion of Mr. Fowles (fol. 153); that Mr. Prendergast advised Mr. Fowles that there was substantial reason to doubt the validity of the clause (*ibid.*); and that Mr. Fowles stated that if the insertion of the clause in the will would not invalidate the other provisions of the will, he preferred that clause should be inserted in the will even if the Court should ultimately hold that the clause in question was invalid (fols. 153-154). The other evidence given by Mr. Prendergast related solely to the effort made to determine whether either Mr. or Mrs. Fowles survived the other, and was to the effect that no facts or evidence on that subject were ascertained (fols. 144-152).

The Decision of the Court Below.

The Surrogate made no findings and based his decision solely upon the construction of the will of Mr. Fowles as a matter of law.

It was conceded by all parties and the Surrogate, following the rule in this State, held, that there was no presumption as to whether or not Mr. Fowles and his wife died at the same moment nor as to which died first. The Surrogate consequently held that there was no presumption that the wife survived her husband. As the power did not come into being until Mr. Fowles' death, and could not be exercised until it did so come into being, and as Mrs. Fowles' will could not be effective as an exercise of the power given by her husband's will unless she did survive him, it followed that her will did not constitute an exercise of that power (fols. 204-205).

The Surrogate also held that under well settled principles of law and from considerations of public policy, the Ninth paragraph of Mr. Fowles' will could not be given effect, either as an attempt to change the substantive law applicable in the event of the simultaneous deaths of the testator and his wife, or as an attempt to create a presumption to bind the Court in the absence of evidence as to which of the two died first, and that notwithstanding paragraph Ninth the rule of law as to the effect of simultaneous deaths and the rule as to the absence of any presumption, in the absence of evidence, as to priority of death, was the same as if paragraph Ninth had not been contained in the will (fols. 194-197).

Notwithstanding his rulings on the foregoing questions, the Surrogate held that paragraph Ninth of Mr. Fowles' will could be given effect, as a "substitutional" provision, and should be construed as though it had provided that in the event of the simultaneous deaths of Mr. and Mrs. Fowles, or in the event of their deaths under such circumstances that the respective priority of their deaths could not be ascertained, the $5,000 legacy, the contents of his house in England, and the beneficial interest under the 45 per cent. trust should go to the *executor named in Mrs. Fowles' will, to be disposed of in accordance with the terms of her will* (fols. 38, 39).

The decree read in part as follows:

> "Ordered, adjudged and decreed that the provisions of the subdivision designated 'Ninth' of the last Will and Testament of Charles Frederick Fowles, the above-named decedent, are valid and that the true and full meaning, construction, force and effect of the said provisions are that the legacies bequeathed by the decedent to his wife, Frances May Fowles, deceased, passed by substitu-

> tion to Stevenson Scott, the executor of the last Will and Testament of the said Frances May Fowles, deceased, for the use and purposes prescribed in and by the will of the said Frances May Fowles, deceased, and that the legacies which passed as aforesaid by virtue of the Will of the said Charles Frederick Fowles, deceased, are as follows: The sum of $5,000 bequeathed by the subdivision thereof designated 'Second'; the personal property bequeathed by the subdivision thereof designated 'Fourth'; and one-half of forty-five per cent. of the residuary estate of the said testator'' (fols. 38-40).

The decision of the Appellate Division, reversing the order of the Surrogate, has already been referred to (pp. 2-3 *supra*).

POINT I.

Under the eighth clause of the testator's will the disposition of that part of the corpus of the trust consisting of one-half of 45% of his residuary estate, after the death of his wife, depended upon a valid execution of the power granted to his wife by her last will and testament, and, in the event of a failure to execute that power by his wife, the property went to his trustees for the benefit of his two daughters during their lives.

An analysis of the whole will of the testator will aid us in this discussion. By the Second clause of his will the testator gives a number of specific legacies of $5,000 each. First, to his mother, brothers and sisters; then one legacy of $5,000 to his wife, a legacy of $5,000 to each of his daughters and a legacy of $5,000 to his wife's sister.

By the Third clause of his will he devises to his wife the dwelling house and buildings situated in England, provided that his wife should elect to take the same at a valuation of £8,250, which sum was to be deducted from the amount which was to be held in trust for her by the Eighth clause of his will. By the Fourth clause of his will he gives to his wife all the personal property contained at the time of his death in said estate in England. By the Fifth and Sixth clauses of his will the testator provides for the disposal of his business. The Seventh clause of his will gives to his executors power to sell all his real estate and by the Eighth clause of his will he disposes of all the rest, residue and remainder of his estate. By this clause he creates three trusts,—the first portion to consist of 45 per cent. of his residuary estate and the other two portions to consist each of 27½ per cent. thereof. The first portion consisting of 45 per cent. of the residuary estate (subject to the possible deduction of £8,250,—the value of the English real property)—he gives to his Trustees in trust "for the use and benefit of my wife Frances May Fowles" the income thereof to be paid over to his said wife semi-annually and for and during each year of the full term of the life of his said wife, with a bequest over upon her death (fols. 95-96).

Having thus made provision for the support of his wife during her life, this clause of the will provides that the second portion shall be held in trust for the use and benefit of his daughter Gertrude, with a termination of the trust upon her death and a bequest of the remainder over, and as to the third portion of the estate consisting of 27½ per cent. thereof, he creates a trust for the benefit of his daughter Gladys with a remainder over to her children. There is no provision in the will as to

the disposition of the second and third portions of his estate in the event that either of his daughters should die without issue. As to the provision for the disposition of the remainder of the corpus of the trust property left for the benefit of his wife, the testator directs that one-half of the corpus of that trust the Trustees should "pay over pursuant to the provisions of such last Will and Testament as my said wife shall leave (hereby conferring upon my said wife the power to dispose of the said one-half by Last Will and Testament duly executed by her) and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions, and such two equal portions to pay over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my Will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C'. One-quarter thereof to pay over pursuant to the provisions of the subdivision 'B' of this article of this my Will. One-quarter thereof to pay over pursuant to the provisions of the subdivision 'C' of this article of this my Will (fols. 96-98)."

The testator by this Eighth clause of his Will disposes of all his residuary estate. He creates a trust for the benefit of his wife and a trust for the benefit of each of his two daughters, and the provisions for the distribution of the remainder after the death of his wife and his two daughters are necessarily a part of the trust provision disposing of the several shares into which he directs his residuary estate to be divided. Each share is to be vested in the trustees for the purposes of the trust. The direction is to the trustees to pay over to the designated beneficiaries upon the termination of the trusts, but each direction to pay

over is a disposition of the corpus of the trust which he charged upon the trustees as part of their duty in administering the trusts. There is no independent devise or bequest to those to whom the trustees are directed to pay over the corpus of the trust upon the death of the life beneficiary. He uses the same language in each of the other trusts for the benefit of his daughters. The corpus of the trust held for the benefit of his wife, consisting of 45 per cent., was thus disposed of after her death by a direction to his trustees "to pay over" to the persons whom he undertook to benefit by this disposition of his residuary estate. One-half of the corpus of the trust fund the executors were directed to pay over "pursuant to the provisions of such last Will and Testament as my said wife may leave, hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her." By this provision he conferred upon his wife the power to dispose of the said one-half by last Will and Testament. It was the power to dispose of the remainder of the corpus of the trust fund; and it could be disposed of only by last Will and Testament, which could only take effect upon the death of his wife.

The provision to pay over pursuant to the provisions of her last Will and Testament was clearly qualified by the subsequent clause by which he conferred upon his wife the power to dispose of the said one-half by last Will and Testament duly executed by her. If she had "duly" exercised that power there would be no question but that the appointees specified in her last Will and Testament would be entitled to this one-half of the trust fund. But the testator then made a further provision for the disposition of this moiety of the trust fund in the event that this power was not

duly exercised. The will provides that in the event that his wife shall fail to make testamentary disposition of the said one-half thereof, "the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my will."

There was no possibility of any intestacy as to this clause. The trust created for the benefit of his wife was to continue during her life, and upon her death the corpus of the trust was disposed of by giving one-half to such person as his wife shall designate by last Will and Testament and the other half to go to increase the trust for the benefit of his two daughters. It was a power to appoint and a clear disposition of the corpus of the trust in the event that the wife should fail to exercise that power. There was no question of construction and no ambiguity in this provision of the Will. The intent of the testator was clear. If his wife died before him, the trust never came into existence, and the power never was created or vested in her. There would in that case be a failure to exercise the power. If the wife survived him and failed to exercise the power by last Will and Testament, the bequest over would become at once operative and the moiety of the trust fund would go to the trustees for the benefit of his daughters. This provision being clearly unambiguous, the disposition of the corpus of this trust did not depend upon the "construction of the will." The validity of an attempt to exercise that power by the wife would not depend upon the construction of the will of the testator; it would depend entirely upon the act of the wife in the attempted exercise of the power that the testator had given her. If she failed to exercise the power according to the rules of law that regulated the

exercise of such a power appointment, no construction of the testator's will would validate an illegal or insufficient exercise of the power. He gave her the power to appoint, and the question of the validity of the exercise of that power depended upon her acts and not upon the construction of the testator's will, and whether or not the wife did execute that power or whether she had any power to exercise would depend upon the question as to whether she did survive the testator and so ever became vested in the power which he had granted to her by the will.

The Ninth clause of the Will upon which the learned Surrogate decided that the wife's personal representatives were entitled to this one-half of the corpus of the trust fund, is as follows:

> "Ninth: In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife" (fol. 103).

By this clause the testator created the presumption which he said should exist in the construction of his will. The Will and any and all of its provisions are to be construed on the assumption and basis that he predeceased his wife. If the clause had simply been that if his wife died before him it should be deemed that he predeceased her, and if his wife had died ten years before him such a presumption certainly could not effect the *fact* that his wife was not alive when his will became

operative. Such an assumption could not have had the effect of validating the trust for the benefit of his wife if she were not alive when his Will became effective by his death. The trust for the benefit of his wife never existed. The power which he granted to his wife as part of the trust provision for her benefit to dispose of this portion of the trust estate by last Will and Testament, never vested in her, because she did not survive him, and if it is a settled rule of law that neither a trust can be created without a beneficiary nor a power can be created without a grantee, the mere declaration of the testator that the beneficiary or grantee shall be presumed to have survived him would seem to be clearly ineffectual to create either a trust or a power. And no presumption that shall apply to the construction of the Will can change the *fact* that there was no beneficiary of the trust and no grantee of the power in existence at the time of the death of the testator and when his will became effective. All that the testator intended was to give his wife power of the disposition of the moiety of the trust fund. If he intended that his wife's will should control the disposition of this fund irrespective of her exercising the power of appointment, as the learned Surrogate seemed to think, then as we shall hereafter show, such a direction was contrary to the positive law of this State and would have been ineffectual. So the only way that the testator could provide for the disposition of this moiety of the corpus of the trust without specifically designating the beneficiaries, was to give his wife power of appointment which, for its execution, necessarily depended upon a valid exercise of such a power, and if the wife never became the grantee of such a power and neither the trust nor the power in her favor ever came into being, then the wife failed to make

testamentary disposition of the one-half of the corpus of the trust and the alternative provision over applied.

The testator by the Tenth clause appointed executors of his will, and by the Eleventh clause Trustees of the trust created by the Will, and it should be noticed here that the executors were appointed two of the Trustees, but there was added the Columbia Trust Company as a Trustee. It is clearly the settled rule that when the testator died, the remainder of this moiety of the trust fund which was provided for the benefit of his wife, vested in the ultimate legatees, the trustees for his two daughters, subject to be divested by a valid execution of the power granted to his wife.

This question was presented in the Court of Errors in *Root* v. *Stuyvesant* (18 Wend., 250), where it was said by Chief Justice Nelson, at page 267:

> "It appears to be well settled that until the execution of the power the remainder by limitations overtake effect the same as if no such power existed or as in case of default of execution of it. * * * The result of the authorities is the power of appointment does not prevent the vesting of the estates limited in default of appointment. They are, of course, subject to be divested on the execution of the power."

The Court cites English cases and text books which establish that proposition.

See also

Connolly v. *Connolly,* 122 A. D., 493;
Matter of Haggerty, 128 A. D., 479, aff'd. 194 N. Y., 550;
Crackenthorpe v. *Sickles,* 156 A. D., 753.

The title to this property, therefore, vested in the trustees for the benefit of his daughters, as provided for in subdivisions "B" and "C" of this Eighth clause of the Will subject to be divested by the execution of the power. To divest that title there must be proof of the due execution of the power, and as neither the trust for the benefit of his wife, nor the power ever was created, it would seem to follow that the title of the trustees for the benefit of testator's daughters is complete.

POINT II.

Neither the trust established for the benefit of his wife by the Eighth Clause of his Will nor the power of appointment by a moiety of the trust estate ever came into existence, by reason of the fact that the beneficiary of the trust and the grantee of the power did not survive the testator, and there was, therefore, a failure of the testator's wife to make a testamentary disposition of one-half of the corpus of the trust estate.

The testator, by the Eighth Clause of the Will, made provision for his wife. That provision consisted of the creation of a trust for her benefit during her life of which she was the sole beneficiary. As part of that trust, he gave to her a power of appointment of one-half of the corpus of the trust fund created for her benefit. It is not, and cannot be, disputed that no trust ever was created because of the failure of the beneficiary

to survive the testator. It is essential, to constitute a trust, that there should be a trustee, trust property to constitute the corpus of the trust, and a designated beneficiary.

Rose v. *Hatch* (125 N. Y., 427, 431);
Holland v. Alcock (108 N. Y., 312).

And when a valid trust is created, the trust falls when the purpose of the trust is accomplished, and the title of the trustee to the corpus of the trust fund terminates.

Fosdick v. *Town of Hempstead* (125 N. Y., 581);
Sawyer v. *Cubby* (146 N. Y., 192);
§109, Real Property Law.

And when the grantee of a power does not survive the testator, and the power is created by last will and testament, the power lapses, as any other bequest or devise would lapse. That is clearly the law of England, and it has never been disputed in this State.

Thus, in *Sugden on Powers* (8th Ed., p. 460), it is said:

> "The appointment will lapse by the death of the donee in the testator's lifetime."

In *Farwell on Powers* (2nd Ed., p. 226) it is said:

> "But a man can execute only such powers as are given to him during his lifetime; he cannot execute a power given to him by the will of a person who survives him."

In *23 Laws of England, 44,* it is said:

> "A man can, however, execute only such powers as are given to him during his life-

> time. He cannot execute a power given by the will of a person who survives him."

And in *28 Laws of England, 607,* it is said:

> "The doctrine of lapse applies to powers created by will, and a power of appointment * * * fails if the testator survives the donee of the power."

And at page 620 of the same Volume, it is said:

> "A power created by will lapses unless the appointor survives the testator even though the appointor refers to the power and purports to exercise it."

The leading case in England on this point is *Jones* v. *Southall* (32 Beav. 31). In that case, a woman intending a marriage with her deceased sister's husband, made a marriage settlement, which, however, never became operative, as the marriage was unlawful. She afterwards made a will by which she gave and bequeathed one moiety of the residue of her estate to such persons as her husband should by deed or Will direct or appoint. The husband made a Will in which he gave all his real and personal estate to his wife, and died leaving her surviving. It was held that his Will did not operate as an execution of the power contained in her Will, as no power created by the latter had any existence until her death as giving validity to the instrument itself, as no one could execute a power of which he was intended to be the donee named in the Will of a person who survived him.

In *Baker* v. *Hanbury* (3 Russell, 340; 1 L. J. (O. S.) Ch., 78), Leach, Vice-Chancellor, treated this as the settled law of England. In that case, the testator gave to a Mrs. Reed the sum of

£10,000 for her life, and if she survived her husband it was to become her absolute property. But the testator considering that she might not survive her husband, gave her, in the event of her dying in the lifetime of her husband, the absolute power of appointing the fund by any Will or writing in the nature of a Will, with a further provision that if Mrs. Reed did not execute the power the fund should go, after her death, to her next of kin exclusive of her husband. The Court held that neither Mrs. Reed nor her appointees could have taken anything unless she survived the testator, the Court saying:

> "So far we have gotten propositions that cannot be disputed."

And continuing:

> "But the testator looking to the possibility of a third event, makes a further disposition with a view to it. Mrs. Reed may fail to execute the power given her; and he orders that if she does not execute it the fund shall go after her death to her next of kin exclusive of her husband. Is this anything more than a substitution of the interest which this lady had a power to appoint? Does the testator mean that she should take anything except what she could have disposed of by will? It being perfectly clear on the whole will taken together that this limitation to Mrs. Reed's next of kin is—not as Mr. Hart has contended, a remainder, to take effect upon Mrs. Reed's death in the lifetime of her husband without making any appointment—but a mere substitution for that power of appointment; I am of opinion that as under the circumstances which have happened Ann Reed could not have executed any appointment, her daughter's claim as next of kin entirely fails,

and the legacy lapsed by the death of Ann Reed in the lifetime of the testator."

In *McAdam* v. *Logan* (3 Brown Ch. R., 310) the same rule is applied. In that case a marriage settlement provided that property was to go as the survivor of the husband and wife should by deed appoint, and they made a joint deed, endeavoring to execute the power. It was held, however, that the appointment was invalid because it was made before the power came into existence, there being no person at that time who could be described as the survivor.

In *Sharpe* v. *M'Call* (1903, 1 I. R., 179) a case which is very close to the case at Bar, the opinion was as follows:

"The question here arises on a will which in every respect except one is clear. It appears that Thomas M'Call and Margaret, his wife, agreed to make mutual wills to be executed on the same day, both bearing date the 20th August, 1890. The wife died on the 31st August, 1890, and the husband lived to the 18th April, 1899. The will of Thomas M'Call, on which the question arises, left a sum of £1000, as to which only the question arises, in the words following:

'And upon such moneys being collected and invested, I hereby direct that thereout the sum of one thousand pounds, which I hereby bequeath to her, shall be paid to my dear wife Margaret M'Call, if living at the time of my decease, and if dead, that same sum shall be paid to such person or persons as she by will or any writing in the nature of a will shall in her lifetime direct and appoint, my intention being that my wife shall after my death have said sum of one thousand pounds at her abso-

lute disposal. And in case of her not having made any disposition of same as before mentioned, that said sum of one thousand pounds shall go and be divided to and among whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried.'

"This bequest contemplates three possible events: The first, the wife being living at the death of the testator; the second, her having predeceased the testator and having made a disposition by will, or some writing in the nature of a will, dealing with the said sum by way of direction or appointment, and he declares his intention to be that his wife shall after his death have the said sum of £1000 at her absolute disposal; and the third event being his surviving his wife, and her not having made any disposition of the same as before mentioned, in which event he directs that said sum of £1000 should go to and be divided amongst whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried. The second event is the only one which creates a difficulty. It raises the question whether the will of the husband can operate as a disposition of this sum in the events that have happened. The leading object of the testator was that his wife should in any event have this sum of money or the absolute right to dispose of it. The method of her disposing of it was by will, or a writing in the nature of a will. She made a will purporting to dispose of it, but it was made in her husband's lifetime, and could not become operative till his death. But she died before he did, and therefore she never had the power to dispose of this fund unless her will can be taken as having done so.

"The question, in my opinion, comes to

this, whether the power of appointing the person to whom the said sum of £1000 should be paid in the event of the wife not surviving her husband has been validly exercised. The wife purported by her will to exercise this power, and such appointment as made by her will would have been valid and effectual but for this, that she died in the lifetime of her husband. If this was the appointment of a sum of money it would necessarily have lapsed by her predeceasing him. It was contended that this right to nominate the persons who were to take the £1000 in the prescribed event was different, and did not come within the doctrine of lapse. But the case of *Jones* v. *Southall* (32 Beav., 31), before Sir John Romilly, is an authority against this contention. He so held there on the ground that no power created by will had any existence until the death of the testatrix had given validity to the instrument itself, stating that it was the first time he remembered it to have been argued that a man could execute a power of which he was intended to be the donee named in the will of a person who survived him. He added that the testator can by his will execute only such powers as are in existence when his will takes effect; that he was not the donee of any power at his death, the time at which his will begins to speak, and unless he had survived the testatrix he never could have become the donee of a power created by her will which has no operation except from the day of her death.

"This, in my opinion, applies to the present case. The power here under which only the wife could act was given by the will of the husband, and he did not die till several years after the death of the wife. Consequently she was not the donee of the power, and the gift of the power to the wife lapsed,

> in my opinion, by her death in the testator's lifetime, and she therefore never had authority to nominate the persons to take.
>
> "I regret that I cannot give more complete effect to the strongly expressed wishes of the testator, but the clear decision of Sir J. Romilly in the case I have cited, in the reasons for which I concur, prevent my doing so.
>
> "I must, therefore, hold that the supposed appointment failed, and that the £1000 legacy went as in default of appointment."

And in every case in which this question has been presented in this country the Courts have enforced this rule.

In *Reid* v. *Boushall* (107 N. C., 345; 12 S. E., 324) property was conveyed to a trustee, to be held in trust for the benefit of husband and wife during their joint lives, with power of appointment in the wife by last will and testament. The trustee was directed to turn over the property to the parties entitled under her last Will, and in case she should die without leaving a will, the trustee was to hold the property for the life of the husband. In case the husband should die before his wife, she to have full power to convey free from any trust; and if she did not convey during her life or leave the property by Will, it was to go to their children. The husband and wife united in a contract to convey, and the wife agreed to execute a Will exercising the power in favor of the purchaser. The purchaser refused to accept, on the ground that they could not give a good title. The Court said:

> "In *Whaley* v. *Drummond* (Ch. Easter term, 1745, MS.) Lord Hardwicke said that 'a power to be executed by will cannot be exe-

> cuted by any act to take effect in the lifetime of the donee of the power'; and to the same effect is 4 Kent. Comm., 331, and the general current of authority. Now, if the will and covenant are sufficient to vest a present indefeasible fee in the purchaser (and he can be required to accept none other), the principle above stated will be contravened, and that which is clearly forbidden to be done directly will be permitted to be done indirectly. Such, in our opinion, is not the law, and we are not surprised that the researches of the plaintiffs' counsel have resulted in a failure to discover any authority in support of his contention."

See, also, *Curley* v. *Lynch,* 206 Mass., 289 (1910), where the question was fully discussed.

See, also, *Batchelder, Petitioner* (147 Mass., 465), where the Supreme Court of Massachusetts held that where a legacy was left by a husband to a trustee for his wife's benefit during her life, with a remainder over, and where the testator and his wife died at the same time in shipwreck, the trust for her benefit failed and the legacy lapsed and passed under the residuary clause of the will.

And the rule is the same in this State. By §141 of the Real Property Law it is expressly provided:

> "A power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable of transferring real property."

It certainly goes without saying, that a person to be either capable of holding or of conveying real property must be an existing person, and a person who is deceased does not occupy that position.

This is recognized in *Matter of Piffard et al.* (111 N. Y., 410), the case mainly relied upon by the appellants, where the Court (p. 414) says:

> "While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime." * * *

And the learned Surrogate by whom the instant case was decided has expressly held that in order to create a valid power the donee of the power must survive the creation of the power.

Matter of Mayo (76 Misc., 416).

In that case a testatrix gave to a legatee a sum of money with a proviso that:

> "In case of her death before my death then I give the same to such person or persons as she may have appointed by will to receive the same, and in default of such appointment, then to her next of kin."

The grantee of the power predeceased the testatrix. The Surrogate said (p. 418):

> "The primary question now before me is, was Grace E. Bird a donee or grantee of a

power of appointment under the will of Mary Nevins Mayo, and, if so,. the secondary question is, whether the will of Grace E. Bird made and taking effect before the death of Mary Nevins Mayo, the grantor of the power, is to be construed as an execution of such a power of appointment by the donee of the power, Grace E. Bird? If the first question is answered in the negative, we need not proceed to the consideration of the second question submitted to the surrogate." * * *

The learned Surrogate, after calling attention to the provisions of the Real Property Law relating to powers and the authorities construing those provisions, said (pp. 419-420):

"If anything is given to Miss Bird, it is a power. * * *

"Under the present statute regulating powers in their creation (Real Prop. Law, §130) a power may be granted by any owner having *jus disponendi,* but it may be vested in those only who are capable in law of holding property. Real Prop. Law, §§139, 141. * * * Let us inquire, then, who may at this day in this state take a power, whether it be a power of appointment or any other recognized power. The Statute on Powers determines it. Section 141 (Real Prop. Law) provides that a power may be vested in any person capable in law of holding property. Now, at the time this power was granted, Grace E. Bird was dead. She could not hold property. It seems to me that this ends the discussion. Grace E. Bird never had a power of appointment, any more than the legacy of $6,600.54 in specie, which, as stated, had lapsed as to her.

"If Grace E. Bird never took a power of appointment by the will of Mary Nevins Mayo, the will of Grace E. Bird could not

> have operated as a testamentary execution of such power in any event, and I so hold. In order that a will may operate as a testamentary execution of a power, the testator must have capacity to be the grantee of a power and be vested with the power. This a dead person cannot be." * * *

See, also, *Curley* v. *Lynch* (1910), 206 Mass., 289, where the question presented in the case at bar and expressly decided.

The authorities are thus uniform that if the testator's wife did not survive him all the provisions in his will in her favor lapsed. The trust for her benefit never was created. The power of appointment given to her never became operative, and her will, executed before the death of the testator, was ineffective as an execution of the power.

POINT III.

Frances May Fowles did not survive the testator.

This proposition does not seem to be disputed. The learned Surrogate in his opinion refers to a very old case, now part of our common law (decided in A. D. 1596, *Broughton* v. *Randall,* Cro. Eliz., 503), but the question is settled beyond dispute in this State in *Newell et al.* v. *Nichols, et al.* (75 N. Y., 78), where the Court of Appeals determined the question of succession to property of those who died in the wreck of a steamship at sea, without any evidence of survivorship among the persons interested.

In that case the will left property to two children, or to the survivor of them. Both children with their father were passengers on the steam-

ship "Schiller," which sailed from New York on the 27th of April, 1875. The ship sank on or about the 7th of May, 1875, when approaching England, and the father and the two children were lost, without any evidence of survivorship. The Court decided the following questions:

> "1st.—That the appellants who claim through a survivorship must prove the survivorship. 2d.—That there is no presumption in law of survivorship in the case of persons who perish by a common disaster, as in this case, by shipwreck, without other evidence tending to prove the fact, and hence that the party upon whom the *onus* lies fails to establish it. * * * 5th.—That the remainder over was a conditional limitation, and not a condition precedent, and that the intent of the will was that it should be effectual if for any reason the children could not take. 6th.—That the death of the children without issue or appointment, under the circumstances, developed without evidence or survivorship, establishes the title of the persons to whom the remainder is limited, and entitled them to have the limitation carried into effect."

The Court said, on page 88:

> "I do not think an alternative claim can be sustained conceding the presumption of survivorship. However this may be, a decisive answer to the suggestion is, that there is no legal presumption which courts are authorized to act upon that there was *a* survivor any more than that there was a particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed, it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and

> as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect the common law differs from the civil law. Under the latter, certain rules prevail in respect to age, sex and physical condition, by which survivorship may be determined, but nothing can be more uncertain, or unsatisfactory than this conjectural mode of arriving at a fact, which from its nature must remain uncertain, and often upon the existence of which the title to large amounts of property depend."

On page 91 the Court adds the following comment, which we ask the Court to seriously consider in determining this case:

> "All the common law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstance that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix."

See also

> *St. John* v. *Andrews Institute* (1908), 191 N. Y., 254;
> *Matter of McInnes,* 119 App. Div., 440;
> *McGowin* v. *Menkin,* 177 App. Div., 841.

This last case involved a husband and wife, who were passengers on the *Lusitania,* the same steamer on which the testator and his wife were passen-

gers. That case involved the ownership of the proceeds of three policies of life insurance on the life of the husband. In the policy the beneficiary was stated to be the insured's wife if living, and if not, then to his executor. In that case, as in this, the administrator of the wife contended that "on the facts it is fairly to be inferred that the husband intended that in the death of his wife and himself in a common disaster, her next of kin should take in preference to his," and urged that these should be controlling factors in the decision of the case. The Court refused to apply that contention, relying upon *Dunn* v. *New Amsterdam Casualty Co.* (141 App. Div., 478). This was also a case of two persons dying in a common disaster, namely, as the result of the accidental burning of the steamboat "General Slocum."

The Eighth Clause of the Will expressly provided that

> "In the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to be divided into two equal portions, and such two equal portions to pay over pursuant to subdivisions b and c of this article of the Will"

and in the absence of proof that the wife had made a legal testamentary disposition by a valid appointment, the alternative provision became effective, and the share of the property which was to constitute the corpus of the trust—if one had ever been created—went over to the trustees of the will, to be held under subdivisions *b* and *c* of this clause of the will.

To prevent this alternative provision from taking effect, the burden was on the person claiming that Mrs. Fowles had made a legal testamentary disposition of this property.

By the will the testator expre
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This precise question was set
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prove the fact, and hence that the party upon whom the *onus* lies fails to establish it."

See also

Dunn v. *New Amsterdam Casualty Co.*, 141 A. D., 478;
McGowin v. *Menken*, 177 A. D., 841.

As we think we have established that there was no exercise of the power of appointment under the Eighth Clause of the will, the property went to the Trustees for the benefit of the testator's two children.

POINT IV.

The ninth clause of the will does not purport to modify the provisions of the eighth clause of the will and cannot be construed to create a power to appoint where none ever did or could exist, or to bring into the will of the testator the will of his wife and thus make her will the controlling element in the disposition of the testator's property; and there is nothing in the will that indicates, or from which the inference can be drawn, that the testator had any such intention.

That clause is as follows:

"*Ninth.*—In the event that my said wife and myself die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have prede-

ceased my said wife, and t
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testator's property should pass
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established that no power of a
existed. The testator's wife neve

appoint, and therefore, her attempted exercise of a power which never existed is nugatory and there is not one word in this whole will, including the Ninth clause, which indicates that the wife or her personal representatives should ever have any interest in the testator's property, except as to the personal bequest of the $5,000., the furniture in the English houses and the right to purchase at an appraised valuation the English property. If the testator had ever intended that his wife's executors or personal representatives should have ever received the one-half of the corpus of the trust estate over which she was given a power of appointment, it was perfectly easy for him to have said so, as the testator had said in the will under consideration in *Matter of Piffard* (111 N. Y., 410). He could have said that in default of a valid appointment by his wife under the power he had given her, that the property should go to his wife's personal representatives. The direction actually given, however, in the Eighth clause of his will was entirely different. That direction was that if his wife failed to make a valid testamentary disposition of this portion of his property, it should go to his Trustees for the benefit of his daughters; and to ask the Court to construe this Ninth clause of the will so that on the failure of his wife to exercise the power of appointment, the property should go to his wife's executors and not to the Trustees for his daughters, is to nullify the express direction of the testator as contained in the Eighth clause of his will. The testator knew that his wife had executed a will which provided for a trust in favor of her sister of any property that she had the power to appoint to. He left his wife's sister $5,000 absolutely and if he had intended that this moiety of the trust to be created if his wife survived him should go to the sister in case

he and his wife died in this common disaster, there was no difficulty in his saying so. What he did say was that if his wife failed to exercise the power of appointment which on his death would be vested in her, the property should go to the trustees for the benefit of his daughters, and that, we submit, is the only intention of the testator that can be spelled out of this will.

A great deal has been said of late years in judicial decisions as to the duty of the Court to ascertain the intention of the testator and to carry that intention into effect, but this Court has never yet determined that from some presumed intention of the testator the Court would presume facts which did not exist, would create survivorship which was unproved, or abolish settled rules of law. Now the settled rule of law of England and of this State is that there is no presumption of survivorship, that a person claiming to divert property of a deceased must prove the facts to justify such a diversion. That a power of appointment given by will does not come into existence until the death of the testator. In the recent English case *Sharpe* v. *McCall* (*supra*, pp. 25-7) the testator expressly provided that his wife might exercise the power by her will if she predeceased him, but the court held that the provision was illegal and void. The diversion of this large sum of money from the testator's children and grandchildren to a stranger to his blood must be based upon a fact and not a presumption.

What was said by this Court in the case of *Central Trust Company* v. *Eggleston* (185 N. Y., 23) is applicable here. Judge Gray in delivering the opinion of the Court said at page 28:

> "It is the very plain duty of the court to find out what a testator has meant to do with his property after his death and, then, if it be possible to give his plan effect by a con-

> struction which will validate it, to do so. But the court cannot make a new will for him; nor should it be expected to resolve into lawfulness of disposition some tangle of desires to provide for future contingencies. The inquiry, in each case, must be what provisions has the testator intended to make for the disposition of his estate and not whether he intended to dispose of his estate according to the statutory rules governing testamentary dispositions. When the provisions are ascertained and understood, then is their legality to be determined."

And again on page 33 the Court said:

> "The question is, as I have before suggested, what provisions the testator intended to make and to determine their validity as made. As it was observed by Judge Martin, in *Herzog* v. *Title Guarantee & Trust Co.* (177 N. Y., 86), 'the intent to be discovered is not whether he intended to make a valid disposition of his estate; but what provisions he in fact intended to make. When that is found, it is for the court to determine whether such intended provisions are valid, or otherwise.' 'The duty of the court,' as the learned judge, further and oppositely, remarked, 'is not to make a new will, to carry out some supposed, but undisclosed purpose * * *. The duty of the court is to interpret, not to construct.'"

The learned counsel in his brief for the appellant states that in the Eighth clause of the will we are dealing with a clause which might be construed in either of two ways, but the two constructions are not given. We submit that the Eighth clause of the will is not susceptible of two constructions but only of one, and that is that if his wife should fail to make testamentary disposi-

tion of the said one-half thereof—and that could only apply to a testamentary disposition which would exercise the power which he provided for and which could only exist in case his wife survived him—the property was to go to his trustees for the benefit of his two daughters. The whole argument is based upon an assumed intention of the testator—an intention which is nowhere expressed in the will—*but it is not indicated upon what theory such an intention, if it were expressed, could be carried into effect.* The question is not whether there is anything in the Ninth clause that is illegal, but whether the testator could by creating a presumption give to a dead person a valid power; and whether merely creating a presumption can be held to validate an act as the exercise of a power which never existed. Furthermore, there is nothing to show that he thought that this Ninth clause of the will could produce that result or that he intended that it should.

It is said time and time again in the brief, and the whole argument of the appellant is based upon the statement that this Ninth clause of the will in connection with the Eighth clause, clearly establishes the testator's intention. But we ask "the intention to do what?" There is certainly no intention expressed that this property should go to his wife's sister, or to his wife's personal representative. He said his will was to be construed as though his wife survived him, but consider *his will* construed as though his wife survived him, it does not validate the power or make an attempted exercise of the power prior to its existence a valid exercise of it, for that would be contravening an established rule of law which, if it was the testator's intention, could not be given effect. If this interpretation is to be given to the Ninth clause of the will, then the testator did attempt to create a trust

and grant a power not authorized by law, for it was a trust in favor of a person who predeceased him and a grant of a power to a person who had predeceased him, where the law provides that the death of the grantee of the power results in a lapse of the grant.

The learned counsel for the appellant at page 41 of his brief quotes from the Piffard case, but he leaves out the language immediately following what he quotes, which is:

> "Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will, in case of the death of the daughter in his lifetime. What she would have done by her will but could not, that he did for her by his own will."

And before that, on p. 414, the Court had said:

> "And while to reach this result the testator gave a power of appointment which as a power the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership, yet the further language of the codicil shows its intent to be that, in case of the death of the daughter in the lifetime of the father, the latter intended to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct in the disposition of her own property; and 'to that end,' in aid of that result, he explicitly declares that the one-fifth given to

> her shall be paid over to her executors for the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property at her death, and had become distributable as such by force of her will."

Thus, the Court in that case, to effect the testator's intention, treated the will as a bequest directly to the executors of his daughter's will, and not in any way recognizing that a power had been created, or that the legacy should pass by virtue of such a power, the Court expressly stating that the power failed, because of the death of the daughter before that of the father whose will created the power. The learned counsel, at p. 42 of the brief, says:

> "The distinction, then, between the *Piffard* will and the one at bar is simply that in the *Piffard* case the direction to 'pay over' to the daughter's executor was express, while in the case at bar it is *necessarily* involved and implied in the provision of the Ninth clause, that, in the case of uncertainty of priorities of death, his property is to be treated as if he had predeceased his wife."

This implication is not justified by anything that appears in the will, and is entirely unwarranted. The will gave to his wife the power to dispose of this portion of the corpus of a trust which he had created for her benefit. But this provision directly negatives the inference that he ever intended his wife or her personal representatives to have any portion of this property. If she had exercised the power, it is the appointee that would take, not under the wife's will but under the husband's will, and neither the wife herself, nor her personal representatives, could have been

entitled to any portion of this property. Thus, in *Sugden on Powers,* p. 470, Secs. 1 and 3, it is said:

> "The estates created by the execution of a power take effect precisely in the same manner (with the exception which will shortly be noticed) as if created by the deed which raised the power. * * * The meaning that the persons must take under the power as if their names had been inserted in the power, is that they shall take in the same manner as if the power and the instrument executing the power had been incorporated in one instrument; they then shall take as if all that was in the instrument executing it had been expressed in that giving the power."

In *Matter of Stewart,* 131 N. Y., 274, the Court of Appeals, in discussing the nature of an estate which the appointee of a power takes, quotes from Chancellor Kent, 4 Kent's Comm., 338, as follows:

> "An estate created by the execution of a power, takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of a power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power and the instrument creating the power had been incorporated in one instrument."

The Court then continues:

> "Where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power"

(Jackson *v.* Davenport, 20 Johns., 537; Sugden on Powers, vol. 2, p. 22).

It was held in that case that the appointees under the power of appointment took their interest under and by virtue of the will and not in any legal sense, under the instrument which executed the power.

In *Cutting* v. *Cutting* (86 N. Y., 522), the Court, after reviewing the effect of the Revised Statutes in relation to powers, says at page 544:

> "The bare creation and existence of the power raised no interest in the grantee of it that would descend or that could be conveyed."

And in the late case of *The Farmers' Loan and Trust Company* v. *Mortimer* (219 N. Y., 290), a testatrix had given to a trustee a portion of her estate to apply the income to the use of her son John, and upon his death to transfer the share to his lawful issue, unless John by his last will and testament otherwise directed. There followed a power of appointment by which John was empowered to make such disposition of the share of his estate by last will and testament or by appointment in the nature of a last will and testament, as he might desire, and that John should have the power to dispose of such a share after his death, notwithstanding the creation of a trust estate.

John obtained a loan and agreed to exercise this power of appointment in favor of the lender. The court held that the contract controlling its exercise was not enforceable in equity; that the subject matter of the power was not the property of the promissor (the grantee of the power); that it was the property of his mother. The promissor was not the owner of any legal estate; he was the

beneficiary of a trust; in such circumstances a power of appointment does not involve that absolute power of disposition which is equivalent to a fee, citing *Farmers' Loan and Trust Company* v. *Kip* (192 N. Y., 266), and continuing:

> "Those who take under this power have received nothing that was the property of John Mortimer. They hold nothing of his to be charged by equity with a trust."

So that if the testator's wife had survived him, she would have had no property which she could have devised, or bequeathed or conveyed. She had power to designate the persons who would receive under her husband's will a portion of his estate, and except as the beneficiary of the trust during her life, neither she nor her personal representative had any interest in the testator's property. Her will, therefore, transferred or conveyed none of the testator's property, whether she had survived the testator or not; and to imply that either the testator's wife or her personal representative were to be entitled to the property would be directly contrary to the testator's will and would be making a new will for him which he never intended—a power that this Court has time and time again said it could not, and would not, exercise. So, on this branch of the case we go back again to the proposition: Was there, or was there not, a valid power which vested the wife? Did she exercise that power? And to both of these questions we submit that the answer must be in the negative.

The second alternative is that to carry out the intention of the testator as employed by the appellants in the Ninth Clause of the will, the Court will incorporate the wife's will in the testator's will and direct the trustees or executors to pay over the money to the wife's executors to carry out

the bequest described in her will. This has been condemned by all of the courts of this State, upon the ground that it would dispense with the Statute of Wills.

Thus in *Langdon* v. *Astor's Executors* (16 N. Y., p. 9), the Court of Appeals said (at p. 31):

> "The testator's whole will must be expressed in his testament. He may confer bounties absolutely or upon conditions; but he cannot reserve the power to make future conditions by unattested instruments, or to declare that acts indifferent as to his bequests should avail, according to his future pleasure, as a revocation of it. The case supposed would be a plain one of an attempt to dispense with the statute of wills."

In *Williams* v. *Freeman* (83 N. Y., 561), the same rule was declared. The court said, at p. 568:

> "The memorandum forms no part of the will, and is not attested in such manner as to form a testamentary declaration. It is merely a parol declaration of the testator, introduced for the purpose of aiding in the interpretation of his will, and comes under the head of extrinsic evidence."

In *Matter of O'Neil* (91 N. Y., 516, 523), the Court said:

> "It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will."

In *Booth* v. *Baptist Church* (126 N. Y., 215), the same rule was treated as the established law of this State. At page 247 the Court said:

> "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument. * * * The office of the paper, if it shall operate at all, is to give specifically what was not so given by the will; to change its terms in a material respect; to alter a bequest and modify the rights of the legatees. Such a paper, we think, cannot be received as a part of the will to affect and modify its terms, and change what was a general or possibly demonstrative legacy into a specific one."

The question was before the Appellate Division in the First Department in *Matter of Emmons* (110 App. Div., 701). The situation presented in that case was that a will offered for probate was defectively executed, while a codicil that referred to the will was executed according to the requirements of the statute. The Surrogate admitted both instruments, but his determination was reversed by the Appellate Division.

In *Matter of Andrews* (162 N. Y., 71), the Court, at page 4, said:

> "It has long been the settled policy of this state to require certain formalities to be observed in the execution of wills; these provisions are exceedingly simple, and calculated to prevent frauds and uncertainty in the testamentary dispositions of property. * * *
>
> "It has been repeatedly laid down as the rule in this state, in cases we shall presently discuss, that the intention of the testator is not to be considered when construing this statute, but that of the legislature. The question is not what did the testator intend to do, but what has he done in the light of the statute."

And this rule has been considered by the Surrogates' Courts and the Special Terms as settled beyond question in this State.

Matter of Martindale, 60 Misc., 522 (Surrogates' Court, Kings Co., 1910;
Matter of Reins, 59 Misc., 126 (Surrogates' Court, N. Y. Co., 1908);
Matter of Weston, 60 Misc., 275 (Affd. on opinion below, 131 A. D. 191, App. Div., First Dept., 1909);
Kiel v. Koehn, 72 Misc., 255 (Supreme Ct., Kings Co., 1911).

In this last case it appeared that the husband and wife executed separate wills on the same day. The wife named no executor, and the disposition of her residuary estate could only be determined by a reference to the will of her husband. The husband predeceased her. The wife's will, after directing the payment of her debts and funeral expenses, gave her real and personal estate to her husband for his life, and then added:

> "And after his decease, the real and personal estates shall be divided as set down in the last will and testament of my husband, Mathias Seiwert to me Annie Marie Siewert."

The Court said, per MADDOX, *J.*, at p. 256:

> "'The extraneous paper so referred to was in existence at the time of the execution of her will and is clearly and distinctly described and identified therein, but was not in anywise attested by her. On the contrary, it was the testamentary disposition by her husband of his residuary estate after the death of his wife."
>
> "'The provisions of the will of Mathias, in

so far as they are referred to in the will of Anna Maria, are dispositive in character; and it seems to be well settled in this State that an extraneous paper or document of a testamentary nature referred to in a last will and testament cannot be incorporated therein, unless it be attested and executed as a will. Matter of Reins, 59 Misc., 126, and cases cited.

"The testatrix fails to state in her will who the objects of her bounty are to be, or the proportion or share, or estate, each is to take, save in so far as she directs that her said estate 'shall be divided as set down in her husband's will; and, consequently, such attempted disposition by her is ineffectual in its purpose as a testamentary disposition of her residuary estate."

The will of the testator in this case makes no mention of the personal representative of his wife, makes no reference to the persons to whom his wife in her will has directed her property to be bequeathed. Assuming that it was his intention that this share of his estate should be paid by his executors or trustees to the beneficiaries named in his wife's will, such a provision would be clearly void under the authorities that we have cited as an attempt to override the Statute of Wills of this State, and would be ineffective as a bequest or devise to the persons named in his wife's will, and certainly it would be a violation of the Statute of Wills to direct that the money be paid to the executors of his wife to carry out her testamentary direction.

We have thus demonstrated that no power ever existed; that the grantee of the power not having survived the testator, the grant of the power lapsed; and consequently an assumed execution of the power made by the grantee before the power

was created was wholly ineffectual as an appointment under the power. And, second, any provision of the will which intended to dispose of this share of the testator's estate in accordance with his wife's will was void as a violation of the Statute of Wills. If the testator had an intention to accomplish this result—which we dispute—it would be clearly illegal, as in violation of the settled law of this State, and one which could not be effectuated.

The learned counsel for the appellant, at p. 33 of the brief, says:

> "We submit, however, that the question whether Mrs. Fowles exercised the power of appointment granted to her does not arise in this proceeding. Whether she exercised the power or not is a fact to be proven and determined by the Surrogate upon testimony. The Surrogate made no findings of fact and construed the testator's will solely upon the language used therein. The question whether the power was exercised does not arise upon the face of the will, and it is not a question which is involved in the construction of the will. The only questions arising in this proceeding, which is one to construe the will of Mr. Fowles are: 1, Whether there was a power granted to Mrs. Fowles to dispose of 22½ per cent. of the residuary estate, and as to this there is no dispute; and 2, Was paragraph 9 valid. If these questions are determined in accordance with our contention then the power granted by the will vested in Mrs. Fowles prior to her death. That is all that can be determined upon the construction of Mr. Fowles' Will."

Where counsel gets the idea that there is no dispute whether there was a power granted to Mrs. Fowles, we are unable to conceive. For that is the crucial point in this case. We have claimed that

there was no power granted to Mrs. Fowles to execute the will because she did not survive her husband, and it is essential for the valid creation of a power that the grantee of the power should survive the granting of the power. But it would seem that it is rather late to raise this point, for the parties were all before the Surrogate,—the trustee of Mrs. Fowles' will and the beneficiaries under her will. The question as to whether there was a proper execution of the power by Mrs. Fowles was one of the questions submitted to the Court with the consent of all parties and there determined. And the question of the validity of the Ninth clause of the will was only one of the questions in dispute, the further question being involved of its effect upon the construction of the will and the validity of the attempted exercise by Mrs. Fowles of a power of appointment which would have been granted to her had she survived her husband. (Record fols. 67-69.) The Surrogate, in construing the will as a whole, held that it was a bequest of the 22½ per cent. to Mrs. Fowles' executors. As to that the Appellate Division disagreed with him, and it is only necessary to refer the Court to the prevailing opinion at the Appellate Division without rearguing what is there so convincingly expressed.

The learned counsel further says at the bottom of p. 34 that the question as to the power granted to Mrs. Fowles to dispose of the 22½ per cent. of the residuary estate of Mr. Fowles by her last will and testament duly executed, was considered and decided both by the Surrogate and the Appellate Division; and the appellants then say that they have no objection to its being decided in this proceeding. But while conceding so much, counsel insists upon the contention, "that it is not a fact to be considered in the construction of Mr. Fowles' will, and it cannot be referred to or taken

as a fact for the purpose of showing that by the execution of the power her will was incorporated as a part of the testator's will." It is a little difficult to understand what is meant by this statement. The Surrogate had held that under the will Mrs. Fowles' executors were entitled to this portion of the testator's estate, and that conclusion necessarily resulted in incorporating Mrs. Fowles' will as a part of the will of the testator, but it has never been before claimed that because a testator stated in his will that a legatee should be presumed to survive him that that clause would prevent a lapsing of a bequest to a legatee who had in fact predeceased him. It is the *fact* that a legatee died before the testator that causes a lapse of the legacy, and it is submitted that no intention of the testator that a death should not cause a legacy to lapse can override the positive rule of law that the death of a legatee during the lifetime of the testator does cause a lapse of a legacy. What the testator can do, as the testator in this case did do, is to provide that in case of the lapse of a legacy there should be substituted for the legatee some other person. But in this will the testator expressly provided that as to this 22½ per cent. of his estate it should be paid to the trustees for the benefit of his daughters, if there was no valid execution of the power.

POINT V.

In Point XII of the appellant's brief it is stated that even though affirmed in all other respects, the order should be modified so as to direct that the English real property should pass pursuant to the Ninth clause and the will of Mrs. Fowles. As this is real property located in England, both the Surrogate and the Appellate Division held that the

question as to the construction of the will as affecting such real property was a question for the English courts to determine, and the Surrogate specially held that this vesting a discretion in Mrs. Fowles as to whether or not she should take the property at the valuation fixed by the testator in his will such discretion was one to be exercised by her, and her death (even though it was presumed she survived the testator), before she exercised that intention, rendered inoperative that provision of the will. But the appellants here do not appeal from that decision of the Surrogate, and there was no question, therefore, before the Appellate Division, nor is there before this Court as to the disposition of the English property. The appellant acquiesced in the decision of the Surrogate on that question, and, not having appealed, it was not before the Appellate Division for its determination, and the Appellate Division did not attempt to determine it. And on the appeal from the order of the Appellate Division reversing the decision of the Surrogate and sending it back to him to render a proper judgment, there is certainly nothing for this court to review.

POINT VI.

The learned Judge who dissented in the Appellate Division construed the Ninth clause of the will as if the testator had said that if his wife and he should die in a common disaster and it could not be determined which of them died first, he directs that his property be disposed of in the same manner in which the law would have disposed of it had he died first. "He does not enjoin the courts to indulge in a presumption as to who died first. On the contrary, he recognizes that the Courts could not legally adopt such a presump-

tion, and requests them to indulge in a fiction for the purpose of effectuating his intention with respect to his property. The creation of a fiction is not an uncommon method of testamentary disposition'' (fols. 316-317).

Just the distinction between a presumption, which is not based upon a fact, or a fiction, which is contrary to a fact, is not apparent. He concedes that the testator could not require the court to indulge in a presumption of survivorship, but seems to think that the testator could create a fiction, which, of course, would mean that the Court should consider a state of facts existing which did not exist, in order to distribute his property, and the illustrations of the so-called fictions that courts recognize in construing wills certainly have no relation to the creation of a state of facts which does not exist, upon which a testator attempts to base his testamentary disposition of the property.

Mr. Justice Page proceeds:

> ''To execute such directions, we must assume a situation which is contrary to the actual facts and contrary to the result which would flow as a matter of law from the facts as they actually exist, and apply the law as if the fiction created by the testator were fact.''

And he further says:

> ''The rule of law applicable to the actual facts is not material, for the testator does not request the court to apply a presumption to the actual facts, but to assume, in construing his will and distributing his property, a state of facts contrary to the actual facts and founded in purefiction.''

And having thus created by a theory of fiction a situation which he concedes did not exist, he

states that the property which was the subject of the appointment by Mrs. Fowles by will should be transferred to the executors named in her will for distribution in accordance with her testamentary direction, thus expressly by means of a fiction overriding the Statute of Wills and the settled law of this State by making Mrs. Fowles' will the foundation of the testamentary distribution of the testator's property.

If such a doctrine were sustained, there would forthwith be an end to all the protection which the law has thrown around the making of wills, the creation of trusts and the vesting and execution of powers. Furthermore, the dissenting opinion is based upon an assumed intent, which, as we have already pointed out in the preceding points of this brief, is not based upon anything actually contained in the will and is contrary to the clearly expressed intent that, in the event of the failure of Mrs. Fowles to execute the power, the 22½ per cent. should go into the two trusts for the benefit of the testator's daughters.

POINT VII.

The order appealed from should be affirmed.

November 7th, 1917.

Respectfully submitted,

STANCHFIELD & LEVY,
Attorneys for Respondents
Gertrude Frances Browne and
Gladys Mary Baylies.

GEORGE L. INGRAHAM,
WILLIAM M. PARKE,
of Counsel.

To be argued by
James W. Prendergast.

Court of Appeals

STATE OF NEW YORK.

In the Matter

of

The Application to Construe the last Will and Testament of CHARLES FREDERICK FOWLES, late of the County of New York, deceased.

DOROTHY ELIZABETH SMITH and KENNETH CHARLES SMITH, by his Guardian, EGERTON L. WINTHROP,

Appellants,

MARJORIE F. S. BROWNE, JEAN C. BROWNE, HARRY L. BAYLIES, JR. and CHARLES R. BAYLIES, by their Guardian, A. PERRY OSBORN; GERTRUDE F. BROWNE, GLADYS M. BAYLIES, THE COLUMBIA TRUST COMPANY, as Trustee, and STEVENSON SCOTT, as Trustee,

Respondents.

BRIEF IN BEHALF OF STEVENSON SCOTT, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF ABOVE NAMED DECEDENT.

Preliminary Statement.

The appeal before this Court is from an order of the Appellate Division of the Supreme Court,

First Department, entered in the office of the Clerk of said Appellate Division on the 23rd day of March, 1917. Said order reversed the decree of the Surrogate's Court of the County of New York which was entered in said proceeding on the 16th day of June, 1916 in the office of the Clerk of said Surrogate's Court. Such appeal has been taken by Dorothy Elizabeth Smith and Kenneth Charles Smith, the latter of whom is an infant.

Stevenson Scott as one of the Trustees under the will of Charles Frederick Fowles, the above named decedent, is a respondent before this Court, the said Trustee having joined, at the request of Gertrude Frances Browne and Gladys Mary Baylies, the *cestui que* trust of the trust created under the will of the said decedent, in the appeal which was taken by the said *cestui que* trust to the Appellate Division, First Department, from the decree of the Surrogate's Court to which reference is above made.

The questions presented by this appeal relate to that portion of the decree of the Surrogate's Court which adjudged that there passed by substitution to Stevenson Scott, as Executor of the last Will and Testament of Frances May Fowles, deceased, for the uses and purposes prescribed in her will, the following certain legacies which were bequeathed to the said Frances May Fowles, deceased, by virtue of the provisions of the will of Charles Frederick Fowles: "The sum of $5,000 bequeathed by subdivision thereof designated 'Second,' the personal property bequeathed by the subdivision thereof designated 'Fourth' and one-half of forty-five per cent. of the residuary estate of the said testator" (fols. 28-32).

Charles F. Fowles and his wife, Frances May

Fowles, perished as a result of the sinking of the Steamship Lusitania, on May 7, 1915. The testator and his wife took passage together on the ill-fated vessel, having executed on April 30, 1915, the day before sailing, their respective last wills. These instruments were prepared as the the result of instructions given by the testator and his wife in the presence and hearing of each other and were executed at substantially the same time and in the presence of the same witnesses. Both wills were duly admitted to probate by the Surrogate's Court of the County of New York, and Letters Testamentary under both wills were duly issued to Stevenson Scott. The said Stevenson Scott and the Columbia Trust Company were nominated as the trustees of the trusts created by the will of Charles Frederick Fowles, and they accepted their appointment and entered upon the discharge of their duties as such trustees. Stevenson Scott was also nominated as the trustee of the trust created by the will of Frances May Fowles, and Stevenson Scott upon joining in the appeal taken by Gertrude Frances Browne and Gladys Mary Baylies from the decree of the Surrogate's Court as hereinbefore stated, promptly applied to the Surrogate's Court of New York County for leave to account and resign as executor and trustee under the will of Frances May Fowles. Such application was granted and the accounting proceeding in such connection was pending before the Surrogate's Court of New York County at the time the appeal was argued before the Appellate Division. That Court decided said appeal on the 9th day of March, 1917, and thereafter and on the 13th day of March, 1917, a decree was entered in the Surrogate's Court of New York County passing

the account of Stevenson Scott as Executor and Trustee of the last Will and Testament of Frances May Fowles and discharging the said Stevenson Scott as such Executor and Trustee. The Appellate Division entered an order upon its decision on the 23rd day of March, 1917, and such order reversed the decree of the Surrogate's Court as to the portion thereof to which reference is above made.

Stevenson Scott as the executor of the will of Charles F. Fowles instituted the above entitled proceeding, and it duly came on for hearing before Mr. Surrogate Fowler on January 28, 1916. At the hearing no proof was adduced by any of the parties which indicated in any way whether the death of Charles F. Fowles occurred before or after the death of his wife. All that was shown was that the testator and his wife together boarded the vessel; that they were upon the vessel at the time of its destruction; that the body of the testator's wife was found within a few hours after the vessel had sunk and that the body of the testator was not found until several weeks thereafter.

The questions which were submitted to the Surrogate's Court for determination as stated in the petition in the above entitled proceeding were as follows:

> "1. Are the provisions of subdivision designated 'Ninth' of said will valid, and if so, what is the true and full construction, force and effect of said provisions?
>
> "2. If the provisions contained in subdivision designated 'Ninth' of said will should be held to be null and void and of no force or effect, do all the various bequests and the certain trust bequeathed and created for the benefit of the said Frances May Fowles,

deceased, lapse and fall, and, if so, does either the personal property which constituted the subject-matter of the said attempted bequests or the personal property which constituted the subject-matter of the said attempted trust and the remainder or reversionary interests limited thereon, pass under and pursuant to the provisions contained in subdivision designated 'Eighth' of said will, or did the decedent die intestate as to any or all of the said personal property" (fols. 67-69).

In addition, the answer interposed in behalf of the said Dorothy Elizabeth Smith submitted the following question:

> "Whether or not by virtue of the ninth clause of the will all the provisions of the will of Frances May Fowles, of which a copy is annexed to the said petition, exercising power of disposition by will by virtue of the provisions of the last will of said Charles Frederick Fowles are not to be incorporated into and treated as terms and provisions of the will of the said Charles Frederick Fowles" (fols. 120-121).

The will of the said testator makes various bequests and provides as to his residuary estate as follows:

> "*Eighth.*—A. All the rest, residue and remainder of my estate, both real and personal and wheresoever situate (including the proceeds resulting from the sale of my stock of the Scott & Fowles Company), I direct my executors to divide into three parts or portions, the first part or portion of which shall consist of forty-five per centum thereof, and the other two parts or portions of which shall each consist of twenty-seven and one-half per centum thereof. The said first part or portion consisting of forty-five per centum of my said residuary estate (subject to the possible deduction of eight thousand two

hundred and fifty pounds (£8,250), as hereinafter provided, I give and bequeath to my trustees hereinafter named, In Trust, Nevertheless, for the use and benefit of my wife, *Frances May Fowles,* to hold and invest the same and to collect and receive any and all the income, interest and increment accruing thereon and the same to pay over to my said wife semi-annually and for and during each year of the full term of the life of my said wife. Upon the death of my said wife the said trust shall cease and determine and the corpus of same I direct my said trustees to then dispose of as follows:

"One-half thereof to pay over pursuant to the provisions of such last Will and Testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last Will and Testament duly executed by her), and in the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal portions to pay over pursuant to the provisions of subdivisions 'B' and 'C' of this article of this my will, one such portion passing under said subdivision 'B' and one such portion passing under said subdivision 'C.'

"One-quarter thereof to pay over pursuant to the provisions of the subdivision 'B' of this article of this my Will.

"One-quarter thereof to pay over pursuant to the subdivision 'C' of this article of this my Will.

"In the event that my said wife should elect to take the devise of my said estate 'Fairmile Court' and at the valuation thereof as provided in and by the provisions of article 'Third' hereof, the said valuation being the sum of eight thousand two hundred and fifty pounds (£8,250.), shall be deducted from the aforesaid forty-five per centum part of my said residuary estate and shall be added in equal portions to the aforesaid

two twenty-seven and one-half per centum parts of my said residuary estate, to the end that, if my said wife should accept the devise of my said estate 'Fairmile Court,' as aforesaid, her share in my said residuary estate shall be reduced to the extent of eight thousand two hundred and fifty pounds (£8,250.), and the shares of my two daughters in my said residuary estate shall each be increased to the extent of four thousand one hundred and twenty-five pounds (£4,125.).

"B. The second part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the addition thereto as hereinbefore provided), I give and bequeath to my said Trustees, In Trust, Nevertheless, for the use and benefit of my daughter *Gertrude Frances Browne*, to hold and invest the same and to receive and collect any and all the income, interest and increment accruing thereon and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my said daughter, per stirpes and not per capita.

"C. The third part or portion of my said residuary estate, consisting of twenty-seven and one-half per centum thereof (and the additions thereto as hereinbefore provided), I give and bequeath to my said trustees, In Trust, Nevertheless, for the use and benefit of my daughter, *Gladys Mary Baylies*, to hold and invest the same and to receive and collect any and all income, interest and increment accruing thereon and the same to pay over to my said daughter in equal semi-annual installments for and during each year of the full term of the life of my said daughter, and upon the death of my said daughter to pay over the corpus of the said trust in equal shares to the children of my

said daughter, per stirpes and not per capita."

Immediately following such provisions is found the clause which may be designated as the "survivorship clause," and which reads as follows:

> "*Ninth*: In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

The testator so clearly stated his intention in the event which has come to pass—"that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other"—that there is no difficulty in determining what the testator intended. For the testator declared that in such event "it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife." The difficulty which arises in connection with the construction of the above provisions of the will relates not to the intention of the testator, but to the question as to whether the intention of the testator may be given legal effect.

POINT I.

The reversal of the Appellate Division rests upon the ground that the decision of the Surrogate was based upon an assumption which was contrary to the intention of the testator as expressed in his will.

The Surrogate based his decision upon the assumption that the testator, by the ninth clause of his will, intended to substitute someone else in place of Mrs. Fowles in the event of her incapacity to take under his will. There is no provision in the will which warrants such assumption. Nowhere in the will is there any indication of an intention on the part of the testator that any part of his estate should go to his wife's sister, Dorothy Elizabeth Smith, or to the executors named in his wife's will. There is no channel (the Surrogate does not point out one) through which title could pass under the testator's will to any legatee named in Mrs. Fowles's will or to her executors unless by incorporating the provisions of Mrs. Fowles's will into the will of her husband. The will of testator does not contain a provision which is suggestive of the intention that his wife's will should be incorporated into his own. And if such intention were present, it would be contrary to the established rule in this State, and, therefore, could not be given effect. This question is fully discussed under Point V of this brief. The substitution which the Surrogate deduces from the ninth clause of the will, if intended by the testator, could have been rendered effective by him by the use of a very few words—such as are found in the will in the case mainly relied upon by the Surrogate (Matter of Piffard, 111 N. Y., 410).

The lack of support for the theory on which

the Surrogate based his decision, has been very clearly pointed out by Mr. Justice Shearn in his opinion, as follows:

> "The underlying and basic grounds for the construction adopted by the learned Surrogate are the supposed intent of the testator, to be gathered from the instrument itself, and the assumption that this construction is necessary to avoid a lapse. For any intent on the part of Mr. Fowles that any part of his estate should go to his wife's sister, Dorothy Elizabeth Smith, or to any child of his wife's sister, the testament will be scanned in vain. A few simple words would have effectuated such an intention, but any such words are carefully omitted. The only possible way of finding any such intent is to incorporate into the testator's will the provisions of the wife's will, which is contrary to the established rule in this State forbidding the incorporation into a will, by reference, of any extraneous instrument containing provisions of a testamentary character" (fols. 281-283).

Further, it is to be observed that apparently the Surrogate was moved to adopt his theory of substitution for the purpose of avoiding an intestacy which the Surrogate assumed would otherwise come to pass. The Surrogate, in his opinion, states:

> "It is to me obvious that Mr. Fowles's real intention by the ninth clause of his will was to prevent lapse in the event of Mrs. Fowles's incapacity in any way to take under his will" (fol. 214).

And again:

> "Substitution is a common remedy for lapse" (fol. 216).

That this assumption of intestacy is unwar-

ranted, clearly appears from the Eighth Paragraph of the will. Justice Shearn, in his opinion, discusses the question as follows:

> "So far as concerns the assumption of a lapse or partial intestacy which this construction is adopted to avoid, there is no basis for it whatever. In the first place, the assumption of a lapse presupposes an intent on the part of the testator that a part of the corpus of the trust estate should go to Dorothy Elizabeth Smith, the wife's sister, and there was no such intent expressed or intimated. The other basis for the assumption of a lapse or partial intestacy is that if the imaginary legacy to Dorothy Elizabeth Smith failed, such part of the trust fund would lapse into the residuary estate, but (as pointed out above), the Eighth Paragraph of the will expressly provides that if Mrs. Fowles should fail to make testamentary disposition of the one-half of the trust fund (and she did fail, because she did not exercise the power conferred), this part of the trust fund passed to the testator's trustees for the benefit of his two daughters. Clearly, therefore, the supposed lapse, to prevent which such an artificial construction has been given to the will, is non-existent" (fols. 290-292).

A partial intestacy cannot be predicated upon the theory that the provisions of the Ninth Paragraph of the will may be construed as a limitation upon the operation of the alternative bequest contained in the Eighth Paragraph. The alternative bequest found in the Eighth Paragraph is couched in the following concise and unambiguous language:

> "In the event that my said wife should fail to make testamentary disposition of the said one-half thereof, the same to divide into two equal portions and such two equal por-

> tions to pay over pursuant to the provisions of Subdivisions 'B' and 'C' of this article of this my will, one such portion passing under said Subdivision 'B' and one such portion passing under said Subdivision 'C' " (fols. 96-97).

The words used create an estate in terms clear and decisive. There are no limitations upon their operation. There is nothing in the language used which shows any intent on the part of the testator that the words "in the event that my wife should fail to make testamentary disposition," should apply only in case of an actual failure on the part of the wife to do something. If it had been proved that the testator's wife had predeceased him, there could be no question but that the wife failed to exercise the power of appointment and that the alternative bequest contained in the Eighth Paragraph would become operative, and this would be true notwithstanding any attempt made by the wife to exercise the power of appointment in any will left by her. In such event the failure of the wife to exercise the power of appointment *would not have been due to any omission on the wife's part to perform any act which she was physically capable of performing.*

Furthermore, the Ninth Paragraph contains no language expressly limiting the operation of the alternative bequest. The intention so clearly set forth in the Eighth Paragraph cannot be defeated by merely raising a doubt as to the meaning or application of the provisions of the Ninth Paragraph—especially when the doubt is suggested only by an attempt to fasten upon the latter paragraph a strained and wholly unreasonable interpretation.

Banzer *v.* Banzer, 156 N. Y., 429.
Goodwin *v.* Coddington, 154 N. Y., 283.
Washbon *v.* Cope, 144 N. Y., 287.

In Banzer *v.* Banzer (quoting page 435) it was said:

> "Where an estate is given in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate, is a well established rule applicable to the construction of wills."

And in Goodwin *v.* Coddington (quoting from page 286), it was said:

> "Where an estate is devised by a will, as it was in this estate, to the children of Jefferson Coddington, such provision cannot be regarded as revoked by subsequent language, capable of other reasonable construction or less clear and certain than the language of the devise or bequest."

POINT II.

No presumption exists to the effect that Frances May Fowles, the wife of Charles F. Fowles, either predeceased him or survived him; the burden of proof as to the fact of survivorship rests upon the residuary legatees and devisees under the will of Frances May Fowles, as they are the persons who claim under her will as an instrument passing the property as to which she had power of disposition by virtue of the will of her husband.

St. John *v.* Andrews Institute, 191 N. Y., 254 (quoting page 272):

> "The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence

in connection with the happening of a certain event, a certain fact shall be presumed. The Ninth Paragraph provides as follows:

> "*Ninth.*—In the event that my said wife and myself die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

The adoption of such a direction would compel the Court to indulge in a presumption which is expressly contrary to the fixed principle of the common law as above stated. In this conclusion both the Surrogate and the Appellate Division have agreed.

The Surrogate, in his opinion, said:

> "Presumptions prescribed by the common law and rules of construction based thereon are fixed and immutable and cannot be thus directed to be altered by the Court to meet particular cases" (fols. 207-208).

And Mr. Justice Shearn wrote to the same effect:

> "The Surrogate also correctly held that under well settled principles of law and from considerations of public policy, the ninth paragraph of Mr. Fowles's will could not be given effect either as an attempt to change the substantive law applicable in the event of the simultaneous deaths of the testator and his wife, or as an attempt to create a presumption to bind the Court in the absence of evidence as to which of the two died first, and that notwithstanding Paragraph Ninth the rule of law as to the effect

of simultaneous deaths and the rule as to the presumption, in the absence of evidence as to priority of death, was the same as if Paragraph Ninth had not been contained in the will" (fols. 277-278).

See, also,

Matter of Anonymous, 80 Misc., 10.

POINT IV.

The power conferred upon Frances May Fowles to dispose of one-half of forty-five per cent. of the residuary estate of her husband by virtue of the provisions of Subdivision "Eighth" of his will, could be validily exercised by her only in the event that she survived her husband, and as there was no proof of such survivorship, and as effect cannot be given to the direction of the said will as to survivorship, the power failed.

Mrs. Fowles assumed to exercise the power conferred upon her by the "Eighth" subdivision of her husband's will as is evident from the "Third" subdivision of Mrs. Fowles's will, which in part reads as follows:

> "*Third.*—Any and all the rest, residue and remainder of my estate, real and personal and wheresoever situate (including any and all property as to which I may have power of disposition by will by virtue of the provisions of the last will and testament of my husband, Charles Frederick Fowles), I give and bequeath to my trustees, hereinafter named," etc.

There is, therefore, no question of the intention of Mrs. Fowles to exercise the power and of the fact that the language contained in her

will is in itself sufficient to exercise such power. The question is as to the validity of the exercise of the power, and this question turns entirely upon the fact as to whether Mrs. Fowles survived her husband. For the authorities uniformly hold that a testamentary power cannot be exercised until after the death of the testator whose will created the power.

1 Jarm (6th Ed., 1910), page 428.

Matter of Piffard, 111 N. Y., 410 (quoting from page 414):

"The testator gave a power of appointment, which, as a power, the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership."

Matter of Mayo, 76 Misc., 416 (quoting from page 419):

"When a power is created by a will, until the death of the testator the power is merely one in posse or contemplation, for, as a will is ambulatory until the death of the testator, the power contemplated in such will has no existence and never may have, as it may be revoked at pleasure. In so far as the donee is concerned such gift of a power is in the position of any other *spes successionis*. The power may or may not ever come to realization. Powers connected with personal property are now for all practical purposes co-extensive with powers in the law of real property in this State, and they are governed by the same rules."

And further (quoting p. 420):

"Let us inquire then who may at this day in this State take a power, whether it be a power of appointment or any other recognized power. The Statute of Powers determines it.

Section 141 (Real Prop. Law), provides that a power may be vested in any person capable in law of holding property. Now at the time this power was granted Grace E. Bird was dead. She could not hold property. It seems to me that this ends the discussion. Grace E. Bird never had a power of appointment, any more than the legacy of $6,600.51 is specie, which as stated had lapsed as to her.

"If Grace E. Bird never took a power of appointment by the will of Mary Nevins Mayo, the will of Grace E. Bird could not have operated as a testamentary execution of such power in any event, and I so hold. In order that a will may operate as a testamentary execution of a power, the testator must have capacity to be the grantee of a power and be vested with the power. This a dead person cannot be."

Jones *v.* Southall, 32 Beavan, 31, 38-39.
Sharpe *v.* McCall, 1 Irish Rep. (1903), 179.
Curley *v.* Lynch, 206 Mass., 289.

POINT V.

The contention that the provisions of the will of Charles F. Fowles, made in behalf of his wife may be rendered effective by incorporating the will of the latter into the will of the former, is open to the objection that the provisions of the will of the latter are plainly dispository in character, and, therefore, cannot be read into the will of the former.

If it were possible to read into the will of Charles F. Fowles, the provisions of his wife's will, there would be a sound basis for the suggestion that the will of Mrs. Fowles might be

referred to as expressive of the intention of Mr. Fowles as to the disposition of that portion of his residuary estate in connection with which he gave to Mrs. Fowles the power of disposition by will. On this theory reference would be had to the provisions of Mrs. Fowles's will merely for the purpose of ascertaining the intention of the testator and the property would pass by virtue of Mr. Fowles's will to the beneficiaries named in Mrs. Fowles's will. This theory, however, rests upon a doctrine—the incorporation of Mrs. Fowles's will into the will of Mr. Fowles's—which is contrary to the law of this State; for whatever support for the doctrine may be afforded by some of the earlier discussions (Tonnele *v.* Hall, 4 N. Y., 140, and Brown *v.* Clark, 77 N. Y., 369, and Caufield *v.* Sullivan, 85 N. Y., 153), all the latter cases have distinctly and absolutely repudiated the doctrine.

Matter of O'Neill, 91 N. Y., 516 (quoting pages 523 and 524):

"It was held in Tonnele *v.* Hall (4 N. Y., 140), that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the County Clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the will. It is to be observed that the paper there in question was referred to merely to identify the subject devised and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such addition, and that the maps could probably have been used as evidence to identify the property devised,

even if no reference had been made thereto in the will."

Booth *v.* Baptist Church, 126 N. Y., 215 (quoting pages 247 and 248):

"It is unquestionably the law in this State that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."

Matter of Conway, 124 N. Y., 455.
Locke *v.* Rings, 56 Hun, 428.
Martin *v.* Pine, 79 Hun, 430.
Matter of Emmons, 110 App. Div., 701.
Matter of Westcon, 60 Misc., 275.
Matter of Martindale, 69 Misc., 522.
Keil *v.* Hoehn, 72 Misc., 255.

In the last case Mathias Seiwert and his wife Anna Maria, separately executed their respective wills, on the same day and before the same witnesses. The husband died prior to the wife and neither left any direct heirs or next of kin. The will of the wife bequeathed and devised all the residuary of her estate, real and personal, to her husband for life, and thereafter as follows: "and after his decease the real and personal estate shall be divided as set down in the last will and testament of my husband, Mathias Seiwert, to me, Anna Maria Seiwert." The will of the wife failed to name an executor. The court held that the will of the testatrix's husband could not be read into her will for the purpose of providing for the disposition of her residuary estate, and that as the husband had predeceased his wife, the bequest and devise to him lapsed and that therefore the wife died intestate as to

her residuary estate. The Court said (quoting pages 256 and 257):

> "The provisions of the will of Mathias, in so far as they are referred to in the will of Anna Maria, are dispositive in character; and it seems to be well settled in this state that an extraneous paper or document of a testamentary nature referred to in a last will and testament cannot be incorporated therein, unless it be attested and executed as a will."

The case of Matter of Piffard, 111 N. Y., 410, is not in conflict with the decision in the case of Booth *v.* Baptist Church (*supra*) and the other cases above cited. The Piffard case is one of alternative gift, as is clear from the language (quoting pages 413 and 414):

> "To that end I direct that such share or shares shall be paid over by my said executors to the executors named in and by the several wills of my said daughters in case of the death of them or either of them, in my lifetime, instead of to my said daughter or daughters."

The testator had made a will absolutely devising and bequeathing certain portions of his estate to his daughters and a few years later he executed a codicil in which he conferred upon his daughters the power to dispose "by their several wills heretofore or hereafter duly made and executed," the shares of his estate devised and bequeathed to them by his will, and after so providing in his codicil the testator used the language which is above quoted. It will thus be seen that the testator in reality provided for an alternative bequest and devise and that the will executed by the daughter who predeceased the testator was referred to only for the purpose of giving effect to the gift in the alternative,

for which the testator had provided in the codicil to his will. And in this connection, it is important to observe that the testator after the death of his daughter made two codicils in which he confirmed the provisions under discussion. The Court laid stress on this fact, saying (quoting p. 414):

> "And this view is very greatly strengthened by the fact that after her death leaving a last will, the testator, with full knowledge of the existing situation, made two other codicils confirming his will and the provisions contained in it now in question."

Furthermore, the Piffard case is sharply distinguishable from the case at bar for the reason that the Piffard case does not involve at all the question with which we are confronted at the threshold of the discussion of the case at bar—that is, whether the testator by inserting in his will a so-called "survivorship clause," may change or suspend the effect or application of the well settled rule of law that in a case in which two persons die as a result of the same disaster, the burden of proof as to the fact of survivorship is upon the representatives of the person who it is claimed was the survivor.

It is to be observed that the Piffard case squarely decides that the power of appointment granted to the daughter by the codicil to the testator's will failed because of the death of the daughter before that of the testator. This case, therefore, is authority for the proposition that Mrs. Fowles, by her will, could not have exercised the power of appointment granted to her by her husband's will, unless she survived her husband.

The case of Condit *v.* DeHart, 62 N. J. L., 78,

which cites and apparently follows the Piffard case, is merely another case illustrative of the principle of alternative gift and is distinguishable from the case at bar on the same grounds as is the Piffard case.

And it is not to be overlooked that the case at bar presents a consideration bearing upon the question of intention which was not present in either Matter of Piffard or Condit *v.* DeHart. This consideration arises from the provisions of the "Fourth" subdivision of the Will of Mrs. Fowles which reads as follows:

> "*Fourth*: In the event that I should predecease my said husband none of the provisions contained in the articles designated 'Second' and 'Third' of this my will shall be effective and in such event I give, devise and bequeath any and all my estate, both real and personal, absolutely and forever, to my said sister, Dorothy Elizabeth Smith."

This language clearly shows that Mrs. Fowles had in mind the contingency of her death occurring before that of her husband and the necessity of her making special provision for the disposition of her property in the event of the happening of such contingency.

POINT VI.

The question under discussion, while primarily one of intention, should be viewed as turning not merely upon the actual intent of the decedent and his wife, but rather upon their intention in so far as the same may be given effect under the well settled rules of law.

If we were merely abstractly considering and discussing the questions involved, we might be

permitted to assume as a premise that the actual intent of the parties, in so far as the same might be gathered from their wills, should govern, and that for the purpose of determining their intent reference might be had from one will to the other. But as to the acceptance of such a premise we are foreclosed by the decisions to which we have above adverted, and which establish the following two propositions: (1) that the burden of proof is upon the persons claiming under Mrs. Fowles's will to establish that she survived her husband, and (2) that the dispositive provisions of Mrs. Fowles's will cannot be incorporated into the will of Mr. Fowles.

The fundamental question is not merely what did the testator intend to do, but rather what is a testator permitted to do under the law. The distinction involved in this connection has been clearly pointed out by this Court.

Matter of Andrews, 162 N. Y., 1 (quoting p. 5):

> "It has been repeatedly laid down as the rule in this state, in cases we shall presently discuss, that the intention of the testator is not to be considered when construing this statute, but that of the Legislature. The question is not what did the testator intend to do, but what has he done in the light of the statute."

Respectfully submitted,

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Court of Appeals

OF THE STATE OF NEW YORK.

Before THE STATE INDUSTRIAL COMMISSION, *Respondent.*

In the Matter

of

The Claim of HELEN L. GIFFORD for compensation arising out of the death of Charles W. Gifford, under the Workmen's Compensation Law,

against

T. G. PATTERSON, INC., Employer, and the LUMBER MUTUAL CASUALTY INSURANCE COMPANY, Insurance Carrier,

Appellants.

Rec. 13. 1917. Jeremiah F. Connor, for Appellant. E. C. Aiken, for Respdt.

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