NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, (Appellant),

Complainant.

AND

ARABELLA WHEATON, (Respondent), and MAY STEELMAN, (Appellant),

Defendants.

} ON BILL FOR INJUNCTION AND RELIEF.

BRIEF FOR APPELLANTS.

STATEMENT.

This bill was filed by the executor of the last will and testament of Philip M. Wheaton, deceased, to obtain a construction of that paragraph of the will of decedent in which he makes provision for his wife.

Is she entitled to interest from the death of testator, or from the time the fund set apart for her is invested?

The widow claims interest from the death; testator's daughter, May Steelman, insists that her step-mother is entitled to interest only as it is earned from the investments made pursuant to the provisions of the will.

Does the clause of the will in question provide for an annuity?

The executor being confronted with conflicting claims, and suit having been commenced against him at law by the widow, filed this bill.

Motion was made on behalf of the widow to dismiss the bill for want of equity. (See notice, printed case, page 16).

Vice Chancellor Bergen, before whom the matter was heard, dismissed the bill, interpreting the clause in question in favor of the widow's contention, saying that "the "question is clearly presented in the bill of complaint for "an inspection of it shows that the right to relief rests "upon the interpretation of the material and only real "element of dispute, which is the effect, when properly "construed, of the clause of the will upon which com- "plainant founds his prayer for injunction." (See opinion, P. C., p. 20, line 32, &c).

The bill prays for an injunction against the pending suit—also for relief with respect to moneys improperly paid the widow by the *Administrator Pendente Lite,* and also for a construction of the will so as to prevent other suits and for general relief. (See bill, P. C., page 14).

The clause in the paragraph of the will in question is on page 2 of the printed case, commencing,

"I hereby instruct, authorize and empower my executor, &c."

It might be noted that the executor promptly set aside securities, and had the same approved by the Orphans' Court of Cape May County, on the day the will was admitted to probate. (See bill, P. C., p. 12, line 18).

BRIEF FOR APPELLANTS.

I.

Insufficiency of Notice.

(1.) The notice of the respondent, Arabella Wheaton, printed case, page 16, to strike out the bill, given to the complainant only, is insufficient.

(2.) Rule 213 provides that the notice "must state the particular ground or grounds of objection." The notice is for want of equity only.

In *Westervelt vs. Ackerson, 8 Stew., 43,* it was held that the grounds of a motion under Rule 213 should be stated with the same, but no greater particularity than in a demurrer.

Rule 209 provides that every demurrer, whether general or special, shall distinctly specify the ground or several grounds of demurrer.

(3.) Where the legal insufficiency of a bill is conspicuous and plain, a general ground of want of equity is sufficient under Rule 213; but where the defect is obscure or latent and needs to be pointed out in order to be observed, then a specification is required.

Essex Paper Co. vs. Graecen, 18 Stew., 504.
Van Houten vs. Van Winkle, 1 Dick., 380.
Parker vs. Stevens, 16 Dick., 163.

The learned Vice Chancellor in his conclusions deals with this branch of the case. (P. C., pp. 20-21).

(4.) The complainant, an executor and trustee, prays for construction of the will, where he is sued on the one hand and threatened by suit on the other, and the ground

of want of equity simply does not specify any particular ground for dismissal. It pays no attention to the phase of the bill which introduces the defendant, May Steelman, making the bill practically a bill of interpleader, gives her no notice of the application, and does not direct the attention of the complainant or the defendant, May Steelman, to the phase of the bill upon which ground, the dismissal is founded.

(5.) The defendant, May Steelman, was entitled to notice of this motion, because of the interpleader phases of the bill, and received no such notice.

(6.) The notice on which this application is based gives only the general ground of objection, of want of equity. According to Rule 213, it should have given the particular grounds of objection on which the application was intended to be based. Some of these particular grounds adverted to by Mrs. Wheaton's counsel are as follows:

1. That there is relief at law to the complainant.

2. That there is relief at law to the complainant and to May Steelman, by her joining in the action at law.

3. That there is a set-off.

4. That if there is no defense at law to the action commenced by Mrs. Wheaton, the suggestion is made, that the action at law of the executor, or of May Steelman, should be against the administrator *pendente lite*.

5. The suggestion that the order of the Orphans' Court permitting the monthly payment to Mrs. Wheaton cannot be questioned collaterally.

6. The suggestions on the law of the case that the bequest of the testator in question is of an annuity.

7. That the payment of interest should commence from the date of the testator's death.

8. That it should not be postponed for one year from the death of the testator.

9. That the accrual of interest should not be postponed to the investment of the fund in question after the conclusion of the unwarranted contest of Mrs. Wheaton.

10. That there is no basis for interpleader in the bill.

11. That the bill asked for affirmative relief only, ignoring the prayer for construction of the will.

12. The objection to the intervention of May Steelman in the equity suit.

13. The suggestion that the whole bill be struck out, while various particular grounds of objection above instanced are objections to particular parts of the bill only. The notice is therefore insufficient under Rule 213.

II.

Complainant is Entitled to Equitable Relief.

(1) Being a stakeholder and placed in a position where he must decide between the contending claims of the two defendants, being a trustee in a position not sought by himself but imposed upon him in the administration of the law, he is peculiarly entitled to the aid of the Court.

Griggs vs. Veghte, 2 Dick., 179.

(2) The widow, Mrs. Wheaton, has no rights under the last will of Philip M. Wheaton, the testator, outside of 820 Central avenue, Ocean City, N. J., except those which arise under the clause of that will where the sum or sums of money sufficient to produce $1,200.00 annually are directed by the testator to be invested by the executor for the use of the widow. (Bill of complaint, P. C.,

p. 2, beginning at line 14.) By the plain intention and direction of the testator, those rights of Mrs. Wheaton are predicated upon, and limited by and postponed to, the action of the executor in making the investment in question, under the terms of that last will, with the approval of the Orphans' Court. The executor must either have taken this action and made the investment in question or he must have been in default thereon and personally liable, before the rights of Mrs. Wheaton under this last will could arise. So long as the executor was not in default, and was prevented from action in making this investment for Mrs. Wheaton by the unwarranted, dilatory and vexatious contest inaugurated and maintained by Mrs. Wheaton herself, at great and irrevocable loss and expense to May Steelman, those rights of Mrs. Wheaton under this last will, it is respectfully submitted, could not arise. All rules for the construction of last wills must give way to the evident intention of the testator. The evident intention of the testator here was the investment of a fund from which should be realized $1,200.00 income and over, annually, $1,200.00 of which, the provision of the will is, should be paid to Mrs. Wheaton annually. The disposition of the fund to special parties by this paragraph of the testator's last will makes this intention clear.

(3) The bill in this case shows that the testator instructed, authorized and empowered his executor, as soon as was convenient after his decease, to invest sufficient sum or sums of money of the testator's estate, with good and sufficient security approved by the Orphans' Court of the county in which his will was probated, which would bear at least $1,200.00 interest annually, and of that interest or income from the fund to be invested the testator

gave and bequeathed to his wife, the defendant, Arabella Wheaton, $1,200.00 annually during her natural life or during widowhood, the same to be paid to her by the complainant as his executor in payments quarterly of three hundred dollars each, and upon the decease of Arabella Wheaton, or upon her again marrying, the testator gave and bequeathed the sum or sums of money which his executor was authorized to invest for the use of his wife to his daughter, May Steelman, if she were living; and if May Steelman were not living at the time of the decease or again marrying of Arabella Wheaton, the testator gave and bequeathed the sum or sums of money which his executor was authorized to invest for the use of his wife to the issue living of his daughter, May Steelman; and if May Steelman were then dead without living issue at that time, the testator bequeathed the sum or sums of money which his executor was authorized to invest for the use of his wife to certain other persons. The testator made other bequests amounting to $18,500.00, and then disposed, by his last will, of the residue of his estate. This phraseology creates a vested legacy of the sum or sums of money necessary to be invested by the executor to produce $1,200.00 annually for the use of the testator's wife during widowhood. That sum was a vested legacy vested in Mrs. Wheaton for life, with remainder over vested in May Steelman, not as residuary legatee, but as donee of the remainder. "A legacy must vest unless there is an intention in the will that it shall not vest, and such intention must be clearly expressed."

Per brief of Vanatta, in Howell vs. Green, 2 Vr., 570, 571.

"The gift of the use of a fund without limit is a gift of the fund."

Mason vs. Trustee of Tuckerton Church, 12 C. E. Gr., 47.

"The gift of the fund for the life of the legatee is but the gift of the use of the fund."

Per Green, Chancellor, speaking for the Court of Errors and Appeals (1864), in *Howell vs. Green, 2 Vr., 570-573*, citing *2 Kent's Com., 352-353.*

(4) By the bill of complaint sought to be dismissed for want of equity, it does not appear that the testator had any real estate except 820 Central avenue, Ocean City. The life estate of the widow in the testator's realty and in sufficient personalty to produce $1,200.00 annually, as provided for by this last will, have none of the contingencies that would attach to the residuary estate and is no aliquot portion of the residuary estate, but a definite, determined sum. Interest on these sums of money, in case there had been no contest, being sums of money that were to be invested by the executor as soon as convenient after testator's decease, would, under the authorities, commence to run only after the lapse of one year from the testator's death.

18 Am. & Eng. Encyc. of L., 794.
Welch vs. Brown, 14 Vr., 37.
Cogswell vs. Cogswell, 2 Edw. Ch., 230.
Halstead vs. Meeker, 3 C. E. Gr., 136.
Hennion vs. Jacobus, 12 C. E. Gr., 28.
Marsh vs. Taylor, 16 Stew., 1.
Weatherby vs. Kier, 11 Stew., 87.
Davis vs. Davis, 12 Stew., 13.

A legacy to the testator's wife in lieu of dower carries interest only from the expiration of one year from the testator's death.

Church at Acquackanonk vs. Ackerman, Saxt. 40.
Howell vs. Francis, 3 Stew., 444.

(5) Where the time of payment is fixed by will, or on the happening of some event (as in this case on the investment of a certain sum for the widow for life, with remainder over), it is a general rule that interest will begin to run from the time designated, or from the happening of the event, and this is so whether the legacy be vested or contingent. *(18 Am. & Eng. Encyc. of L., page 795, note 3.)* In *Kent vs. Dunham, 106 Mass., 590,* the payments of the legacies were fixed at three years after the death of the testator, and the Court held that interest commenced at that time.

(6.) This is not an annuity, because it sets apart a sum from which the income is to be derived, and designates that fund as "the sum or sums of money to be invested by my executor for the use of my wife." An annuity is a yearly payment of a certain sum of money granted in fee for life or for years, chargeable on the person or estate of the grantor, without any fund set aside from which the annuity is to be derived. In this case there is a fund to be disposed of when the yearly payments cease. In case of an annuity the grantor makes no such provision.

Stevens vs. Milnor, 9 C. E. Gr., 359.
2 Cyc., title "Annuities," page 459.
Owen vs. Owen, 2 Beas., 188.

III.

Respondent's Interference.

(1.) Where, as shown in paragraph 7 of this bill (P. C., p. 9) the widow unwarrantably and without merit in her favor, vexatiously and in a dilatory manner, inaugurated a contest against the probate of the will, which disappointed the will for four years, and which prevented the happening of the event upon which the commencement of interest was predicated, and prevented the executor from doing the act to which the commencement of the payment of interest was postponed, interest will not begin to run until after the termination of such contest.

State vs. Adams, 71 Mo., 620.

Foster vs. Wetmore, 14 N. Y. Supp., 194, and authorities cited.

(2.) "No man shall be allowed to disappoint a will under which he takes a benefit."

Blake vs. Bunberry, 1 Ves. Jr., 523.

Bird vs. Hawkins, 13 Dick, 229, at page 246.

Mrs. Wheaton disappointed this will for four years and thereby prevented the executor from making the investment out of which only, by the terms of the will, the income of her life estate could arise. (P. C., pp. 9-10; paragraphs 7-8).

IV.

Respondent's Suit at Law.

For the two instalments of income from the life estate of this widow, which had accrued on the sixteenth of November, 1906, the widow first having made demand

therefor has brought an action at law in the Camden County Circuit Court. To this action the executor has no defence. He has a set-off. But the set-off is equitable only. The executor cannot set it up at law. The only defence which the executor could set up is a plea denying the facts upon which the action is brought, and such plea he would not be able to sustain with facts. To the suggestion that May Steelman might intervene in the action at law, for the purpose of pleading this set-off, the evident reply is, that the set-off would be as unavailing at law for May Steelman as for the executor. The defence of set-off or recoupment is available at equity only, whether for the executor or for May Steelman. The only relief to which May Steelman is entitled is in equity. (P. C., 13, paragraph 14).

V.

May Steelman's Interpleader.

(1.) The interpleader aspect of this bill, given to it in relation to May Steelman by paragraphs 10, 11, 12, 13 and 15 (P. C., pp. 11-13), is an aspect of which May Steelman has a right to avail herself, and if the prayer of the bill, outside of general relief and a prayer for construction, is limited to affirmative relief, this is no reason to dismiss the bill. That defect may be corrected by the answer and cross-bill of May Steelman. It may be also corrected by amendment. On sustaining a demurrer, it is usual, instead of dismissing the bill, to give leave to amend. Amendment will not be denied on sustaining a

demurrer, except where the bill is wholly without equity. or where no amendment could be made improving the bill.

16 Cyc., pp. 282-284, article "Equity," heading "(II) Leave to Amend."

Lyon vs. Talmage, 1 Johns. Ch., 184.
Picken vs. Knisely, 36 W. Va., 794; 15 S. E., 997.
Lee vs. Robeson, 12 Gray, 280.

(2) It nowhere appears in the bill that May Steelman is the wife of Daniel Steelman. So far as May Steelman is concerned, one of the difficulties in which the complainant finds himself is that the suit at law brought by Arabella Wheaton, if it should be proceeded in to a conclusion, would not settle for the complainant the rights of May Steelman against him. May Steelman has rights in the interest or income money now sued for, which make the executor to that extent a stakeholder. The adjudication of the right of Mrs. Wheaton to the $4,600.00 already paid to her without authority, can be settled by this one action. But it cannot be settled and determined properly, legally and equitably, unless May Steelman has her day in court in a Court of Equity. By this suit, by avoiding a multiplicity of suits to the number of thirteen, and without going through all the prolixity and formality of an interpleader bill, and by omitting to deposit in court money only part in hand, every matter of controversy raised by the particular grounds of objection of the counsel of Mrs. Wheaton above instanced can be determined in this suit so as to settle the rights of all parties.

VI.

It nowhere appears in the bill that any provision of this last will was for the maintenance of Mrs. Wheaton. The fact that she could maintain for four years a contest against the probate of this last will, as caveator in the Orphans' Court and as appellant in the Prerogative Court and this court, of such magnitude that the printed state of the case on appeal covered over 2,600 pages, would indicate that no such provision was necessary.

VII.

The inequity of Mrs. Wheaton's position consists in her intention to retain and in her retaining $4,600.00 to which she is not entitled, while she continues to maintain the suit against the complainant which he seeks to enjoin. To permit her to continue is to permit her to take advantage of her own wrong, to the great damage of the appellant, May Steelman.

J. H. GASKILL,
For Daniel Steelman, Ex.

HERBERT A. DRAKE,
For May Steelman.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STEELMAN, Executor,

vs.

WHEATON, ET ALS.

} ON BILL.

SUPPLEMENT ON BEHALF OF EXECUTOR TO POINT 2 OF JOINT BRIEF.

I.

The distinction between an annuity and a general legacy is clearly pointed out by Justice Depue, speaking for the Supreme Court, in *Welsh agst. Brown, 43 N. J. Law, p. 37.*

The doctrine laid down in this case was distinctly affirmed by this Court by the same Justice, in *Davison agst. Rake, 45 N. J. Eq., pages 767-8.*

"To be paid annually, &c." This characteristic is common alike to an annuity and to interest on a sum set apart but not peculiar to either.

Justice Depue, in *Welsh agst. Brown,* citing Lord Eldon: See pages 45-6.

See also *Flummervelt vs. Flummervelt, 51 N. J. E., 436.*

The distinction between an annuity and a general legacy, or a sum set apart from the income of which a

certain amount is payable, is that the annuity is a charge upon the residue and the other is not.

Welsh vs. Brown, supra.

The cases cited by Justice Depue show that in an annuity the same persons are entitled to the remainder of the sum set apart and to the residue of the estate.

Under the will in question the testator's daughter has no absolute gift of the remainder. If she dies childless before her step-mother the principal of the fund set apart goes to testator's nieces and nephews.

She cannot compound the provision for the widow; she cannot purchase an annuity and release the fund ordered to be set apart.

She is the residuary legatee under the will, but having only a contingent interest in the fund set aside for the widow, insists: (1) That no greater sum than necessary shall be set apart out of the residue of the estate to which she is entitled. (2) That she shall not be called upon to make up any loss that may befall the principal fund set apart. (3) That she shall not be required to make up any deficiency of income derived from the fund set apart. (4) That she shall not be compelled to pay interest during the four years the widow carried on her litigation against this will.

Her position is that *first* there must be an investment of a sum to be approved by the Orphans' Court, then from the interest received on this fund the $1,200 is to be paid.

"And *this sum* of $1,200 I give, &c." That is, the bequest is of interest to be derived from the fund. *"This sum"* the language of the will identifies as the provision for the widow.

The directions of the will "to invest, &c." (the executor having made the investment as directed), the will should be construed in practice to read "to invest the sum of $29,300" and $1,200 of the "income from the fund so invested I give, &c."

The testator takes this sum when once fixed and set apart out of his estate as much as he does any of the bequests contained in his will, and then disposes of the residue.

Suppose the estate, at the time of testator's death, had been invested in business—a mercantile or manufacturing business—could widow claim interest until the principal of the funds had been realized and put at interest?

The bill demurred to shows that the executor had no control over the estate until the widow's contention finally ended, and that he set apart a fund with the approval of the Orphans' Court on the same day the will was probated and he received his letters testamentary.

II.

V. C. Bergen, in his opinon filed in this case, follows Chancellor McGill, in *Merritt vs. Merritt, 43 N. J. E., page 11.*

The above case was before the Chancellor upon demurrer; four years later it was before the same Chancellor on final hearing, where the matter was more fully discussed.

See Merritt vs. Merritt, 48 N. J. E., page 1.

The latter is much stronger authority for the position taken by the Vice Chancellor in this case than the former cited by him.

The doctrine laid down by the Chancellor in *Merritt vs. Merritt* is not in harmony with the decision of the Supreme Court in *Welsh vs. Brown, 43 N. J. L., page 37,* and of this Court, in *Davison vs. Rake, 45 N. J. E., page 767.*

There is an apparent divergence between the position of the Law and Equity Courts of this State upon this point.

Welsh vs. Brown was decided by the Supreme Court at the February term, 1881, Justices Beasley, Depue, Scudder and Knapp sitting.

Merritt vs. Merritt was decided upon demurrer by the Chancellor at the May term, 1887, yet no mention is made of *Welsh vs. Brown,* or comment made thereupon in the opinion as reported.

Welsh vs. Brown is directly affirmed by this Court in *Davison vs. Rake,* decided at the June term, 1889.

Merritt vs. Merritt is decided by the Chancellor upon final hearing at the February term, 1891, entirely ignoring *Welsh vs. Brown* and *Davison vs. Rake.*

Welsh agst. Brown was on demurrer to a declaration by a legatee suing for interest from death of testator on a provision in the will giving her the interest on a certain sum, payable annually. Demurrer sustained.

Merritt agst. Merritt was on a bill filed by a son, to whom $1,000 a year was given by a codicil, in place of a provision in the will giving him the interest on $15,000, to have a larger sum set aside to produce his income.

The Chancellor was not ignorant of *Welsh vs. Brown,* as he cites it in *Marsh vs. Taylor,* decided at the same term as *Merritt vs. Merritt* on demurrer, appearing in the same book of Reports, page 1, while *Merritt vs. Meritt* is page 11. *(See 43 N. J. E.)*

In *Marsh vs. Taylor* the Chancellor cites Justice Depue in *Welsh vs. Brown,* with approval. In that case there was a bequest of *residue* or some *aliquot part* in trust to pay interest to a legatee for life with gift of the principal over. It was held that interest ran from death.

Marsh vs. Taylor is within the exception clearly pointed out by Justice Depue in *Welsh vs. Brown.*

Although Chancellor McGill does not attempt in so many words to overrule *Welsh vs. Brown,* yet he in effect does do so.

Justice Depue in *Welsh vs. Brown* shows clearly that where the remainderman and the residuary legatee are not the same, interest does not run from death of testator. Chancellor McGill in *Merritt vs. Merritt* on final hearing apparently comes to a different conclusion; he fails to notice or concur in the distinction pointed out by Justice Depue.

In the case decided by the Chancellor four daughters were entitled to the residue and the corpus of the trust fund went to them and one other daughter in remainder.

In one of the cases cited by the Chancellor, *Wright agst. Callendor,* the residuary legatee and the remainderman were apparently different persons, but in reality they were the same; there was no residue when the fund was set apart—it constituted the residue, and the annual payment was chargeable on the whole of it.

In another case cited by the Chancellor, *May agst. Bennett,* the fund set apart fell into the residue—was part of it.

The case cited by Vice Chancellor Bergen *(Craig vs. Craig)* is one of the cases discarded by Justice Depue as it contained a provision for an insane child. This case is also cited by the Chancellor in *Merritt agst. Merritt.*

Booth vs. Ammerman, cited by the Vice Chancellor, is also distinguished by Justice Depue.

In no case that I have been able to find in the New Jersey Reports has the doctrine of *Merritt vs. Merritt* been cited with approval upon the point now under discussion.

It is cited by V. C. Grey in *Turner vs. Gibbs, 48 N. J. E., page 529,* on another point: that legacies are a charge on the residuary real as well as the residuary personal estate.

Again, by the same Vice Chancellor in *Kempton vs. Bartine, 59 N. J. E., page 155,* as to amendments.

In no other case do I find it cited on any point.

In no case in equity down to Chancellor Magie in *Stewart vs. Stewart, 61 N. J. E., page 25,* do I find *Welsh vs. Brown* cited with approval on the point in issue here.

In *Corle vs. Monkhouse, 47 N. J. E., page 77,* Vice Chancellor Van Fleet cited it as authority for *Interest on the Residue.*

V. C. Green cited it in *Griggs vs. Veghte,* same book, page 188, on the same point.

V. C. Bird, in *Flummervelt vs. Flummervelt, 51 N. J. E., page 436,* cites it on same point; no mention is made in this opinion as to who is entitled to the funds upon death of life tenant.

In *Stewart vs. Stewart, 61 N. J. E., page 25,* Chancellor Magie cites *Welsh vs. Brown* with approval. By the first paragraph of the will the income of the whole estate was set apart for certain purposes for the period of two years subject to support of the widow; by the fifth paragraph $10,000 was to be invested for a son for life with remainder to children.

Held, interest on the fund thus set apart did not run from death, but after expiration of two years.

It is manifest from the foregoing review of the authorities that the widow of Philip M. Wheaton is not entitled to interest from his death.

She certainly is not entitled to interest until the lapse of a year at the best.

She has no annuity under the will.

III.

There is a condition precedent in the will to her receiving any interest at all.

The fund to produce it must be first set aside and invested.

The question here, as was stated by Justice Depue in *Welsh vs. Brown* and by Chancellor McGill in *Merritt vs. Merritt,* is one of construction.

Is there anything in the will to show that the widow is entitled to "this sum" independent of an investment to be made?

And is not her receipt of interest postponed under the will to the time of the investment and the receipt of money from the investment by the executor out of which to pay her, in precisely the same manner as the son's interest was postponed in *Stewart vs. Stewart,* above cited?

The decree must be reversed.

J. H. GASKILL,
Of Counsel with the Executor.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased (Appellant),

Complainant,

and

ARABELLA WHEATON (Respondent) and MAY STEELMAN (Appellant),

Defendants.

ON APPEAL.

SUPPLEMENTAL BRIEF OF H. A. DRAKE, FOR MAY STEELMAN, Appellant.

I.

One of the objects of this supplemental brief will be to justify the definition of an annuity, page 9 of the principal brief, viz:

"An annuity is a yearly payment of a certain sum of money granted in fee for life or for years, chargeable on

the person or estate of the grantor, without any fund set aside from which the annuity is to be derived."

(1) "An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onely."

Co. on Litt., 144 b.

3 Kent's Com., 460; 2 Blk. Com., 40.

(2) "If an annuity be granted to a man and his heirs it is a fee simple personal."

Co. on Litt., 2 a.

(3) "An annuity for instance is an incorporeal hereditament, for though the money which is the fruit or product of this annuity is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence and cannot be delivered over from hand to hand."

2 Blk. Com., 20.

(4) Blackstone, after defining "Corrodies" as a right of sustenance, says of them:

"And these may be reckoned another species of incorporeal hereditaments, though not chargeable on or issuing from any corporeal inheritance, but only charged on the person of the owner in respect of such, his inheritance. To this may be added,

"IX. Annuities, which are much of the same nature; only that these arise from temporal as the former from spiritual persons. An annuity is a thing very distinct from a rent charge, with which it is frequently confounded; a rent charge being a burthen imposed upon and

issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore, if a man by deed grant to another the sum of 20 l. per annum without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity."

(5) "If I, by my deed, for me and my heirs grant an annuity to a man and the heirs of his body this only chargeth my person and concerneth no land nor savoureth of the realty."

Co. on Litt., 2 a.

(6) Some of the diversities between a rent and an annuity are thus laid down in the 30th Chap. of the Doctor and Student: "Every rent, be it rent service, rent charge or rent seck is going out of land. Also of an annuity there lieth no action but one, a writ of annuity; but of a rent the same action may lie as doth of land. Also an annuity is never taken for assets, because it has no freehold in the law, nor shall it be put in execution upon a statute merchant, statute staple, or elegit, as a rent may be."

2 Blk. Com. (Chitty's Ed.), page 40, note 34.

(7) "If it be agreed to be paid to the annuitant and his heirs it is a personal fee and transmissible by descent, like an estate in fee forfeitable for treason as a hereditament, and for that reason it belongs to the class of incorporeal hereditaments. It is chargeable upon the person of the grantor, for if the grantor was made chargeable upon land it would then become a rent charge and descend to the heirs as real property. Unless the gran-

tor grants the annuity for himself and his heirs, the heirs of the grantor are not bound, for the law presumes by the omission to name them that he didn't intend to include them in the obligation.

3 Kent's Com., 460.

II.

The defendant, May Steelman, takes issue with the conclusion of the learned Vice Chancellor, "That the "retention of complainant's bill depends upon the char- "acter of the bequest; if there is an annuity the defend- "ant has only received what she was entitled to, and the "complainant would then have no standing in this court."

(1) For the sake of argument my client may admit this to be an annuity and still have the right to have the complainant's bill retained.

(2) If the bequest be merely in the form of an annuity the first payment will be due at the end of the year after the testator's death. "But if the disposition be of a sum of money and the interest of it is given as an annuity to the annuitant for life, the first payment will not accrue before the expiration of the second year after the death of the testator." The annuity being given in the form of interest upon a gross sum of money to be taken out of the assets, as any other legacy which does not carry interest until the end of the year after testator's decease,

cannot be payable sooner than the fund produces the means for that purpose.

1 Rop. on Leg., 877.
Gibson vs. Bott., 7 Vesey, 96.
2 Rop. on Leg., 1324.

III.

Appropriation of Legacies.

The practice existed in the English Court of Chancery, where legatees were not entitled to the principal of their legacies, yet where legacies were not charged on real estate, to have those legacies either appropriated or secured, according to circumstances. Where the testator directed the appropriation and the executors failed to exercise it, the English Court of Chancery, in conformity with its early practice, did direct the appropriation by the purchase of consols and not by the appropriation of a specific part of the assets in species.

1 Rop. on Leg., 931, 932, 937, 946.
Prendergast vs. Lushington, 5 Hare, 171.
Abraham vs. Holderness, 6 Jur., 290.

(2) When the appropriation is once duly made whether by direction of the Court or by the executors or trustees *in pais,* according to the rules of the Court, the legatees entitled to the legacy for which the appropriation was made must take it subject to its chances of fluctuation.

1 Rop. on Leg., 942.
Orr vs. Moses, 52 Me., 287.
Nutter vs. Vickery, 64 Me., 490.

It is a matter of serious importance to May Steelman that the right of Mrs. Wheaton shall not extend beyond the fund itself invested to secure Mrs. Wheaton's life estate therein. If this fund should be lost by failure of all the mortgagors of the mortgages by which the fund is secured, it would be a serious loss to my client. Under the authority above stated, it should be and ought to be a serious loss to Mrs. Wheaton also. Her interest in the estate of this testator is limited by the express directions of this testator to the fund invested under the direction of the testator with the approval of the Orphans' Court in the presence of Mrs. Wheaton. Therefore, May Steelman has the right in this case, not only to the fund which Mrs. Wheaton is claiming and about the payment of which the complainant is in doubt, but she has the right to have Mrs. Wheaton's interest limited to the fund appropriated according to the practice of the Court of Chancery for the bequest of Mrs. Wheaton.

IV.

A bill of interpleader cannot be sustained where it appears from the bill itself that there can be no doubt as to which of the defendants is entitled to the debt or duty claimed.

Hoppinger vs. O'Donnell, 16 R. I., 417; 16 Atl. R., 714.

Nassau Bank vs. Yandes, 44 Hun., 55.

The defendant, May Steelman, is entitled to have the fund claimed by Mrs. Wheaton retained.

V.

"While the suit contesting the will was undetermined, the executrix could not carry into effect the provisions of the will (looking to the investment of the fund on which interest was to accrue) and could not therefore be in default to the legatees. Interest should have been allowed only from the time the suit to contest the will was dismissed, and not from the date of the first annual settlement.

State vs. Adams, 71 Mo., 622.

Where one species of property is directed to be converted into another, there it has been said "to be consistent with the will of the testator, to consider the life interest as commencing when the conversation takes place, or the investment is made."

Foster vs. Wetmore, 14 N. Y. Sup., 194, 196.

In *Williamson vs. Williamson, 6 Paige, 298-305,* there was no direction for the conversion of the fund or for the investment thereof in any particular manner, before the right of the widow to the use thereof was to commence. Hence it was held that the widow's right to interest commenced at once.

Per Walworth, C., 1837.

VI.

To the rule that interest begins on a legacy one year after the testator's death, an exception is made in favor of the children of the testator. They are entitled to sup-

port by the testator, and interest on legacies to them begins on the death of the testator. This exception is not extended to the testator's wife, natural child, grandchild or niece, all of whom are considered as strangers to the testator.

2 Rop. on Leg., 1271.

Respectfully submitted,

HERBERT A. DRAKE,

Of Counsel with the Defendant, May Steelman.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

DANIEL STEELMAN, Executor, *Complainant-Appellant,* and ARABELLA WHEATON, *et al, Defendants-Respondents.*	*On Appeal from Chancery.*

BRIEF OF ARABELLA WHEATON.

The respondent prays for the affirmance of the decree of the chancellor, made in the above cause, dated the second day of April, 1907, and entered in the Court of Chancery dismissing the complainant's original bill.

Counsel refers to the opinion of the vice-chancellor in this case as being the clearest possible statement of the law and in addition urges:

First. The simple statement of want of equity was in this case a sufficient specification of the grounds for moving to strike out the complainant's bill. The rule requiring every demurrant to distinctly specify the grounds of his demurrer was passed for the purpose of securing greater fairness in the discussion of questions arising on general demurrer than could be had under the old practice. Its main purpose was to point out to the opposite party the grounds on which the statement of his case would be attacked by the demurrer. This purpose is satisfied in a case of this kind by a simple statement of want of equity where it appears to the court on looking at complainant's bill that his right to relief is doubtful or uncertain, or that his equity is not obvious at first

sight. The mere statement in the demurrer that the bill does not set forth any cause for equitable relief is a "specification" of a ground of demurrer within the meaning of the rule, and under such statement the demurrant may raise all objections to the complainant's case on the merits as are reasonably apparent upon a perusal of the bill and demurrer.

Essex Paper Co. vs. *Greacen,* 18 Stew. 504.

Parker vs. *Stevens,* 16 Dick. 163.

Demarest vs. *Terhune,* 17 Dick. 666.

Second. The appellant has no standing whatever in a court of equity to restrain the respondent's suit at law, to recover the three quarterly payments of $300 each, which have accrued since the will was admitted to probate May 16, 1906. There is no doubt that a Court of Chancery has power, to restrain an action begun in a court of law. But it is well settled that where a suit at law has been commenced and the defense at law is complete, then the Court of Chancery will refuse to take jurisdiction. Also where the defense is of a character plain and palpable, as it is in this case, and within the command of the party at any time, then a chancellor ought not encourage a resort to an expensive litigation in a court of equity.

Cornish vs. *Bryan,* 2 Stock., 146.

And as was said by vice-chancellor Van Fleet in a case decided in 1892, *Chase* vs. *Chase,* 5 Dick., 143, 147:—"Indeed there is no reason for a change in such a case, for justice may be fully and completely done in the tribunal having priority of jurisdiction. If under such circumstances, a change were made, the obvious effect of it would be to allow the complainant capriciously to oust the court having rightful prior jurisdiction and to select his own tribunal simply for the purpose of prolonging the litigation

at a *greatly increased expense.* If the defense is equally available in a court of law, either by application to the court in which the judgment is rendered, or by appeal and no special ground exists growing out of fraud or accident, equity will not interfere; and to warrant relief in equity against a suit at law, it must be shown not only that injustice would be done, but that the defendant was not guilty of laches about his defense.

Bispham's Equity page 567.

Third. Under the will of the testator, the respondent is entitled to an annuity of $1200, annually, payable quarterly, is we think too clear to admit of doubt. It was held by his honor, the vice-chancellor in upholding respondent's motion to dismiss appellant's bill, and we contend this opinion is not only upheld by the great weight of authority but is the only reasonable and satisfactory interpretation that can be placed upon it. The gift is a yearly payment (payable quarterly) of a certain sum of money directed to be paid absolutely without any contingency, and the direction to the executor to invest in good and sufficient security so much of the estate as will bear this amount is merely a wise provision on part of the testator to secure the payment of the annuity.

In addition to the authorities upon this point cited by the vice chancellor, to wit, may be added the following, viz: A provision in a will for the payment of five hundred dollars per year for ten years to B, in equal quarterly installments, is an annuity contingent on B's life and not a legacy of five thousand dollars, payable in installments.

Bates vs. *Barry,* 125 Mass. 83.

A gift of the sum of $170 to be allowed and paid to a son until he shall arrive at the age of twenty-one

years, is an annuity, and not a gross sum to be paid in distributive portions.

Berry vs. *Headington*, 3 J. J. Marsh (Ky) 315.

In *Stephens Executors* vs. *Hilnor*, 9 C. E. Gr. Eq. 358, it was said that a bequest of "an annuity or yearly sum of $300 to be paid yearly and every year, for fifteen years from and after my decease," is an annuity for years; while a bequest of "the sum of $500, payable in sums of $100 yearly" is not an annuity.

Again in *Welsh* vs. *Brown*, 14 Vr., 37, 42 the court defined an annuity to be "a yearly payment of a certain sum of money."

In *Whitson* vs. *Whitson*, 53 N. Y. 479, it was said "there is a distinction between the income of a fund and an annuity, the former embraces only the net profits after deducting all necessary expenses; the latter is a fixed amount directed to be paid absolutely, without contingency." We therefore contend the gift under this will was an annuity and not an ordinary legacy.

Fourth. This being so the respondent was entitled to her share under the will, and this sum of $1200 being an annuity bequeathed, it began from the death of the testator and the first payment became due in one year thereafter (in this case in three months thereafter) being the first quarter as per bill.

3 Redfield on Wills, 184.

So that the respondent has received no more than she was justly entitled to under the will and the complainant has therefore no equitable ground for relief by a bill of this nature.

Besides the Orphans' Court of Cape May County directed by a number of orders the payments and therefore the question as to the propriety of the admin-

istrator pendente lite paying these quarterly installments up to the time the will was probated, has already been passed upon by the proper tribunal, namely, the Orphans Court of the County of Cape May, *whose orders have not been appealed from,* and cannot be inquired into in this action. As to the payments which have accured since the date of probation, May 16, 1906, these are justly due and owing to the respondent and whatever moneys may have been paid prior to that date, form no equitable ground upon which the complainant, as executor under this will, can successfully contest in a Court of Equity the payment of these annuities. The court will observe the orders were entered in the Orphans' Court by *consent* of all parties in interest.

We therefore pray the court that the decree of the Court of Chancery be affirmed with costs.

BLEAKLY & STOCKWELL,
GEORGE H. PEIRCE,
Solicitors of Defendant.
GILBERT COLLINS,
of Counsel.

N. J. Court of Errors & Appeals

Between

DANIEL STEELMAN, EXECUTOR OF PHILIP M. WHEATON, DECEASED,

(Complainant), Appellant,

and

ARABELLA WHEATON,

(Defendant), Respondent,

MAY STEELMAN,

(Defendant), Appellant.

ON APPEAL. STATE OF THE CASE.

GASKILL & GASKILL,
Solicitors for Appellant, Daniel Steelman, Exr., &c.,

HERBERT A. DRAKE,
Solicitor for Appellant, May Steelman.

BLEAKLY & STOCKWELL,
Solicitors for Respondent.

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IN CHANCERY OF NEW JERSEY.

To his Honor William J. Magie, Chancellor:

Humbly complaining, showeth unto your Honor, your orator, Daniel Steelman, executor of the last will and testament of Philip M. Wheaton, deceased, late of Ocean City, county of Cape May, in this State, that the said Philip M. Wheaton departed this life at Ocean City aforesaid on the nineteenth day of June, in the year of our Lord one thousand nine hundred and two, having first made and executed his last will and testament in due form of law, as follows:

I, Philip M. Wheaton, of the city of Ocean City and county of Cape May, and State of New Jersey, being of sound and disposing mind and memory, do make, publish and declare this as and for my last will and testament:

I direct my executor, hereinafter named, to pay all my just debts and funeral expenses as soon as the same can conveniently be done after my decease.

I give, devise and bequeath the house and lot and furniture where I now reside, No. 820 Central avenue, Ocean City, New Jersey, to my wife, Arabella Wheaton during her natural life; and upon her decease or upon my decease, if I should survive my said wife, I give, devise and bequeath the house and lot and furniture No. 820 Central avenue, Ocean City, New Jersey, to my daughter, May Steelman, if she be living; and if my daughter, May Steelman, be not living at the time of my wife's decease, or at the time of my decease, if I should survive my wife, I give, devise and bequeath the house and lot and furniture No. 820 Central avenue, Ocean

City, New Jersey, to the issue living of my said daughter, and if my said daughter, May Steelman, be not living, nor there be not any issue of my said daughter living at the time of my wife's decease, or at the time of my decease if I should survive my wife, I give, devise and bequeath the house and lot and furniture, No. 820 Central avenue, Ocean City, New Jersey, to my niece Julia Godfrey; to my niece, Priscilla Coddington; to my niece, Rachel Smith; to my niece, Miriam Douglass; to my niece, Emma Smith; to my niece, Laura Steel; to my nephew, Clark P. Smith; to my nephew, Daniel Smith; to my nephew, Frank Parker; to my nephew, Thomas Parker; share and share alike, their heirs and assigns forever.

I hereby instruct, authorize and empower my executor, hereinafter named, as soon as it is convenient after my decease to invest a sufficient sum or sums of money of my estate, with good and sufficient security and approved by the Orphans' Court of the county in which this will is probated, which will bear twelve hundred ($1,200) dollars interest annually; and this sum of twelve hundred ($1,200) dollars I give and bequeath to my wife, Arabella Wheaton, during her natural life, and if she again does not marry; which sum of twelve hundred ($1,200) dollars is to be paid annually to my said wife, by my executor, in payments quarterly of three hundred ($300) dollars each; and upon her decease, or upon her again marrying, or upon my decease, if I should survive my said wife, I give and bequeath the sum or sums of money, which my executor is authorized to invest for the use of my wife, to my daughter, May Steelman, if she be living; and if my said daughter be not living at the time of my wife's decease, or at the time of my wife again marrying, or at the time of my decease, if I should survive my wife, I give and bequeath the sum or sums of money which my executor is authorized to invest for the use of my wife, to the issue living of my said daughter;

and if my said daughter, May Steelman, be not living, nor there be not living any issue of my said daughter at the time of my wife's decease, or at the time my wife again marries, or at the time of my decease, if I survive my wife, then I bequeath the sum or sums of money which my executor is authorized to invest for the use of my wife to my niece, Julia Godfrey; to my niece, Priscilla Coddington; to my niece, Rachel Smith; to my niece, Miriam Douglass; to my niece, Emma Smith; to my niece, Laura Steel; to my nephew, Clark P. Smith; to my nephew, Daniel Smith; to my nephew, Frank Parker, and to my nephew, Thomas Parker, share and share alike to their own proper use, benefit and behoof forever.

I give and bequeath to the trustees of the First Methodist Episcopal Church of Ocean City, New Jersey, the sum of two thousand ($2,000) dollars, which sum the said trustees are to invest with good and sufficient security, and the interest of and from such investment is to be paid annually to the pastor appointed to the said Ocean City Church by the New Jersey Methodist Episcopal Conference as salary.

I give and bequeath to the trustees of the Tuckahoe Methodist Episcopal Church of Tuckahoe, New Jersey, the sum of two thousand ($2,000) dollars, which sum said trustees are to invest with good and sufficient security, and the interest of and from such investment is to be paid annually to the pastor appointed to the said Tuckahoe Methodist Episcopal Church by the New Jersey Methodist Episcopal Conference as salary.

And it is further my will that if either the First Methodist Episcopal Church of Ocean City, New Jersey, or the Methodist Episcopal Church of Tuckahoe, New Jersey, should withdraw, sever its connections or in any way cease to be a member of the said New Jersey Methodist Episcopal Conference, then the sum of money ($2,000) intrusted to the trustees of such Church so with-

drawing, severing its connections or ceasing to be a member of said New Jersey Conference, I give and bequeath to the Preachers' Aid Society of the said New Jersey Conference, to be by them invested with good and sufficient security, and the interest of and from such investment to be paid to the general fund for the support of the Superannuated Preachers of the New Jersey Conference. And it is further my will that if either the said Ocean City Church or the said Tuckahoe Church, while a member of the New Jersey Conference, should be without a pastor, then the interest of the money ($2,000) intrusted to the trustees of such church shall be paid to the general fund for the support of the Superannuated Preachers of the New Jersey Methodist Conference.

I hereby instruct my executor, hereinafter named, to pay to the trustees of the Tuckahoe Methodist Episcopal Church the sum of five hundred ($500) dollars, which sum is to be invested by said trustees with good and sufficient security, and the interest of and from such investment is to be used for the care-taking, repairing and improving of my burying lot, in the Tuckahoe Cemetery of Tuckahoe, New Jersey.

I hereby instruct my executor, hereinafter named, to pay to the trustees of the Tuckahoe Cemetery, where my burying lot is situated, the sum of five hundred ($500) dollars, which sum is to be invested by said trustees, with good and sufficient security, and the interest of and from such investment is to be used in repairing the fence and fencing which encloses the said cemetery.

I hereby authorize my executor, hereinafter named, to give to Harry S. Douglass a credit of five hundred ($500) dollars on a certain bond and obligation bearing date November 25th, eighteen hundred and ninety-six, if there should be due me, at the time of my decease, on the said bond and obligation, five hundred ($500) or more; and if at the time of my decease the said bond and obligation

be not paid in full and there be less than five hundred ($500) dollars due me on said bond and obligation, then and in such case I authorize my executor to give to the said Harry S. Douglass credit on the said bond for the balance that may be due me.

I give and bequeath to my niece, Miriam Douglass, the difference between one thousand ($1,000) dollars and the credit which my executor is authorized to give Harry S. Douglass on a certain bond and obligation, bearing date November twenty-fifth, eighteen hundred and ninety-six, if said bond and obligation is not paid in full at the time of my decease; and if said bond and obligation is paid in full at the time of my decease, then I give and bequqeath to my niece, Miriam Douglass, the sum of one thousand dollars ($1,000).

I hereby authorize my executor, hereinafter named, to give to Kate H. Smith, of Atlantic City, New Jersey, a credit of one thousand dollars on a certain bond and obligation, bearing date November first, eighteen hundred and eighty-nine, if there should be due me at the time of my decease on the said bond and obligation one thousand ($1,000) dollars or more; and if at the time of my decease the said bond and obligation be not paid in full and there be less than one thousand $1,000) dollars due me on said bond and obligation, then and in such case I authorize my executor to give to the said Kate H. Smith credit on the said bond for the balance that may be due me.

I give and bequeath to my nephew, Clark P. Smith, the difference between one thousand ($1,000) dollars and the credit which my executor is authorized to give Kate H. Smith, of Atlantic City, New Jersey, on a certain bond and obligation, bearing date November first, eighteen hundred and eighty-nine, if said bond and obligation is not paid in full at the time of my decease; and if at the time of my decease the said bond and obligation is paid in full I give and bequeath to my said

nephew, Clark P. Smith, the sum of one thousand ($1,000) dollars.

I give and bequeath to my niece, Phebe May Brooks, the sum of one thousand ($1,000) dollars; to my niece, Priscilla Coddington, the sum of one thousand ($1,000) dollars; to my niece, Laura Steel, the sum of one thousand ($1,000) dollars; to my niece, Emma Smith, the sum of one thousand ($1,000) dollars; to my niece, Rachel Smith, the sum of one thousand ($1,000) dollars; to my niece, Julia Godfrey, the sum of one thousand ($1,000) dollars; to my nephew, Frank Parker, the sum of one thousand ($1,000) dollars; to my nephew, Thomas Parker, the sum of one thousand ($1,000) dollars; to my nephew, Daniel Smith, the sum of one thousand ($1,000) dollars; to John Champion, of Port Richmond, the sum of one thousand ($1,000) dollars; to my friend, Samuel H. Hann, of Camden, New Jersey, the sum of one thousand ($1,000) dollars; to my friend, Frank Stiles, of Port Richmond, the sum of five hundred ($500) dollars, to their own proper use, benefit and behoof forever.

All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever, after the provisions of this, my will, are carried out and the legacies are paid, I give, devise and bequeath to my daughter, May Steelman, if she be living, and if my daughter, May Steelman, be not living at the time of my decease, then I give, devise and bequeath all the rest of my estate, real, personal and mixed, after the provisions of this, my will, are carried out and the legacies are paid, to the issue living of my daughter, May Steelman, and if my daughter, May Steelman, is not living nor there be not living any issue of my daughter, May Steelman, at the time of my decease, then and in such case I give, devise and bequeath all the rest, residue and remainder of my estate, after the provisions of this, my will, are carried out and the legacies are paid, to Julia Godfrey, Priscilla Coddington, Emma Smith, Laura Steel, Miriam

Douglass, Rachel Smith, Frank Parker, Thomas Parker, Clark P. Smith and Daniel Smith, share and share alike, their heirs and assigns forever.

I hereby appoint Daniel Steelman executor of this, my last will and testament, hereby revoking any and all other wills by me at any time made.

In witness whereof, I have hereunto set my hand and seal this fifteenth day of November, in the year of our Lord nineteen hundred.

(Signed) PHILIP M. WHEATON.

Signed, sealed, published and declared by the said testator as and for his last will and testament, in the presence of us, and each of us, who, in his presence and in the presence of each and by his request, subscribed our names as witnesses hereunto at the end of his will.

Witnesses:

YOUNGS CORSON,
Ocean City, N. J.

CHARLES P. LAKE,
Ocean City, N. J.

---

2. And your orator further shows unto your Honor that on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and two, and within ten days from and after the death of the said Philip M. Wheaton, his widow, Arabella Wheaton, filed a caveat against the probate of the said last will and testament of the said Philip M. Wheaton, in the office of the Surrogate of the county of Cape May aforesaid, and that such proceedings were had thereupon that the Orphans' Court of the said county of Cape May did, on the eighth day of June, in the year of our Lord one thousand nine hundred and four, order said last will and testament admitted to probate and letters testamentary thereon be issued to your orator, the executor therein named.

3. And your orator further shows unto your Honor that before probate could be granted pursuant to said order of the Cape May County Orphans' Court, and on the same day said order was made and immediately thereafter, in open court, the said Arabella Wheaton, caveatrix, presented through her counsel a written demand of appeal from said order for probate, which demand was filed with the Surrogate of Cape May county, as Clerk of the Orphans' Court of said county, along with and at the same time said order for probate was filed; that probate of said last will and testament was not granted at that time nor were letters testamentary thereupon granted to your orator at that time, by reason of said demand or notice of appeal so filed as aforesaid.

4. And your orator further shows unto your Honor, that pursuant to said demand or notice of appeal, a petition of appeal was filed by said Arabella Wheaton, caveatrix, in the Prerogative Court of this State, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and four, to which answer was filed by your orator as executor and proponent, and the cause regularly brought on for argument, whereupon the Ordinary or Surrogate General of this State did affirm the order for probate made by said Orphans' Court of the county of Cape May, by a decree or order bearing date the seventh day of February, in the year of our Lord one thousand nine hundred and five.

5. And your orator further shows unto your Honor, that immediately after said decree was made in the Prerogative Court as aforesaid, affirming the decree for probate made by the Orphans' Court of the county of Cape May, said Arabella Wheaton, caveatrix, through her counsel, filed in the office of the Register of the Prerogative Court a notice of appeal to the Court of Errors and Appeals of this State and afterward filed in the office of the Clerk of said Court of Errors and Appeals a petition of appeal, to which an answer was filed by your orator

as executor and proponent, and the matter brought on for a hearing, whereupon the Court of Errors and Appeals, by its decree bearing date the twentieth day of April, one thousand nine hundred and six, affirmed with costs the decree of the Prerogative Court affirming the decree of the Orphans' Court of the county of Cape May, ordering said last will and testament be admitted to probate and letters testamentary issued thereupon to your orator, as executor.

6. And your orator further shows unto your Honor, that afterwards, to wit, upon the sixteenth day of May, one thousand nine hundred and six, upon filing in the Surrogate's office of the county of Cape May a duly certified copy of said decree of affirmance of the Prerogative Court, and also a duly certified copy of said decree of affirmance of the Court of Errors and Appeals, an order was made admitting said last will and testament to probate, and probate was thereupon had and letters testamentary were thereupon issued to your orator as the executor in said will named, who then took upon himself the administration of the estate of said Philip M. Wheaton, deceased.

7. And your orator further shows unto your Honor, that the contest over the probate of the said last will and testament of the said Philip M. Wheaton, was unwarranted, dilatory and vexatious; that the said Arabella Wheaton well knew her husband to be competent to transact business at the time he made and published his said last will and testament; that he was to her knowledge at that time and afterwards engaged in the transaction of important business, and that notwithstanding the adverse decision in the Orphans' Court and in the Prerogative Court, she prosecuted her appeals to the Court of last resort in this State, causing great delay and loss to the estate, and requiring your orator to incur large expense in and about the defense of said will. And your orator charges that the delay in the probate of

said last will and testament, from the time of the death of the said Philip M. Wheaton on the nineteenth day of June, one thousand nine hundred and two, to the sixteenth day of May, one thousand nine hundred and six, when said will was admitted to probate and letters testamentary issued thereon to your orator, was caused by the action of the said Arabella Wheaton, and that said delay was wholly on account thereof.

8. And your orator further shows unto your Honor, that on the twenty-third day of July, nineteen hundred and two, the Orphans' Court of the county of Cape May appointed Julius Way, administrator *pendente lite*, who thereupon took possession of the estate of the said Phillip M. Wheaton, and held the same until the probate of the will of the said Phillip M. Wheaton and the issue of letters testamentary to your orator on the sixteenth day of May last past, and that until said last mentioned date, your orator had no possession of or control over any of the securities, moneys, property or other assets of said estate, and could not set apart or invest the moneys directed by said will to be invested for said widow.

9. And your orator further shows that the said Philip M. Wheaton, deceased, in and by his said last will and testament instructed, authorized and empowered his executor, your orator, as soon as it was convenient after his decease, to invest a sufficient sum or sums of money of his estate, with good and sufficient security and approved by the Orphans' Court of the county in which his said will was probated, which would bear twelve hundred dollars ($1,200) interest annually, and that sum of twelve hundred dollars said testator gave and bequeathed to his wife, the said Arabella Wheaton, during her natural life, and if she again did not marry; which sum of twelve hundred dollars was to be paid annually to the testator's said wife by his executor, your orator, in payments quarterly of three hundred dollars each; as by the said last will and testament of the said Philip M. Wheaton, de-

ceased, as hereinabove quoted and set forth, and to which your orator refers, will more fully and at large appear.

10. And your orator further shows, that the said May Steelman, the residuary legatee under the said last will and testament, claims that it was not convenient or possible even to invest the said sum of money, which your orator was instructed, authorized and empowered to invest for the use of the testator's said wife, Arabella Wheaton, as aforesaid, until after the said contest of the said Arabella Wheaton as caveatrix against the probate of the will of the said testator had terminated as aforesaid; and the said May Steelman further claims, that under a proper construction of the said will, under the exigencies of the said contest, your orator could not, pending the contest, and while the goods and chattels, rights and credits, moneys and effects of the said testator and of his estate were in the possession and under the control of the said administrator *pendente lite,* make the said investment for the use of the testator's said widow, Arabella Wheaton, and that the said Arabella Wheaton is entitled only to such interest as may be derived from said fund after the investment is made pursuant to said will.

11. And your orator further shows, that the said widow, Arabella Wheaton, claims and insists that your orator should have invested the said sum or sums of money prior to the termination of the said contest, and that she is entitled to be paid out of the estate of the said testator, by your orator, the sum of twelve hundred dollars annually, from and immediaely after the death of the said testator, in quarterly payments of three hundred dollars each, the first payment to begin three months from the date of the death of the said testator.

12. And your orator further shows, that the said administrator *pendente lite,* without lawful authority, undertook to pay and did pay, to the said widow, Arabella Wheaton, against the protest of the defendant, May

Steelman, at the rate of one hundred dollars a month, from and after the date of the death of the said testator, and continued to make said payments for the period of forty-six months and until after the termination of the said contest against the probate of the said will of the said testator, and that there has been thus paid to the said widow, Arabella Wheaton, the sum of forty-six hundred dollars, or thereabouts; that the said sum was paid by the said administrator *pendente lite* pretending to have an order of the Orphans' Court of the county of Cape May authorizing such payment, which order, if any there were, was invalid, in that the said Orphans' Court of Cape May county had no jurisdiction over the subject matter of said estate, as was well known to the said Arabella Wheaton, widow as aforesaid, when she received the said payments amounting to forty-six hundred dollars.

13. And your orator further shows, that on the sixteenth day of May, in the year nineteen hundred and six, your orator, with the approval of the counsel of the said Arabella Wheaton, widow as aforesaid, and with the approval of the Orphans' Court of the county of Cape May, evidenced by its order made for that purpose, set apart certain securities and invested said sum or sums of money for the use of the testator's said widow, as by his will he was directed to do, which would bear at least twelve hundred dollars interest annually, and that there have accumulated and are now in the hands of your orator nine months' interest on the said investment and securities, and that the interest thereon has accumulated to the extent of nine hundred dollars; that your orator has been directed not to pay over the said sum or any part thereof to the said Arabella Wheaton until he has repaid to himself, your orator, under the said will, the aforesaid sum of forty-six hundred dollars, already paid to the said Arabella Wheaton, and that your orator cannot safely pay any portion of the said income from the

said last named sum or sums of money so invested as aforesaid, until the sum exceed the said sum of forty-six hundred dollars already paid to the said Arabella Wheaton, widow as aforesaid.

14. And your orator further shows, that shortly after the sixteenth day of November, in the year nineteen hundred and six, when six months' interest had accumulated in the hands of your orator upon the said sum or sums of money invested for the use of the testator's widow as aforesaid, the said Arabella Wheaton made demand for the six hundred dollars ($600) so accrued, and the said demand having been refused by your orator, the said Arabella Wheaton thereupon brought suit for the said sum of six hundred dollars in the Circuit Court of the county of Camden, which suit is now pending and undetermined, but has not as yet been noticed for trial.

15. And your orator further shows, that the said May Steelman insists and protests that your orator should not pay to the said Arabella Wheaton any part of the said sum so invested for her use until the accumulation of income therefrom shall have exceeded the said sum of forty-six hundred dollars so wrongfully paid to her as aforesaid, and further insists that your orator was not bound, under the provisions of the said will, to make the investment of the said sum or sums of money for the use of the said Arabella Wheaton, widow as aforesaid, until one year after the death of the said testator, in case there had been no contest against said probate, or until after one year from the probate of said will, because of said contest.

All of which actings and doings of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator.

In tender consideration whereof, and forasmuch as your orator is without relief in the premises, at and by the strict rules of the common law, and can only obtain relief in this honorable Court, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that the said defendants, Arabella Wheaton and May Steelman, may, but without oath, full, true and perfect answer make to all and singular the premises, as fully and particularly as if the same were here again repeated and she and they and each of them thereto particularly interrogated, according to their respective knowledge, information, remembrance and belief, and (1) that the said Arabella Wheaton may be perpetually enjoined and restrained from further proceeding in her said suit for the recovery of the said six hundred dollars; and (2) that the said Arabella Wheaton may be restrained from bringing any further suits for any portion of the income of the sums of money so invested by your orator for her use, during her lifetime, as in the foregoing bill of complaint particularly set forth and stated, until said income shall have exceeded the sum of forty-six hundred dollars; and (3) that the payments already made to the said Arabella Wheaton of forty-six hundred dollars may be decreed to have been illegal, and without authority; and (4) that your orator may be authorized and empowered to regard and consider the income of the said sum or sums of money so invested for the use of the said Arabella Wheaton under the said will of her deceased husband, until it accrues and amounts to the said sum of forty-six hundred dollars, as a part of the residuary estate of the said Philip M. Wheaton, to be distributed in accordance with the said will; and that your orator may have such further and other relief and that the said will may be construed so as to prevent other suits against your orator in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator, not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said Arabella Wheaton, enjoining and restraining her, her servants, attorneys and

agents, from further proceeding in a certain suit or action on contract brought by her in the Circuit Court of the county of Camden, against Daniel Steelman, executor of the last will and testament of Philip M. Wheaton, deceased, and also enjoining and restraining her, her servants, attorneys and agents, from bringing any suit at law, in any court of law of this State, against the said Daniel Steelman, executor as aforesaid, for the recovery of any sum or sums of money coming into the possession of said executor as income from the sum or sums of money authorized and directed to be invested by the said executor under the will of the said testator, for the use of the said Arabella Wheaton, during her lifetime, until such sum or sums of money so falling into the hands of the said executor as income as aforesaid shall exceed the sum of forty-six hundred dollars; but also the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Arabella Wheaton and May Steelman, commanding her, them and each of them, by a certain day, and under a certain penalty to be therein expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray for the health and prosperity of your Honor.

GASKILL & GASKILL,
Solicitors and Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

Between

DANIEL STEELMAN, EXECUTOR, ETC., Complainant,

and

ARABELLA WHEATON, Defendant.

ON BILL, &c.

NOTICE TO DISMISS BILL.

To Gaskill & Gaskill, Solicitors for Complainant:

Please take notice, that we shall apply to the Chancellor, at the State House in Trenton (or before such Vice Chancellor as shall sit for the Chancellor), on the nineteenth day of March instant, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that the bill of complaint in this cause be dismissed with costs, for want of equity.

Dated March 7th, 1907.

BLEAKLY & STOCKWELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

DANIEL STEELMAN, EXECUTOR OF PHILIP M. WHEATON, DECEASED, Complainant,

and

ARABELLA WHEATON AND MAY STEELMAN, Defendants.

ON APPLICATION TO STRIKE OUT BILL.

NOTICE.

To Gaskill & Gaskill, Esquires, Solicitors for Complainant, and Bleakly & Stockwell, Esquires, Solicitors for Defendant, Arabella Wheaton:

Please take notice, that the defendant, May Steelman, will intervene and insist on resisting and resist the application of the defendant, Arabella Wheaton, to be made in this cause, at the State House, in the city of Trenton, at eleven o'clock in the forenoon of the nineteenth day of March instant, to strike out and dismiss the bill of complaint in this cause for want of equity.

And take further notice, that the intervention of this defendant, May Steelman, will be on the ground that the said bill of complaint is a bill in the nature of a bill of interpleading, which this defendant, May Steelman, is interested to have retained, and is therefore entitled to be heard and to resist said application.

Dated March 15th, 1907.

H. A. DRAKE,
Solicitor for the Defendant,
May Steelman.

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IN CHANCERY OF NEW JERSEY.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, Complainant,

and

ARABELLA WHEATON, Defendant.

ON MOTION TO STRIKE OUT BILL OF COMPLAINT.

Submitted March 19th, 1907. Decided March 23d, 1907.

MR. ROBERT H. MCCARTER, for Complainant.

MR. GILBERT COLLINS, for Defendant.

BERGEN, V. C.:

The bill in this case seeks an injunction restraining the defendant from prosecuting her action at law, for the recovery of the accrued portion of a bequest which appears in the last will and testament of her husband, in the following words: "I hereby instruct, authorize and empower my executor hereinafter named, as soon as it is convenient after my decease, to invest a sufficient sum or sums of money of my estate, with good and sufficient security, approved by the Orphans' Court of the county in which this will is probated, which will bear twelve hundred ($1,200.00) dollars interest annually; and this sum of twelve hundred ($1,200.00) dollars I give and

bequeath to my wife, Arabella Wheaton, during her natural life, and if she again does not marry; which sum of twelve hundred ($1,200.00) dollars is to be paid annually to my said wife, by my executor, in payments quarterly of three hundred ($300) dollars each, and upon her decease, or upon her again marrying, or upon my decease, if I should survive my said wife, I give and bequeath the sum or sums of money which my executor is authorized to invest for the use of my wife, to my daughter, May Steelman, if she be living." After the death of the testator this defendant filed a caveat against the probate of the will, and in proceedings had thereon in the Orphans' Court, the will was admitted to probate. From this decree she appealed to the Prerogative Court, and to the Court of Errors and Appeals, the result in each of the appellant courts being an affirmance of the decree of the Orphans' Court. During the pendency of the litigation an administrator *pen dente lite* was appointed by the Orphans' Court, and under an order made by that Court he paid to the defendant her legacy or annuity of $1,200 from the date of her husband's death, the whole amount paid by him up to the time the will was established amounted to $4,600, since then three quarterly payments of $300 each have accrued, to recover which the action at law, halted by the preliminary injunction in this case, was brought. The complainant alleges that no part of the $1,200 was payable to the defendant until the executor had qualified and invested an amount sufficient to produce it, and that as the delay in making the investment was caused by the litigation instituted by the defendant she is not entitled to the payments made by the administrator, and that she is not now entitled to further payments until he has recouped out of the income due and to become due a sum sufficient to repay to the estate the sum of $4,600 improperly obtained by her, and that in no event was she entitled to have her income run from the date of the testator's death. The residuary legatee has

notified them that she will contest any further payments until the moneys, which she claims were improperly advanced to the defendant, have been recouped from such accruing income.

The defendant now moves to strike from the files the bill of complaint, alleging as a reason therefor a want of equity. Whether this motion should be allowed depends upon the interpretation to be given the bequeathing clause. The defendant insists that a proper construction of the will, as set up in the bill, does not warrant the granting of an injunctive order, and therefore the bill should be dismissed, this motion being, under our practice, a substitute for a demurrer. The complainant resists the motion on several grounds, the first being that on a motion of this character the notice should be as specific as is required in case of a demurrer, and that a notice to strike out, for want of equity, a bill filed by an executor for affirmative relief dependent upon the construction of the will under which he is acting, does not satisfy rule 209, which calls upon every demurrant to distinctly specify the grounds of a demurrer. The retention of complainant's bill depends upon the character of the bequest; if there is an annuity, the defendant has only received what she was entitled to, and the complainant would them have no standing in this court; on the other hand, if it is only a gift of the income for life of a principal sum to be invested, with remainder over, then the complainant has made a case, entitling him to an answer, or in default thereof, a decree upon *ex parte* proofs. It therefore follows that the only question to be met on this branch of the case is whether the clause in the will, upon which the complainant rests his case, entitles him to equitable relief. It seems to me that the question is clearly presented in the bill of complaint, for an inspection of it shows that the right to relief rests upon the interpretation of the material and only real element of dispute, which is the effect, when properly construed, of the clause of the will upon

which the complainant founds his prayer for injunction. The defect is not latent or obscure, but the pertinent fact alleged in the bill as a ground for relief raises a doubt as to complainant's right thereto, and I am of opinion that the general specification of want of equity is sufficient to justify me in hearing this motion.

Essex Paper Company vs. Graecen, 18 Stew., 504.
Parker vs. Stevens, 16 Dick., 163.

The second ground urged by the complainant in resisting this application is that the legacy is not an annuity payable from the death of the testator, but is a gift of the interest or income of a sum to be invested, making it an ordinary legacy, the income from which begins to run in favor of the legatee, only after the expiration of the year following testator's death, and as the administrator *pendente lite* has treated it as an annuity and paid the defendant accordingly she has received $1,200 more than she should, and ought not to be allowed to press her action at law until she has accounted therefor or the complainant has received sufficient income and returned it to the corpus of the estate to liquidate the over payment.

Whether this bequest is an annuity is the only question to be considered on this branch of the case. In *Booth vs. Amerman, 4 Brad. Sur. R., 129,* an annuity is well described as follows: "An annuity is a stated sum per annum, payable annually, unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable." I am of the opinian that the bequest we are considering falls within this definition, for the executor is to invest a sufficient sum to produce $1,200 annually, which is to be paid to the annuitant during her natural life, "in payments quarterly of three hundred ($300) dollars each." It is the gift of a fixed sum, not indeterminate in amount, or varying according to the income or profits, and if the

amount set apart by the executor to produce this annual sum should for any reason fail to produce it, the residuary legatee would be required to provide the deficiency.

In *Craig vs. Craig, 3 Barb. Chy., 76,* the gift to a wife was, "I also give to her an annuity of $1,600 per year to be paid to her in semi-annual payments; the principal of such annuity to be invested in such manner as she may reasonably require." In construing this language, the Court held that the annuity for the widow began to accrue at the testator's death.

In *Merritt vs. Merritt, 16 Stew., 11,* the will ordered the executors to invest sufficient money to produce an annual income of $1,000 for testator's son, to be paid in equal weekly payments. The amount invested proving insufficient, through changes in interest rates, to produce the required annual income, the deficiency was decreed to be paid by the residuary legatees, the Court saying, "it was obviously the intention of the testator to provide and secure, out of his estate, an annuity of $1,000."

In *Welsh vs. Brown, 14 Vr., 37-43,* Chief Justice Depue said, "the distinction between an annuity pure and simple, which is to be paid at all events, out of testator's estate, at the expense of the residuary legatee, and the interest or income for life of a certain sum set apart by the testator for that purpose, and given over in gross to another, after the death of the life tenant, has been quite uniformly adhered to, citing with approval from *Baker vs. Baker, 6 H. of L. case, 623,* the following portion of Lord Cranworth's opinion, "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered what you must look to is this, whether the language of the testator imports that a sum, at all events, is annually to be paid out of his

general estate, or only the interest or a portion of the interest, of a capital sum, which is to be set apart."

Turning to the will under consideration, there is no gift of the interest of a capital sum which is to be set apart, it is a gift of a sum which is annually to be paid out of testator's estate, and is not subject to any dimunition resulting from a change in the rate of interest, the payment of taxes, or a failure from any reason of a particular fund to produce the amount.

The only case to which I have been referred as holding a contrary doctrine, is that of *Cogswell Ex'r. vs. Cogswell, 2 Edw. Chy., 23,* but there the gift was to his executors in trust to set apart a sufficient sum to produce an annual income of $1,000, "and from time to time, as the same shall become payable to permit my wife to take such interest moneys in the whole amounting to the annual interest of one thousand dollars." In interpretating this language, the Court held that "the gross sum to be set apart to produce the yearly income of one thousand dollars, is considered in the light of a legacy, payable by law, at the end of the year." It will be observed that in this case the testator fixes the time of payment of the gift to be when the interest or income arising from the investment provided for "shall become payable," and the Court was of opinion that it was the plain meaning of the will that the widow was only entitled to such dividends as were declared after the expiration of the first year, and that as the gift depended upon the proceeds of an investment to be made in stock, the executor might take one year for the purpose of making the investment in analogy to the time allowed by law for paying legacies. I apprehend that in determining this cause, Vice Chancellor McCoun was influenced by the fact that it was not considered an absolute gift of $1,000 to be paid in annual or at other fixed periods, but rather of interest moneys upon investments to be made to be paid to the wife as the income from such investments became pay-

able, for the authority upon which he relied in reaching his determination, viz., *1 Roper on Leg., 588,* does not support the proposition that a gift of a stated sum payable annually unless otherwise directed, without regard to the income or profits derived from the portion of testator's estate, set aside by his executors to provide it, is not an annuity, for a reference to the authority cited declares, "But if the disposition be of a sum of money, and the interest of it is given as an annuity to B for life, the first payment will not accrue before the expiration of the second year after the death of the testator," and the learned author undoubtedly means that the disposition shall be of a fixed sum upon which the interest is given, and not of a fixed amount to be paid without regard to the amount of the fund required to produce it. If the case just referred to is an authority sustaining a rule that the gift of a fixed sum to be paid annually is an ordinary legacy and not an annuity, because the executor is to invest a sufficient portion of the estate to provide for the annuity, without any direction as to the amount of the investment, then it is contrary to the weight of authority on this subject.

It was insisted on the argument that as the will directed the executor to invest a sufficient sum to raise the $1,200 annually, the executor was not required to make the investment until the expiration of one year from testator's death. The answer to this contention is, that the executor is only authorized to do what the law requires and permits him to do. He is always justified in setting apart immediately a fund sufficient to indemnify him against the payment of the annuity.

A further contention of the complainant is, that granting the bequest to be an annuity, nevertheless, the defendant was improperly paid all that she received, because her opposition to the probate of the will was "unwarranted, dilatory and vexatious," and that by reason of such conduct, the executor was prevented from making

the investments required to provide the annuity. I am unable to discover any equitable reason for refusing to the defendant what she is entitled to under the will, simply because she contested its probate to an unsuccessful issue. The estate was in the hands of an officer appointed by the Court, the presumption is that he did his duty and kept the money invested, and the contrary is not alleged, therefore it could make no difference in the status of the estate whether the administrator or the executor collected the income, and I am aware of no equitable rule which visits upon an unsuccessful litigant the penalty of depriving him of that portion of the estate which the courts have determined he is entitled to, notwithstanding his unsuccessful claim that he was unfairly dealt with.

Whether the administrator *pen dente lite* was justified in paying legacies is a question which cannot be determined in this suit, that is a matter of administration. The funds were placed in his hands by the Orphans' Court to be administered by him as the law directs, and any improper misapplication of the funds committed to his charge must be adjusted in the settlement of his accounts in that Court. If this defendant was entitled to the money it would have to be paid to her by the present executor, and the fact that it may have been paid to her by the administrator *pen dente lite* works no injury to the parties interested therein, which calls upon a Court of equity to interfere, for such an administrator, even if he pays a legacy which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, provided the party who received it was entitled to it, and the estate able and liable to make the same after all prior charges are provided for.

The result which I have reached is, that the bill of complaint presents no equity as against this defendant and the motion should prevail.

IN CHANCERY OF NEW JERSEY.

Between

DANIEL STEELMAN, Executor, etc.,

Complainant,

and

ARABELLA WHEATON, ET AL.,

Defendants.

ON BILL.

ORDER.

This matter coming regularly on to a hearing on due notice given, in the presence of Gaskill & Gaskill, solicitors for complainant, and Herbert A. Drake, solicitor for May Steelman, Robert H. McCarter, of counsel, and Bleakly & Stockwell, and George H. Pierce, solicitors for defendant, Arabella Wheaton, Gilbert Collins, of counsel, and the Court having heard the argument of the respective counsel and considered the subject matter of the bill, and being of the opinion that the bill filed in the above cause does not present any equity which requires an answer from the defendant, Arabella Wheaton,

It is, on this second day of April, A. D. nineteen hundred and seven, ordered, adjudged and decreed, that the bill filed in the above cause be and the same is hereby stricken out and dismissed as against the said defendant, Arabella Wheaton, with costs.

W. J. MAGIE,
C.

Respectfully advised,
J. J. BERGEN,
V. C.

A true copy.
VIVIAN M. LEWIS,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between	
DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, Complainant,	ON BILL FOR RELIEF.
and	NOTICE OF APPEAL.
ARABELLA WHEATON and MAY STEELMAN, Defendants.	

The complainant hereby appeals from the order made in the above stated cause on the second day of April, in the year of our Lord one thousand nine hundred and seven, and filed on the fourth day of that month, by which it was ordered, adjudged and decreed that the bill filed in the above cause be and the same was thereby stricken out and dismissed as against the defendant, Arabella Wheaton, with costs, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 11, 1907.

GASKILL & GASKILL.
Solicitors for Complainants.

J H. GASKILL
Of Counsel.

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

J H. GASKILL
Of Counsel with Complainant.

Service acknowledged this 22d day of April, 1907.
BLEAKLY & STOCKWELL,
Solicitors of Arabella Wheaton.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, (Appellant), Complainant,

and

ARABELLA WHEATON (Respondent) and MAY STEELMAN, Defendants.

PETITION OF APPEAL.

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

The petition of Daniel Steelman, executor of the last will and testament of Philip M. Wheaton, deceased, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by the Honorable William J. Magie, Chancellor of New Jersey, bearing date the second day of April, in the year one thousand nine hundred and seven, and filed April 4, 1907, wherein the

said Daniel Steelman, executor as aforesaid, the appellant is complainant, and the said Arabella Wheaton, the respondent, is one of the defendants, and the said May Steelman is the other defendant, in this respect, to wit: That the said order, orders and adjudges and decrees that the bill filed in the said cause be and the same thereby was stricken out and dismissed as against the respondent, Arabella Wheaton, with costs.

And your petitioner humbly appeals from the said order, and all parts thereof, upon the ground that the same is erroneous, and for that the same should have ordered, that the application of the respondent, Arabella Wheaton, to dismiss or strike out the bill of complaint of the complainant for want of equity should have been denied, with costs.

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

Dated April 11, 1907.

GASKILL & GASKILL,
Solicitors for Appellant and Complainant.

J. H. GASKILL,
Of Counsel.

Served on Bleakly & Stockwell April 26, 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, (Appellant), Complainant, and ARABELLA WHEATON (Respondent), and MAY STEELMAN, Defendants.	ON APPEAL OF DANIEL STEELMAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PHILIP M. WHEATON, DECEASED. ANSWER OF ARABELLA WHEATON, RESPONDENT.

The answer of Arabella Wheaton, respondent, to the petition of appeal of Daniel Steelman, executor of the last will and testament of Philip M. Wheaton, in the above entitled cause.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits that a decree was made in said cause, dated the second day of April, one thousand nine hundred and seven, and entered in the Court of Chancery in the cause dismissing the bill of complaint as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the

same may be affirmed, with costs to be adjudged to this respondent.

Dated April 27th, 1907.

BLEAKLY & STOCKWELL,
Solicitors for and of counsel
with Respondent.

IN CHANCERY OF NEW JERSEY.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, Complainant,

and

ARABELLA WHEATON and MAY STEELMAN, Defendants.

ON BILL OF RELIEF.

NOTICE OF APPEAL.

The defendant, May Steelman, hereby appeals from the order made in the above stated cause on the second day of April, in the year of our Lord one thousand nine hundred and seven, and filed on the fourth day of that month, by which it was ordered, adjudged and decreed, that the bill filed in the above cause be, and the same was thereby striken out and dismissed as against the defendant, Arabella Wheaton, with costs, and from the

whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 11th, 1907.

H. A. DRAKE,
Solicitor for the Defendant,
May Steelman.

H. A. DRAKE,
Of Counsel.

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

H. A. DRAKE,
Of Counsel with Defendant,
May Steelman.

Service of a copy of the within notice of appeal is hereby acknowledged this eleventh day of April, A. D. 1907.

BLEAKLY & STOCKWELL,
Solicitors for Arabella Wheaton,
Respondent.
GASKILL & GASKILL,
Solicitors for Complainant.

Original to Trenton, April 11th, 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, Complainant,

and

ARABELLA WHEATON (Respondent), and MAY STEELMAN (Appellant), Defendants.

PETITION OF APPEAL.

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

The petition of May Steelman, the appellant in the above stated cause, respectfully shows, that your petitioner finds herself aggrieved by an order made in the Court of Chancery by the Honorable William J. Magie, Chancellor of New Jersey, bearing date of the second day of April, in the year one thousand nine hundred and seven, and filed April 4th, 1907, wherein the said Daniel Steelman, executor of the last will and testament of Philip M. Wheaton, was complainant, and your petitioner, May Steelman, appellant, was one of the defendants, and the said Arabella Wheaton, respondent, was the other defendant, in this respect, to wit, in and by said order it was ordered, adjudged and decreed that

the bill of complaint filed in the above cause by the said Daniel Steelman, executor as aforesaid, be, and the same thereby was stricken out and dismissed as against the defendant, Arabella Wheaton, with costs.

And your petitioner humbly appeals from the said order and all parts thereof, upon the ground that the same is erroneous, and for that same should have ordered that the application of the defendant, Arabella Wheaton, to dismiss or strike out the bill of complaint of the said Daniel Steelman, executor as aforesaid, for want of equity, should have been denied with costs.

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

Dated April 11th, 1907.

H. A. DRAKE,
Solicitor for May Steelman,
(Appellant), Defendant.

H. A. DRAKE,
Of Counsel with the Defendant, May Steelman, Appellant.

Served on Gaskill & Gaskill, Solicitors for Complainant, and Bleakly & Stockwell, Solicitors for Defendant, and Arabella Wheaton, April 13th, 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between DANIEL STEELMAN, Executor of PHILIP M. WHEATON, deceased, Complainant, and ARABELLA WHEATON (Respondent) and MAY STEELMAN (Appellant), Defendants.	ON APPEAL OF MAY STEELMAN. ANSWER OF ARABELLA WHEATON, Respondent.

The answer of Arabella Wheaton, respondent, to the petition of appeal of May Steelman in the above entitled cause.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was made in said cause, dated the second day of April, one thousand nine hundred and seven, and entered in the Court of Chancery in the cause dismissing the bill of complaint, as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

Dated April 23, 1907.

BLEAKLY & STOCKWELL,
Solicitors for and of Counsel with Respondent.