

## INDEX

---

	PAGE
Bill of Complaint.....	1
Schedule "A"—Last Will and Testa- ment of Emma J. Dunkerley.....	14
Schedule "B"—Inventory—Estate of Emma J. Dunkerley.....	16
Schedule "C"—Last Will and Testa- ment of W. George Dunkerley.....	19
Schedule "D"—Securities Delivered to Complainant .....	20
Schedule "E"—Inventory—Estate of William George Dunkerley.....	22
Schedule "F"—Securities and moneys Delivered to Defendant, Emma L. Bainbridge .....	25
Schedule "G"—Metes and Bound Descrip- tion, Premises 43 Sherman Ave., Pat- erson, N. J.....	29
Affidavit of Howard Trafton.....	30
Order to Show Cause.....	41
Subpoena .....	43
Continuance .....	44
Notice of Motion to Strike Out Bill of Com- plaint .....	45
Order of Restraint.....	47
Opinion .....	49
Notice .....	55
Proposed Final Decree.....	56

	PAGE
Stipulation .....	58
Affidavit of Services of Aaron Lasser.....	59
Decree of Dismissal and Order of Restraint Pending Appeal.....	64
Notice of Appeal.....	67
Affidavit of Service.....	68
Petition of Appeal.....	69

58  
59  
**Bill of Complaint.**

(Filed May 9, 1938.)

64  
67  
68  
**In Chancery of New Jersey**

To HIS HONOR, LUTHER A. CAMPBELL, Chancellor  
of the State of New Jersey.

10

69  
The complainant, Howard Trafton, as substitutionary administrator with the will annexed of the last will and testament of Emma J. Dunkerley, late of the City of Paterson, County of Passaic and State of New Jersey, respectfully shows and alleges:

1. Emma J. Dunkerley, late of the City of Paterson, County of Passaic and State of New Jersey, died on September 11th, 1930, testate, leaving a last will and testament dated September 8th, 1930, which last will and testament was on September 22nd, 1930 duly admitted to probate by the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "A" is a copy of said last will and testament. Thereupon, William George Dunkerley, husband of said testatrix, the executor named therein, duly qualified as such executor and took upon himself the administration of the assets of her estate.

20

30

2. On or about October 22nd, 1930, the said William George Dunkerley, as such executor, filed an inventory and appraisal of the assets of the estate of the said Emma J. Dunkerley in the office of the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "B" is a list of the assets and securities listed in such inventory.

40

*Bill of Complaint.*

3. As will more fully appear by reference to the last will and testament of the said Emma J. Dunkerley, after provision for the payment of the testatrix's debts and funeral expense and for the payment of legacies aggregating \$1,000.00, said testatrix gave, devised and bequeathed all  
10 of the rest, residue and remainder of her estate, real and personal, of whatsoever nature and wheresoever situate, to her said husband William George Dunkerley:

“for his sole use and benefit during his life with full right and power to sell, transfer and convey the same and use the whole or any part of said estate principal or interest, or the proceeds for his own use and benefit in  
20 any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute.”

Said last will and testament further provided:

“At the decease of my said husband, I then give, devise and bequeath so much of said estate and property as shall remain, one-third thereof to my nephew Howard Trafton, one-third to my nephew Clifford Trafton, and one-third to the children of my nephew, Clifford Trafton; in case of the death of either nephew, his share to go to his children if any or if none to the other nephew or his children; in case of the death of the children of Clifford Trafton their share to be given to the said Clifford Trafton or if he be dead then  
30 to Howard Trafton or his children.”  
40

*Bill of Complaint.*

4. The said Emma J. Dunkerley was survived by the said nephews Howard Trafton and Clifford Trafton and by Allan Trafton and Janice Trafton, children of said Clifford Trafton. Thereafter and during the lifetime of said William George Dunkerley, the said Clifford Trafton died, 10  
 intestate, leaving the said Allan Trafton and Janice Trafton as his sole surviving children. By reason of the foregoing, the residuary estate of the said Emma J. Dunkerley became and is payable and distributable, upon the death of William George Dunkerley, as follows: one-third to Howard Trafton, one-third to Allan Trafton and one-third to Janice Trafton. The said Allan Trafton and Janice Trafton are infants, the said Allan Trafton being, at the present time, fourteen years 20  
 of age, and the said Janice Trafton being, at present, seventeen years of age.

5. The said William George Dunkerley administered the said estate as executor thereof, until June 11th, 1931, at which time his final account as such executor was allowed by decree of the Passaic County Orphans' Court entered that day. Said decree found that there was a balance in the hands of the accountant amounting to \$24,850.01 30  
 to be disposed of according to law and directed the payment out of said balance of commissions, counsel fees and surrogate's fees aggregating \$1,056.30. Said assets of said estate consisted of cash and miscellaneous securities of a varied character.

6. From and after the allowance of said account as aforesaid, the said William George Dunkerley held and administered the assets of said estate as trustee for the benefit of the various parties in interest in said estate as aforesaid. 40  
 He never filed any account as such trustee.

*Bill of Complaint.*

7. On January 25th, 1936, the said George Dunkerley died, testate, leaving a last will and testament dated October 19th, 1934, which last will and testament was, on February 6th, 1936, duly admitted to probate by the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "C" is a copy of said last will and testament. Thereupon, The Hamilton Trust Company of Paterson, N. J., the executor named therein, duly qualified as such executor and took upon itself the administration of the assets of his estate.

8. On August 31st, 1936 the United States Trust Co. of Paterson, N. J., who, by the last will and testament of Emma J. Dunkerley, was appointed executor thereof in case of the death of William George Dunkerley, having renounced and refused to qualify and act as such executor, the complainant was appointed substituted administrator with the will annexed of the last will and testament of the said Emma J. Dunkerley by order of the Passaic County Orphans' Court, and thereupon complainant qualified as such and took upon himself the administration of said estate.

9. The only assets of the estate of the said Emma J. Dunkerley which complainant has received, consist of miscellaneous securities having a face value of \$9,937.00, a complete and detailed list of which is annexed hereto and made part hereof, marked Schedule "D", leaving unaccounted for the remaining assets of said estate as fixed by the final decree of the Passaic County Orphans' Court referred to in paragraph 5.

10. Upon the death of the said William George Dunkerley, and the appointment and qualification

*Bill of Complaint.*

of said The Hamilton Trust Company of Paterson, N. J., as executor of said estate, as hereinabove referred to, The Hamilton Trust Company of Paterson, N. J. became charged with the duty of accounting in behalf of the said William George Dunkerley, for his acts and conduct as trustee of the estate of the said Emma J. Dunkerley from May 1st, 1931, the date of the final accounting of said William George Dunkerley as aforesaid, up to the date of his death. The said The Hamilton Trust Company of Paterson, N. J. did not so account. 10

11. The said The Hamilton Trust Company of Paterson, N. J., as executor under the last will and testament of William George Dunkerley, did on or about September 16th, 1936, cause an inventory of the alleged assets of the estate of William George Dunkerley to be filed in the office of the Surrogate of Passaic County. A list of the assets and securities described in said inventory is annexed hereto and made part hereof, marked Schedule "E". Complainant is informed and believes, and therefore charges the fact to be, that included in said inventory were assets which were not the property of the said William George Dunkerley individually, but which in fact were assets of the estate of Emma J. Dunkerley, held by said William George Dunkerley as trustee as aforesaid. The nature, character and extent of such assets so improperly included as aforesaid, can only be correctly ascertained after an accounting has been made as hereinafter prayed for. 20 30

12. The said The Hamilton Trust Company of Paterson, N. J. administered the estate of the said William George Dunkerley until March 18th, 40

*Bill of Complaint.*

1937, when its final account as executor of said estate was allowed by the Passaic County Orphans' Court and it was decreed that there was a balance of \$15,561.25 to be disposed of according to law. Included in such administration and accounting were the assets which were the property of the estate of Emma J. Dunkerley and which should have been turned over and delivered to complainant for administration and distribution by him in his capacity as substitutionary administrator c.t.a. of the last will and testament of Emma J. Dunkerley. In its administration of said estate it calculated and improperly disbursed moneys for inheritance taxes, commissions and the like as if all of said assets were the sole property of said William George Dunkerley, and without regard to the assets held by him in trust as aforesaid.

13. Following the allowance of the final account of said The Hamilton Trust Company of Paterson, N. J. as aforesaid, the said The Hamilton Trust Company of Paterson, N. J. turned over and delivered to the defendant Emma L. Bainbridge, the residuary legatee named in the will of the said William George Dunkerley, all of the assets in its possession. These assets, so far as complainant has been able to ascertain, consisted of the securities and moneys stated in detail in the schedule hereto annexed and made part hereof, marked Schedule "F". Complainant is advised that such delivery was made on or about April 19th, 1937, excepting therefrom the sum of \$946.10 which was allowed for commissions, counsel fees and surrogate's fees.

*Bill of Complaint.*

14. From and after April 19th, 1937, the defendant Emma L. Bainbridge enjoyed the possession and use of the said assets, which, as nearly as complainant has been able to ascertain, were of the value of \$14,614.41, and has received the income and profits therefrom.

10

15. Complainant is advised and verily believes, and therefore charges the fact to be, that the said William George Dunkerley possessed no personal property at the date of his death, other than such property and assets as had been received by him from the estate of the said Emma J. Dunkerley, the form of which may have been and was by re-investment, and change, from time to time altered and converted into that of the securities, investments and assets described in detail in the aforesaid inventory filed by The Hamilton Trust Company of Paterson, N. J. as executor under the last will and testament of William George Dunkerley, deceased.

20

16. As will more fully appear by reference to the inventory of the assets of the estate of the said William George Dunkerley, filed by said The Hamilton Trust Company of Paterson, N. J., the assets taken into its possession and custody at the date of the death of the said William George Dunkerley consisted of certain stocks, bonds, mortgages, guaranteed mortgage certificates and cash, the nature and character of which is such as to make it appear that the assets of the said William George Dunkerley at the time of his death, were in fact the assets of which the said Emma J. Dunkerley had died seized and possessed, altered, however, in form and nature to such extent as was made necessary by the lapse of time,

30

40

*Bill of Complaint.*

10 the maturity of mortgages and mortgage certificates, and the necessity and desirability for the re-investment of the same. Complainant is advised and verily believes that the nature and extent of such changes, and the fact of such change and re-investment can be established and verified by an examination of the books and records of the said William George Dunkerley, deceased, but that such records and books are in the possession of the defendants or one of them. Complainant is unable to produce the same without the aid and assistance of this court.

20 17. Complainant alleges that information concerning the income and profits received by the defendant Emma L. Bainbridge since April 19th, 1937 is in the exclusive possession of the defendant Emma L. Bainbridge and complainant is unable to obtain the same without the aid and assistance of this court.

30 18. Complainant alleges that the said William George Dunkerley died seized of certain lands and premises located in Paterson, New Jersey, commonly known as No. 43 Sherman Ave., and more particularly described in Schedule "G", which is hereto annexed and made part hereof. By the terms of said last will and testament, title to said property became vested in the defendant Emma L. Bainbridge, who is still the owner of record thereof. Complainant alleges that should the defendants be unable to deliver to him the assets to which complainant is entitled, or to pay the value thereof, then that this court should impress a lien upon said real estate to the extent of the value of said assets and direct a sale thereof  
40 pursuant to law, to satisfy the amount so found due.

*Bill of Complaint.*

19. Complainant is advised and verily believes that such assets as the defendant Emma L. Bainbridge was entitled to receive under the last will and testament of William George Dunkerley have been commingled with the assets of the estate of Emma J. Dunkerley, to which complainant is entitled, so that it may be impossible to determine which of such assets are trust assets as aforesaid, and which of said assets were the separate property of the said William George Dunkerley and were improperly and unlawfully commingled with such trust assets. Complainant alleges that if it cannot be ascertained which of such property constituted trust property and which of such property constituted the separate property of the said William George Dunkerley aforesaid, then complainant is entitled to receive all of the property which was in the possession of the said William George Dunkerley at the date of his death on January 25th, 1936, chargeable with the aforesaid trust.

20. The defendant Emma L. Bainbridge is an elderly woman who, before the death of the said William George Dunkerley, was employed by him as a housekeeper. So far as complainant has been able to ascertain, the defendant Emma L. Bainbridge is without any financial responsibility except to the extent of the property to which she became entitled under the last will and testament of the said William George Dunkerley. Such assets as she was entitled to receive thereunder have, as hereinabove alleged, been commingled with the assets of the estate of Emma J. Dunkerley, to which complainant is entitled, so that, as hereinbefore alleged, it may be impossible to determine which of such assets are trust assets

*Bill of Complaint.*

and which of such assets were the independent property of the said William George Dunkerley. Complainant is fearful that unless the defendant Emma L. Bainbridge is restrained from paying or transferring to any person or persons any portion of the property, securities or money received by her as aforesaid, complainant may be unable to recover the same and administer the same in accordance with the provisions of the last will and testament of Emma J. Dunkerley, deceased, and complainant alleges that it is necessary that the defendant be restrained and enjoined from paying or transferring any portion of such property to any person or persons, and that a receiver pendente lite be appointed of all of the property, securities and money delivered to the defendant Emma L. Bainbridge by the defendant The Hamilton Trust Company of Paterson, N. J., as executor under the last will and testament of William George Dunkerley, deceased, which receiver should have authority to possess, receive, and in his own name as such receiver, sue for said property, securities or money and preserve and conserve the same pending this litigation and until the further order of the court in the premises.

Complainant is without adequate remedy in the courts of law and therefore prays:

(a) That Emma L. Bainbridge and The Hamilton Trust Company of Paterson, N. J., who are the defendants to this suit, may answer this bill of complaint and each statement therein made;

(b) That the said William George Dunkerley may be held and decreed to have been chargeable as trustee for the complainant of the property and assets of the estate of Emma J. Dunkerley, de-

*Bill of Complaint.*

ceased excepting so much thereof as was sold or used by him during his lifetime for the purposes set forth in the will of the said Emma J. Dunkerley;

(c) That the value, amount, nature and extent of the property and assets of Emma J. Dunkerley, deceased, so held by the said William J. Dunkerley, be fixed and determined by this court; 10

(d) That the defendant The Hamilton Trust Company of Paterson, N. J., may be ordered and decreed to make a full and true accounting, disclosure and discovery of its administration of the property so determined to have been held by the said William George Dunkerley upon the trusts aforesaid; 20

(e) That the defendants Emma L. Bainbridge and The Hamilton Trust Company of Paterson, N. J. may be ordered and decreed to account for the property and assets of the said Emma J. Dunkerley and for all income thereon and appreciations and accretions thereunto since the date of the death of the said William George Dunkerley, and that they or one of them may be required to deliver, restore and pay over to the complainant such property and assets of the said Emma J. Dunkerley, deceased, together with such income, accretions and appreciations; 30

(f) That the defendant Emma L. Bainbridge may be ordered and decreed to make a full and true accounting, discovery and disclosure of the property and assets of Emma J. Dunkerley, deceased, so determined to have been held in trust as aforesaid, and of all receipts and expenditures made by her in respect thereto since April 19th, 1937, and of the present condition of the said prop- 40

*Bill of Complaint.*

erty, assets and securities, and where and how located, invested and by whom held or possessed;

10 (g) That if it be determined that the said William George Dunkerley did unlawfully and im-  
properly commingle the assets and property of the  
said Emma J. Dunkerley, held in trust as afore-  
said, with other assets and property owned and  
held by the said William George Dunkerley indi-  
vidually, so that it cannot be readily ascertained  
which of such property constituted property held  
in trust as aforesaid and which of said property  
constituted separate property of the said William  
George Dunkerley, that it may be held and decreed  
20 that all of the property in the possession of the  
said William George Dunkerley at the date of his  
death on January 25th, 1936, is chargeable with  
the aforesaid trust and be paid and turned over to  
the complainant;

30 (h) That if the defendants be unable to pay  
over and deliver to the complainant the assets of  
the said Emma J. Dunkerley, deceased, to which  
complainant shall be found to be entitled, that a  
lien be impressed upon the real estate commonly  
known as #43 Sherman Ave., Paterson, N. J. to  
the extent of the value of such assets, in favor of  
the complainant, and that this court may decree a  
sale of such real estate to satisfy such lien;

40 (i) That this Court may enjoin and restrain  
the defendant Emma L. Bainbridge from paying  
or transferring any portion of the property, secur-  
ities or money received by her from The Hamilton  
Trust Company of Paterson, N. J., executor  
under the last will and testament of William  
George Dunkerley, deceased, to any person or per-  
sons, pending the further order of this court;

*Bill of Complaint.*

(j) That this Court may appoint a receiver pendente lite of all of the property, assets, securities and moneys paid over and delivered by The Hamilton Trust Company of Paterson, N. J. as executor under the last will and testament of William George Dunkerley, deceased, to the defendant Emma L. Bainbridge, in purported accordance with the directions of the last will and testament of William George Dunkerley, deceased, which receiver shall have authority to possess, receive in his own name as such receiver, sue for said property, assets, securities or moneys and shall in all respects be subject to the authority of this court in accordance with the practice of this court, and shall and may dispose of said property, securities, assets or moneys in conformity with the further order of this court;

(k) That this Court may order the defendants Emma L. Bainbridge and The Hamilton Trust Company of Paterson, N. J. to make discovery and disclosure of the books and records of William G. Dunkerley, late of the County of Passaic, in respect to the properties, assets, securities and moneys received by the said William George Dunkerley, deceased, in his lifetime from Emma J. Dunkerley;

(l) That the further administration of the estate of Emma J. Dunkerley be taken over by this court from the Passaic County Orphans' Court and that all further administration of said estate be had in this court;

(m) That a writ of subpoena may issue out of this court directed to said defendants, commanding them to answer this bill of complaint on a cer-

*Bill of Complaint—Schedule "A".*

tain day and under a certain penalty therein to be specified and to be abided by and perform such order and decree as the court may make in the premises;

- 10 (n) That complainant may have such other and further relief as the nature of the premises may require.

HANNOCH & LASSER,  
Solicitors of Complainant.

HERBERT J. HANNOCH,  
Of Counsel.

---

**Schedule "A".**

20

I, EMMA J. DUNKERLEY, of the City of Paterson, State of New Jersey, being of sound mind and memory, do make publish and declare this to be my Last Will and Testament

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

30

SECOND: I give to Ida Smith of 139 Division Ave., Brooklyn, N. Y. (\$500) Five Hundred Dollars and to Mrs. Arthur C. (Jennie) Kates of Churchville, N. Y. the sum of (\$500) Five Hundred Dollars.

40

THIRD: All the rest, residue and remainder of my estate real and personal of whatsoever nature and whersoever (sic) situate I give devise and bequeath to my husband William George Dunkerley for his sole use and benefit during his life with full right and power to sell transfer and convey the

*Bill of Complaint—Schedule "A".*

same and use the whole or any part of said estate principal or interest, or the proceeds for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute. 10

FOURTH: At the decease of my said husband, I then give, devise and bequeath so much of said estate and property as shall remain, one-third thereof to my nephew Howard Trafton, one-third to my nephew Clifford Trafton, and one-third to the children of my nephew, Clifford Trafton; in case of the death of either nephew, his share to go to his children if any or if none to the other nephew or his children; in case of the death of the children of Clifford Trafton their share to be given to the said Clifford Trafton or if he be dead then to Howard Trafton or his children. 20

FIFTH: I direct that all taxes be paid from my residuary estate.

SIXTH: I appoint my husband William George Dunkerley to be executor, and in case of his death I appoint United States Trust Company of Paterson, and direct that no bonds be required of either of them. 30

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 8th day of September, One thousand nine hundred and thirty.

(L.S.) EMMA J. DUNKERLEY.

Witnesses:

JOANNA S. GIBBONS,  
MRS. D. WILLOCKS.

40

*Bill of Complaint—Schedule "B".*

Signed, sealed, published and declared by the said testatrix, to be her last Will and Testament in our presence, who, in her presence and in the presence of each other, and at her *re* request, have hereunto subscribed our names as witnesses the day and year first above written.

10 Joanna S. Gibbons residing at 33 Sherman Ave., Paterson, N. J.

Mary Willocks residing at 45 Sherman Ave., Paterson, N. J.

---

**Schedule "B".**

20	SECURITIES AND PROPERTY OF EMMA J. DUNKERLEY, DECEASED, AS SET FORTH IN INVENTORY FILED WITH THE SURROGATE OF PASSAIC COUNTY ON NOVEMBER 18TH, 1930, AND RECORDED ON NOVEMBER 25TH, 1930 IN INVENTORY BOOK U2 PAGE 131.	
	64 Shares capital stock Home Title Insurance Co., par value \$25 @ 55....	\$ 3,250.00
	4 Shares common stock Hotitle Holding Corporation @ 100.....	400.00
30	208 Shares Class A no par value stock United Thrift Plan, Inc. (with warrant) @ 8.....	1,664.00
	1—\$500 6½ Cert. Commonwealth Bond Corporation due January 1st, 1940, interest January and July.....	500.00
	Certificate of Deposit for mortgage participation certificate M 23 and N 32 issued by Commonwealth Bond Corporation against mortgage Ponce	
40	DeLeon Apartments \$2,000.00.....	400.00

*Bill of Complaint—Schedule "B".*

Guaranteed Mortgage on 108-12 Saratoga Jamaica, L. I. Ave., due 4/1/32, certificate 5½%, April and October @ 20.....	1,100.00	
Guaranteed Mortgage 3437 Linden St., Flushing, L. I., due 4/1/31; int. 5½% April and October.....	1,900.00	10
Guaranteed Mortgage 1612-43rd St., Brooklyn, N. Y. due 5/1/31; interest 5½%; May and November.....	3,000.00	
Guaranteed Mortgage Stevens St., Oceanside, due 6/1/31; interest 5½%; June and December.....	1,800.00	
Guaranteed Mortgage on 43 Garfield Pl., Brooklyn, N. Y., due July 1/32; interest 5½%, January and July...	1,000.00	20
Guaranteed Mortgage Certificate Home Title & Insurance Co., Brooklyn, due 2/1/30; interest 5½% February and August.....	1,250.00	
Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 7/1/32; interest 5½%; January and July.....	1,500.00	
Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 6/1/32; interest 5½%; June and December.....	500.00	30
Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 7/1/33; interest 5½%; June and December.....	750.00	
Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 9/1/31; interest 5½%; March and September.....	500.00	40

*Bill of Complaint—Schedule "B".*

	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 5/1/32; interest 5½%; May and November.....	500.00
10	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 5/1/31; interest 5½%; May and November.....	500.00
	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 11/1/30; interest 5½%; May and November.....	500.00
20	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 6/1/30; interest 5½%; May and November.....	750.00
	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 11/1/31; interest 5½%; May and November.....	2,500.00
	Guaranteed Mortgage Certificate Home Title Insurance Co., Brooklyn, N. Y., due 6/1/33; interest 5½%; May and November.....	750.00
30	Guaranteed Mortgage, Oak St., Bald- win, L. I. Ave., due 7/1/32; interest 5½%; January and July.....	3,500.00
		<hr/> \$28,514.00

*Bill of Complaint—Schedule "C".***Schedule "C".**

IN THE NAME OF GOD, AMEN.

I, W. GEORGE DUNKERLEY, of the City of Paterson, in the County of Passaic and State of New Jersey, being of sound and disposing mind, memory and understanding, do make and execute this, my last will and testament in the manner and form as follows: 10

FIRST: I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently may be.

SECOND: I give, devise and bequeath to Emma L. Bainbridge of 43 Sherman Avenue, Paterson, New Jersey, all the rest, residue and remainder of my estate, both real and personal. 20

I hereby appoint The Hamilton Trust Company of Paterson, New Jersey, executor of this my last will and testament and direct them to complete the lettering upon the marker on my grave.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 19th day of October, Nineteen Hundred and Thirty-Four. 30

W. GEORGE DUNKERLEY (L. S.)

Signed, sealed, published and declared by W. George Dunkerley, the above testator, as and for his last will and testament, in the presence of each of us, and we, at his request and in his presence and in the presence of each other have subscribed our names as witnesses.

MELVIN W. MONROE 40  
JAMES ANDERSON

*Bill of Complaint—Schedule “D”.***Schedule “D”.**

ASSETS OF THE ESTATE OF EMMA J. DUNKERLEY  
 RECEIVED BY HOWARD TRAFTON, SUBSTITUTED  
 ADMINISTRATOR C. T. A.

10	Bond and mortgage for \$1100.00, Samuel W. Houston to Home Mortgage Investment Co. dated October 4th, 1919; interest 6%; April and October 1st, covering premises Saratoga Ave., Jamaica, N. Y. Guaranteed by Home Title Insurance Co. Appraised at 60	\$ 660.00
20	Bond and mortgage for \$3500 on which there is now due \$3250.00; Alex. L. Miller, Inc. to Home Title Insurance Co. dated June 24th, 1925; interest January and July 1st; 6%; covering premises east side of Oak St., Baldwin, L. I. Guaranteed by Home Title Insurance Co. Appraised at 50....	1,625.00
30	Bond and mortgage for \$1800.00, Fred Eberlein to Home Title Insurance Co., dated May 27th, 1925; interest June and December 1st; 6%, covering premises Stevens St., Rockville Center, N. Y. Guaranteed by Home Title Insurance Co. Appraised at 60	1,080.00
40	Guaranteed mortgage certificate of Home Title Insurance Co. No. C 4711 for \$1250.00; 5½% interest February and August, covering property west side of VanSicken St., Brooklyn, N. Y. Guaranteed by Home Title Insurance Co. Appraised at 45.....	562.50

*Bill of Complaint—Schedule "D".*

Guaranteed mortgage certificate of Home Title Insurance Company #C 2910 for \$500, 5½% March and September 1st, covering property west side of East 96th St., Brooklyn, N. Y. Appraised at 35.....	175.00	10
Guaranteed mortgage certificate of Home Title Insurance Co. #C 6777; \$750.00; 5½% interest June and December, covering premises 1903 Ocean Ave., Brooklyn, N. Y. Appraised at 45.....	337.50	
Guaranteed mortgage certificate of Home Title Insurance Co. C-4127 for \$500.00; 5½% interest June and December; covering premises northwest corner 78th St. and New Utrecht Ave., Brooklyn, N. Y. Appraised at 25 .....	125.00	20
Guaranteed mortgage certificate of Home Title Insurance Co. for \$357.00; No. C 2258 now represented by trustees certificate #F-1, covering premises north side of Neptune Ave. West 20th to West 19th St., Brooklyn, N. Y. Appraised at 35.....	124.95	30
80 shares capital stock Home Title Insurance Co. at \$1.00 per share.....	80.00	

*Bill of Complaint—Schedule "E".***Schedule "E".**

10 LIST OF ASSETS OF THE ESTATE OF WILLIAM J. DUNKERLEY AS SET FORTH IN INVENTORY AND APPRAISEMENT FILED BY THE HAMILTON TRUST COMPANY OF PATERSON, N. J., EXECUTOR, AND RECORDED IN THE OFFICE OF THE SURROGATE OF PASSAIC COUNTY IN INVENTORY BOOK X2, PAGE 599.

*Stocks:*

	55 shares pfd. stock The Hamilton Trust Co. of Paterson, N. J. \$10 par @ \$7.50.....	\$ 412.50
20	10 shares The Sons of Veterans Building Assn. @ \$2.50.....	25.00
	1/2 interest in 20 shares Tudor Corporation n/o W. George Dunkerley and Emma J. Dunkerley, part of bonds..	No value
	30 shares Fifteen Ten Ocean Parkway, Inc. common stock voting certificate n/o W. George Dunkerley, part of bonds .....	No value

*Bond and Mortgage:*

30	Bond and mortgage made by Spade Realty Company, a corporation, to Home Title Insurance Co. N. Y. dated 4/5/1909, 3 years, due 4/5/1912; 5 1/2%; interest due 4/1 and 10/1; covers property on 13th Ave. & 43rd St., Brooklyn, N. Y.; guaranteed 1/18/1916 by Home Title Insurance Co. of N. Y. to W. George Dunkerley and Margaret L. Dunkerley, No. 3933, title No. 19432 and Loan No. 2807, for \$4250.00; new owner Joseph Leoner, valued at.....	2,550.00
40		

*Bill of Complaint—Schedule "E"**Bonds and Guaranteed Mortgage Certificates:*

1—\$1,000 Fifteen Ten Ocean Parkway, Inc.		
1—\$500 mortgage, 20 yr. 6%, income bonds; due 6/1/1951; valued at \$2 each for \$1000 bond.....	30.00	10
Certificate of deposit for \$2000 Tudor Hall Apartment Building, first mortgage 5% S.F. in n/o W. George Dunkerley at \$132.50 for a \$1000 bond .....	265.00	
Certificate of deposit for \$500—#2061 Broadway Corporation First Lease- hold mortgage 6½% Serial Gold Bond in n/o W. George Dunkerley..	No value	20
Certificate of deposit for \$1000 Clive- den Hall 7%, first mortgage bonds n/o W. George Dunkerley.....	10.00	
Guaranteed first mortgage certificate No. C 10851 Loan No. 3571A, Home Title Insurance Co.; Loan No. 3571A; Home Title Insurance Co. N. Y. dated 11/25/30 5½%, interest February 1 and August 1, covers property South St., St. Johns Pl., 70 feet west of Utica Ave., Brooklyn, N. Y. \$1,000 valued at .....	600.00	30
Guaranteed first mortgage certificate No. C 10853 Loan No. 20533 Home Title Insurance Co. N. Y., dated Nov. 25, 1930; 5½% interest April 1 and October 1, covers property west side West 6th St. 106 feet north of Ave. R, Brooklyn, N. Y. \$1000.....	350.00	
		40

*Bill of Complaint—Schedule “E”.*

10	Guaranteed first mortgage certificate No. C 10852 Loan No. 11245; dated Nov. 25, 1930 Home Title Insurance Co. N. Y. 5½% interest April 1 and October 1; covers property southwest corner 97th St. & Fort Hamilton Ave., Brooklyn, N. Y. \$600.....	120.00
	Gold first mortgage certificate No. C 14203; Loan No. 23288; Home Title Insurance Co. N. Y. 5½%; \$1250; interest January 1 and July 1; covers property southwest corner Eastern Parkway and Rogers Ave., Brooklyn, N. Y. ....	750.00
20	Gold first mortgage certificate No. C 3948; Loan No. 15227 Home Title Insurance Co. N. Y. 5½%; \$1000 interest January 1 and July 1 covers property southeast corner Washington & High Sts., Brooklyn, N. Y....	600.00
30	Guaranteed first mortgage certificate No. C 3195 Loan No. 3571A Home Title Insurance Co. N. Y.; 5½%; \$1,000; interest February 1 and August 1; covers property south side of St. Johns Pl. west of Utica Ave., Brooklyn, N. Y.....	600.00
	Guaranteed first mortgage certificate No. C 10855, Loan No. 17485 Home Title Insurance Co. N. Y.; 5½%; \$2000; interest April 1 and October 1; covers property 15 Crown St., Brooklyn, N. Y.....	1,200.00

*Bill of Complaint—Schedule "F".**Cash:*

Savings account No. 11518 The Hamilton Trust Company of Paterson, N. J., Totowa Branch in n/o W. George Dunkerley or Mrs. Emma L. Bainbridge .....	4,281.38	10
Savings account No. 88201 United States Trust Company of Paterson, N. J. in n/o W. George Dunkerley or Emma L. Bainbridge.....	3,036.43	

*Household Furniture:*

Electric ice box, radio, parlor suite, bedroom suite, piano, odds and ends valued at .....	400.00	20
	<hr/>	
	\$15,230.21	

**Schedule "F".**

STATEMENT OF SECURITIES AND MONEYS DELIVERED  
BY THE HAMILTON TRUST COMPANY OF PATERSON,  
N. J., TO EMMA L. BAINBRIDGE ON OR ABOUT APRIL  
19TH, 1937. 30

*Stocks:*

55 Shares Pref. stock Hamilton Trust Company, Paterson, N. J., \$10 par @ \$7.50 .....	\$ 412.50	
10 Shares Veterans Building Association @ \$2.50.....	25.00	
Half interest in 20 shares Tudor Corporation, in name of W. George Dunkerley and Emma J. Dunkerley, part of bonds .....	No value	40

*Bill of Complaint—Schedule “F”.*

	20 Shares Fifteen Ten Ocean Parkway, Inc., common stock voting certificate in name of George W. Dunkerley, part of bonds.....	No value
10	<i>Bonds and Guaranteed Mortgage Certificates:</i>	
	1—\$1,000 Fifteen Ten Ocean Parkway, Inc., second	
	1—\$500 Mortgage, 20 Yr., 6% income bonds, due June 1st, 1951, valued at \$2 each for \$1,000.00 bond.....	30.00
20	Certificate of deposit for \$2,000.00 Tudor Hall Apartment Building, first mortgage, 5% sinking fund in name of W. George Dunkerley, at \$132.50 for \$1,000.00 bond.....	265.00
	Certificate of deposit for \$500.00, Twenty Sixty-One Broadway Corporation, first leasehold mortgage 6½%, Serial gold bond in name of George W. Dunkerley.....	No value
	Certificate of deposit for \$1,000.00, Clineden Hall, 7% first mortgage bond in name of George W. Dunkerley .....	10.00
30	Guaranteed first mortgage certificate No. C 10851, Loan No. 3571A, Home Title Insurance Co. of N. Y., dated November 25, 1930, 5½%, interest February 1 and August 1, covering property south side St. Johns Pl. 70 feet west of Utica Ave., Brooklyn, N. Y., \$1,000.00; valued at.....	600.00
40		

*Bill of Complaint—Schedule “F”.*

Guaranteed first mortgage certificate No. C 10853, Loan No. 20533, Home Title Insurance Co. of N. Y., dated November 25th, 1930, 5½%, interest April 1st and October 1st, covers property west side West Sixth St., 106 feet north of Avenue R, Brook- lyn, N. Y., \$1,000.00.....	350.00	10
Guaranteed first mortgage certificate No. C 10852, Loan No. 112455, dated November 25th, 1930, Home Title In- surance Co. of N. Y., 5½%; interest April 1st and October 1st, covering property at southwest corner of 97th St. and Fort Hamilton Ave., Brook- lyn, N. Y., \$600.00.....	120.00	20
Guaranteed first mortgage certificate No. 14203, Loan No. 23888, Home Title Insurance Company of N. Y., 5½%; \$1,250.00; interest January 1st and July 1st, covers property south- west corner Eastern Parkway and Rogers Ave., Brooklyn, N. Y.....	750.00	
Guaranteed first mortgage certificate No. C 3948, Loan No. 15227, Home Title Ins. Co. of N. Y. 5½%, \$1,000.00, interest Jan. 1 and July 1, covers property southeast corner Washing- ton and High Sts., Brooklyn, N. Y., valued at .....	600.00	30
Guaranteed first mortgage certificate No. C 3195, Loan No. 3571A, Home Title Ins. Co. of N. Y., 5½%, \$1,000.00, interest Feb. 1 and Aug. 1, property south side St. Johns Pl., 70 feet west of Utica Ave., Brooklyn, N. Y., valued at.....	600.00	40

*Bill of Complaint—Schedule "F"*

10	Guaranteed first mortgage certificate No. 10855, Loan No. 17485, Home Title Ins. Co. of N. Y., 5½%, \$2,000.00; interest April 1 and Oct. 1, covers property 15 Crown St., Brook- lyn, N. Y.....	1,200.00
----	---	----------

*Cash:*

	Savings Account No. 11518, Hamilton Trust Co. of Paterson, Totowa Branch, in name of George W. Dunk- erley or Mrs. Emma L. Bainbridge..	4,281.28
	Interest thereon.....	35.69
20	Savings Account No. 88201, U. S. Trust Company, Paterson, N. J., in name of W. George Dunkerley or Emma L. Bainbridge .....	1,518.23
	Interest thereon.....	48.40

*Household Furnishings:*

	Electric ice box, radio, parlor suite, bedroom suite, piano, odds and ends, valued at .....	400.00
30	Balance of cash in executor's principal account .....	3,665.87
	Balance of cash in executor's income account .....	659.29
		*\$15,561.26

\*—By the decree of the Passaic County Orphans' Court of March 18th, 1937, the executor was directed to pay commissions, counsel fees and surrogate's fees aggregating \$946.10 out of this  
40 balance.

*Bill of Complaint—Schedule "G".***Schedule "G".****Premises in the City of Paterson.**

BEGINNING on the westerly side of Sherman Ave.  
 50 feet north of the intersection of the westerly 10  
 line of Sherman Ave. with the northerly line of  
 Henry St.; and running thence (1) along the west  
 line of Sherman Ave. 25 feet; thence (2) westerly  
 at right angles to Sherman Ave. 100 feet; thence  
 (3) southerly parallel with the westerly side of  
 Sherman Ave. 25 feet; thence (4) easterly 100 feet  
 to the said westerly side of Sherman Ave. and the  
 point and place of BEGINNING.

Being commonly known as #43 Sherman Ave.,  
 Paterson, N. J. 20

30

40

*Bill of Complaint—Affidavit.***Affidavit.**

## IN CHANCERY OF NEW JERSEY.

10 Between

HOWARD TRAFTON, as Substitu-  
 tionary Administrator with  
 the will annexed of the  
 Last Will and Testament of  
 EMMA J. DUNKERLEY,  
*Complainant,*  
*and*

20

EMMA L. BAINBRIDGE and THE  
 HAMILTON TRUST COMPANY  
 OF PATERSON, N. J.,  
*Defendants.*

On Bill, etc.  
 Affidavit.

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

HOWARD TRAFTON being duly sworn according to law upon his oath deposes and says:

30 1. I am the complainant in the foregoing bill of complaint named and am familiar with the matters and things therein contained.

40 2. Emma J. Dunkerley, late of the City of Paterson, County of Passaic and State of New Jersey, died on September 11th, 1930, testate, leaving a last will and testament dated September 8th, 1930, which last will and testament was on September 22nd, 1930 duly admitted to probate by the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "A" is a copy of said last will and testa-

*Bill of Complaint—Affidavit.*

ment. Thereupon, William George Dunkerley, husband of said testatrix, the executor named therein, duly qualified as such executor and took upon himself the administration of the assets of her estate.

3. On or about October 22nd, 1930, the said William George Dunkerley, as executor, filed an inventory and appraisal of the assets of the estate of the said Emma J. Dunkerley in the office of the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "B" is a list of the assets and securities listed in such inventory.

4. As will more fully appear by reference to the last will and testament of the said Emma J. Dunkerley, after provision for the payment of the testatrix's debts and funeral expense and for payment of legacies aggregating \$1,000.00, said testatrix gave, devised and bequeathed all of the rest, residue and remainder of her estate, real and personal, of whatsoever nature and wheresoever situate, to her husband William George Dunkerley.

"for his sole use and benefit during his life with full right and power to sell transfer and convey the same and use the whole or any part of said estate principal or interest, or the proceeds for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute."

10

20

30

40

*Bill of Complaint—Affidavit.*

Said last will and testament further provided:

10           “At the decease of my said husband, I then  
give, devise and bequeath so much of said  
estate and property as shall remain, one-  
third thereof to my nephew Howard Traf-  
ton, one-third to my nephew Clifford Traf-  
ton, and one-third to the children of my  
nephew, Clifford Trafton; in case of the  
death of either nephew, his share to go to his  
children if any or if none to the other nephew  
or his children; in case of the death of the  
children of Clifford Trafton their share to  
be given to the said Clifford Trafton or if he  
be dead then to Howard Trafton or his chil-  
20           dren.”

5. The said Emma J. Dunkerley was survived  
by her nephew Clifford Trafton and me, also a  
nephew, and by Allan Trafton and Janice Traf-  
ton, children of said Clifford Trafton. There-  
after and during the lifetime of said William  
George Dunkerley, the said Clifford Trafton died,  
intestate, leaving the said Allan Trafton and  
Janice Trafton as his sole surviving children.  
30           By reason of the foregoing, the residuary estate  
of the said Emma J. Dunkerley became and is  
payable and distributable, upon the death of  
William George Dunkerley, as follows: one-third  
to Allan Trafton, one-third to Janice Trafton,  
and one-third to me. The said Allan Trafton and  
Janice Trafton are infants, the said Allan Traf-  
ton being, at the present time, fourteen years  
of age, and the said Janice Trafton being, at pres-  
ent, seventeen years of age.

40

*Bill of Complaint—Affidavit.*

6. The said William George Dunkerley administered the said estate as executor thereof, until June 11th, 1931, at which time his final account as such executor was allowed by decree of the Passaic County Orphans' Court entered that day. Said decree found that there was a balance in the hands of the accountant amounting to \$24,850.01 to be disposed of according to law and directed the payment out of said balance of commissions, counsel fees and surrogate's fees aggregating \$1,056.30. Said assets of said estate consisted of cash and miscellaneous securities of a varied character. 10

7. From and after the allowance of said account as aforesaid, the said William George Dunkerley held and administered the assets of said estate as trustee for the benefit of the various parties in interest in said estate as aforesaid. He never filed any account as such trustee. 20

8. On January 25th, 1936, the said William George Dunkerley died, testate, leaving a last will and testament dated October 19th, 1934, which last will and testament was, on February 6th, 1936, duly admitted to probate by the Surrogate of Passaic County. Annexed hereto and made part hereof, marked Schedule "C" is a copy of said last will and testament. Thereupon, The Hamilton Trust Company of Paterson, N. J., the executor named therein, duly qualified as such executor and took upon itself the administration of the assets of his estate. 30

9. On August 31st, 1936 the United States Trust Co. of Paterson, N. J., who, by the last will and testament of Emma J. Dunkerley, was ap- 40

*Bill of Complaint—Affidavit.*

pointed executor thereof in case of the death of William George Dunkerley, having renounced and refused to qualify and act as such executor, I was appointed substituted administrator with the will annexed of the last will and testament  
10 of the said Emma J. Dunkerley by order of the Passaic County Orphans' Court, and thereupon I qualified as such and took upon myself the administration of said estate.

10. The only assets of the estate of the said Emma J. Dunkerley which I have received, consist of miscellaneous securities having a face value of \$9,937.00, a complete and detailed list of which is annexed hereto and made part hereof,  
20 marked Schedule "D", leaving unaccounted for the remaining assets of said estate as fixed by the final decree of the Passaic County Orphans' Court referred to in paragraph 6.

11. Upon the death of the said William George Dunkerley, and the appointment and qualification of said The Hamilton Trust Company of Paterson, N. J., as executor of said estate, as hereinabove referred to, The Hamilton Trust Company of Paterson, N. J. became charged with the duty  
30 of accounting in behalf of the said William George Dunkerley, for his acts and conduct as trustee of the estate of the said Emma J. Dunkerley from May 1st, 1931, the date of the final accounting of said William George Dunkerley as aforesaid, up to the date of his death. The said The Hamilton Trust Company of Paterson, N. J. did not so account.

12. The said The Hamilton Trust Company of  
40 Paterson, N. J., as executor under the last will

*Bill of Complaint—Affidavit.*

and testament of William George Dunkerley, did on or about September 16th, 1938, cause an inventory of the alleged assets of the estate of William George Dunkerley to be filed in the office of the Surrogate of Passaic County. A list of the assets and securities described in said inventory is annexed hereto and made part hereof, marked Schedule "E". I am informed and believe, and therefore charge the fact to be, that included in said inventory were assets which were not the property of the said William George Dunkerley individually, but which in fact were assets of the estate of Emma J. Dunkerley, held by said William George Dunkerley as trustee as aforesaid. The nature, character and extent of such assets so improperly included as aforesaid, can only be correctly ascertained after an accounting has been made as hereinafter prayed for.

13. The said The Hamilton Trust Company of Paterson, N. J., administered the estate of the said William George Dunkerley until March 18th, 1937, when its final account as executor of said estate was allowed by the Passaic County Orphans' Court and it was decreed that there was a balance of \$15,561.25 to be disposed of according to law. Included in such administration and accounting were the assets which were the property of the estate of Emma J. Dunkerley and which should have been turned over and delivered to me for administration and distribution by me in my capacity as substitutionary administrator c.t.a. of the last will and testament of Emma J. Dunkerley. In its administration of said estate it calculated and improperly disbursed moneys for inheritance taxes, commissions and the like as

*Bill of Complaint—Affidavit.*

if all of said assets were the sole property of said William George Dunkerley, and without regard to the assets held by him in trust as aforesaid.

10 14. Following the allowance of the final account of said The Hamilton Trust Company of Paterson, N. J. as aforesaid, the said The Hamilton Trust Company of Paterson, N. J., turned over and delivered to the defendant Emma L. Bainbridge, the residuary legatee named in the will of the said William George Dunkerley, all of the assets in its possession. These assets, so far as I have been able to ascertain, consisted of the securities and moneys stated in detail in the schedule hereto annexed and made part hereof, marked Schedule  
20 "F". I am advised that such delivery was made on or about April 19th, 1937, excepting therefrom the sum of \$946.10 which was allowed for commissions, counsel fees and surrogate's fees.

15, From and after April 19th, 1937, the defendant Emma L. Bainbridge enjoyed the possession and use of the said assets, which, as nearly as I have been able to ascertain, were of the value of \$14,614.41, and has received the income and profits therefrom.  
30

16. I am advised and verily believe, and therefore charge the fact to be, that the said William George Dunkerley possessed no personal property at the date of his death, other than such property and assets as had been received by him from the estate of the said Emma J. Dunkerley, the form of which may have been and was by reinvestment, and change, from time to time, altered and converted into that of the securities, investments and assets described in detail in the afore-  
40

*Bill of Complaint—Affidavit.*

said inventory filed by The Hamilton Trust Company of Paterson, N. J., as executor under the last will and testament of William George Dunkerley, deceased.

17. As will more fully appear by reference to the inventory of the assets of the estate of the said William George Dunkerley, filed by said The Hamilton Trust Company of Paterson, N. J., the assets taken into its possession and custody at the date of the death of the said William George Dunkerley consisted of certain stocks, bonds, mortgages, guaranteed mortgage certificates and cash, the nature and character of which is such as to make it appear that the assets of the said William George Dunkerley at the time of his death, were in fact the assets of which the said Emma J. Dunkerley had died seized and possessed, altered, however, in form and nature to such extent as was made necessary by the lapse of time, the maturity of mortgages and mortgage certificates, and the necessity and desirability for the re-investment of the same. I am advised and verily believe that the nature and extent of such changes, and the fact of such change and re-investment can be established and verified by an examination of the books and records of the said William George Dunkerley, deceased, but that such records and books are in the possession of the defendants or one of them. I am unable to produce the same without the aid and assistance of this court.

18. I allege that information concerning the income and profits received by the defendant Emma L. Bainbridge since April 19th, 1937, is in the exclusive possession of the defendant Emma L.

*Bill of Complaint—Affidavit.*

Bainbridge, and I am unable to obtain the same without the aid and assistance of this court.

10 19. I allege that the said William George Dunkerley died seized of certain lands and premises located in Paterson, New Jersey, commonly known as #43 Sherman Ave., and more particularly described in Schedule "G," which is hereto annexed and made part hereof. By the terms of said last will and testament, title to said property became vested in the defendant Emma L. Bainbridge, who is still the owner of record thereof. I allege that should the defendants be unable to deliver to me the assets to which I am entitled, or to pay the value thereof, then that this court  
20 should impress a lien upon said real estate to the extent of the value of said assets and direct a sale thereof pursuant to law, to satisfy the amount so found due.

30 20. I am advised and verily believe that such assets as the defendant Emma L. Bainbridge was entitled to receive under the last will and testament of William George Dunkerley have been commingled with the assets of the estate of Emma J. Dunkerley, to which I am entitled, so that it may be impossible to determine which of such assets are trust assets as aforesaid, and which of said assets were the separate property of the said William George Dunkerley and were improperly and unlawfully commingled with such trust assets. I allege that if it cannot be readily ascertained which of such property constituted trust property and which of such property constituted the separate property of the said William George Dunkerley aforesaid, then I am entitled to receive all  
40 of the property which was in the possession of

*Bill of Complaint—Affidavit.*

the said William George Dunkerley at the date of his death on January 25th, 1936, chargeable with the aforesaid trust.

21. The defendant Emma L. Bainbridge is an elderly woman who, before the death of said William George Dunkerley, was employed by him as a housekeeper. So far as I have been able to ascertain, the defendant Emma L. Bainbridge is without any financial responsibility except to the extent of the property to which she became entitled under the last will and testament of the said William George Dunkerley. Such assets as she was entitled to receive thereunder have, as hereinabove alleged, been commingled with the assets of the estate of Emma J. Dunkerley, to which I am entitled, so that, as hereinbefore alleged, it may be impossible to determine which of such assets are trust assets and which of such assets were the independent property of the said William George Dunkerley. I am fearful that unless the defendant Emma L. Bainbridge is restrained from paying or transferring to any person or persons any portion of the property, securities or money received by her as aforesaid, I may be unable to recover the same and administer the same in accordance with the provisions of the last will and testament of Emma J. Dunkerley, deceased, and I allege that it is necessary that the defendant be restrained and enjoined from paying or transferring any portion of such property to any person or persons, and that a receiver pendente lite be appointed of all of the property, securities and money delivered to the defendant Emma L. Bainbridge by the defendant The Hamilton Trust Company of Paterson, N. J., as executor under the last

10

20

30

40

*Bill of Complaint—Affidavit.*

10 will and testament of William George Dunkerley, deceased, which receiver should have authority to possess, receive, and in his own name as such receiver, sue for said property, securities or money and preserve and conserve the same pending this litigation and until the further order of the court in the premises.

HOWARD TRAFTON.

Sworn to and subscribed before  
me this 6th day of May, 1938.

20 MAX APPLEBAUM,

Commissioner of Deeds of New York City.  
N. Y. Co. Clk's No. 59, Reg. No. 20A-9.  
Commission expires Dec. 2, 1939.  
Co. Clk's Ctf. No. 76038, Series C.

30

40

**Order to Show Cause.**

(Filed May 9, 1938.)

## IN CHANCERY OF NEW JERSEY.

Between

HOWARD TRAFTON, as Substitutionary Administrator with the Will Annexed of the Last Will and Testament of EMMA J. DUNKERLEY,

*Complainant,**and*

EMMA L. BAINBRIDGE, et als.,  
*Defendants.*

10

On Bill, etc.

Order to Show Cause.

20

This matter being opened to the Court by Hanocho & Lasser, solicitors of the complainant; and the Court having read the bill of complaint in the above-entitled cause and the affidavit thereunto annexed; it is, on this 9th day of May, 1938,

ORDERED, that the defendant Emma L. Bainbridge show cause before the Chancellor, at Chancery Chambers, Court House, Paterson, on the 16th day of May, 1938, at the hour of ten o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard, why the said defendant Emma L. Bainbridge should not be restrained and enjoined according to the prayer of said bill, and why a receiver pendente lite should not be appointed of all the property, assets, securities and money paid over and delivered by The Hamilton Trust Company of Paterson, N. J., as executor under the last will and testament

30

40

*Order to Show Cause.*

of William George Dunkerley, deceased, to the said defendant Emma L. Bainbridge, in purported accordance with the directions of the last will and testament of William George Dunkerley, deceased, as set forth in the prayer of said bill; and it is

10

FURTHER ORDERED, that the said defendant Emma L. Bainbridge, and her agents and servants, in the meantime and until the further order of this Court in the premises, desist and refrain from paying or transferring any portion of the property, securities and money received by her from The Hamilton Trust Company of Paterson, N. J., executor under the last will and testament of William George Dunkerley, deceased, or the proceeds thereof to any person or persons; and it is

20

FURTHER ORDERED, that a true but uncertified copy of the said bill of complaint and the affidavit thereunto annexed, and of this order, be served on the said defendant Emma L. Bainbridge within two days from the date hereof.

LUTHER A. CAMPBELL,  
C.

Respectfully advised,

30

JAMES F. FIELDER,  
V. C.

40

**Subpoena.**

(Filed May 19, 1938.)

NEW JERSEY, TO WIT: The State of  
New Jersey to EMMA L. BAIN-  
BRIDGE, THE HAMILTON TRUST COM-  
PANY OF PATERSON, N. J.

[L. S.]

10

GREETING: WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery by Howard Trafton, as Substitutionary Administrator with the Will Annexed of the Last Will and Testament of Emma J. Dunkerley to be relieved touching the matters therein contained:

THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, within twenty days after service upon you of this Writ, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

20

WITNESS, his Honor, LUTHER A. CAMPBELL, our Chancellor, at Trenton, the 9th day of May, in the year of our Lord one thousand nine hundred and thirty-eight.

HANNOCH & LASSER,  
Sol'rs.

EDW. L. WHELAN,  
Clerk.

30

Duly served the within subpoena and ticket on The Hamilton Trust Company of Paterson, N. J., May 12th, 1938, by leaving a copy of the same with George Schultze, Pres., at their usual place of business 137 Market St., Paterson, N. J.

Duly served the within subpoena on Emma L. Bainbridge, May 12th, 1938, personally at her usual place of abode 43 Sherman Ave., Paterson, N. J.

40

JOHN A. GAVIN,  
Sheriff.  
By LOUIS H. KING.

**Continuance.**

(Filed May 16, 1938.)

## IN CHANCERY OF NEW JERSEY.

Between

10

HOWARD TRAFTON, as Substitutive  
 Administrator with  
 the will annexed of the Last  
 Will and Testament of  
 EMMA J. DUNKERLEY,

*Complainant,**and*

EMMA L. BAINBRIDGE, et al.,  
*Defendants.*

On Bill, etc.  
 Continuance.

20

This matter being opened to the court by Albert Comstock, Esq., solicitor for the defendants, Emma L. Bainbridge and The Hamilton Trust Company of Paterson, New Jersey, and no cause being shown to the contrary:

30

It is on this 16th day of May, 1938, ORDERED that the Order to Show Cause made in this cause on the 9th day of May, 1938, and returnable this 16th day of May, 1938, be and the same is hereby continued until Monday, the 23rd day of May, 1938, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the Chancery Chamber, in the City of Jersey City, New Jersey.

LUTHER A. CAMPBELL,

Respectfully advised,

C.

CHARLES M. EGAN,

V. C.

40

We hereby consent to the entry of the above order of continuance.

HANNOCH & LASSER,  
 Solicitors of Complainant.

**Notice of Motion to Strike Out  
Bill of Complaint.**

(Filed July 1, 1938.)

IN CHANCERY OF NEW JERSEY.

Between

HOWARD TRAFTON, as Substitu-  
tionary Administrator with  
the will annexed of the Last  
Will and Testament of  
EMMA J. DUNKERLEY,

*Complainant,*

*and*

EMMA L. BAINBRIDGE, et al.,

*Defendants.*

10

On Bill, etc.

Notice of  
Motion to  
Strike Out  
Bill of  
Complaint.

20

To: MESSRS. HANNOCH & LASSER,  
Solicitors of Complainant.

Gentlemen:

PLEASE TO TAKE NOTICE that I shall apply to the  
Chancellor of this State, on behalf of the defend-  
ants, Emma L. Bainbridge and The Hamilton  
Trust Company of Paterson, New Jersey, on Mon-  
day, the 23rd day of May, 1938, at ten o'clock in  
the forenoon or as soon thereafter as counsel  
can be heard, at the Chancery Chambers in the  
City of Jersey City, for an order striking from  
the files, the bill of complaint in the above cause,  
for the following reasons:

30

40

*Notice of Motion to Strike Out Bill of Complaint.*

10 That under the "THIRD" clause of the will of Emma J. Dunkerley, deceased, her husband, William George Dunkerley, now deceased, took an estate in fee and became the absolute owner of said residuary estate, and the subsequent limitation over contained in the "FOURTH" clause of said will is void as inconsistent with the right of said William George Dunkerley; and, also because a fee cannot be limited after a fee.

Yours, etc.,

ALBERT COMSTOCK,  
Solicitor of Defendants.

20 Dated Paterson, N. J.  
May 16th, 1938.

Service of the within Notice is hereby acknowledged this 17th day of May, 1938.

HANNOCH & LASSER,  
Solicitors of Complainant.

30

40

**Order of Restraint.**

(Filed June 6, 1938.)

IN CHANCERY OF NEW JERSEY.

122-180.

10

Between

HOWARD TRAFTON as Substitu-  
tionary Administrator, etc.,  
*Complainant,*

*and*

EMMA L. BAINBRIDGE, et al.,  
*Defendants.*

On Bill, etc.  
Order of  
Restraint.

20

This matter coming on to be heard in the presence of Herbert H. Hannoeh, solicitor of complainant, and Albert Comstock, solicitor of defendant, upon return of order to show cause why preliminary relief should not be granted, and upon defendants' motion to strike the bill, and the parties consenting hereto,

It is on this 6th day of June, 1938,

30

ORDERED, that the defendant, Emma L. Bainbridge, be and she is hereby restrained from removing from her safe deposit box at the Hamilton Trust Company (Totowa Branch) any of the contents thereof, and the said Hamilton Trust Company is restrained from permitting any access to said vault, until the further order of this Court in the premises, except that a list of the contents of said vault shall be made by the defendants within 20 days from the date hereof, and a copy of such list be served upon solicitor of complainant; and it is further

40

*Order of Restraint.*

10 ORDERED, that the motion to strike the bill be submitted by the parties upon brief, solicitor for the defendant serving copy of his brief upon solicitor for complainant within 10 days, and the solicitor of complainant reply thereto, and serve copy upon opposing solicitor within 10 days thereafter.

LUTHER A. CAMPBELL,  
C.

Respectfully advised,  
CHARLES M. EGAN,  
V. C.

Above order consented to:

20 HANNOCH & LASSEY,  
Solicitors of Complainant.

ALBERT COMSTOCK,  
Solicitor of Defendants.

30

40

**Opinion.**

(Filed July 27, 1938.)

IN CHANCERY OF NEW JERSEY.

122-180.

10

Between

HOWARD TRAFTON, as Substitutive  
Administrator with  
the will annexed of the  
Last Will and Testament of  
EMMA J. DUNKERLEY,

*Complainant,*

*and*

EMMA L. BAINBRIDGE, et al.,  
*Defendants.*

On Bill, etc.  
On Motion  
to Strike Out  
Bill of  
Complaint.  
Opinion.

20

1. Testamentary gift, absolute in form or indeterminate as to quantity of estate given, coupled with uncontrolled power of disposition, express or implied, imports estate in fee, and gift over is void as inconsistent with rights of first legatee.

2. It is a legal principle that a fee cannot be limited over after a fee. 30

\* \* \* \* \*

MESSRS. HANNOCH & LASSER, for Complainant.

MR. ALBERT COMSTOCK, for Defendants.

\* \* \* \* \*

40

*Opinion.*

EGAN, V. C.

A motion to strike the bill of complaint was argued on the following notice:

10       “That under the ‘THIRD’ clause of the will of Emma J. Dunkerley, deceased, her husband, William George Dunkerley, now deceased, took an estate in fee and became the absolute owner of said residuary estate, and the subsequent limitation over contained in the ‘FOURTH’ clause of said will is void as inconsistent with the right of said William George Dunkerley; and, also because a fee cannot be limited after a fee.”

20       The third and fourth clauses of the will adverted to in the notice of motion reads as follows:

30       “*Third*: All the rest, residue and remainder of my estate real and personal of whatsoever nature and wheresoever situate I give, devise and bequeath to my husband, William George Dunkerley, for his sole use and benefit during his life with full right and power to sell, transfer and convey the same and use the whole or any part of said estate, principal or interest, or the proceeds for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute.

40       “*Fourth*: At the decease of my said husband, I then give, devise and bequeath so much of said estate property as shall remain, one-third thereof to my nephew, Howard

*Opinion.*

Trafton, one-third to my nephew Clifford Trafton, and one-third to the children of my nephew Clifford Trafton; in case of the death of either nephew, his share to go to his children, if any, or if none to the other nephew or his children; in case of the death of the children of Clifford Trafton their share to be given to the said Clifford Trafton or if he be dead then to Howard Trafton or his children.” 10

The defendants contend that William George Dunkerley under the last recited clauses, took an estate in fee and became the absolute owner of the residuary estate, in consequence of which, the subsequent limitation over mentioned in the said Fourth clause of Emma J. Dunkerley’s will is void. While the points at issue have been considered in many cases by this court, still there appears to be a conflict of thought on the question between two eminent jurists of this state. In *Naundorf v. Schumann*, 41 N. J. Eq. 14, in which Chancellor Runyon wrote the opinion, in construing paragraph one of the decedent’s will, which read as follows: 20

“*First*: My will and desire is that all my property both real and personal shall be for the sole use and benefit of my wife, Julianna, after my decease, and in the event of her death, then, what shall remain to be disposed of in the manner following: \* \* \*.” 30

the court found that the gift to the decedent’s wife, was merely for her use and benefit, and that she had a life estate therein with remainder absolute to others. It, among other things, said: 40  
 “The will gives to the widow no power, express

*Opinion.*

or implied to dispose of the property or any part of it in any way." It further said: "The testator indeed uses the qualifying words 'what shall remain' but he probably used them in view of the fact that some of the personal property was of a consumable character."

10 Chancellor McGill, some three years later, held in *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 17 Atl. 688, on a bill to quiet title, that the widow took the testator's estate in fee. We find in the case of *Briggs v. Faulkner*, 120 N. J. Eq. 1, 183 Atl. 712, that Vice Chancellor Berry followed the views of Chancellor McGill, and, *inter alia*, said:

20 "It is an old legal principle that a fee cannot be limited over after a fee (*Tooker v. Tooker*, 71 N. J. Eq. 513, 64 A. 806-807) and 'it is a fixed rule of construction in this state as to testamentary gifts either absolute in form or in form indeterminate as to quantity of the estate given, that, if testator either expressly or by implication, manifests an intent to vest in the first devisee, or legatee, the uncontrolled power of such disposition of the property, such power embraces the quality of absolute ownership, and a subsequent limitation over is void, as inconsistent with the right of the first devisee or legatee. The manifestation of that intent may appear in the gift over as well as elsewhere' (*Kleaver v. Jacobs*, 104 N. J. Eq. 406, 146 A. 55). There is a long line of cases to the same effect, among which may be cited *Annin's Executors v. Van Doren's Administrator*, 14 N. J. Eq. 135; *Downey v. Borden*, 36 N. J. L. 460; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 A. 269, 270; *Wilson v. Wilson*, 46 N. J. Eq. 321,

30

40

## Opinion.

19 A. 132, 133; *Bryan v. Bryan*, 61 N. J. Eq. 45, 48 A. 341; *Tuerk v. Schueler*, 71 N. J. L. 331, 60 A. 357; *McCloskey v. Thorpe*, 74 N. J. Eq. 413, 69 A. 973, 974; *Hyde v. Hyde*, 88 N. J. Eq. 358, 102 A. 830; *Weaver v. Patterson*, 92 N. J. Eq. 170, 111 A. 506; *Brohm v. Berner*, 95 N. J. L. 85, 77 A. 517; *Gaston v. Ford*, 99 N. J. Eq. 592, 133 A. 531; *Fithian v. Fithian*, 109 N. J. Eq. 383, 157 A. 563; *Morrison v. Dawson*, 115 N. J. Eq. 45, 169 A. 694.”

10

The courts take the position that the uncontrolled power of disposition in the first taker creates absolute ownership, and that the limitation over is void as totally inconsistent with the rights of the first legatee. See *McCloskey v. Thorpe*, 74 N. J. Eq. 413, 69 Atl. 973. The recent case of *Brown v. Turpan*, 122 N. J. Eq. 305, 194 Atl. 63, carries into effect the principle laid down in the foregoing cited cases. The same rule is expressed in *Klotz v. Klotz*, 122 N. J. Eq. 31, 191 Atl. 854.

20

While there are many cases which, in principle, appear to run counter to the rule above-mentioned, among which is *Downey v. Borden*, 36 N. J. Law 460, the Third paragraph of the will in the instant case, which states “the intention hereof being that he shall at all times use and enjoy the whole or any part of my estate, the same as if this devise and bequest was absolute,” distinguishes it from them and carries an entirely different implication from those cases which follow *Downey v. Borden*, *supra*.

30

In reaching the conclusion indicated above, I have also considered the rules of construction applicable to the instant case, and call attention

40

*Opinion.*

to the language of the court in the case of *Second National Bank v. Borden*, 113 N. J. Eq. 378, 167 Atl. 224, where it said:

10           “The primary rule of testamentary construction as expressed in countless authorities is that the plain intent of the testator is disclosed by the language of his will, unless contrary to law, must govern. That intention is to be gathered from a reading of the entire will and not from isolated portions thereof. *Supp v. Second National Bank and Trust Company*, 98 N. J. Eq. 242; *Kutschinski v. Sheffer*, 109 N. J. Eq. 659; 2 *Schoul. Wills (6th Ed)* 967, 977. The court must do every-

20           thing in its power to ascertain the testator’s intentions and to see that they are carried out, if possible. *Johnson v. Bowen*, 85 N. J. Eq. 76. The predominant idea of the testator’s mind, if apparent, is heeded as against all doubts and conflicting provisions which might of themselves defeat it. 2 *Schoul. Wills*, 973.”

30           See *Maxwell v. Maxwell*, 122 N. J. Eq. 247, 193 Atl. 719; *N. J. Title Guarantee, &c. v. Dailey, &c.*, 123 N. J. Eq. 205.

          In *N. J. Title Guarantee, &c. v. Dailey, supra*, the following appears: “The court’s main concern is not so much what the testator meant to say as it is to determine what he meant by what he did say.”

          A consideration of all the circumstances prompts me to conclude that the defendants’ motion to strike the bill of complaint should prevail.

40           Dated: July 25, 1938.

**Notice.**

(Filed Sept. 6, 1938.)

## IN CHANCERY OF NEW JERSEY.

Between

HOWARD TRAFTON as Substitutionary Administrator with the will annexed of the Last Will and Testament of EMMA J. DURKERLEY, deceased,

*Complainant,**and*

EMMA L. BAINBRIDGE, et al.,  
*Defendants.*

10

On Bill, etc.  
Notice.

20

To: MESSRS. HANNOCK & LASSER,  
Solicitors of Complainant.

Gentlemen:

PLEASE TO TAKE NOTICE that on Monday, the 15th day of August, 1938, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, I shall apply to the Honorable Charles M. Egan, the Vice Chancellor to whom this cause has been referred, at the Chancery Chambers in the City of Jersey City, to settle the form of the final decree to be entered in the above entitled cause and also for an order allowing costs and counsel fees to the defendants; a copy of the proposed final decree is annexed hereto for your information.

30

Yours, etc.,

ALBERT COMSTOCK,  
Solicitor of Defendants.

40

Dated: Paterson, N. J.  
August 1st, 1938.

*Notice—Proposed Final Decree.***Proposed Final Decree.**

## IN CHANCERY OF NEW JERSEY.

10 Between

HOWARD TRAFTON, as Substitu-  
 tionary Administrator with  
 the will annexed of the last  
 Will and Testament of  
 EMMA J. DUNKERLEY,

*Complainant,**and*

EMMA L. BAINBRIDGE, et al.,  
 20 *Defendants.*

On Bill, etc.  
 Final Decree.

30 This matter coming on to be heard in the pres-  
 ence of Messrs. Hannoeh & Lasser, solicitors of the  
 complainant, Howard Trafton as substitutionary  
 administrator with the will annexed of the Last  
 Will and Testament of Emma J. Dunkerley, and  
 of Albert Comstock, solicitor of the defendants,  
 Emma L. Bainbridge and The Hamilton Trust  
 Company of Paterson, New Jersey, and the court  
 having heard the arguments of said solicitors and  
 being of the opinion that the bill of complaint filed  
 herein discloses no cause of action for the follow-  
 ing reasons:

That under the "THIRD" clause of the will  
 of Emma J. Dunkerley, deceased, her hus-  
 band, William George Dunkerley, now de-  
 ceased, took an estate in fee and became the

40

*Notice—Proposed Final Decree.*

absolute owner of said residuary estate, and the subsequent limitation over contained in the "FOURTH" clause of said will is void as inconsistent with the right of said William George Dunkerley; and also because a fee cannot be limited after a fee.

10

And it appearing that due notice of the defendants' motion to dismiss the bill of complaint for the cause aforesaid has been given to said complainant:

It is thereupon, on this        day of        1938, ORDERED, ADJUDGED and DECREED that the complainant's said bill of complaint be and the same is hereby dismissed with costs and that a counsel fee of        dollars, be and is hereby allowed to the solicitor of said defendants, to be paid by the said complainant, and execution may issue therefor, according to the practice of this court.

20

.....  
C.

Respectfully advised,

.....

V. C.

30

Service of the within Notice is hereby acknowledged this 2nd day of August, 1938.

HANNOCH & LASSER,  
Solicitors of Complainant.

40

**Stipulation.**

(Filed Sept. 6, 1938.)

## IN CHANCERY OF NEW JERSEY.

10 Between

HOWARD TRAFTON as Substitu-  
 tionary Administrator with  
 the will annexed of the Last  
 Will and Testament of  
 EMMA J. DUNKERLEY,  
*Complainant,*

*and*

20

EMMA L. BAINBRIDGE, et al.,  
*Defendants.*

On Bill, etc.  
 Stipulation.

It is hereby stipulated and agreed that the notice for the settling and signing of the final decree in the above entitled cause, at the Chancery Chambers in Jersey City, on August 14th next, be and is hereby continued until September 6th, at the same time and place.

30

HANNOCH & LASSER,  
 Solicitors of Complainant.

ALBERT COMSTOCK,  
 Solicitor of Defendants.

Dated: August 2, 1938.

40

**Affidavit of Services.**

(Filed Sept. 9, 1938.)

IN CHANCERY OF NEW JERSEY.

122-180.

10

Between

HOWARD TRAFTON, as Substitu-  
 tionary administrator with  
 the will annexed of the Last  
 Will and Testament of  
 EMMA J. DUNKERLEY,  
*Complainant,*

*and*

EMMA L. BAINBRIDGE, et al.,  
*Defendants,*

On Bill, etc.  
 Affidavit of  
 Services.

20

State of New Jersey, }  
 County of Essex, } ss.:

AARON LASSER being duly sworn according to law upon his oath deposes and says:

1. I am a Master in Chancery of New Jersey and am a member of the firm of Hannoeh & Lasser, solicitors for the complainant herein. The within proceedings have been conducted under my supervision and the services rendered by the solicitors for the complainant herein have been performed by me personally or by my associate, William S. Myers, a Master in Chancery of New Jersey.

30

2. The following is a detailed statement of the services that we have been called upon to perform and of the time devoted to the within matter:

40

*Affidavit of Services.*

1938

- April 6 Preliminary examination into the law of wills on the subject of bequests for life, coupled with power of disposal.
- 10 April 13 Conference with Stanley M. Lazarus, Esq., of the New York Bar, representing Howard J. Trafton, substituted administrator of the will of Emma J. Dunkerley.  
Examination of will, inventory and other documents pertaining to the estate.
- 20 April 18 Examination of records in the office of the Surrogate of Passaic County, in the matters of the Estates of Emma J. Dunkerley and William George Dunkerley; to abstracting of wills, of inventories and accounts filed herein.
- 30 May 3 To conference with Charles F. Edsall, Esq., former proctor for the Estate of Emma J. Dunkerley, deceased; to receipt from him of miscellaneous documents pertaining to the affairs of the estate and to general discussion concerning the delivery of assets of the Estate of Emma J. Dunkerley to the substituted administrator of that estate.
- 40 May 5 To further examination of authorities appertaining to the question of law suggested by the language of the will of Emma J. Dunkerley.  
To preparation of bill of complaint.

*Affidavit of Services.*

- May 9            Delivery of subpoena to sheriff of Passaic County.  
                  Preparation of order to show cause, seeking restraints, and appearance before Vice Chancellor Egan with respect thereto.            10
- May 10           Service of the order to show cause dated May 9th, 1938, upon the defendant Emma L. Bainbridge.
- May 12           Telephone conversation with Albert Comstock, Esq., consenting to continuance of the hearing on the order to show cause.
- June 6           Appearance and argument before Vice Chancellor Egan on defendant's motion to strike complainant's bill of complaint and on complainant's motion for restraints pending final hearing, resulting in the entry of an order impounding the assets stored in the safe deposit vault of the defendant Emma L. Bainbridge, and in the direction by the Vice Chancellor to submit briefs on the motion to dismiss.            20
- Examination of answering affidavits filed on behalf of the defendants.            30
- June 29           Examination of brief filed on behalf of the defendants and examination of authorities cited therein.
- July 11           Preparation and filing of memorandum on behalf of complainant, in reply to defendants' memorandum.            40

*Affidavit of Services.*

- September 6 Appearance before Vice Chancellor Egan in response to defendants' notice of application to settle form of final decree.
- 10 September 8 Preparation of memorandum to Vice Chancellor Egan on the subject of costs and counsel fee.

3. In addition to the foregoing, we have from time to time communicated and corresponded with the complainant's New York counsel, reporting the progress of the proceedings and obtaining such factual information as was required for the purpose of the pending litigation.

- 20 4. The object of the complainant's bill was to obtain an accounting with respect to the assets of the Estate of Emma J. Dunkerley, deceased, delivered to her husband William George Dunkerley after her death, which, according to the inventory filed with the Surrogate of Passaic County in the matter of the Estate of Emma J. Dunkerley, had a value of \$28,514.00, of which assets having a face value of \$9,937.00 were delivered to the complainant by The Hamilton Trust Company of Paterson, New Jersey, and of which \$14,614.41 is alleged to have been delivered by the executor of the Estate of William George Dunkerley to the defendant Emma L. Bainbridge. We are advised that the present cash value of the property remaining in the possession of the defendant Emma L. Bainbridge, is considerably less than the amount originally delivered to her, but we have no knowledge of the present cash value of the same.
- 30

*Affidavit of Services.*

5. Having in mind the nature of the litigation, the amount involved, and the time and effort devoted thereto, I am of the opinion that the sum of \$500.00 would represent reasonable compensation to us for the services which we have been called upon to perform in connection with the pending proceedings and I respectfully request allowance of the same out of the property in the possession of the defendant Emma L. Bainbridge. 10

AARON LASSER.

Sworn and subscribed before me  
this 9th day of September, 1938.

WILLIAM S. MYERS,  
A Master in Chancery of New Jersey. 20

30

40

**Decree of Dismissal and Order of Restraint  
Pending Appeal.**

(Filed Sept. 30, 1938.)

IN CHANCERY OF NEW JERSEY.

10

122-180.

---

Between

HOWARD TRAFTON, as Substitu-  
tionary Administrator with  
the will annexed of the Last  
Will and Testament of  
EMMA J. DUNKERLEY,

*Complainant,*

20

*and*

EMMA L. BAINBRIDGE, et als.,

*Defendants.*

---

On Bill, etc.

Decree of  
Dismissal and  
Order of  
Restraint  
Pending Appeal.

30

This matter coming on to be heard in the pres-  
ence of Messrs. Hannoeh & Lasser, solicitors of  
the complainant, Howard Trafton as substitution-  
ary administrator with the will annexed of the  
Last Will and Testament of Emma J. Dunkerley,  
and of Albert Comstock, solicitor of the defendants  
Emma L. Bainbridge and The Hamilton Trust  
Company of Paterson, New Jersey; and the Court  
having heard the arguments of said solicitors and  
being of the opinion that the bill of complaint  
filed herein discloses no cause of action for the fol-  
lowing reasons:

40

That under the "THIRD" clause of the will  
of Emma J. Dunkerley, deceased, her husband,  
William George Dunkerley, now deceased,  
took an estate in fee and became the absolute

*Decree of Dismissal and Order of Restraint  
Pending Appeal.*

owner of said residuary estate, and the subsequent limitation over contained in the "FOURTH" clause of said will is void as inconsistent with the right of said William George Dunkerley; and also because a fee cannot be limited after a fee. 10

And it appearing that due notice of the defendants' motion to dismiss the bill of complaint for the cause aforesaid has been given to said complainant;

It is thereupon, on this 30th day of September, 1938, ORDERED, ADJUDGED and DECREED that the complainant's said bill of complaint be and the same is hereby dismissed; and it is 20

FURTHER ORDERED, that a counsel fee of Three hundred dollars be allowed to the complainant and a counsel fee of Twelve hundred dollars be allowed to the defendants together with their costs of this suit, to be paid by the defendant Emma L. Bainbridge out of the assets directed to be impounded by this decree;

And it having been represented to the Court by the solicitors for the complainant that an appeal will be taken from the within decree, and application having been made for an order restraining the defendant Emma L. Bainbridge from removing from her safe deposit box in The Hamilton Trust Company of Paterson, New Jersey (Totowa Branch) any of the contents thereof and restraining the defendant The Hamilton Trust Company of Paterson, New Jersey, from permitting access to the same; and the Court being satisfied with the sufficiency of such application, it is 30  
40

*Decree of Dismissal and Order of Restraint  
Pending Appeal.*

10 FURTHER ORDERED, that the defendant Emma L. Bainbridge be and she is hereby restrained from removing from her safe deposit box at The Hamilton Trust Company of Paterson, New Jersey (Totowa Branch) any of the contents thereof, and the defendant The Hamilton Trust Company of Paterson, New Jersey, be and it is hereby restrained from permitting any access to said vault until the further order of this court in the premises, pending the prosecution by the complainant of an appeal from this decree to the Court of Errors and Appeals, except that a list of the contents of said vault shall be made by the defendant within twenty days from the date hereof, and a copy of such list be served upon the solicitors of the complainant, and except that the defendants have leave to remove from the said safe deposit box sufficient of the contents thereof to permit of the payment of the counsel fees and costs allowed by this decree.

20

LUTHER A. CAMPBELL,  
C.

30 Respectfully advised,  
CHARLES M. EGAN,  
V. C.

A true copy.

EDW. L. WHELAN,  
Clerk.

**Notice of Appeal.**

(Filed Oct. 24, 1938.)

IN CHANCERY OF NEW JERSEY.  
122-180.

Between

HOWARD TRAFTON as Substitu-  
tionary Administrator with  
the will annexed of the Last  
Will and Testament of  
EMMA J. DUNKERLEY,*Complainant,*  
*and*EMMA L. BAINBRIDGE, et als.,  
*Defendants.*

10

On Bill, etc.

Notice of Appeal.

20

The complainant, Howard Trafton as substitutionary administrator with the will annexed of the Last Will and Testament of Emma J. Dunkerley, hereby appeals from the decree of dismissal and so much of the order of restraint pending appeal made by the Chancellor on the advice of the Honorable Charles M. Egan as Vice Chancellor, in the above entitled cause on September 30th, 1938, as orders, adjudges and decrees that the complainant's bill of complaint be dismissed and as directs that a counsel fee of \$1200.00 be allowed to the defendants, to the Court of Errors and Appeals in the last resort in all causes.

30

Dated: October 19th, 1938.

HANNOCH & LASSER,  
Solicitors for and of  
Counsel with Complainant.

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

40

AARON LASSER,  
Of Counsel with Complainant.

**Affidavit of Service.**

(Filed Oct. 24, 1938.)

IN CHANCERY OF NEW JERSEY.  
122-180.

10

Between

HOWARD TRAFTON as Substitu-  
tionary Administrator with  
the will annexed of the Last  
Will and Testament of  
EMMA J. DUNKERLEY,*Complainant,**and*

EMMA L. BAINBRIDGE, et als.,

20

*Defendants.*On Bill, etc.  
Affidavit  
of Service.State of New Jersey, }  
County of Essex, } ss.:HAROLD HURWITZ being duly sworn according to  
law upon his oath deposes and says:1. I am a clerk in the offices of Hannoch & Lasser,  
solicitors for and of counsel with complainant.

30

2. I did, on October 21st, 1938, serve a copy of  
the Notice of Appeal to which this affidavit is at-  
tached, upon Albert Comstock, Esq., solicitor for  
the defendants Emma L. Bainbridge and The  
Hamilton Trust Company of Paterson, N. J., by  
delivering the same to Olive F. Kane, a stenog-  
rapher in the employ of Albert Comstock, Esq.,  
at his office, 125 Ellison St., Paterson, N. J.

HAROLD HURWITZ

Sworn and subscribed before me  
this 21st day of October 1938.

40

WILLIAM S. MYERS,

A Master in Chancery of N. J.

**Petition of Appeal.**

(Filed Nov. 9, 1938.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

Between

HOWARD TRAFTON as Substitu-  
tionary Administrator with  
the will annexed of the Last  
Will and Testament of  
EMMA J. DUNKERLEY,  
*Complainant-Appellant,*  
*and*

EMMA L. BAINBRIDGE, et als.,  
*Defendants-Respondents.*

On Appeal from  
the Court of  
Chancery.

Petition of  
Appeal.

10

20

TO THE HONORABLE, THE COURT OF ERRORS AND  
APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Howard Trafton as Substitu-  
tionary Administrator with the will annexed of  
the Last Will and Testament of Emma J. Dunk-  
erley, the appellant in the above entitled cause,  
respectfully shows that:

30

1. Petitioner finds himself aggrieved by a de-  
cree of dismissal and order of restraint pending  
appeal made in the Court of Chancery by his  
Honor, Luther A. Campbell, Chancellor of the  
State of New Jersey, upon the advice of Honorable  
Charles M. Egan as Vice Chancellor, bearing date  
September 30th, 1938, in a certain cause in said  
Court of Chancery wherein said Howard Trafton  
as Substitutionary Administrator with the will  
annexed of the Last Will and Testament of Emma

40

*Petition of Appeal.*

J. Dunkerley, was complainant, and the said Emma L. Bainbridge et als were defendants, in this respect, viz: That the said decree adjudges that:

(a) "The complainant's said bill of complaint be and the same is hereby dismissed";

10 (b) "A counsel fee of \$1200.00 be allowed to the defendants."

2. And petitioner appeals from the decree of the Chancellor, advised by the Honorable Charles M. Egan as Vice Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that:

(a) The Chancellor erroneously concluded that under the Third Clause of the will of Emma J. Dunkerley, deceased, her husband, William George Dunkerley, now deceased, took an estate in fee and became the absolute owner of said residuary estate and the subsequent limitation over contained in the Fourth Clause of said will was void as inconsistent with the right of said William George Dunkerley and also because a fee cannot be limited after a fee.

3. The Chancellor should have found and adjudged that no estate in fee was created in William George Dunkerley by the Third Clause of the will of Emma J. Dunkerley.

4. The Chancellor should have found and adjudged that under the Third Clause of the will of Emma J. Dunkerley there was created in William George Dunkerley an estate for life with remainder over, with a power of disposition in fee of the remainder annexed and that the limitation for the life of William George Dunkerley should control and the life estate created in him should not be enlarged to a fee.

*Petition of Appeal.*

5. The Chancellor should have found and adjudged that the Third Clause of the will of Emma J. Dunkerley comprised a gift for life only by certain and express words to which was annexed a power of disposal, by reason of which William George Dunkerley was entitled only to an estate for life and not to an estate in fee. 10

6. The Chancellor abused his discretion by allowing to the defendants a counsel fee in the sum of \$1200.00, which sum is excessive, exorbitant and unreasonable for the services rendered, and was not justified by the amount of such services.

HANNOCH & LASSER,  
Solicitors of Complainant-Appellant.

AARON LASSER,  
WILLIAM S. MYERS,  
Of Counsel. 20

30

40

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

1911

1912

1913

1914

1915

1916

1917

1918

1919

1920

1921

1922

1923

1924

1925

1926

1927

1928

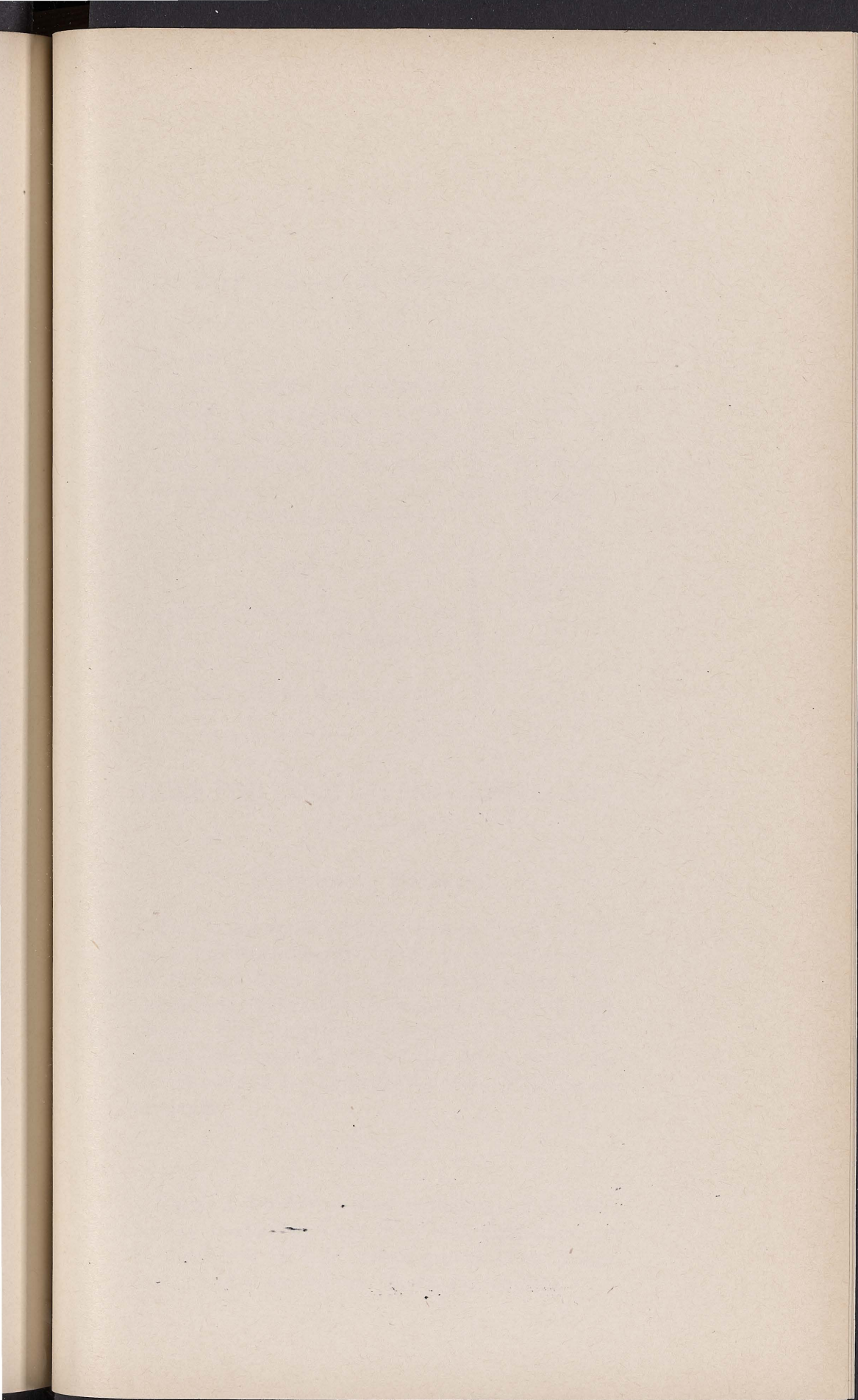
1929

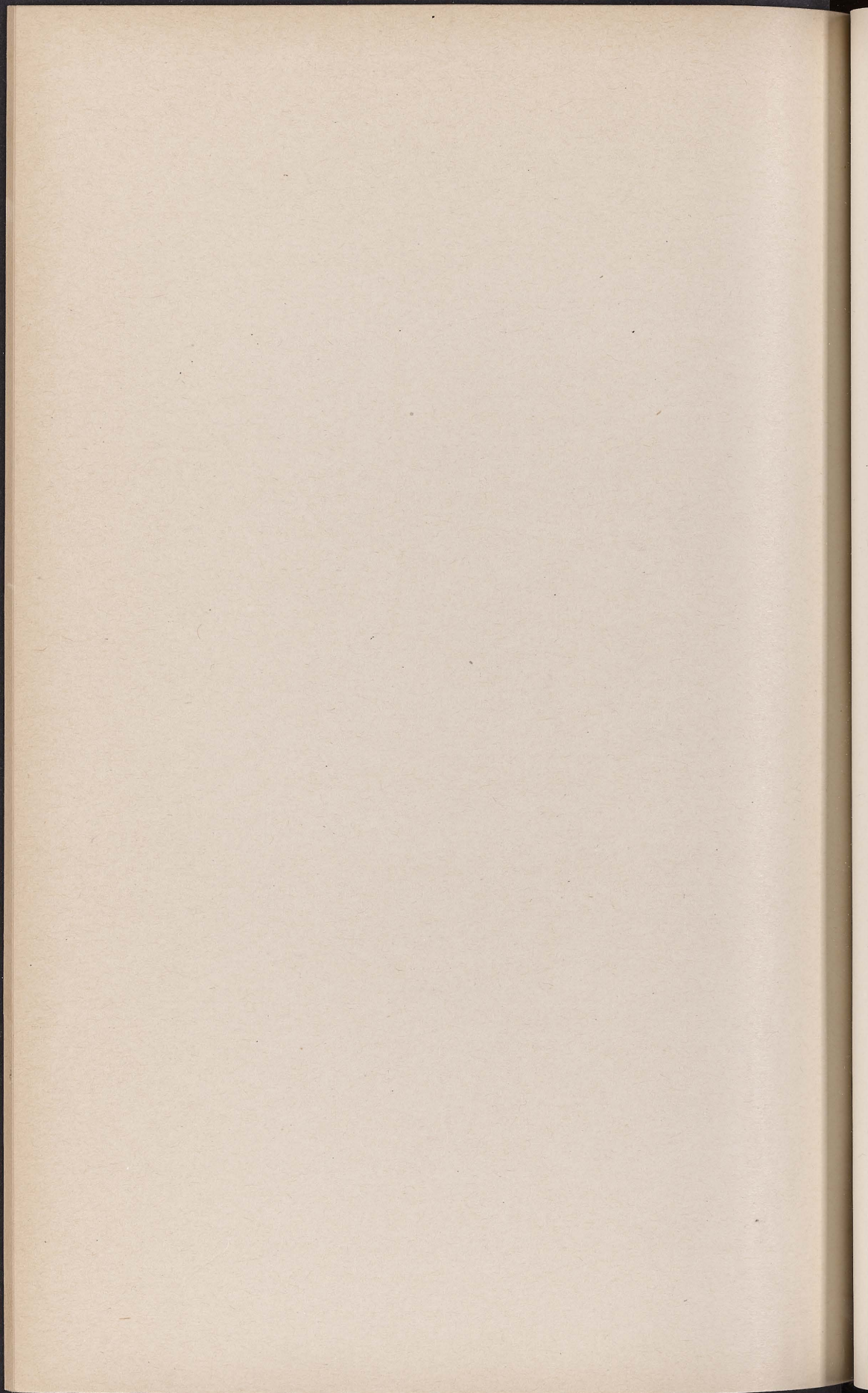
1930

1931

1932

1933





## New Jersey Court of Errors and Appeals

Between

HOWARD TRAFTON, as Substitutive  
Administrator with the  
will annexed of the Last Will  
and Testament of EMMA J.  
DUNKERLEY,  
Complainant-Appellant,

*and*

EMMA L. BAINBRIDGE and THE  
HAMILTON TRUST COMPANY OF  
PATERSON, N. J.,  
Defendants-Respondents.

On Bill, &c.

On Appeal  
from the  
Court of  
Chancery.

(Sat Below:  
Egan, V.-C.)

### BRIEF FOR COMPLAINANT-APPELLANT.

(Italics our own.)

#### Preliminary Statement.

This is an appeal from a decree (S. C., p. 64) made on September 30, 1938, by the Chancellor on the advice of Hon. Charles M. Egan, Vice-Chancellor, dismissing complainant's Bill of Complaint. The complainant appeals from such dismissal and from so much of the decree as directs that a counsel fee of \$1200 be allowed to the defendants.

#### Facts.

Emma J. Dunkerley died on September 11, 1930, having made her Last Will and Testament on September 8, 1930, by which, among other things, she provided as follows (S. C., pp. 14-15):

Third: All the rest, residue and remainder of my estate real and personal of whatsoever nature and wheresoever situate I give devise and bequeath to my husband William George Dunkerley for his sole use and benefit during his life with full right and power to sell transfer and convey the same and use the whole or any part of said estate principal or interest, or the proceeds for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute.

FOURTH: At the decease of my said husband, I then give, devise and bequeath so much of said estate and property as shall remain, one-third thereof to my nephew Howard Trafton, one-third to my nephew Clifford Trafton, and one-third to the children of my nephew, Clifford Trafton; in case of the death of either nephew, his share to go to his children if any or if none to the other nephew or his children; in case of the death of the children of Clifford Trafton their share to be given to the said Clifford Trafton or if he be dead then to Howard Trafton or his children.

The testatrix's husband, William George Dunkerley, survived her, and under the terms of her will, took possession and control of her entire estate. As executor thereof, he filed an inventory and account in the Passaic County Orphans' Court, which was allowed on June 11, 1931. The account set forth a balance of \$24,850.01, to be disposed of according to law (S. C., p. 3, ll. 25-30). The decree allowing his account directed that commissions, counsel fees and Surrogate fees of \$1,056.30 be paid, leaving a net estate of \$23,793.71.

Testatrix's husband, William George Dunkerley, died on January 25, 1936, testate, and the

defendant, The Hamilton Trust Company of Paterson, N. J., qualified as *his* executor (S. C., p. 4, l. 11). His will designated Emma L. Bainbridge as sole beneficiary (S. C., p. 19).

After the death of William George Dunkerley, the complainant qualified as substitutionary administrator with the will annexed of the will of Emma J. Dunkerley, deceased, and there was delivered to him, by the executor of William George Dunkerley, certain of the assets which had comprised part of the testatrix's estate. This property had a face value of \$9,937 (S. C., p. 4, l. 30). No further property was delivered to the complainant, but the defendant, The Hamilton Trust Company, proceeded with the administration of the estate of its testator and distributed the *alleged* assets of *that* estate in purported accordance with the will of William George Dunkerley. An inventory of such assets was filed in the office of the Surrogate of Passaic County on September 16, 1936 (S. C., p. 5, l. 20 and Schedule E, p. 22), listing assets having a face value of \$15,230.21. The executor's final account was filed thereafter and allowed on March 18, 1937. The account sets forth a balance of \$15,561.25, to be disposed of according to law (S. C., p. 6, l. 8). On or about April 19, 1937, the defendant, Hamilton Trust Company, as executor of the will of William George Dunkerley, delivered the balance available for distribution to the defendant, Emma L. Bainbridge, \$14,614.41 in amount (S. C., p. 6, l. 35, p. 7, l. 1).

Testatrix's nephew, Clifford Trafton, survived testatrix but predeceased her husband, intestate. He is survived by his children, Allan Trafton and Janice Trafton, infants (S. C., p. 3, ll. 4-22). Hence, the interests directed to be paid by Paragraph "Fourth" of testatrix's will are now dis-

tributable one-third each to Howard, Allan and Janice Trafton.

The complainant filed his Bill of Complaint (S. C., p. 1) herein on May 9, 1938, charging that assets aggregating some \$10,764.01, which had comprised part of the estate of Emma J. Dunkerley and in which William George Dunkerley possessed *only* a *life* interest by the terms of his wife's will, had been distributed to the defendant, Emma L. Bainbridge, as if William George Dunkerley had been the absolute owner of such property. Complainant sought an adjudication of his rights in the property, and sought to obtain a discovery and accounting from the defendants, in order that the property rightfully forming part of the testatrix's estate might be restored to that estate, and might be distributed by the complainant, as substitutionary administrator *c. t. a.*, to the persons designated in Paragraph "Fourth" of testatrix's will.

The defendants moved (S. C., pp. 45-46) to strike the Bill of Complaint for the sole reasons:

"That under the "Third" clause of the will of Emma J. Dunkerley, deceased, her husband, William George Dunkerley, now deceased, took an estate in fee and became the absolute owner of said residuary estate, and the subsequent limitation over contained in the "Fourth" clause of said will is void as inconsistent with the right of said William George Dunkerley; and, also because a fee cannot be limited after a fee."

The court below concluded that the defendants' motion to strike should prevail (Opinion, S. C., pp. 49-54 and reported in 124 N. J. Eq. 179). It is from this action that the complainant appeals.

### Questions Involved.

Complainant urges that the Court of Chancery in dismissing the Bill of Complaint relied, erroneously, upon a rule of law that is wholly inapplicable in that it applied the rule that "a testamentary gift absolute in form or indeterminate as to quantity of estate given, coupled with uncontrolled power of disposition, express or implied, imports estate in fee, and gift over is void as inconsistent with rights of first legatee" (Opinion, S. C., pp. 49 and 52), whereas, the language of the testatrix's will required the application of the principle that "where the testator gives an estate for life *only* by certain and express words, and annexes to it a power of disposal \* \* \* the devisee for life will not take an estate in fee" (*Borden v. Downey*, *infra*, and cases cited, *infra*).

More specifically, complainant urges that the action of the Court of Chancery was erroneous in that:

1. The court erroneously concluded that William George Dunkerley took an estate in fee under the will of Emma J. Dunkerley, and that, therefore, the subsequent limitation over contained in the "Fourth" Clause of testatrix's will was void (Petition of Appeal, Ground No. 2, S. C., p. 70).

2. The court should have found that no estate in fee was created in William G. Dunkerley by the "Third" Clause of testatrix's will (Petition of Appeal, Ground No. 3, S. C., p. 70).

3. The court should have found that there was created in William George Dunkerley by the "Third" Clause of the testatrix's will only an estate for life, to which was coupled a power of disposition (Petition of Appeal, Grounds No. 4 and 5, S. C., pp. 70 and 71).

4. The court should have found that the limitation for the life of William George Dunkerley was controlling and that such life estate should not be enlarged to a fee (Petition of Appeal, Ground No. 4, S. C., p. 70).

5. The counsel fee of \$1,200 allowed to the defendants was unjustified, excessive and unreasonable (Petition of Appeal, Ground No. 6, S. C., p. 71).

In short, the questions brought on for review are:

1. Did William George Dunkerley take an absolute estate, or only a life estate in the property of his wife, Emma J. Dunkerley, under the terms of her will?

2. Did the Chancellor abuse his discretion in making an allowance of a counsel fee of \$1,200 to the defendants?

### The Will.

It may be of assistance to here restate the provisions of the testatrix's will, with particular emphasis upon those provisions with which the courts have been chiefly concerned in instances where constructions of the nature here sought have been made:

“THIRD: All the rest, residue and remainder of my estate real and personal of whatsoever nature and wheresoever situate I give, devise and bequeath to my husband, William George Dunkerley, for his sole use and benefit *during his life* with full right and power to sell, transfer and convey the same and use the whole or any part of said estate, principal or interest, or the proceeds *for his own use and benefit* in any manner he may

deem proper, the intention hereof being that **he** shall at all times **use and enjoy** the whole or any part of my said property or estate the same **as if** this devise and bequest was absolute.

“Fourth: At the decease of my said husband, I then give, devise and bequeath **so much** of said estate property **as shall remain**, (to nephews, grandnephew and grandniece)  
\* \* \*”

## L A W .

### P O I N T I .

**The Chancellor should have denied the motion to strike complainant's bill of complaint, because by the terms of the will in question, there was created in the husband an *estate for life only*, with remainder over as specified in Paragraph "Fourth" of the will.**

It is our confirmed conviction that the court below misconceived the legal effect of the language employed in the testatrix's will, and that that misconception led to the erroneous application of a rule of law, sound enough in principle but entirely inapposite. Correspondingly, the Court of Chancery disregarded an equally well established principle of law that has been made incontrovertible by the pronouncements of this Court. It requires only a resume of the authorities to demonstrate the error of the action of the court below.

Where an estate for life, with remainder over, is given, with a power of disposition in fee of the remainder annexed, the limitation for the life of the first taker will control, and the life estate will not be enlarged to a fee, notwithstanding the power of the life tenant to dispose of the fee.

- Borden v. Downey*, 35 N. J. Law 74, affirmed 36 N. J. Law 460;  
*Cory v. Cory*, 37 N. J. Eq. 198;  
*Pratt v. Douglas*, 38 N. J. Eq. 516;  
*Rodenfels v. Schumann*, 45 N. J. Eq. 384;  
*Wooster v. Cooper*, 53 N. J. Eq. 682;  
*Robeson v. Shotwell*, 55 N. J. Eq. 318, affirmed 55 N. J. Eq. 824;  
*Hunt v. Smith*, 58 N. J. Eq. 25;  
*Bryan v. Bryan*, 61 N. J. Eq. 45;  
*Parker v. Travers*, 74 N. J. Eq. 812;  
*Kellers v. Kellers*, 80 N. J. Eq. 441, affirming 79 N. J. Eq. 412;  
*Deats v. Ziegner*, 82 N. J. Eq. 605;  
*Smith v. Wagner*, (not officially reported) 91 Atl. 599;  
*McDermott v. Zimmerman*, 89 N. J. Eq. 215;  
*Weaver v. Patterson*, 92 N. J. Eq. 170;  
*Leaming v. Hoffman*, 96 N. J. Eq. 249;  
*Kleaver v. Jacobs*, 104 N. J. Eq. 407.

In *Pratt v. Douglas*, (Court of Errors and Appeals), 38 N. J. Eq. 516, the will provided:

“I give, devise and bequeath all my real and personal estate whatsoever and wheresoever unto my beloved wife, Eliza Cory, *for her sole use and benefit, for and during the period of her natural life, to be under her control and used by her as she may see fit to use the same*, and in case she should find it necessary or see fit to dispose of any part or all of the same, I do hereby authorize, empower and direct my said wife as my executrix hereinafter named, to sell, deed and dispose of the same, or any part thereof, from time to time, as she may deem proper, and to make good and sufficient deed or deeds for any part or the whole of my estate so sold or conveyed.

“After the death of my said wife it is my will and I do order my executors \* \* \* to sell the whole of my estate \* \* \* remaining at the decease of my wife \* \* \* and dispose of the proceeds as follows, to wit: (legacies to several persons and balance to brothers and brother-in-law).”

This Court, dismissing the argument that an absolute estate passed to the wife (at p. 533), said:

“In *Downey v. Borden*, 7 Vr. 460, it was held by this Court, on a devise of lands expressly for life, that superadded words granting a power to sell in fee would not enlarge the life estate to a fee. The same rule of construction is applicable to bequests of personal estate. *Dutch Church v. Smock*, Sax. 148; *Amin v. Vandoren*, 1 McCart. 135. \* \* \*. The meaning of the testator in his will is apparent. For so much of his estate as he gives ‘for the sole use and benefit of his wife, to be under her control and used by her as she may see fit to use the same,’ he expressly limits the time of her use and enjoyment, ‘during the period of her natural life;’ and he provides for the residue not only by the specific bequests, but also by a residuary disposition of the balance of his estate \* \* \*. I agree with the conclusion of the Vice-Chancellor that under the testator’s will, Mrs. Cory took only the use of his property for her life \* \* \*.”

In *Downey v. Borden* (Court of Errors and Appeals), 36 N. J. Law 460, this Court said (and its pronouncement has been repeatedly reiterated in subsequent cases) (p. 466):

“The distinction is between a devise *expressly for life* with a power of disposition annexed, and a devise *in general terms* with such a power annexed. In the former case, an estate *for life only* passes, in the latter a fee. As a rule of construction, the principle is entirely settled, that where lands are de-

vised in the first instance in language indeterminate as to the quantity of the estate from which an estate for life would result by implication, and words adapted to the creation of a power of disposal without restriction as to the mode of execution are added, the construction will be, that an estate in fee is given; *but where the quantity of the estate of the taker is expressly defined to be for life, the superadded words will be construed to be the mere gift of a power of disposition.* The leading English authorities sustaining this distinction, are cited by the Chief Justice in his opinion in the court below.

“The general rule is, that when a will devises to a man with a power to give a fee, he is construed to have a fee, subject to the qualification that he has not an express estate divided from the power. 2 *Preston on Estates* 82, ‘We may lay it down as an incontrovertible rule,’ says Chancellor Kent in *Jackson v. Robbins*, 16 *Johns*, 537, 538, ‘that where an estate is given to a person *generally or indefinitely* with a power of disposition, it carries a fee and the only exception to the rule is, *where the testator gives an estate for life only* by certain and express words, and annexes to it a power of disposal, *in that particular and special case, the devisee for life will not take an estate in fee.*’ The cases are collected and commented on in 1 *Sugden on Powers* 120, *et seq.*; 8 *Vin. Abr.* 234, *tit. Devises W a*; 6 *Bac. Abr.*, *tit. Legacies and Devises (C)*; 2 *Preston on Estates* 81; 1 *Roper on Legacies* 642, *et seq.* 4 *Kent* 319, 535; 2 *Washburn on Real Prop.* 373.

“This rule of construction has been repeatedly approved by the courts of this state. It was made the ground of decision by Chancellor Vroom in *The Dutch Church v. Smock*, *Saxton* 148, and by Chancellor Green in *Annin v. Van Doren’s Adm’rs*, 1 *McCarter* 135; and was recognized by Chief Justice Hornblower in *Den v. Humphreys*, 1 *Harr.* 28; by Justices Nevius and Carpenter in *Armstrong v. Kent*, 1 *Zab.* 519, 522; and by Chief Justice

Green in *Den v. Young*, 3 Zab. 481, as an established rule of construction.”

In *Wooster v. Cooper* (Court of Errors and Appeals), 53 N. J. Eq. 682, the will provided:

“I order and direct that all my estate, real, personal and mixed, shall, during the life of my beloved wife, Tacy Cooper, should she survive me, pass into her hands, and be subject to her sole management and control, to keep and use or sell and dispose of the same as she shall see fit, and my executors hereinafter named shall not, during said time, be responsible therefor.

“From and after the death of my wife, should she survive me, otherwise from and after my death, all my estate \* \* \*, which shall then remain, I order and direct my executors \* \* \* to dispose of \* \* \* as follows: \* \* \*”

This Court left no room for doubt concerning its concept of the principle now urged, for it said:

“It gives to his wife, by express words, a life estate in his property, and then annexes to it a power to dispose of the same without qualification or limitation. The rule that a devise of an estate, generally, with a power to dispose of the same absolutely and without limitation, imports such dominion over the property that an estate in fee is created, and that a devise over is consequently void, has one exception, which is this: *That where the testator gives an estate for life only, by certain and express words, and annexes to it such a power of disposal, the devisee for life will not take an estate in fee.*

“This exception was recognized and enforced by this court in the case of *Downey v. Borden*, 7 Vr. 460, and again in the case of *Pratt v. Douglass*, 11 Stew. Eq. 533, and in the latter case it was declared to apply to bequests of personal estate as well as to devises of realty. These cases have definitely

settled the law on this subject in New Jersey, and the propriety of the rule laid down in them is no longer open to discussion."

In *Robeson v. Shotwell*, (Chancery) 55 N. J. Eq. 318, the will provided:

"I give to my beloved wife, Martha S. Shotwell, all the property that I possess, \* \* \* for her sole use, benefit and enjoyment during her life, with full power to sell and dispose of any of the said property, \* \* \* and to use the proceeds thereof in such manner as she may desire.

"After the death of my wife, I do authorize and direct my executors to divide such property as may then remain, as follows \* \* \*"

Vice-Chancellor Emery prefaced his thought that the rule of *Borden v. Downey, supra*, and *Wooster v. Cooper, supra*, is:

"a rule of construction which is a rule of property so far as a general rule of construction can be applicable to wills."

with the statement that:

"The first question, therefore, is as to the extent of the estate of the first taker (Martha S. Shotwell) under this will.

"Upon this question I reach the conclusion that the testator did not intend to bequeath the absolute estate to his wife, but to give her a life estate only, with a power of disposal and appointment, which she had the right to exercise if she chose, by act taking effect during her life, for her own benefit. This conclusion is based on these considerations: The testator, at the outset, himself limited the character and duration of the estate, by expressly confining the use, benefit and enjoyment to the life of his wife. When such life estate is granted by certain and express terms, and there follows then an ad-

dition of powers of disposal or appointment to the estate for life, the general rule relating to the effect of adding these powers to the express life estate is that *they will not have the effect of conferring an additional right of property upon the life tenant by being construed to enlarge to a fee or absolute estate the estate which had been previously expressly declared to be for life only*, but will be carried into effect only as powers over the property given to the holder of the life estate. This general rule is no longer open to discussion. *Borden v. Downey*, 6 Vr. 74 (New Jersey Supreme Court); S. C. on error, 7 Vr. 460; *Wooster v. Cooper*, 33 Atl. Rep. 1050 (Errors and Appeals, March, 1896)."

In *Bryan v. Bryan*, (Chancery) 61 N. J. Eq. 45, Vice-Chancellor Pitney found it necessary to make only casual reference to the established rule:

"It is proper here to premise that the question for solution is not whether the widow took a fee which descended to her children as her heirs-at-law. The authorities are decidedly against any such result. (*Downey v. Borden*, 7 Vr. 460, at pp. 466, 467.)"

In *McDermott v. Zimmerman*, (Court of Errors and Appeals) 89 N. J. Eq. 215, where property was bequeathed to testatrix's husband for the term of his natural life, with power to sell or otherwise dispose thereof as "he shall see fit", and remainder over, the rule expressed under this point was so clear that it was:

"conceded that Mr. Zimmerman's interest in his wife's estate was expressly limited to a life estate with power to sell or dispose of the whole or any part of it as he saw fit."

and the rule was sought to be avoided by a claim that the power of disposal had been exercised by

a demand for and receipt of the estate by the life beneficiary,—an attempt that failed. A decree was made directing an accounting and distribution of just such a character as the complainant here seeks.

To like effect are *Parker v. Travers*, 74 N. J. Eq. 812; *Hunt v. Smith*, 58 N. J. Eq. 25; *Weaver v. Patterson*, 92 N. J. Eq. 170, and the great weight of authority throughout the United States (See annotations 36 *A. L. R.* 1177 and 76 *A. L. R.* 1153 and cases therein cited).

It is only when the gift to the first taker is either *absolute in form* or in *form indeterminate* and there is added a manifest intention to vest in such taker the uncontrolled power of disposition of the property that the fee will pass. Hence in each of the authorities relied upon by the court below, there was present either a gift of an *indeterminate interest* or one *absolute in form*, while in the matter *sub judice* the gift is for the use of the husband “*during his life*,” that is, a *gift of a life estate in certain and express words*. Thus in the cases cited in the Vice-Chancellor’s opinion (S. C., pp. 52 and 53), the fee was held to have passed:

In *Briggs v. Faulkner*, 120 N. J. Eq. 1, where the bequest to the first taker provided:

“All the rest, residue and remainder of my estate, both real and personal, whatsoever and wheresoever, I give, bequeath and devise unto my daughter \* \* \*.”

In *Kleaver v. Jacobs*, 104 N. J. Eq. 406, where the gift to the first taker was expressed as follows:

“I give, bequeath and devise to my wife hereinafter named, all the rest and residue of my estate, wheresoever the same may be found or of whatsoever nature the same may consist, to my wife, Anna B. Fulmer, and to have the net income from my estate \* \* \*.”

In *Annin's Ex'rs v. VanDoren's Adm'r*, 14 N. J. Eq. 135, where the bequest and devise to the first takers was to them by name, to them and their heirs, share and share alike;

In *Downey v. Borden*, 36 N. J. Law 460, where the gift to the first taker was in the following words:

“I also give and bequeath to my beloved wife, Lucy Akins, one-third of all my estate that may remain at the time of her death, for to dispose of as she may see proper \* \* \*.”

In *McClellan v. Larcher*, 45 N. J. Eq. 17, where the gift to the first taker was of the residuary estate (to the wife)

“\* \* \* same to be held and enjoyed by her fully and absolutely and without restriction of any kind \* \* \*.”

In *Wilson v. Wilson*, 46 N. J. Eq. 321, where the bequest was to testatrix's daughter

“\* \* \* and to her heirs forever.”

In *Tuerk v. Schueler*, 71 N. J. Law 331, where the bequest to the first taker was in the following language:

“I give, devise and bequeath all my property, real and personal, to my beloved wife, she to have full disposing power of the same \* \* \*.”

In *McCloskey v. Thorpe*, 74 N. J. Eq. 413, where the gift to the first taker provided that the proceeds of the sale of certain real estate should be

“\* \* \* paid over to my wife, Charity, for her use and I also will her all my personal property that I am possessed of \* \* \*.”

In *Hyde v. Hyde*, 88 N. J. Eq. 358, where the provision of the will was:

“That the balance of the (estate should be divided) among my widow and my heirs at law and next of kin.”

In *Brohm v. Berner*, 95 N. J. Law 85, where the gift to the first taker (the wife) was of

“All my real estate, also all my personal property, of every description, also all mon-  
eys due me at my decease, to her own private use forever.”

In *Gaston v. Ford*, 99 N. J. Eq. 592, where the gift to the first taker was expressed by the court as follows:

“I devise and bequeath my real and personal property to my wife, the above devise and bequest to be at her own disposal while she lives, \* \* \*.”

In *Fithian v. Fithian*, 109 N. J. Eq. 383, where the gift to the first taker was:

“Unto her, all my estate, real, personal and mixed, whatsoever and wheresoever \* \* \*.”

In *Morrison v. Dawson*, 115 N. J. Eq. 45, where the gift to the first taker was expressed as follows:

“I give and bequeath to my wife \* \* \* all of my estate, real and personal, to be used and enjoyed by her with full power to sell and dispose of the same \* \* \*.”

In *Brown vs. Turpan*, 122 N. J. Eq. 305, where the gift to the first taker read as follows:

“I give, bequeath and devise to my wife \* \* \* all my property, both real, personal and mixed, wheresoever situate \* \* \* to have and to hold the same to her, absolutely and forever.”

And in *Klotz v. Klotz*, 122 N. J. Eq. 31, where the entire bequest was:

“I give, devise and bequeath all my property, both real and personal, to my wife, Elsie Maude Klotz, after her death, residue to my son, Harland Klotz.”

In all of the foregoing cases the gifts to the first taker were *absolute in form*, excepting in *McCloskey v. Thorpe*, *supra*, and *Brohm v. Berner*, *supra*, where the gifts were *indeterminate in form*.

Among the authorities cited in the opinion of the court below, are included *Weaver v. Patterson*, 92 N. J. Eq. 170 and *Bryan v. Bryan*, 61 N. J. Eq. 45. There was no attempt made in these cases to enlarge the life estate to a fee. There arose only the question whether the life tenant possessed a power of disposal by implication.

It was upon these authorities (Opinion, S. C., pp. 52 to 53) that the learned Vice-Chancellor based his conclusions. It is obvious that he overlooked what Vice-Chancellor Emery, in *Robeson v. Shotwell*, *supra*, said was a “perfectly established” distinction, tantamount to a “rule of construction.” It is apparent that the cited authorities deal with what is referred to as the general rule, while the matter at bar is controlled by what has been referred to as an exception to the general rule, but which has been so definitely settled as to have acquired the stature of an independent rule (and was so referred to in *Robeson v. Shotwell*, *supra*).

The only reference made by the Vice-Chancellor to the long line of authorities which has followed *Borden v. Downey*, *supra*, was this comment (S. C., p. 53, l. 28):

“While there are many cases which, in principle, appear to run counter to the rule above-mentioned among which is *Downey v. Borden*,

36 N. J. Law 460, the Third paragraph of the will in the instant case, which states 'the intention hereof being that he shall at all times use and enjoy the whole or any part of my estate, the same as if this devise and bequest was absolute,' distinguishes it from them and carries an entirely different implication from those cases which follow *Downey v. Borden, supra.*'

That such a distinction is clearly erroneous is evident from a brief perusal of language of like nature that has appeared in cases of this kind, in addition to those already alluded to. In every instance cited, a *life estate only* was held to have been created:

"to be used and appropriated by her as much as she may wish for her happiness, without any restrictions or limitations whatsoever." *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271.

"with liberty and authority to use as much of the principal of my estate, both real and personal, as she may desire for her own personal comfort." *Bishop v. Groton Sav. Bank*, 96 Conn. 325, 114 Atl. 88.

"and, if she so desires, she shall have full power and authority to convey any and all of my real estate by absolute conveyance in fee simple." *Hamlin v. United States Exp. Co.*, 107 Ill. 443.

"to have the free and unrestricted use, possession, and benefit of the same so long as she may live." *Mann v. Martin*, 172 Ill. 18, 49 N. E. 706.

"with full power to use and transfer the same as if it belonged to him in fee simple." *Pool v. Napier*, 145 Iowa 699, 124 N. W. 755.

"with full power to sell and convey the same in fee." *Edgar v. Emerson*, 235 Mo. 552, 139 S. W. 122.

“to be used and disposed of during her life the same as I might do if living \* \* \*.”  
*Powers v. Wells*, 244 Ill. 558, 91 N. E. 717.

“for her to dispose of as she sees best, sell, bargain and convey, as much so as myself in person, to all intents and purposes, in law and equity.” *Levengood v. Hoople*, 124 Ind. 27, 24 N. E. 373.

And see annotations in 36 *A. L. R.* 1177 and 76 *A. L. R.* 1153.

The basis for the alleged distinction is predicated upon a mistaken comprehension concerning the effect of the explanatory clause:

“\* \* \* the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute.”

Patently, the testatrix's concern was with her husband's personal use and enjoyment of the property. Immediately before her expression of intent, she had limited his interest to one for *his life*, and had added a power of sale “for his own use and benefit.” There followed at once a gift over of “*so much \* \* \* as shall remain.*” Clearly the expression of the testatrix's intention was addressed to the *quantum* and quality of the *power of sale*, and not to the *quantum* of the *estate* to be vested in her husband. The use of the phrase “*as if*” demonstrates this conclusively. It recognizes that what has been given is not absolute (but is only a life interest), and expresses that notwithstanding that it is such a life interest, the beneficiary's *enjoyment* during the period of his limited estate should be unrestricted. Any other inference would require a conclusion that the testatrix intended to give a life estate to her husband in a thing of which she was intending to

grant him a fee, and would thus necessitate that the clear and unambiguous language of the will be distorted out of all ordinary meaning.

The court below recognized the principle that the plain intent of the testator, as disclosed by the language of the will, must govern, but failed to apply it. The effect of the decree that was made is to excise from the "Third" Clause of the will the limitation for the husband's life and to excise completely the entire "Fourth" Clause. Thus the decree renders meaningless all of the language in the "Third" and "Fourth" Clauses which follows the words, "All the rest, residue, and remainder of my estate, real and personal, of whatsoever nature and wheresoever situate, I give, devise and bequeath to my husband, William George Dunkerley". It expunges the 191 words that appear in the 21 lines that follow. We submit that not only was the testatrix's intention clearly one to create a life estate only, but if it were otherwise it could not be given effect, because it runs counter to an established rule of law, and in such case the so-called cardinal rule of construction must give way. Vice-Chancellor Berry, in *Briggs v. Faulkner*, 120 N. J. Eq. 1, at page 2, expressed this principle:

"While the cardinal rule of construction of wills is that the intention of the testator must prevail (*Wills v. Wills*, 73 N. J. Eq. 733; *Pierson v. Jones*, 108 N. J. Eq. 453; *Genung v. Best*, 100 N. J. Eq. 250; *Child v. Orton*, 119 N. J. Eq. 438), that rule is subject to the qualification that the testator's intention cannot be given effect, if it runs counter to an established rule of law. *White v. Graves*, 104 Atl. Rep. 205; *In re Fisher's Estate*, 7 N. J. Mis. R. 1075; *Hewitt v. Green*, 77 N. J. Eq. 345."

There remains to consider the Vice-Chancellor's references to *Naundorf v. Schumann*, 41 N. J. Eq. 14; and *Rodenfels v. Schumann*, 45 N. J. Eq. 383. In these cases Chancellors McGill and Runyon construed the same will and reached opposite conclusions. Neither opinion supports the finding of the court below in the matter *sub judice*. The will of Adam Reiniker directed that his property should be "for the use and benefit of my wife \* \* \*" with remainder over at her death. Chancellor McGill felt that this bequest was indeterminate in form, so that coupled with the power of disposal, it passed the fee. Chancellor Runyon, however, felt that this same language constituted a "gift \* \* \* only for the life of the primary legatee", and hence held that the widow took only a life estate. In the instant case, no such variance in result is possible, because the gift by its express terms is to the husband "during his life".

The rule which has been expressed above applies both to personal and real property. *Pratt v. Douglas*, 38 N. J. Eq. 516; *Wooster v. Cooper*, 53 N. J. Eq. 682.

The established and long settled rules pertinent to a construction of this character are these:

1. When an estate, indeterminate as to time and quantity (or, as is sometimes said, absolute in form or in form indeterminate), is given with an absolute power of disposal and consumption in the taker, a devise over to another of what remains upon the death of the first taker is void, and the first taker receives a fee.

2. When, however, the estate in the first taker is expressly limited to the life of that taker, by certain and express words, with a power of disposal annexed, the devisee for

life will not take an estate in fee and the gift over is valid.

Where then, as here, the testatrix said, "I give, devise and bequeath (my property) to my husband, William George Dunkerley, *for his sole use and benefit during his life*, with full (power of sale and disposal, and at his death I give) so much of said estate property as shall remain (to others)", it is in order for this Court to say again, as it did with seeming impatience in *Wooster v. Cooper, supra*:

"These cases have definitely settled the law on this subject in New Jersey, and the propriety of the rule laid down in them is no longer open to discussion."

and to reverse the decree of the Court of Chancery.

## P O I N T   I I .

**The counsel fee of \$1,200.00 allowed to the defendants by the Chancellor's decree was excessive, exorbitant and unreasonable for the services rendered, and was not justified by the amount of such services.**

It is respectfully submitted that there has been an abuse of discretion on the part of the Chancellor in the making of the allowance of a counsel fee of \$1,200 to the defendants. The decree directs that there be allowed to the complainant a counsel fee of \$300.00. Complainant's counsel filed an affidavit of services (S. C., pp. 59-63). No such statement of services was filed by the defendants' counsel.

It must appear from an examination of the record that the only services which counsel for the defendant was called upon to perform were such as were necessary in connection with an examination of law preliminary to the making of the motion to dismiss the bill of complaint, such conferences with the defendants as the nature of the case might reasonably have required, the filing of a memorandum in support of the motion to strike (which, in fact, comprised seven pages), and actual appearances before the court on the date of the entry of the order of restraint (S. C., p. 47), on the motion to dismiss the bill (S. C., p. 45), and on the application to settle the form of final decree (S. C., p. 55). In respect to the form of final decree, counsel for both parties submitted suggestions by way of letter, that of the defendants comprising four pages. These things and these things alone required attention on the part of the defendants' solicitor. There was no hearing.

The amount involved in this litigation is unquestionably of import in the consideration of the propriety of the allowances. The entire net estate of William George Dunkerley (including that property claimed by the complainant to be the property of the estate of Emma J. Dunkerley) amounted to \$14,614.41. The complainant seeks to recover some \$10,000.00 of this property. The allowance, therefore, represents more than 8% of the estate of William George Dunkerley, and about 12% of the amount in dispute. No such allowance would be made to the proctor for such an estate in settling its entire affairs and this litigation dealt only with one phase of administration.

By way of comparison, reference can be made to the allowance directed to be paid to the complainant, the sum of \$300.00, and the services ren-

dered by complainant's solicitors. Counsel for the complainant was called upon to make and complete a *de novo* investigation of the facts and circumstances (Bill of Complaint, S. C., pp. 1-40). Appearances were required on the entry of the original Order to Show Cause, in opposition to the Notice of Motion to strike out the Bill of Complaint, on the date of the entry of the Order of Restraint, and in response to the notice to settle the form of final decree. The complainant's solicitors were likewise called upon to submit memoranda to the Court of Chancery. From the standpoint of sheer effort, the services performed by counsel for the complainants far outweighed those required to be performed by counsel for the defendants. Notwithstanding that the defendant was successful in the court below, it does not seem at all reasonable that such a disparity in the amount of the respective allowances should appear.

While it has been established that the allowance of counsel fees in a Chancery suit is within the sound discretion of the Chancellor and will not be disturbed on review unless there is an abuse of discretion, it is respectfully submitted that the facts and circumstances herein establish such an abuse. We urge that the usual presumption of knowledge as to exactness and value of the services rendered, as determined by the court below, finds no support in the record. We ask that there be a finding by this Court that the fee is excessive and should be reduced to a reasonable amount.

## PART II.

The defendant, Emma L. Bainbridge, has given notice that she appeals from so much of the decree made on September 30, 1938 as directs that a counsel fee of \$300.00 be allowed to the complainant and one of \$1,200.00 to the defendants, together with costs to be paid by the defendant, Emma L. Bainbridge, out of the assets directed to be impounded by the decree. To state it otherwise, the defendant seeks to have costs and counsel fees paid by complainant *personally* instead of out of the assets involved in this litigation.

Complainant's views on the subject of the impropriety of the *amount* of the counsel fee allowed to the defendants have already been set out under Point II. In anticipation of the matter that may be urged by the defendant, Emma L. Bainbridge, on her cross-appeal, it is now submitted that, apart from the question of amount, the action of the Chancellor in respect to the allowance of counsel fees, was correct and should not be disturbed.

The complainant, who filed his Bill of Complaint in his capacity as substitutionary administrator *c. t. a.* of Emma J. Dunkerley, deceased, acted in complete good faith. He sought only to discharge, in proper manner, the duties imposed upon him as a fiduciary. Had he failed to do so, he should have been open to the censure of the infants who are among the remaindermen designated in the testatrix's will. The complainant's fiduciary obligations compelled him to seek to recover the property, which, as he interpreted his testatrix's will, formed part of the estate to be administered by him.

Had the defendant, Hamilton Trust Company, properly administered the affairs of its testator, William George Dunkerley, no need for this pro-

ceeding would have arisen. That institution apparently acquiesced in the construction of testatrix's will which complainant now seeks (for it delivered to the complainant some \$9,000. of the assets), but it failed to deliver all of the testatrix's property to complainant after the death of the life tenant. Without seeking the aid or instruction of any court, it paid over the remaining assets to the defendant, Emma L. Bainbridge. Whether or not, in so doing, it acted injudiciously may be of little moment at this time, but the fact of its having acted as it did definitely demonstrates that complainant acted most reasonably in filing his Bill of Complaint.

In a proceeding brought by an executor for the construction of a will, costs and a reasonable counsel fee for all proper parties are generally charged against the estate, provided there is a reasonable doubt as to the language sought to be construed. This has been the rule in England and in this state, and was expressed by this Court in *Attorney General v. Moore's Executors*, 19 N. J. Eq. 503, at page 519:

“Where the duty of a trustee is a matter of doubt, it is his undoubted right to ask and receive the aid and direction of a court of equity in the execution of his trust. *Kearney v. Macomb*, 1 C. E. Green 189. In such cases, if reasonable grounds exist for coming into the court to obtain the construction of the instrument creating the trust, the practice is to allow the costs and expenses, as it respects all the parties, and as between attorney and client, out of the trust funds. *1 Redfield on Wills 493; 3 Daniell's Ch. Pr. 1554*. This case comes within the application of this principle. The costs, and a reasonable counsel fee on both sides, both in this Court and in the Court of Chancery, should be allowed out of the trust estate; the amount of counsel fees to be settled by the Chancellor. In this respect the decree of the Chancellor is modified; in all other respects, it is affirmed.”

Allowances of this character have been frequently made:

- West v. St. James Episcopal Church*, 83 N. J. Eq. 224;  
*Cox v. Wills*, 49 N. J. Eq. 573;  
*Bruere v. Cook*, 63 N. J. Eq. 624;  
*Cooke v. Women's College*, 82 N. J. Eq. 179.

Equally well established is the principle that an executor who acts in good faith for the benefit of the estate which he represents, should *not* be charged with costs or counsel fees. This rule finds much favor in courts of equity. Thus, in *Wade v. Cox*, 115 N. J. Eq. 608, at p. 609, Vice-Chancellor Backes said:

“Costs in equity are discretionary. Where an executor, for the protection of the estate, in good faith, sues to recover upon a cause of action which accrued to his testator, and prosecutes with propriety, he will not, without more, be charged with the costs if he fails to recover. The reason for the rule at law exempting executors from costs, i. e., because they cannot be supposed to know the infirmity of their testator's cause, has a strong appeal to equity's discretion in absolving them from the payment of costs.”

It may be suggested by the defendants that this proceeding was not originally one to construe a will. When, however, the defendants chose to move to strike the Bill of Complaint, the sole reasons urged (S. C., pp. 45-46) were such as to compel a construction. For the purpose of the motion, all of the material allegations of the bill were regarded as admitted.

If the defendant, Hamilton Trust Company, as executor of the will of William George Dunkerley, had sought a construction of Emma J. Dunker-

ley's will, unquestionably it would have been proper for the court to make reasonable allowances to each party out of the estate in the hands of the executor. Such is exactly the effect of the decree as made and is precisely the procedure approved by this Court in *Cox v. Wills*, 49 N. J. Eq. 573, which reviewed the action of Vice-Chancellor Pitney in the proceedings below (*Cox v. Wills*, 49 N. J. Eq. 130).

There, the complainants, the executors of Lydia H. Leeds, filed a bill to obtain the direction of the court as to the disposition of the estate of John Leeds which had come to the hands of his wife, Lydia Leeds, as his executrix and residuary legatee. There, as in this case, the question arose whether the language of the will created an absolute gift with consequent invalidity of the limitation over, or whether the bequest created a trust in favor of the widow for her life, remainder to testator's next of kin.

Vice-Chancellor Pitney concluded that the words employed by the testator constituted the wife trustee of the residue, first for her own benefit, to the extent that she might need the estate for her comfortable maintenance, and, after her death, for the testator's next of kin. He decided that costs should be paid *out of the estate* of Mrs. Leeds after satisfying the amount due the *cestuis que trust* under the will of John Leeds.

On the appeal, this Court found that the court below had properly construed the will, but it effected certain changes and modifications in the method of accounting and form of distribution. On the subject of costs and counsel fees, it said (49 N. J. Eq. at p. 575):

“As the difficulty in settling the estate of Lydia H. Leeds, which has led the complainants, executors of her will, to file this bill for the direction of the court, has been caused by

the will of John Leeds, deceased, and a reasonable doubt of its true meaning, and the proper method of accounting under it, as well as by the intermingling the trust fund, the costs should be paid out of the money in the hands of these executors, and reasonable counsel fees allowed, before any account is stated between the parties.”

The situation in *Cox v. Wills, supra*, is strikingly like that present here. The only apparent difference is that there the executor of the life tenant filed the bill, while here the legal representative of the first testator has done so (since the life tenant's executor failed so to do).

For these reasons, it is urged that the decree of the Chancellor, insofar as it relates to the allowance of counsel fees, aside from the question of amount, should not be disturbed.

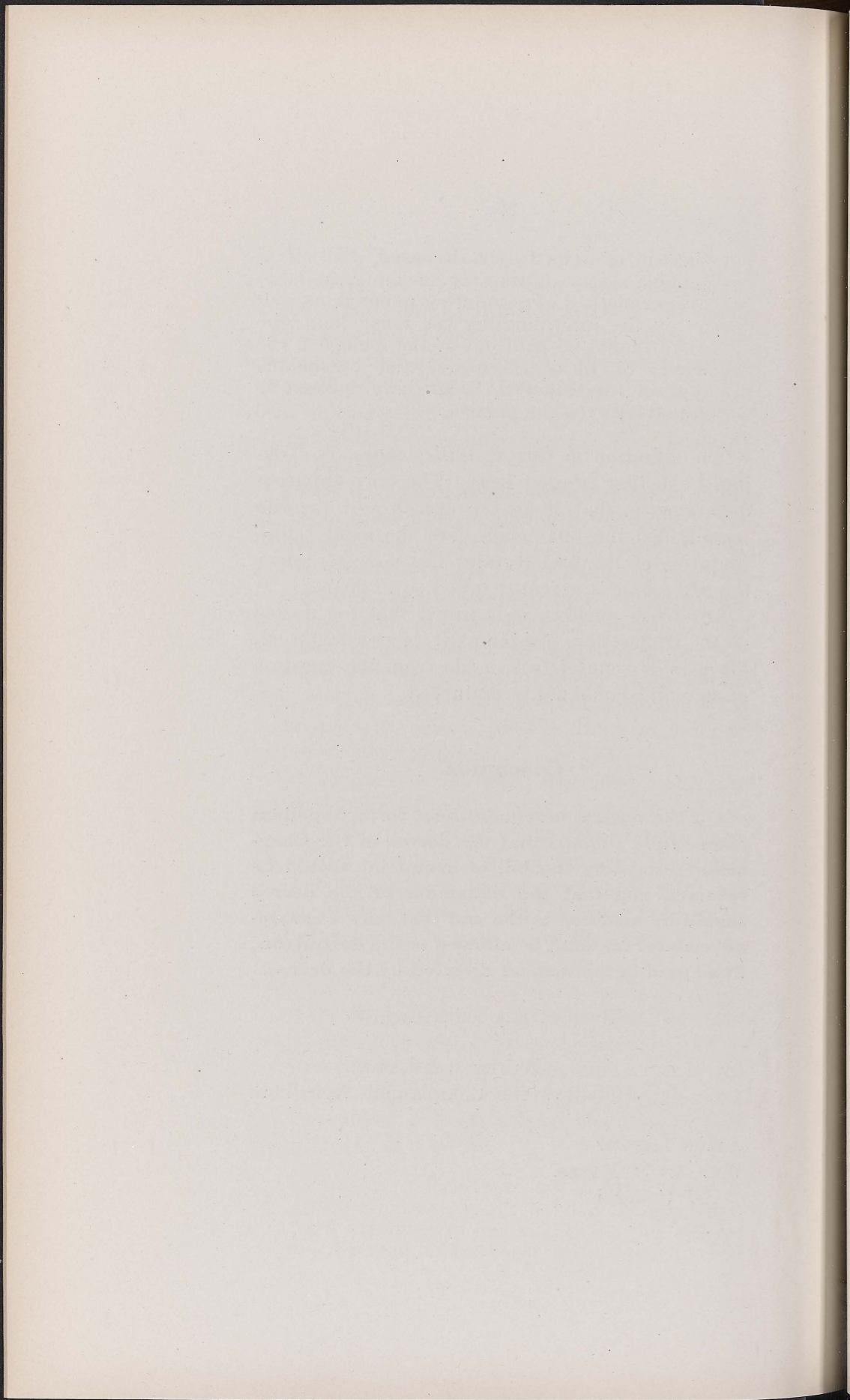
### Conclusion.

**For the reasons hereinabove set forth, appellant respectfully submits that the decree of the Chancellor dismissing the bill of complaint should be reversed and that the remainder of the decree should be modified to the end that only a reasonable counsel fee shall be allowed to the defendants, to be paid in the manner directed by the decree.**

Respectfully submitted,

HANNOCH & LASSER,  
Solicitors for Complainant-Appellant.

AARON LASSER,  
WILLIAM S. MYERS,  
Of Counsel.





1871

214 FEB. T. 1939

## New Jersey Court of Errors and Appeals

Between

Howard Trafton as Substitutive Administrator with the will annexed of the last will and testament of Emma J. Dunkerley,

Complainant-Appellant  
and

Emma L. Bainbridge and The Hamilton Trust Company of Paterson, New Jersey,  
Defendants-Respondents.

On Bill, Etc.  
On Appeal From  
Court of  
Chancery.

### Brief for Defendants-Respondents

The notice of motion for an order striking from the files the bill of complaint cited the following reason:

"That under the "THIRD" clause of the will of Emma J. Dunkerley, deceased, her husband, William George Dunkerley, now deceased, took an estate in fee and became the absolute owner of said residuary estate, and the subsequent limitation over contained in the "FOURTH" clause of said will is void as inconsistent with the right of said William George Dunkerley; and, also because a fee cannot be limited after a fee.

The decision rested entirely upon the construction of the third and fourth clauses of the will of Emma J. Dunkerley, deceased. They read as follows:

“Third. All the rest, residue and remainder of my estate, real and personal of whatsoever nature and wheresoever situate, I give, devise and bequeath to my husband, William George Dunkerley, for his sole use and benefit during his life with full right and power to sell, transfer and convey, the same and use the whole or any part of said estate, principal or interest, or the proceeds for his own use and benefit, in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute.

Fourth: At the decease of my said husband, I then give, devise and bequeath so much of said estate and property as shall remain, one-third thereof to my nephew Howard Trafton, one-third to my nephew Clifford Trafton, and one-third thereof to the children of my nephew Clifford Trafton; in case of the death of either nephew, his share to go to his children if any, or if none, to the other nephew or his children; in case of the death of the children of Clifford Trafton their share to be given to the said Clifford Trafton or if he be dead, then to Howard Trafton or his children.”

It is submitted by the defendants-respondents that WILLIAM GEORGE DUNKERLEY took an estate in fee and became the absolute owner of the residuary estate; and that the subsequent limitation over contained in the fourth clause is void.

This question has been passed upon in many cases. As early as 1886, Chancellor Runyon wrote the opinion in *Naundorf v. Schumann*, 41 N. J. Eq.

14. The will in this case reads as follows:

“FIRST: My will and desire is that all my property both real and personal shall be for the sole use and benefit of my wife, Julianna after my decease, and in the event of her death, then what shall remain to be disposed of in the manner following: \*\*

The Chancellor held that the gift to her was not all the property but only the use and benefit of it and held that the widow had merely a life estate with remainder absolute to others. He said:

“The will gives to the widow no power, express or implied to dispose of the property or any part of it in any way.”

He further said:

“The testator indeed uses the qualifying words ‘what shall remain’ but he probably used them in view of the fact that some of the personal property was of a consumable character.”

It would appear from this decision that the contention of the defendants-respondents herein is not well taken; but, the same will came before the Court of Chancery again in 1889, in *Rodenfels v. Schumann*, 45 N. J. Eq. 383 and Chancellor McGill held that the widow took the testator’s estate in fee.

These two opinions, construing the same will, apparently express opposing views. Because of these opposing views of two such eminent Chancellors, Vice Chancellor Berry in the case of *Briggs v. Faulkner, et al.*, 120 N. J. Eq. 1, 183 A. 712, reviewed the authorities with great care and fol-

lowed the decision of Chancellor McGill, which is the construction sought by the defendants-respondents, in this cause. Among other things he said:

“Testamentary gift, absolute in form or indeterminate as to quantity of estate given, coupled with uncontrolled power of disposition, express or implied, imports estate in fee, and gift over is void as inconsistent with rights of first legatee.

Where one paragraph of will gave daughter residuary estate and following paragraph made gift over of ‘what remains at my daughter’s decease,’ daughter took fee and gift over was void, since words, ‘what remains’ implied uncontrolled power of disposition in daughter.

It is an old legal principle that a fee cannot be limited over after a fee (*Tooker v. Tooker*, 71 N. J. Eq. 513, 64 A. 806-807) and ‘it is a fixed rule of construction in this state as to testamentary gifts either absolute in form or in form indeterminate as to quantity of the estate given, that, if testator either expressly or by implication, manifests an intent to invest in the first devisee or legatee the uncontrolled power of such disposition of the property, such power embraces the quality of absolute ownership, and a subsequent limitation over is void, as inconsistent with the right of the first devisee or legatee. The manifestation of that intent may appear in the gift over as well as elsewhere” (*Kleaver v. Jacobs*, 104 N. J. Eq. 406, 146 A. 55). There is a long line of cases to the same effect, among

which may be cited, *Annin's Executors v. VanDoren's Administrator*, 14 N. J. Eq. 135; *Downey v. Borden*, 36 N. J. L. 460; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 A. 269, 270; *Wilson v. Wilson*, 46 N. J. Eq. 321; 19 A. 132, 133; *Bryan v. Bryan*, 61 N. J. Eq. 45, 48 A. 341; *Tuerk v. Schueler*, 71 N. J. L. 331; 60 A. 357; *McCloskey v. Thorpe*, 74 N. J. Eq. 413, 69 A. 973, 974; *Hyde v. Hyde*, 88 N. J. Eq. 358, 102 A. 830; *Weaver v. Patterson*, 92 N. J. Eq. 170, 111 A. 506; *Brohm v. Berner*, 95 N. J. L. 85, 77 A. 517; *Gaston v. Ford*, 99 N. J. Eq. 592, 133 A. 531; *Fithian v. Fithian*, 109 N. J. Eq. 383, 157 A. 563 *Morrison v. Dawson*, 115 N. J. Eq. 45, 169 A. 694.

The cases rest upon the principle that the uncontrolled power of disposition in the first taker necessarily implies absolute ownership and that the limitation over is void as totally inconsistent with the rights of the first legatee. *McCloskey v. Thorpe*, *supra*.

In the will now under consideration there is no express power of disposition given to the complainant unless it be contained in the words "And I invest her with full power to sell and dispose of any and all real estate owned by me" contained in the paragraph designated "lastly" above recited. In view of the conclusion I have reached, the extent of the power of disposition thus conferred need not be now determined. It is mentioned only because counsel for the complainant, in his brief, stresses this language, but it should be noted that the power only relates to real estate. I have

reached the conclusion that the words "what remains at my daughter's decease" import a power of disposition in the first beneficiary, the complainant, but only after a thorough consideration of the cases and the many decisions of our courts touching the point involved, including those cited above, and including also *Naundorf v. Schumann*, 41 N. J. Eq. 14, 2 A. 609; and *Rodenfelds v. Schumann*, 45 N. J. Eq. 383, 17 A. 688, in both of which cases the same will was considered and in which apparently opposite conclusions were reached. In view of the many subsequent decisions of our courts, both of law and equity, touching like controversies, and the variant comment of judges anent the apparently opposing views of the two eminent Chancellors who decided the Schumann cases, it would be idle to now speculate upon the reasons or the reasoning upon which those contrary decisions were based. The law is now firmly established.

A comparison of the words "what remains at my daughter's decease," as contained in the instant will, with the language involved in other wills, considered in the cited cases, and in which the first legatee or devisee has been held to have an absolute estate, confirms me in my conclusion that the complainant has an absolute fee here. For the purpose of such comparison, the language involved in the cited cases is quoted and tabulated as follows:

"Such part thereof as remains unexpended." *Annin's Executors v. VanDoren's Executors*.

"That may remain at the time of her death." *Downey v. Borden*.

"So much of it as remains the property of my wife on her death." *McClellan v. Larchar*.

"Whatever it may be, at the decease of my said daughter." *Wilson v. Wilson*.

"What is left at her death." *Tuerk v. Schueler*.

"If there should be anything left." *McCloskey v. Thorpe*.

"So much as shall remain at her death." *Hyde v. Hyde*.

"As much as shall remain." *Weaver v. Patterson*.

"The balance." *Brohm v. Berner*.

"Whatever \* \* \* shall remain in her hands undisposed of." *Gaston v. Ford*.

"If any of my real estate shall remain unexpended." *Kleaver v. Jacobs*.

"Out of the balance of said property remaining at the death of my said wife." *Morrison v. Dawson*.

"What shall remain." *Rodenfels v. Schumann*.

The same rule was followed in *Brown v. Turpan*, 122 N. J. Eq. 305, 194 A. 63, as follows:

"Where testator devised all his property to his wife, to have and to hold, absolutely and forever, and in a subsequent clause expressed a wish that if any of his estate

remained in his wife's hands at her decease, that she divide it equally between certain named individuals, devise to wife was absolute and no trust was created for named individuals."

The same rule was again followed in *Klotz v. Klotz*, 122 N. J. Eq. 191 A. 854 as follows:

"Under will bequeathing all testator's property real and personal to his wife and after her death 'residue' to testator's son, wife took fee, and gift over to son was void; the word 'residue' being equivalent to the term 'what remains' implying uncontrolled power of disposition in wife.

Testamentary gift which is absolute in form or indeterminate as to quantity of estate given, coupled with uncontrolled power of disposition, express or implied, imports estate in fee and gift over is void, as inconsistent with rights of first legatee, except where testator gives estate for life only by certain and express words and annexed thereto power of disposal in which case, devisee for life will not take estate in fee."

Vice Chancellor Pitney discussed the cases of *Naundorf v. Schumann*, and *Rodenfels v. Schumann*, above cited in *Bryan v. Bryan*, 61 N. J. Eq. 45, and points out

"that the widow had no power in the *Schumann* cases express or implied to dispose of the property or any part of it. The

words 'what shall remain' was used in view of the fact that some of the personal property was of a consumable character.' Vice Chancellor Pitney then calls attention to the language used by Chancellor McGill in construing the same will as follows: 'In the absence of the words 'what shall remain', the direction for the disposition of the estate at the death of the wife, by implication, determines that the estate to her was for life. But upon the authority of *Downey v. Borden*, 7 Vr. 460, if the words 'what shall remain' in the connection in which they were used, create a power of disposition in the widow, the bequest over is void, and she took a fee. The question then is narrowed to this, 'Did they create such a power?' I cannot resist the conclusion that they did. In making provision for his wife, the testator made use of most liberal terms. All his property, real and personal, was to be for her sole use and benefit. That use and benefit was unrestricted and uncontrolled. It was not limited to consumption of income, or to mere physical enjoyment. It was to be something more than mere usufruct, for it was not to survive the use intact. It was contemplated that some part of it was to be consumed in the wife's use and benefit. The remainder alone was thereafter to be dealt with. I think that a broader meaning should be given to the words 'what shall remain' than to say they refer merely to personal chattels consumable by use. To my mind, they plainly imply a power of alienation in the widow.

This being so, she took a fee in her husband's property and that fee passed to the complainant Mrs. Rodenfels by her deed."

In this case of *Bryan v. Bryan*, there is an estate for life without express power of distribution, with a devise over of the remainder that might be left and Vice Chancellor Pitney held that the conveyances by the widow were effective to pass the title, not because she took a fee as in *Rodenfels v. Schumann*, but as the proper exercise of a power entrusted to her by the testator."

There is a line of cases which might appear to conflict with the established rule above pointed out; the leading case appearing to be *Downey v. Borden*, 36 L. 460, but it will be perceived that in the case under consideration, the third paragraph of the will provides, 'the intention hereof being that he shall at all times use and enjoy the whole or any part of my estate, the same as if this devise and bequest was absolute.'

Neither in the *Downey* case, nor in any case following, did the will use this language. We must try to find the predominant idea in the testatrix's mind and follow her wishes as against all doubts and conflicting provisions which might of themselves defeat it. This rule has been expressed in countless authorities and it is hardly necessary to cite the case of *Second National Bank v. Borden*, 113 N. J. Eq. 378-380 where the familiar rule is laid down:

"The primary rule of testamentary construction as expressed in countless authorities is that the plain intent of the testator

is disclosed by the language of his will, unless contrary to law, must govern. That intention is to be gathered from a reading of the entire will and not from isolated portions thereof. *Supp. v. Second National Bank and Trust Company*, 98 N. J. Eq. 242; *Kutschinski v. Sheffer*, 109 N. J. Eq. 659, 2 Schoul Wills (6th Ed.) 967, 977. The court must do everything in its power to ascertain the testator's intentions and to see that they are carried out, if possible. *Johnson v. Bowen*, 85 N. J. Eq. 76. The predominant idea of the testator's mind, if apparent, is heeded as against all doubts and conflicting provisions which might of themselves defeat it. 2 Schoul Wills, 973."

The provision of the will in question says 'the **intention** is that William George Dunkerley shall have the estate as if the devise was absolute.' We need not look for her intention; she tells us what it is. The testatrix's predominant and final idea made the devise an absolute gift.

## II.

The subject discussed in this part of the complainant-appellant's brief is also discussed by the defendant-respondent in the brief filed on the cross-appeal. It is said under this part that the costs and counsel fees are sought to be charged against the complainant's personal estate instead of out of the assets of the estate. This is not the fact as we see the situation. The assets held by the complainant-appellant are also involved in this litigation. In fact, under the opinion in the Court

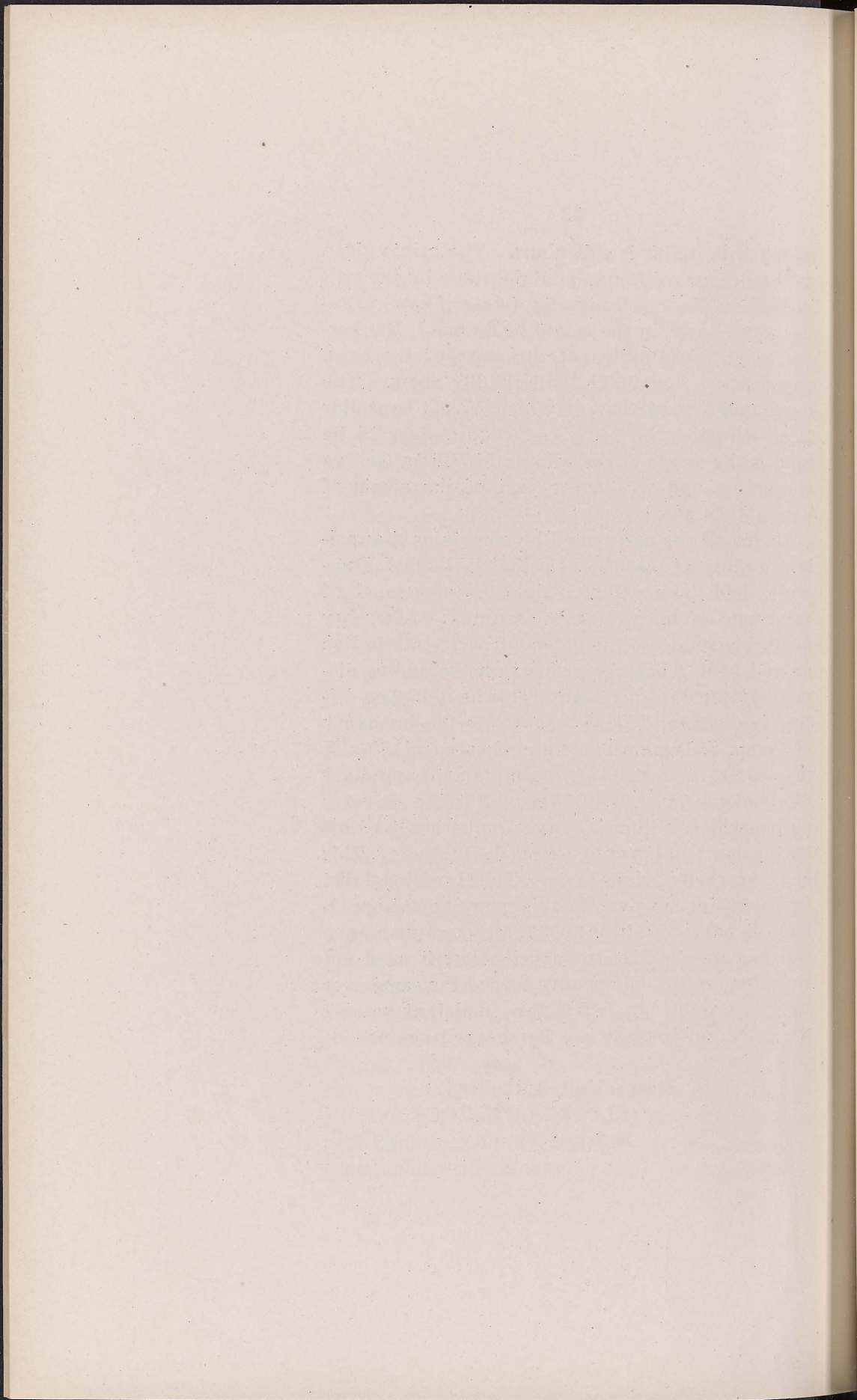
below, those assets now held by the complainant-appellant, rightfully belong to the defendant, Emma L. Bainbridge. In our brief on the cross-appeal this is fully discussed. The complainant-appellant was not successful in his attack and such costs and counsel fees should not be charged against the successful party. The bill was not filed to construe the will although it became necessary to do so to decide the issue. It is maintained that the Hamilton Trust Company did properly administer the affairs of William George Dunkerley. His will is very short and explicit and needed no action for construction. It delivered to the complainant about \$9000. in assets which, according to the Vice Chancellor's opinion, should have been delivered to the defendant, Emma L. Bainbridge.

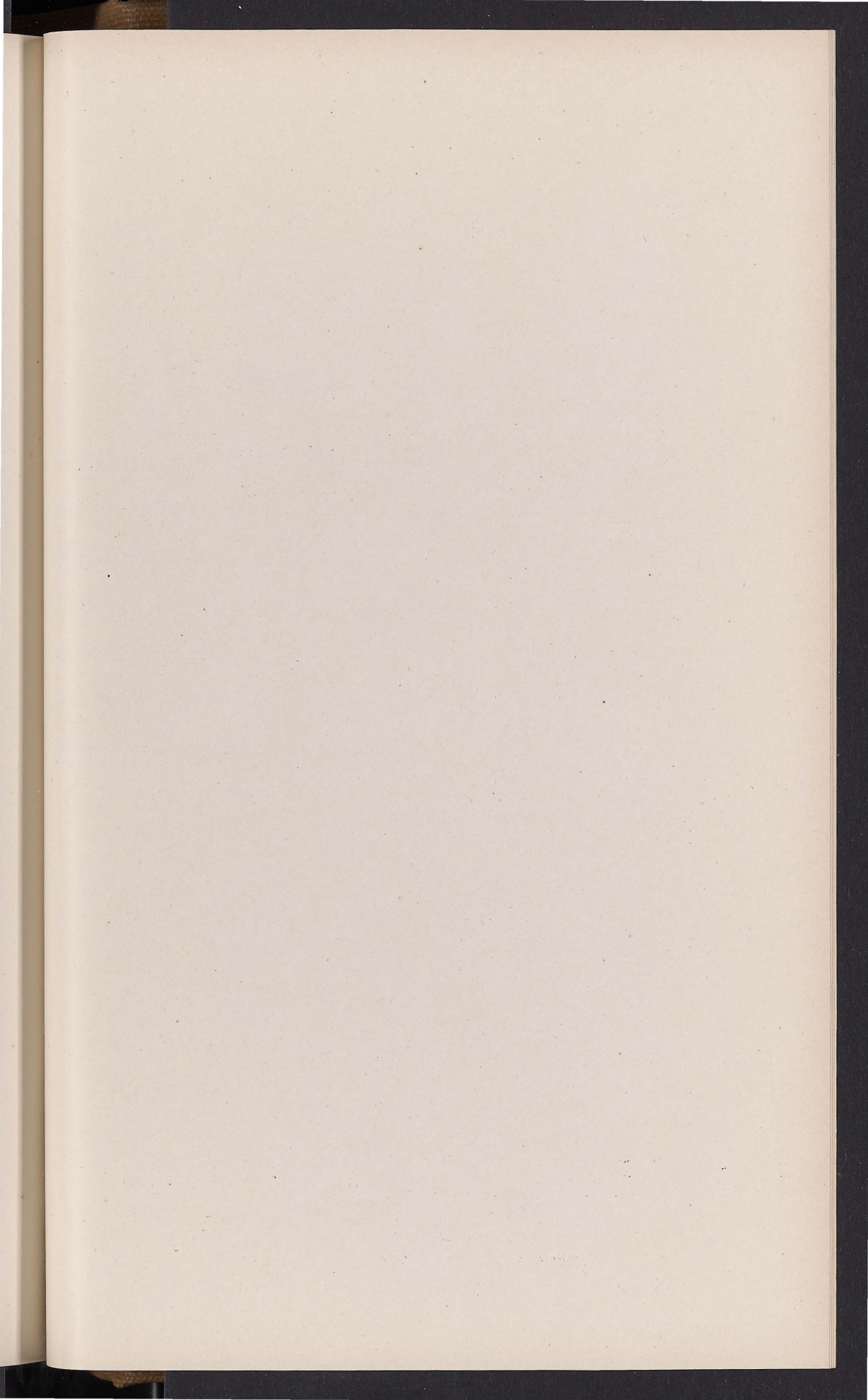
The complainant-appellant also maintains that the costs and counsel fees should be charged against the "estate" and cites several authorities for that proposition. There is no doubt that under a bill to construe a will costs and counsel fees, if any reasonable ground to bring the action existed, are charged against the estate. We maintain that, if costs and counsel fees are charged against the assets in the hands of the complainant-appellant, they are charged against the 'estate' because those assets were part of the estate of Emma J. Dunkerley and it is her will that is being construed. Examination of the inventory of the estate of William George Dunkerley (state of case, p. 22-25) shows that none of the assets are listed in the estate of Emma J. Dunkerley (state of case, p. 20-21). How can it be said that the estate of William George Dunkerley should pay the costs of construing the will of Emma J. Dunkerley? It is like saying that your estate should pay for the construction

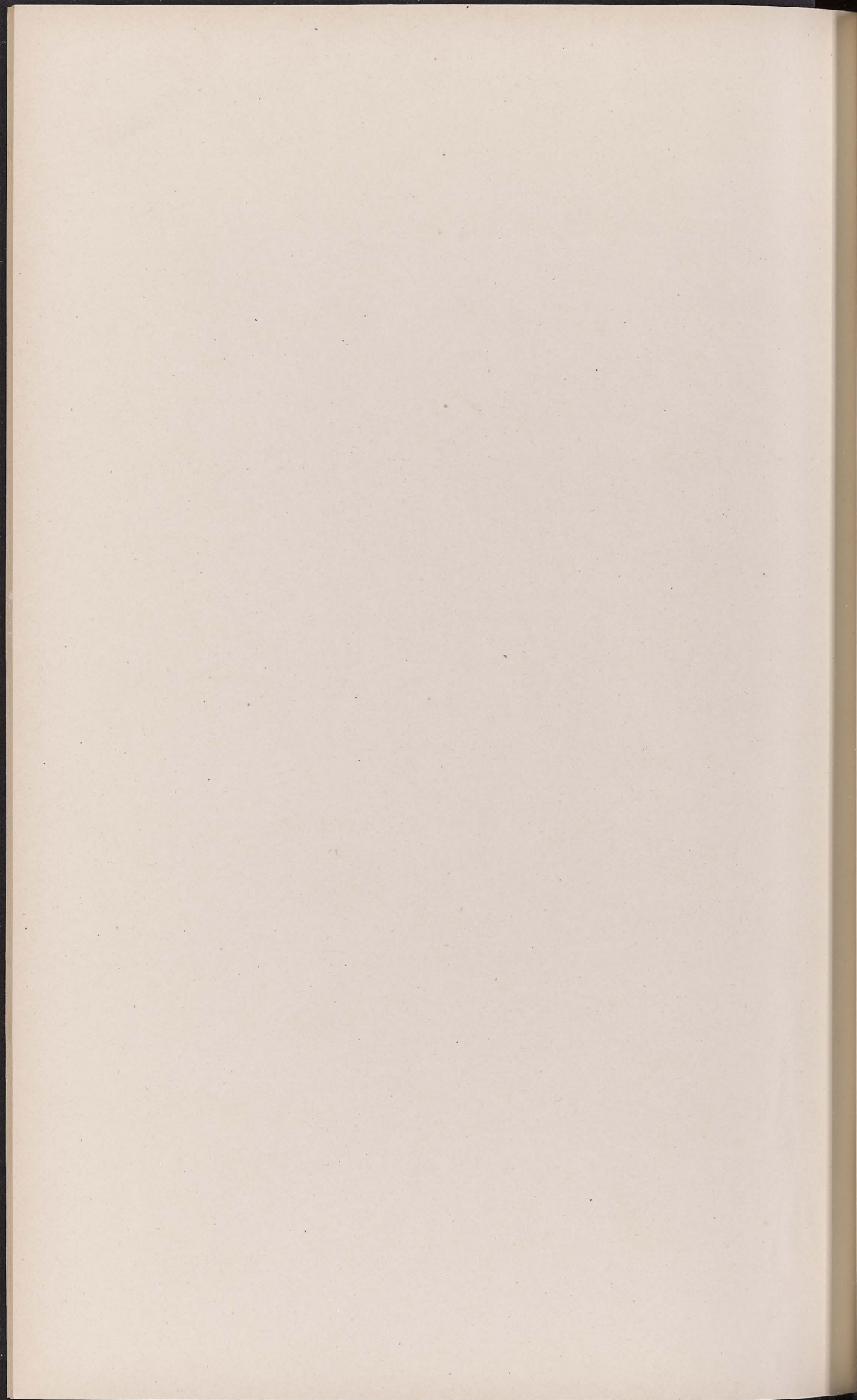
of my will. This is ridiculous. The assets given to the defendant Emma L. Bainbridge by the will of William George Dunkerley (state of case, p. 25-28) were never in the estate of Emma J. Dunkerley as an examination of the state of the case, pages 20-21 and 25-28, will readily show. The 'impounded fund' out of which Vice Chancellor Egan directed the costs and counsel fees to be paid is the assets of the estate of William George Dunkerley and was never part of the assets of Emma J. Dunkerley.

Under all the cases cited by complainant-appellant it must, at least be held that William J. Dunkerley had the undisputed right to use as much of the estate of his wife as he wanted. After her death he could use the assets of her estate to live on and keep whatever property he owned to dispose of by will at his death. This he did. The difference between \$28,514. shown in the inventory of Emma J. Dunkerley (state of case, p. 18) and the \$9,937. received by complainant-appellant (state of case, p. 4, l. 30) was used in the six years during which William George Dunkerley lived after the death of his wife, Emma J. Dunkerley. This he had a perfect right to do. The Hamilton Trust Company turned over to this complainant-appellant the balance left of \$9937. although under the will as construed by the court below it need not have done so but might have turned the same over to Mrs. Bainbridge. It is this fund that we ask the costs and counsel fees be charged against.

Respectfully submitted,  
ALBERT COMSTOCK,  
Solicitor for and of counsel with  
defendants-respondents.







## INDEX

Order Extending Time to Take Appeal .....	1
Service of Preceding .....	2
Stipulation .....	3
Notice of Appeal .....	5
Service of Preceding .....	6
Petition of Appeal .....	7
Service of Preceding .....	8

New Jersey State Library

1894

**ORDER EXTENDING TIME TO TAKE APPEAL**

(Filed January 13, 1939)

IN CHANCERY OF NEW JERSEY

122-180

Between

Howard Trafton, as substit-  
utionary Administrator  
with the will annexed of the  
Last Will and Testament of  
Emma J. Dunkerley,  
Complainant,  
and  
Emma L. Bainbridge, et. al.  
Defendants.

On Petition 10  
Order Extending  
Time to Take  
Appeal

This matter being opened to the court by Albert Comstock, solicitor of the defendant, Emma L. 20  
Bainbridge, and it appearing that a petition has  
been filed herein by the said defendant, Emma L.  
Bainbridge, alleging that she is aggrieved by so  
much of a certain decree made in this cause on  
the 30th day of September, 1938, as directs the  
payment of counsel fees out of properly declared  
to be hers, and that she intended and desired to  
appeal therefrom, but by reason of her illness was  
unable to do so within the time limited therefor by  
law; and the court having read the petition and 30  
the affidavit thereto annexed, and having con-  
sidered the matter, and being satisfied that the  
time within which the defendant Emma L. Bain-  
bridge may take her appeal from the aforesaid  
decree should be extended and that not more  
than thirty days have elapsed after the time limit-

*Order Extending Time to Take Appeal*

ed by law for taking an appeal from said decree;

It is on this 11th day of January, 1939, Ordered that the time within which defendant Emma L. Bainbridge may take her appeal from the aforesaid decree be extended to the 18th day of January, 1939.

Respectfully advised,

10

Luther A. Campbell,  
C.

Charles M. Egan,  
V.C.

Service of the within Order is hereby acknowledged this 11th day of January, 1939.

Hannoch & Lasser,  
Solicitors of Complainant.

20

30

## STIPULATION

(Filed January 21, 1939)

IN CHANCERY OF NEW JERSEY

122-180

Between

Howard Trafton, as substit-  
 u t i o n a r y Administrator  
 with the will annexed of the  
 Last Will and Testament of  
 Emma J. Dunkerley,  
 Complainant,  
 and  
 Emma L. Bainbridge, et. al.

10

Defendants.  
 On Bill Etc.  
 Stipulation

Whereas, the above named complainant has  
 taken an appeal from the final decree entered in 20  
 the above entitled matter on September 30, 1938,  
 and has made the deposit of \$100. with the Clerk  
 in Chancery to answer the costs of the appeal and  
 has had the state of the case printed; and

Whereas, the above named defendant, Emma L.  
 Bainbridge has taken an appeal, in the nature of  
 a cross-appeal from the same decree:

Now Therefore, it is hereby stipulated and  
 agreed that the state of the case prepared by the  
 above named complainant may be used as the 30  
 state of the case upon the said defendant's appeal,  
 and as far as the parties hereto are concerned a  
 further deposit of \$100. contemplated by Rule 21

*Stipulation*

of the Court of Errors and Appeals, may be dispensed with.

Dated: January 11, 1939.

Hannock & Lasser,  
Solicitor of Complainant.  
Albert Comstock,  
Solicitor of Defendant.

10

20

30

## NOTICE OF APPEAL

(Filed January 13, 1939)

IN CHANCERY OF NEW JERSEY

122-180

Between

Howard Trafton, as substit-  
u t i o n a r y Administrator  
with the will annexed of the  
Last Will and Testament of  
Emma J. Dunkerley,

Complainant,

and

Emma L. Bainbridge and  
The Hamilton Trust Com-  
pany of Paterson, New Jer-  
sey,

Defendants.

10

On Bill, Etc.  
Notice of  
Appeal

20

The Defendant, Emma L. Bainbridge, hereby  
appeals to the Court of Errors and Appeals in the  
last resort in all causes, from so much of the final  
decree made on September 30th, 1938, by the  
Chancellor on the advice of the Honorable Charles  
M. Egan, as Vice Chancellor, in the above entitled  
cause, as orders, adjudges and decrees that a 30  
counsel fee of \$300. be allowed to the complain-  
ant and a counsel fee of \$1200. be allowed to the  
defendants together with their costs of this suit  
to be paid by the defendant, Emma L. Bainbridge  
out of the assets directed to be impounded by said  
decree.

*Notice of Appeal*

Dated: January 11th, 1939.

Albert Comstock,

Solicitor for and of counsel with defendant.

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

Albert Comstock,

Of counsel with defendant.

10 Service of the within Notice is hereby acknowledged this 11th day of January, 1939.

Hannoch & Lasser,

Solicitors of Complainant.

20

30

**PETITION OF APPEAL**

(Filed January 13, 1939)

**NEW JERSEY COURT OF ERRORS  
AND APPEALS**

Between

Howard Trafton, as substi-  
tutionary Administrator  
with the will annexed of the  
Last Will and Testament of  
Emma J. Dunkerley,  
Complainant-Appellee.  
and  
Emma L. Bainbridge,  
Defendant-Appellant.

10

On Appeal  
from Court  
of Chancery  
Petition  
of Appeal

20

To the Honorable, The Court of Errors and Ap-  
peals in the last resort in all causes:

The petition of Emma L. Bainbridge, the ap-  
pellant in the above entitled cause, respectfully  
shows that:

1. Petitioner finds herself aggrieved by a de-  
cree of dismissal and order or restraint pending  
appeal made in the Court of Chancery by his  
Honor, Luther A. Campbell, Chancellor of the  
State of New Jersey, upon the advice of Honor-  
able Charles M. Egan, as Vice Chancellor, bear-  
ing date September 30, 1938, in a certain cause  
wherein said Howard Trafton as substitutionary  
administrator with the will annexed of the last

30

*Petition of Appeal*

will and testament of Emma J. Dunkerley, was complainant, and the said Emma L. Bainbridge, and The Hamilton Trust Company of Paterson, New Jersey, were defendants, in this respect, viz: That the said decree adjudges that:

(A) Further Ordered that a counsel fee of Three Hundred Dollars be allowed to the complainant and a counsel fee of Twelve Hundred Dollars be allowed to the defendants together with their costs of this suit, to be paid by the defendant, Emma L. Bainbridge, out of the assets directed to be impounded by this decree.

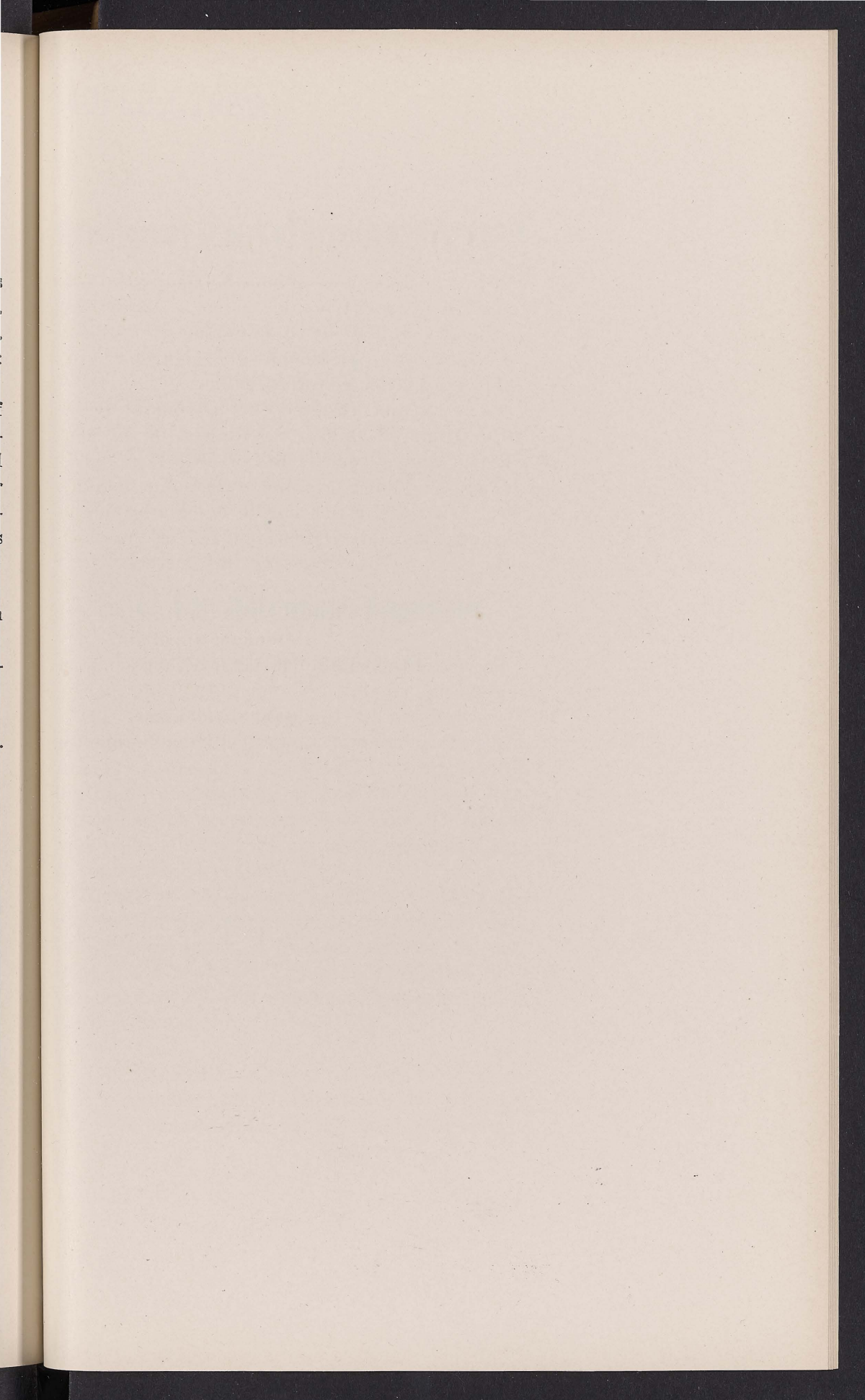
Albert Comstock,  
Solicitor for and of counsel with  
Defendant-appellant.

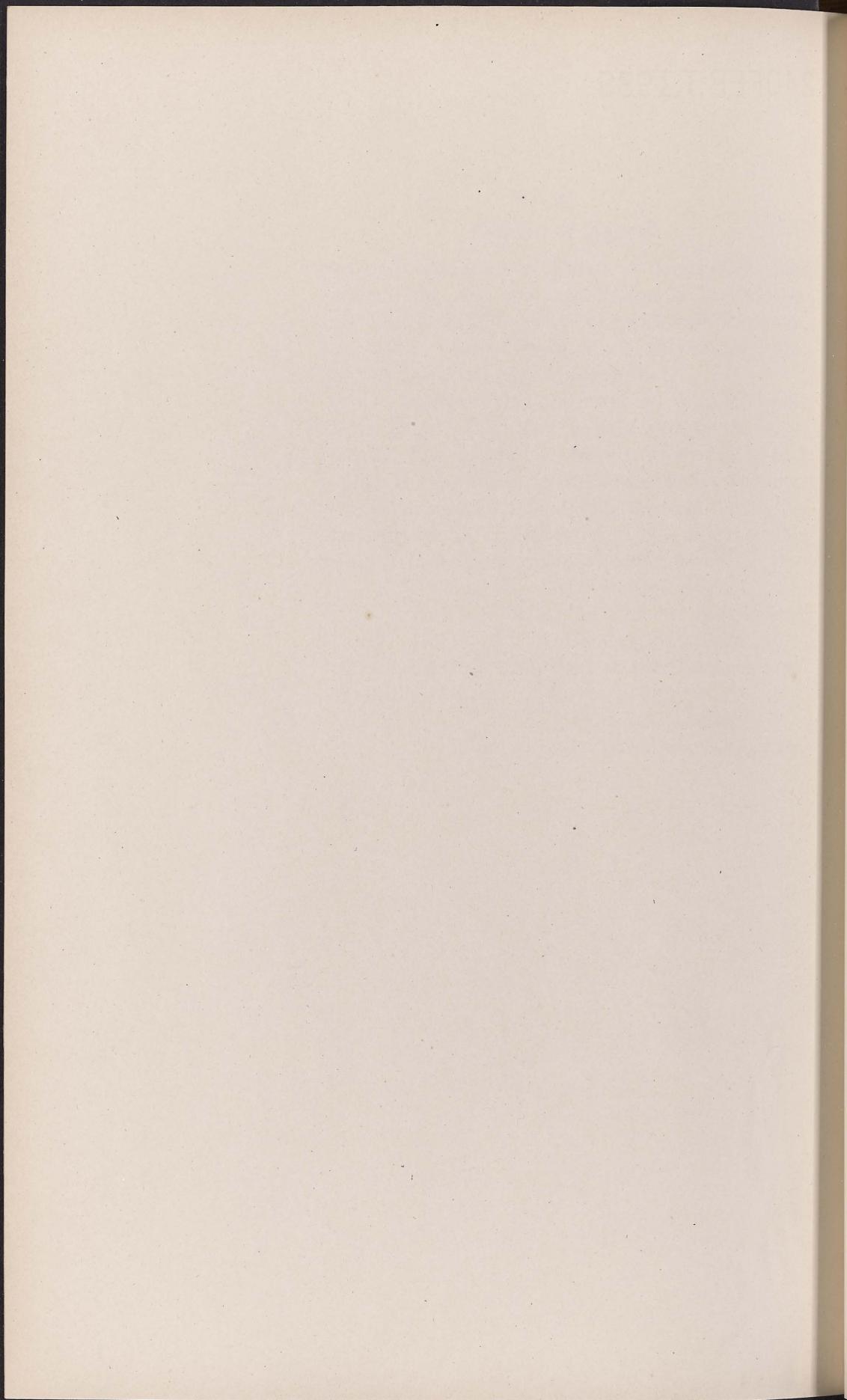
Service of the within Petition is hereby acknowledged this 11th day of January, 1939.

20

Hannoch & Lasser,  
Solicitors of Complainant-Appellee.

30





240 FEB. T. 1939

## New Jersey Court of Errors and Appeals

Between

Howard Trafton, as substit-  
u t i o n a r y Administrator  
with the will annexed of the  
Last Will and Testament of  
Emma J. Dunkerley,  
Complainant-Appellee.  
and  
Emma L. Bainbridge,  
Defendant-Appellant.

### Brief For Defendant-Appellant

#### STATEMENT OF THE CASE

The complainant-appellee, as substitutionary administrator with the will annexed of Emma J. Dunkerley, deceased, filed his bill of complaint in the Court of Chancery seeking to recover from the defendants certain securities which he alleged were rightfully the property of the estate of Emma J. Dunkerley, deceased.

Though it was not an action to construe the will, yet for the purpose of determining his right to any such action, it became necessary to construe the will of said Emma J. Dunkerley. The paragraph of the will which required construction reads as follows:

“THIRD: All the rest, residue and remainder of my estate, real and personal, of whatsoever nature and wheresoever

situate, I give, devise and bequeath to my husband, William George Dunkerley, for his sole use and benefit during his life with full power to sell, transfer and convey the same and use the whole or any part of said estate, principal or interest, or the proceeds for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute."

This defendant-appellant conceived that such paragraph of the will barred any recovery by the complainant-appellee, and therefore served notice to strike out the bill of complaint. This notice is found on pages 45 and 46 of the State of the Case in the appeal of Howard Trafton as substitutionary administrator with the will annexed of Emma J. Dunkerley, complainant-appellant, and Emma L. Bainbridge and The Hamilton Trust Company of Paterson, New Jersey, defendants-respondent. It is necessary at this time to call the Court's attention to the fact that there are two appeals involving the same subject matter, and the appeal in which this brief is filed is in the nature of a cross-appeal by Emma L. Bainbridge against the complainant. By stipulation (Supplemental State of Case on Cross-appeal, p. 3 ) it has been agreed that the state of the case in the first appeal may be used as the state of the case in this cross-appeal together with a supplemental state of the case on the cross-appeal.

After argument before Vice Chancellor Egan

on the motion to strike out the bill, he construed said paragraph of the will of Emma J. Dunkerley, and held:

"1. Testamentary gift, absolute in form or indeterminate as to quantity of estate given, coupled with uncontrolled power of disposition, express or implied, imports estate in fee and gift over is void as inconsistent with rights of first legatee.

"2. It is a legal principle that a fee cannot be limited over after a fee."

The opinion of Vice Chancellor Egan is found on pages 49 to 56 inclusive of the state of the case on the first appeal, and the decree entered upon said opinion is found on pages 64-66 inclusive of the state of the case on the first appeal.

This decree established the fact that Mrs. Bainbridge is entitled to the fund, now in her possession and which is in the safe deposit box at the Totowa Branch of The Hamilton Trust Company of Paterson, New Jersey (described as 'the impounded fund' because it has been stipulated that it would remain intact until the decision of this case). By this decree she is also entitled to have returned to her by the complainant that fund which she voluntarily turned over to him referred to in paragraph 9 of the bill of complaint (p. 4, line 30, state of case on first appeal) and also referred to as Schedule "D" (page 20-21 state of case on first appeal). In other words, Mrs. Bainbridge was the successful litigant upon every issue involved. Nevertheless, the Vice Chancellor directed that

she should bear the burden of the costs and the payment of the counsel fees awarded. The sole question involved upon this cross-appeal is the propriety of the payment of the costs and counsel fees against the successful defendant, Mrs. Bainbridge, out of the impounded fund.

**IN WHAT THE DECREE IS ALLEGED TO  
BE ERRONEOUS.**

The decree provides:

“Further ordered that a counsel fee of Three Hundred Dollars be allowed to the complainant, and a counsel fee of Twelve Hundred Dollars be allowed to the defendants, together with their costs of this suit, to be paid by the defendant, Emma L. Bainbridge, out of the assets directed to be impounded by this decree.” (p. 65, line 21, state of case on first appeal).

It will be recalled that these impounded assets under the decree aforesaid, and prior to the entry of the decree, are and were the sole property of the defendant Mrs. Bainbridge, and we believe the Vice Chancellor was in error in awarding these counsel fees and costs out of this fund and maintain on the other hand that the award of counsel fees and costs should have been directed to have been paid out of the fund mentioned in paragraph 9 of the bill of complaint and known as Schedule ‘D’ annexed thereto (p. 4, l. 30 and p. 20-21 state of case on first appeal). As I mentioned above, this fund, described in paragraph 9

of the bill, under the decree aforesaid is also rightfully the property of Mrs. Bainbridge but we made no objection to the payment of costs and counsel fees out of that fund.

The only question, therefore, is: Under the circumstances of this case, shall the successful litigant be obliged to pay these fees and costs out of her impounded funds? We maintain that such costs and counsel fees should have been awarded against the unsuccessful litigant and directed to be paid out of the fund which has been turned over to him as described in paragraph 9 of the bill of complaint, and of which he now has possession.

### THE ARGUMENT

The statutes in relation to fees and costs are found in Revised Statutes of 1937, Title 2, Article 17 and are as follows:

“2:29-129. Costs in discretion of court. Except as otherwise provided by law, it shall be in the discretion of the court of chancery to award costs or not.”

“2:29-131. Allowance of counsel fees; direction for payment. In any cause, matter or proceeding in the court of chancery, the chancellor may make such allowances by way of counsel fee to the party obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowances; or, where such allowances are

ordered to be paid out of property funds, shall specify and direct the property or funds liable therefor.

The chancellor may provide for the inclusion of such allowances in the taxable costs, or may provide for their collection in such other manner as is agreeable to the practice of the court.

Such allowances shall be in lieu of any allowance for counsel fees provided for by statute.

“2:29-132. Successful party charged with costs and counsel fees. The court of chancery, upon making any order or decree may charge the successful party with costs or a reasonable counsel fee, or both, in any case in which the court shall deem it just to do so.”

Section 131 above quoted was formerly found in 1 Comp. Stat. 1910 p. 445, sec. 91 which was substantially the same as the present enactment. This section was construed in 1913 in *Sparks v. Ross*, 82 N. J. Eq. p. 121, as follows:

1 Comp. Stat. 1910, p. 445, sec. 91, authorizing an allowance for a counsel fee on behalf of the successful litigant in a suit to quiet title to real estate, does not authorize such an allowance to an unsuccessful litigant to such suit, nor is the court authorized to make such an award independent of the act, though the claim of title urged by the respective parties to the suit was

through or under the will of the deceased person; not involving the administration of a trust or the estate of such person.”

In 1915 an act was passed identical with section 132 above quoted. After the passage of this act of 1915 this court in the case of Commonwealth Title Insurance and Trust Company v. New Jersey Lime Company, 86 N. J. Eq. 460, affirmed Vice Chancellor Howell, who said:

“As I read the statute relating to counsel fees, (P. L. 1910, p. 427) this court is authorized to make allowances by way of counsel fee to successful litigants only, and it was so held by Vice Chancellor Leaming in Sparks v. Ross, 82 N. J. Eq. 121.”

It would appear from the above statutes that the allowance of counsel fees and costs is in the discretion of the chancellor to be exercised on equitable principles. I can conceive no reason, in applying equitable principles, why the successful litigant herein should be charged with the counsel fees and costs. This court in the case of Brittin v. Blake, 36 N. J. L. 442, said:

“The spirit of the maxim, “Victus victori in expensis condemnandus est,” has for many years prevailed in our courts.

In the case under consideration, the bill of complaint formerly would have been met by a demurrer. Under the present practice it was a motion

to strike out which involves the same principles. Therefore, the complainant did not, on the face of his own papers, make out a cause of action. Certainly under such circumstances it is inequitable to charge the successful party with costs and counsel fees. To do so merely puts a premium on unsuccessful litigation.

In *Wade v. Cox*, 115 N. J. Eq. 608, Vice Chancellor Backes held:

“Costs in equity are discretionary. Where an executor for the protection of the estate, in good faith, sues to recover upon a cause of action which accrued to his testator, and prosecutes with propriety, he will not, without more, be charged with the costs if he fails to recover.”

In the case under consideration the bill was not filed by the administrator to recover upon a cause of action which had accrued to his testatrix. This clearly distinguishes it from the *Wade* case. In any event, this successful defendant, did not ask that counsel fees and costs be paid by the complainant as administrator, but requested payment thereof out of the fund which has been awarded to her by said decree. In reality she merely asks that the court make allowance for counsel fees and costs out of the fund in the possession of the complainant, but which has been awarded to her. It is true that the complainant maintains that this fund cannot be acquired by the defendant without a plenary action, nevertheless, as the will was construed by the Vice Chancellor, it clearly indicates that such fund passed by the will to Mrs.

Bainbridge, through the will of William George Dunkerley.

Vice Chancellor Backes also held in the case of *Miller v. Marshall*, 115 B. J. Eq. 545 that an "administratrix is liable for costs on the dismissal of her bill for her fault."

This court in the case of *Cox v. Wills*, 49 N. J. Eq. 573 directed the costs and counsel fees to be paid by the complainants who were executors of the estate of Lydia H. Leeds, deceased. At page 575 this court said:

The costs should be paid out of the money in the hands of these executors and reasonable counsel fees allowed before any account is stated between the parties.

This was a case to construe the will of John Leeds deceased, in which respect it is distinguishable from the case under consideration, which is a suit to recover assets.

### CONCLUSION

It is of course the general rule of the court in awarding costs and counsel fees to direct that these follow the event and are usually given to the successful party. *Carpenter v. Easton and Amboy R. R.* 28 N. J. Eq. 390.

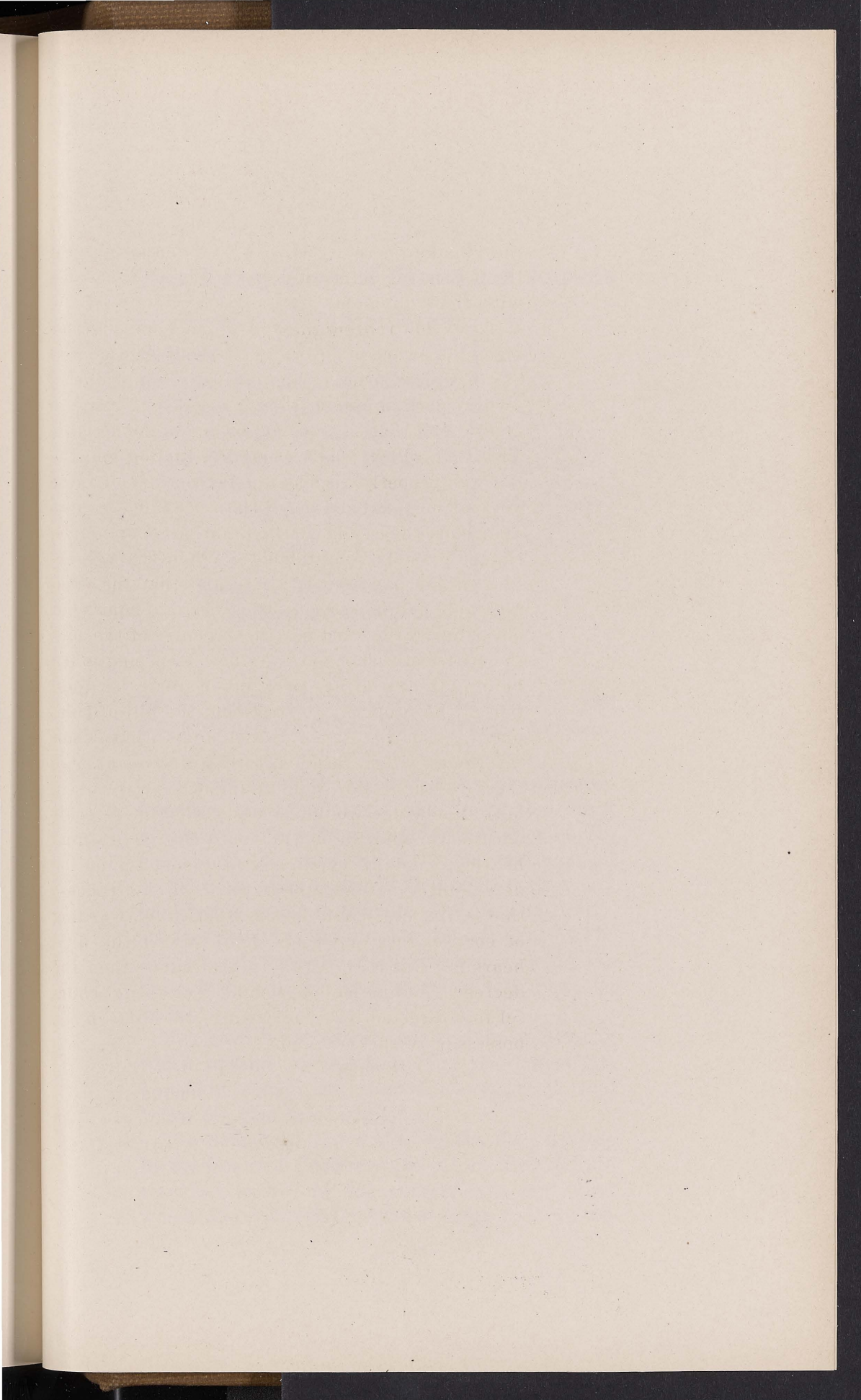
It must also be conceded that costs and counsel fees rested in the discretion of the Vice Chancellor. We do not maintain that the Vice Chancellor abused his discretion in this respect for both complainant and defendant requested counsel fees and costs. The Vice Chancellor very properly allowed them and we are not complaining about

the amount thereof. Our sole contention is that the successful defendant should not be burdened with their payment. It is very evident that the situation confronting the Vice Chancellor when he made the award of costs and counsel fees was this: Suit had been brought against Mrs. Bainbridge to recover certain assets; she was forced to come in and defend that suit, which, by the opinion of the Vice Chancellor, was a groundless action and the bill was properly dismissed. Yet in view of these findings he penalized her with over \$1500. in costs and counsel fees. This Mrs. Bainbridge, of course, cannot possibly comprehend. When she was informed she had won the case and that the complainants had no right to bring her into court, but nevertheless she must pay the expenses of the suit, she was justly shocked. As has been mentioned before, an appeal has been taken upon the question of the propriety to strike out the bill of complaint. If in that appeal, which under the rules of this court will be argued with this cross-appeal, the Vice Chancellor should happen to be reversed, Mrs. Bainbridge would then be called upon to file her answer and the cause would then go to final hearing. It is the opinion of the solicitor of the defendant-appellant under such circumstances; that is, if there should be a reversal, the awarding of counsel fees and costs should await the final hearing. But if there be an affirmance then the decree should be modified and the costs and counsel fees directed to be paid out of the fund in the possession of the complainant.

Respectfully submitted,

Albert Comstock,

Solicitor for and of counsel with  
defendant-appellant.





0FEB.T.1939

## New Jersey Court of Errors and Appeals

Between

HOWARD TRAFTON, as Substitutive Administrator with the will annexed of the Last Will and Testament of Emma J. Dunkerley,

Complainant-Appellee,

*and*

EMMA L. BAINBRIDGE,  
Defendant-Appellant.

On  
Defendant-Appellant's  
Cross-Appeal  
from a Decree  
of the Court of  
Chancery.

### BRIEF FOR COMPLAINANT-APPELLEE ON DEFENDANT-APPELLANT'S CROSS APPEAL.

In Part II of the brief for the complainant-appellee, the complainant has anticipated much of the matter urged by the defendant-appellant in respect to its cross-appeal. The cross-appeal seeks to have the decree of the Court of Chancery modified in order to provide that costs and counsel fees should be paid out of funds alleged to be in the hands of the complainant, instead of by the defendant out of the so-called "impounded assets".

We deem it expedient that certain statements which appear in the brief for the defendant-appellant should not remain unchallenged, and hence file this brief reply.

The defendant states that by the decree made by the Court of Chancery she is "entitled to have returned to her by the complainant that fund which she voluntarily turned over to him, re-

ferred to in paragraph 9 of the Bill of Complaint". This is not true.

The property delivered to the complainant by the executor of William George Dunkerley is not involved in the present litigation. If the defendant claims to be entitled to this fund, or what remains of it, it will be necessary for her to institute a plenary suit for its recovery. Indeed, in the proceedings before the court below, defendant's counsel (in his memorandum to the Vice-Chancellor) said with respect to this fund that it had been "turned over to (complainant) as a complete termination of the estate, and not under complainant's interpretation of the will of Emma J. Dunkerley". It may well be that if the present decree should be affirmed, other reasons will appear why this fund should be retained by the complainant and be distributed as part of the estate of Emma J. Dunkerley.

The defendant imputes that the court below has directed her to pay fees and costs out of her own property, when in truth the effect of the decree is to make such allowances out of the assets of the estate of William George Dunkerley. This, as has been observed in our main brief, was eminently proper, and followed the practice suggested in *Cox v. Wills*, 49 N. J. Eq. 573. *Miller v. Marshall*, 115 N. J. Eq. 545, cited by counsel of the defendant, does not present any different rule, but on the contrary, confirms the existing rule that an executor or administrator is exempt from the payment of costs when the prosecution is "in the right of their testators or intestates". In that case, the "administratrix sought relief in (the Court of Chancery) when she had an adequate remedy in the Orphans' Court", and since she was unsuc-

cessful, because of her erroneous selection of the jurisdiction in which to enforce the cause for action, she was made to suffer "the cost for her own faults". No such condition exists here.

The circumstances to be considered in the review of the action of the court below with respect to counsel fees and costs are these: The complainant's bill was filed for the purpose of carrying out the intent of complainant's testatrix. In the course of the proceedings, assets which were in the possession of the testatrix's life tenant at the time of the life tenant's death were impounded by order of the court. (It is not material that the defendant consented that these assets should be impounded, for it does not appear that in the absence of such consent the court would not have made its order.) Hence, the fund involved in the litigation was in the custody of the court. Other assets, which had come into the custody of the life tenant, <sup>and</sup> had been delivered to the complainant by the life tenant's executor, were not involved in the proceeding.

From these circumstances, the court below first had to decide whether allowances of any kind should be made. It decided to make such allowances. It then had to determine whether the unsuccessful litigant should be paid his costs and counsel fees. It decided that he should, and had ample authority to so determine (*R. S. 2:29-132*). Finally, it had to determine from what source the fees and costs should be paid. It could have charged them against the defendant personally, or have directed that they be paid out of those assets of the estate of William George Dunkerley which had been impounded. It adopted the latter course.

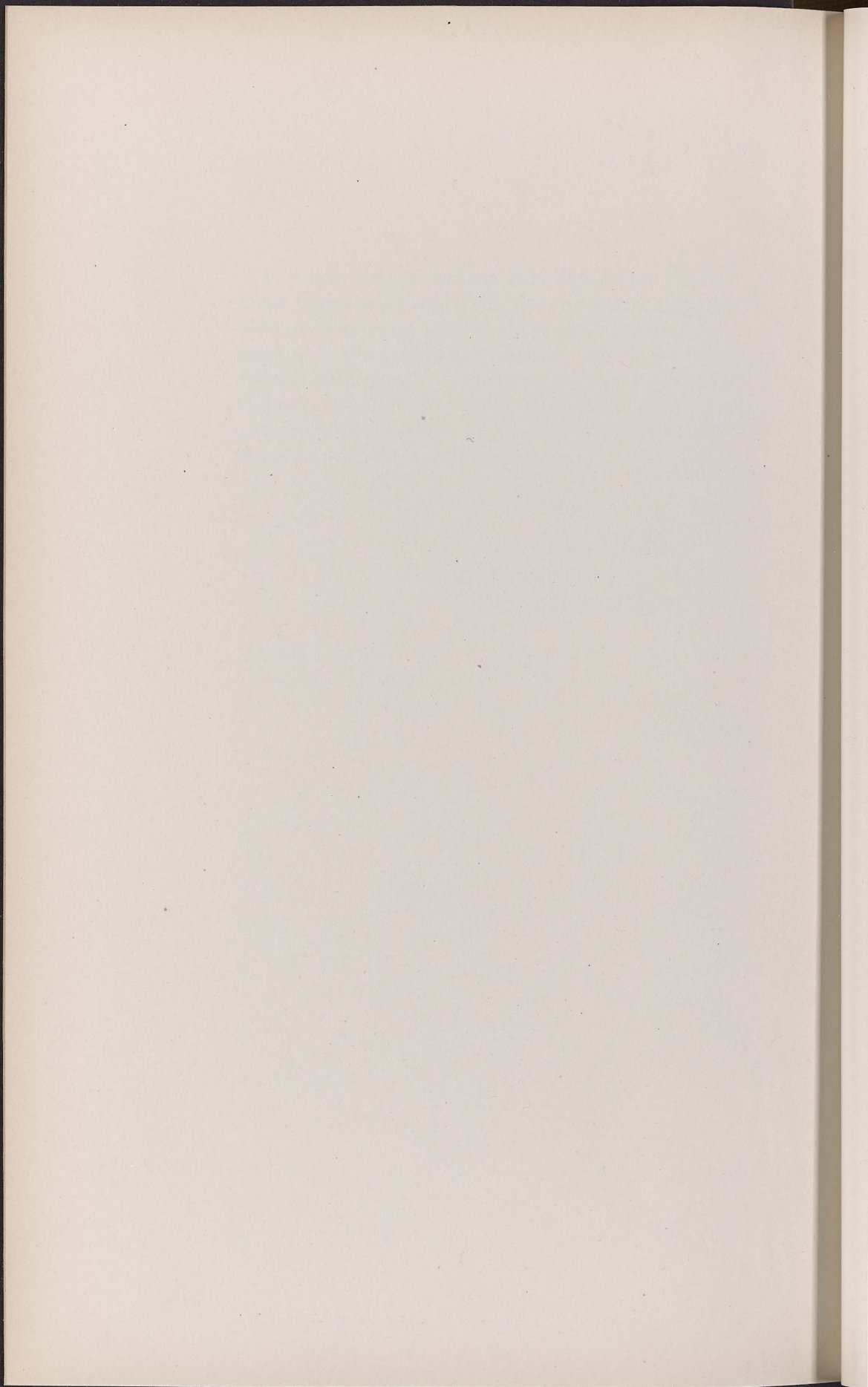
We respectfully submit that the action of the court below with respect to the allowance of counsel fees and costs was in all respects proper (except as to the question of amount, which we have heretofore argued). However, we agree with the defendant that if the decree of dismissal should be reversed, the matter of counsel fees and costs should await the final hearing.

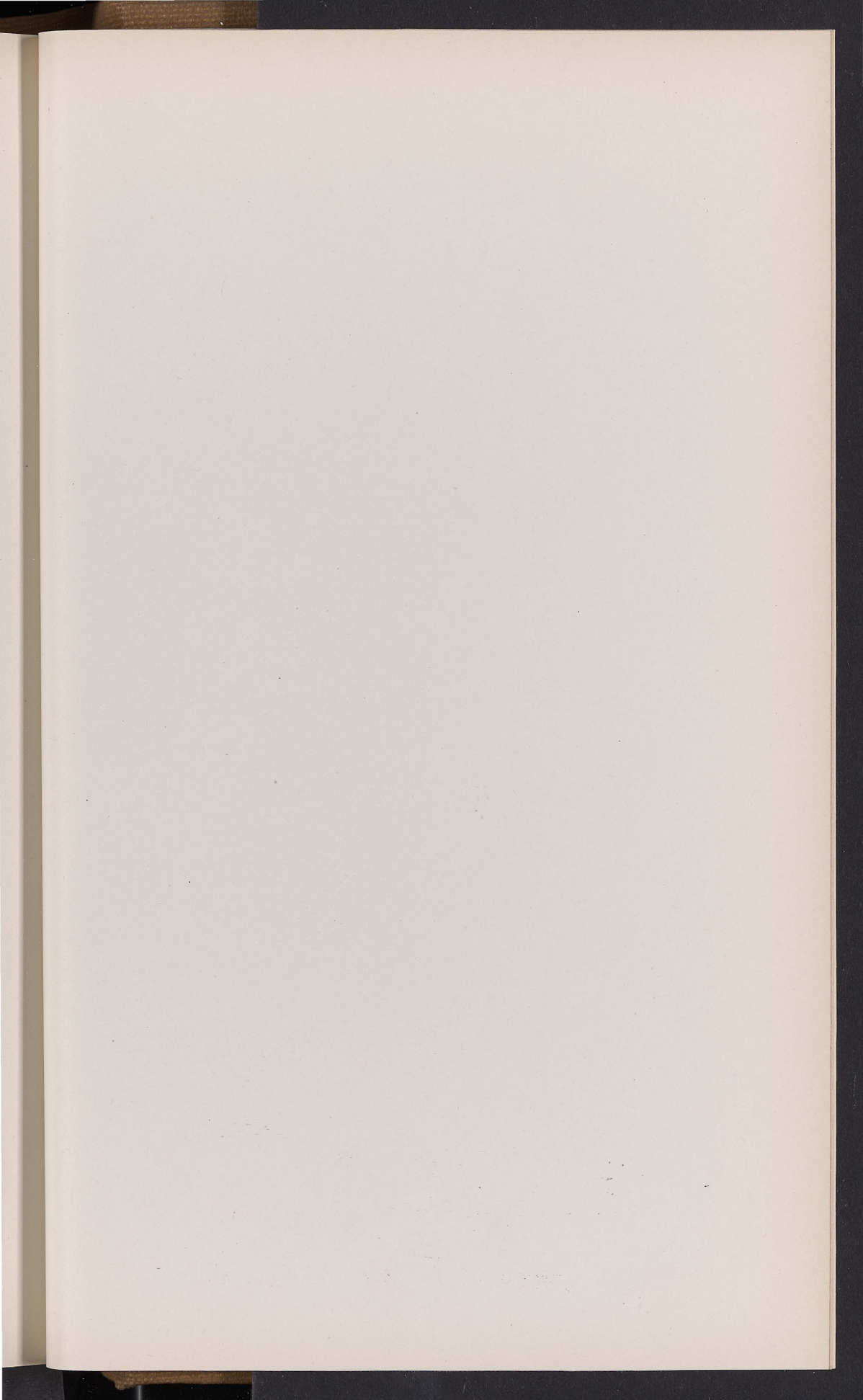
Respectfully submitted,

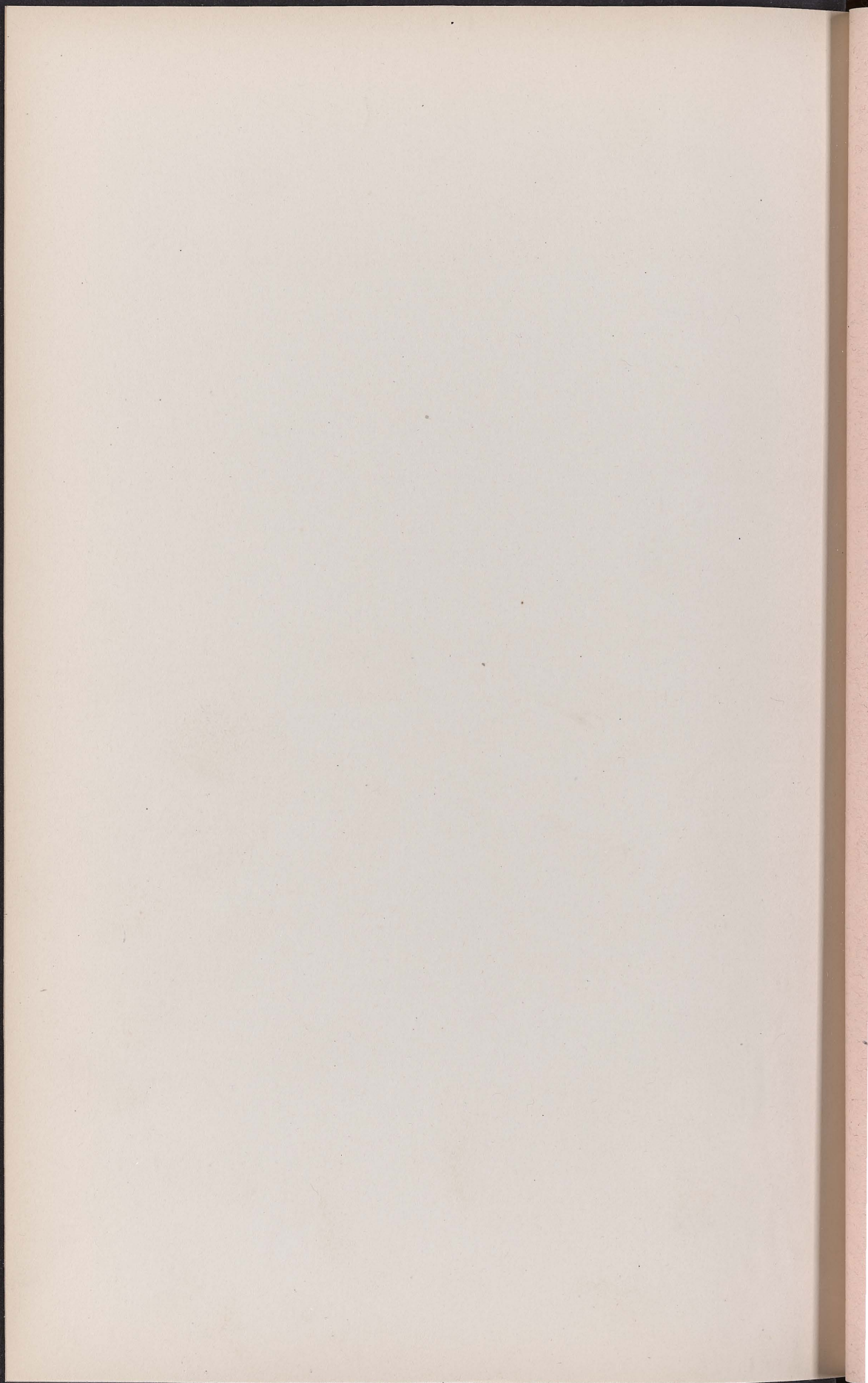
HANNOCH & LASSER,  
Solicitors for and of Counsel  
with Complainant-Appellee.

AARON LASSER,  
WILLIAM S. MYERS,  
Of Counsel.









## INDEX

Amended Bill of Complaint	1
Answer of Defendants	4
Notice of Motion to Strike Answer	13
Affidavit of Florence Bell Winters	15
Answering Affidavit	20
Affidavit of James B. Davidson	20
Affidavit of John W. Davidson	20
Affidavit of Walter R. Davidson	31
Opinion of Vice-Chancellor	36
Order to Strike Portion of Answer with Leave to Amend	38
Notice of Appeal	41
Refusal of Appeal	41

