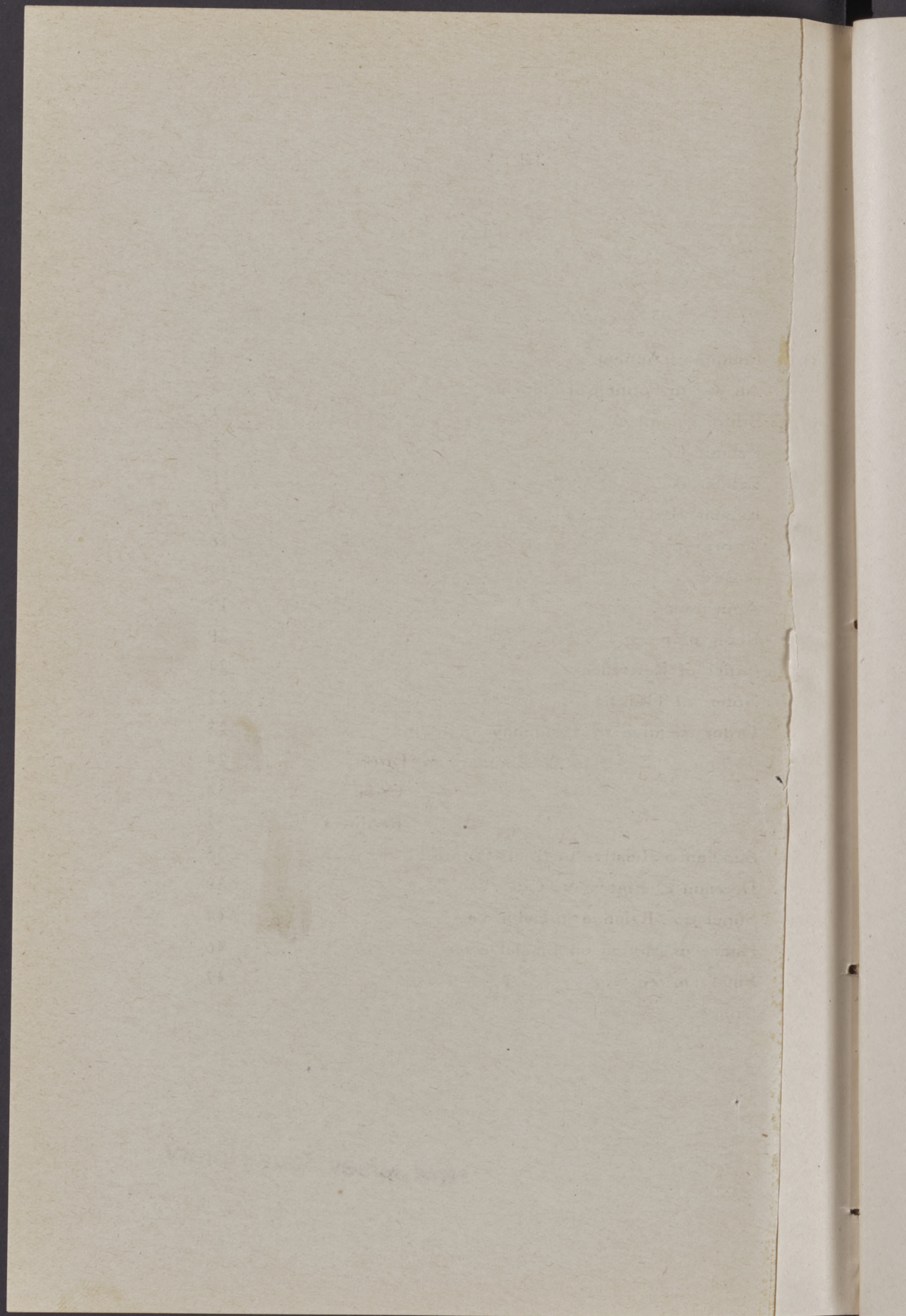


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(a) Because the findings of the court below are inequitable, unjust and oppressive to the defendant-appellant.

(b) Because decedent, Theodore A. Zimmerman, as shown by the evidence intended to reduce to possession the estate of Annie M. Zimmerman, as appears from the uncontradicted testimony in the case.

10 (c) Because the Court of Chancery erred in its decree that Theodore A. Zimmerman did not under the facts of the case reduce the estate of Annie M. Zimmerman under her will to possession.

(d) Because the Court of Chancery erred in its decision wherein it held that Theodore A. Zimmerman did not by his acts and conduct become seized and possessed of the estate of Annie M. Zimmerman under the will of Annie M. Zimmerman.

20 (e) Because the Court of Chancery erred in deciding under the evidence submitted that Theodore A. Zimmerman did not exercise the power of disposal given him by will by demanding and receiving from defendant-appellant executor the entire estate of his wife as the beneficiary under said will.

30 (f) Because the Court of Chancery erred in its decision that delivery of the personal estate under the will could not be made informally and because defendant-appellant, as executor, upon the demand of Theodore A. Zimmerman, the beneficiary, delivered the bonds and mortgages and other securities, constituting the valuable part of the estate of Annie M. Zimmerman, without formally assigning the said bonds, mortgages and other securities in writing and that title thereto did not pass, and that the estate still remains in the executor of Annie M. Zimmerman, although at the time of the death of Theodore A. Zimmerman, the personal estate, or a large part of it, was in the possession of the said Theodore A. Zimmerman.

(g) Because the court below erred in the conclusion that from the evidence Mrs. Zimmerman did not intend to bequeath an absolute estate to her husband but only a life estate.

(h) Because the court below held that Theodore A. Zimmerman did not by the mere demand for and receipt

of her estate exercise his power of disposal and did not by his acts enlarge the bequest to him in the will of Annie M. Zimmerman into an absolute gift.

(i) Because the court below held that the transfer of Annie M. Zimmerman's estate by defendant-appellant, executor to Theodore A. Zimmerman, mentioned in her will, was merely a delivery of possession of securities to Theodore A. Zimmerman as a life beneficiary and not absolute.

(j) Because the court below decided that under all 10
the circumstances of the case the acts and conduct of the said Theodore A. Zimmerman that he did not dispose of or intended to dispose of by his will the personal estate of Annie M. Zimmerman, devised to him and in his possession at the time of his death, he having demanded the same from his executor and received the same, and the court having held that he had no power under the circumstances to dispose by will of such personal estate so received by him and that he had no power of disposal. 20

(k) Because the court below held that Annie M. Zimmerman by her will devised only a limited estate for life and not an absolute one, and that so much of her estate as remained undisposed of at the time of the death of the said Theodore A. Zimmerman should be distributed in accordance with the provisions of the will of Annie M. Zimmerman, defendant-appellant claiming that as to that portion of the personal estate delivered over by him as executor of Annie M. Zimmerman to Theodore A. Zimmerman in his lifetime and held by him 30
was his absolute property, which he could dispose of as he attempted to do by his last will and testament.

(l) Because the court below decided by its decree that the defendant-appellant individually and as executor of both wills, namely Annie M. Zimmerman and Theodore A. Zimmerman, must account in this court for such undisposed portion of Annie M. Zimmerman's estate, and make distribution thereof among those entitled thereto under the terms of her will, thus erroneously holding that defendant-appellant must account for the estate of Annie M. Zimmerman, demanded from him as executor and delivered to Theodore A. Zimmerman,

of which portion of said estate Theodore A. Zimmerman died seized and possessed of.

Your petitioner therefore prays that the final decree may in all things aforesaid be reversed, set aside, and for nothing holden, and your petitioner may have such relief in the premises as to this honorable court may seem meet.

CHARLES E. COOK,
Solicitor of Defendant-Appellant.

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

CHARLES E. COOK,
Of Counsel.

20

30

NEW JERSEY COURT OF ERRORS AND APPEALS.

EMILY McDERMOTT ET ALS.,	} On Bill, &c.	10
<i>Complainant-Respondent,</i>		
AND		
ARTHUR A. ZIMMERMAN, EXECU- TOR, &C.,		
<i>Defendant-Appellant.</i>		

ANSWER TO PETITION OF APPEAL.

(Filed Dec. 12, 1917.)

The answer of the above named respondent to the petition of appeal of the above named appellant.

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 on the third day of November, 1917, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the circumstances 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 prays that the same may be affirmed, with costs to be adjudged to this respondent.

JOHN S. APPLGATE & SON,
Solicitors for Complainants.

IN CHANCERY OF NEW JERSEY.

(Filed May 21, 1917.)

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

The complainants, Emily McDermott and Carl McDermott, of the town of Freehold, county of Monmouth and State of New Jersey, respectfully show:

10 1. That Annie M. Zimmerman died in February, 1912, leaving a last will and testament, duly probated in the surrogate's office of Monmouth county, and letters testamentary issued to Arthur A. Zimmerman, the executor named in said will (a true copy of which is hereto annexed and made a part of this complaint by reference thereto), who has taken upon himself the burden thereof.

20 2. According to the provisions of said will, the estate of said testatrix was devised to her husband, Theodore A. Zimmerman, for life, with remainder upon his death to these complainants as their interest may appear according to the provisions of said will.

3. The estate of said Annie M. Zimmerman at her death amounted to approximately \$15,750.22, according to the inventory and appraisal filed March 2d, 1912, in the Monmouth Orphans' Court by her said executor, and consisted of stocks, mortgages and bonds, and other personal property.

30 4. That the said executor did, on the second day of March, 1912, deliver to the said Theodore A. Zimmerman the assets of the estate of the said Annie M. Zimmerman, deceased, consisting of bonds and mortgages, choses in action, goods and chattels, and other property, amounting to \$15,750.22 in value.

5. That in December, 1916, the said Theodore A. Zimmerman, surviving husband of said Annie M. Zimmerman, deceased, departed this life, leaving a last will and testament, which was duly probated in the Orphans' Court of Ocean county, New Jersey, and letters testamentary issued to Theodore A. Zimmerman, the executor designated in said last will (a true copy of which will is hereto annexed and made a part of this complaint by

reference thereto), who has taken upon himself the burden thereof.

6. That at the time of the death of said Theodore A. Zimmerman there remained of the estate of his wife, Annie M. Zimmerman, undisposed-of property in the form of mortgages, notes, stocks, etc., worth approximately the sum of \$15,750.22, according to the inventory and appraisal filed January 11, 1917, in the Orphans' Court of Ocean county by her said executor, which said properties came into the possession of said Arthur A. Zimmerman, executor of the said Theodore A. Zimmerman, deceased, but that no accounting has as yet been made by said executor of said estate. 10

7. That the said Arthur A. Zimmerman, as executor of the estate of said Theodore A. Zimmerman, deceased; as executor of the estate of Annie M. Zimmerman, and as an individual, has refused, and still does refuse, to pay over to these complainants their shares as legatees under the last will and testament of Annie M. Zimmerman, deceased, of the property which came into the possession of said Theodore A. Zimmerman under the terms of said will, as life tenant, and which property came into the possession of said Arthur A. Zimmerman, as executor of said Theodore A. Zimmerman, deceased. 20

8. That, as these complainants are informed, the said executor refuses to deliver to these complainants their share of said estate, and refuses to pay these complainants their respective legacies to which they are entitled by virtue of the will of Annie M. Zimmerman, deceased, and refuses to recognize the interests of the said complainants in or to any of the properties possessed by the said Theodore A. Zimmerman at the time of his decease, according to the provisions of the said will of Annie M. Zimmerman, deceased, because the said Arthur A. Zimmerman, as an individual, has either already made, or proposes to make, claim against the estate of said Theodore A. Zimmerman, deceased, as a creditor thereof, and for that reason the said executor asserts that the said Theodore A. Zimmerman did receive, by virtue of the last will and testament of Annie M. Zimmerman, his deceased wife, an absolute estate thereunder. 30

9. That these complainants filed exceptions to the ac-

count as rendered, and as filed by the executor of Annie M. Zimmerman, deceased, in the Orphans' Court of Monmouth county, and the said court did dismiss the same on the ground, as stated in the conclusions of said court, that said court was without jurisdiction to compel the executor of the estate of Theodore A. Zimmerman, deceased, to return to the estate of Annie M. Zimmerman, deceased, the property remaining undisposed of by the said Theodore A. Zimmerman at the time of his

10 death, and which he had received from the estate of his said wife, under and by virtue of her last will. And the court does further state in its conclusions: "It seems clear that the remedy of the exceptants is by an appropriate proceeding for an accounting in the Court of Chancery, and in the circumstances the exceptions must be dismissed."

10. That, by virtue of the premises, these complainants charge that the said defendant, Arthur A. Zimmerman, either as executor of the estate of Annie M. Zimmerman, deceased, or as executor of the estate of Theodore A. Zimmerman, deceased, or as an individual, as this honorable court may decide, holds the said estate of Annie M. Zimmerman, which came into the possession of Theodore A. Zimmerman, and remained undisposed of at the time of his death, as a trustee, for the benefit and use of these complainants, to the extent of their right and interest therein.

20

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

30 First—That the said defendants may answer this bill of complaint without oath and each statement therein made:

Second—That the said Arthur A. Zimmerman, either as executor, or as an individual, or both, as this court may decide, be required to render an account of the properties of Annie M. Zimmerman, deceased, as at the time of her death, and also of the properties of Theodore A. Zimmerman, as well as of the property of Annie M. Zimmerman remaining undisposed of at the death of Theodore A. Zimmerman, and which came into the possession of said Arthur A. Zimmerman, either as executor or as an individual.

Third—That the amount due these complainants, respectively, be ascertained, and the defendants, or such one of them as the court may require, be decreed to pay the complainants the moneys due them, respectively, as legatees under the last will and testament of Annie M. Zimmerman, deceased, with interest and costs, and that the complainants may have such further or other relief as your honor may seem meet and shall be agreeable to equity and good conscience.

Fourth—That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

J. S. APPLGATE & SON,
Solicitors of Complainants.

Exhibit "C"

WILL OF ANNA M. ZIMMERMAN.

20

IN THE NAME OF GOD, AMEN—I, Annie M. Zimmerman, wife of Theodore A. Zimmerman, of the Township of Wall, in the County of Monmouth and State of New Jersey, do hereby make, publish and declare this my last will and testament in manner following, that is to say:

First—I hereby give, devise and bequeath unto my beloved husband, Theodore A. Zimmerman, all my estate, both real and personal of whatsoever kind or wheresoever same may be situate, to have and to hold 30
unto my said husband for and during the term of his natural life, with full power and authority to sell or otherwise dispose of, mortgage or in any way encumber the whole or any part of said property as he shall see fit.

Second—Upon the death of my said husband, I give and bequeath out of any of my estate which may remain, unto my grandchildren Theodore Zimmerman, Harold Zimmerman and Carl McDermott, four hundred dollars (\$400) each, and to my grandchildren Carl Zimmerman and Anna M. Zimmerman one hundred dollars (\$100) each.

Third—All the residue of my estate, if any, I give,

devise and bequeath to my three children, Howard S. Zimmerman, Emily McDermott and Arthur A. Zimmerman, equally to be divided among them, share and share alike, and I direct that in the event of the death of any of my said children prior to the decease of my said husband leaving issue him or her surviving that then and in that case the said issue shall take the share which their said parent would have taken if living; and I further direct that if any of the said issue shall not have
 10 attained the age of twenty-one years at the time of the death of my said husband, that then the share which such issue does take shall be held in trust by my son Arthur A. Zimmerman until such issue shall attain the age of twenty-one years.

Fourth--I hereby appoint my son, Arthur A. Zimmerman, sole executor of this my last will and testament, without bonds.

In Witness Whereof, I, the said Annie M. Zimmerman, have hereunto set my hand this seventh day of
 20 January, in the year of our Lord one thousand nine hundred and eight.

ANNIE M. ZIMMERMAN.

Signed, acknowledged and declared by the said Annie M. Zimmerman as and for her last will and testament in the presence of us (both being present at the same time) who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

30

JOSEPH E. VOORHEES, SR.
 CLARENCE H. MURPHY.

Exhibit "A"

WILL OF THEODORE A. ZIMMERMAN.

Filed and Recorded October 11, 1916.

IN THE NAME OF GOD, AMEN.—I, Theodore A. Zimmerman, of the Township of Wall, in the County of Monmouth, and State of New Jersey, do hereby

make, publish and declare this my last will and testament in manner following, that is to say:

First—I hereby give, devise and bequeath unto my beloved wife, Annie A. Zimmerman, all my estate, both real and personal of whatsoever kind or wheresoever same may be situate, to have and to hold unto my said wife for and during the term of her natural life, with full power and authority to sell or otherwise dispose of, mortgage or in any way encumber the whole or any part of said property as she shall see fit. 10

Second—Upon the death of my said wife, I give and bequeath out of any of my estate which may remain, unto my grandchildren, Theodore Zimmerman, Harold Zimmerman and Carl McDermott, four hundred dollars (\$400) each, and to my grandchildren, Carl Zimmerman and Anna M. Zimmerman, one hundred dollars (\$100) each.

Third—All of the residue of my estate, if any, I give, devise and bequeath to my three children, Howard S. Zimmerman, Emily McDermott and Arthur A. Zimmerman, equally to be divided among them, share and share alike, and I direct that in the event of the death of any of my said children prior to the decease of my said wife leaving him or her surviving, that then and in that case the said issue shall take the share which their said parent would have taken if living; and I further direct that if any of the said issue shall not have attained the age of twenty-one years at the time of the death of my said wife, that then the share which said issue does take shall be held in trust by my son, Arthur A. Zimmerman, until such issue shall attain the age of twenty-one years. 20 30

Fourth—I hereby appoint my son, Arthur A. Zimmerman, sole executor of this my last will and testament, without bonds.

In Witness Whereof, I, the said Theodore A. Zimmerman, have hereunto set my hand this seventh day of January, in the year of our Lord one thousand nine hundred and eight.

THEODORE A. ZIMMERMAN.

Signed, acknowledged and declared by the said Theodore A. Zimmerman, as and for his last will and

testament in the presence of us (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

JOSEPH E. VOORHEES, SR.
CLARENCE H. MURPHY.

10 I hereby expressly confirm my former will, dated 7th January, 1908, excepting so far as the disposition of my property is changed by this codicil. I deduct from Howard S. Zimmerman's share \$125; I deduct from Theodore Zimmerman's share \$100; I deduct from Harold Zimmerman's share \$25; I revoke the share bequeathed to Annie Zimmerman, deceased daughter of Howard S. Zimmerman, and bequeath the same to Maggie Shaw. I also bequest and give to my son Arthur A. Zimmerman my bank stock in Freehold Bank, in addition to his share. Balance of the estate be equally
20 divided between my three children, Howard, Emily and Arthur.

Witness my hand and seal.

THEODORE A. ZIMMERMAN. [L. s.]

JOSEPH B. VANNOTE,
R. D. KRUGER.

November 15, 1915.

30

Exhibit "B"

INVENTORY AND APPRAISEMENT OF THEODORE A.
ZIMMERMAN.

(Filed and Recorded January 12, 1917.)

A true and perfect inventory and appraisalment of the goods and chattels, rights and credits, moneys and effects of Theodore A. Zimmerman, deceased, late of the County of Ocean, made this eleventh day of January, A. D. 1917, by Joseph F. Moran and William H. Makin, appraisers.

	Value.	
Expert Oil on Pipe Line Co. (Beaumont, Texas) — Certificate No. 8046, 60 shares; Certificate No. 3257, 40 shares; Certificate No. 4674, 100 shares; Certificate No. 4762, 100 shares.....	\$1.00	
Assignment of Mortgage, dated March 25, 1899, lands in Howland Township, Monmouth Co., N. J., \$300 mortgage.		10
Consideration for Assignment of Julia L. Osborn to Annie M. Zimmerman, \$109.72, recorded in Monmouth Co. Book R 2 of Assignments of Mortgages, p. 75	109.72	
Bond and Mortgage, Emma Wooley and A. P. Wooley to T. A. Zimmerman, mortgage recorded in Monmouth Co. Book 365 of Mortgages, p. 245, dated Oct. 1, 1908, \$500, 6% (int. paid up to Oct. 1, 1916		20
\$100 cash received from Masonic Mutual Life Insurance Association, Fourth Masonic District of N. J., located at Manasquan, N. J., Wall Lodge, No. 73, Certificate No. 69	100.00	
1-16 int. in Schooner O. H. Brown..	250.00	
One share, par value \$25.00 to Monmouth Fair Association (N. J.)..	25.00	30
One share, par value \$100, Certificate No. 4, The Shore Gas Co. (N. J.)	10.00	
Greenwich Electric Co. (N. J.) Certificate No. 13, 1 share, par value, \$100.00	1.00	
Note of Jennie L. Baretman, 6 mos., First National Bank of Manasquan, N. J., dated September 24, 1897. Last letter from debtor admitting indebtedness dated March 29, 1902. (Note outlawed.)00

	Bond and Mortgage, Lucetta G. Hancock and Royal A. Hancock to Annie M. Zimmerman, dated July 14, 1906, recorded in Monmouth County Clerk's office, in Book 327, pages 223, etc., amount \$1,400. . . .	1,400.00 & Int.
10	Assignment of bond and mortgage, Anthony R. Kuser and Joseph L. Kuser to Theodore A. Zimmerman, dated September 28, 1914, recorded in Book 15 of Assignments of Mortgages of Ocean County, p. 177, etc. mortgage covers Hotel Marion property, Point Pleasant, N. J. Amount of mortgage, \$12,000, int. 5%	12,000.00 & Int.
	Cash in Ocean County National Bank of Point Pleasant Beach, N. J. . . .	81.84
	Jewelry (gold watch, 2 gold rings, 1 gold chain, 1 pair gold cuff links)	70.00
20	Clothing	5.00
	Certificate No. 69, 5 shares of Central National Bank of Freehold, N. J., par value \$100 each	1,500.00
	Total	\$16,053.56

ARTHUR A. ZIMMERMAN,
Executor.
 WILLIAM H. MAKIN,
Appraiser.
 JOSEPH F. MORAN,
Appraiser.

30

STATE OF NEW JERSEY, ss.
 OCEAN COUNTY.

William H. Makin, one of the appraisers in the annexed inventory named, being duly sworn according to law, deposes and says that the goods and chattels and credits in the annexed inventory set down and specified, were by him appraised according to their just and true respective rates and values, after the best of his judg-

ment and understanding; and that Joseph F. Moran, the other appraiser whose name is subscribed thereto, was present at the same time with this deponent, and consented in all things to the doing thereof, and that they appraised all things that were brought to their view for appraisement.

WILLIAM H. MAKIN.

Sworn and subscribed before me this eleventh day
of January, A. D. 1917. 10

THOS. C. CURTIS,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
OCEAN COUNTY. } ss.

Arthur A. Zimmerman, executor of the estate of Theodore A. Zimmerman, deceased, being duly sworn according to law, deposes and says that the annexed writing contains a true and perfect inventory of all and singular the goods, chattels and credits of the said Theodore A. Zimmerman, deceased, as far as have come to his possession or knowledge, or to the possession of any other person or persons for his use, to his knowledge. 20

ARTHUR A. ZIMMERMAN,
Executor.

Sworn and subscribed before me this eleventh day
of January, A. D. 1917. 30

THOS. C. CURTIS,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
COUNTY OF OCEAN, } ss.

I, Otto C. Thompson, Surrogate of the County of Ocean, do certify the foregoing to be a true copy of inventory and appraisement in the matter of the estate of Theodore A. Zimmerman, late of the county of Ocean, deceased, as the same remains of record in my office.

In witness whereof, I have hereunto set
my hand and affixed my seal of office, at
[L. s.] Toms River, this sixteenth day of April, in
the year of our Lord one thousand nine hun-
dred and seventeen.

OTTO C. THOMPSON,

Surrogate.

By PERCY L. GROVER,

Deputy Surrogate.

10

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

AND

20 ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC.,
Defendants.

APPEARANCE.

(Filed June 20, 1917.)

30 Appearance entered for Arthur A. Zimmerman, as
an individual, Arthur A. Zimmerman, Executor of
Annie M. Zimmerman, deceased and Arthur A. Zim-
merman, Executor of Theodore A. Zimmerman, de-
ceased, defendants in the above-stated cause, by

CLARENCE H. MURPHY,

Solicitor.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC.,
Defendants.

10

ANSWER.

(Filed June 20, 1917.)

The answer of the defendants, Arthur A. Zimmerman, as an individual, Arthur A. Zimmerman, Executor of Annie M. Zimmerman, deceased, and Arthur A. Zimmerman, Executor of Theodore A. Zimmerman, deceased. 20

These defendants, Arthur A. Zimmerman, as an individual, Arthur A. Zimmerman, Executor of Annie M. Zimmerman, deceased, and Arthur A. Zimmerman, Executor of Theodore A. Zimmerman, deceased, answering the bill of complaint, say that:

1. Paragraphs 1, 3, 4 and 9 are admitted.
2. Paragraph 2 is denied.
3. Paragraph 5 is admitted, excepting that Theodore A. Zimmerman died in August, 1916, and that letters testamentary were issued to Arthur A. Zimmerman. 30
4. Paragraph 6 is denied, excepting that no accounting has yet been made by the executor of Theodore A. Zimmerman, as a year has not elapsed since Theodore A. Zimmerman died. An inventory of the estate of Theodore A. Zimmerman approximating the sum of \$15,750.22 was filed January 11th, 1917, in the Orphans' Court of the County of Ocean by the executor of said Theodore A. Zimmerman.

5. Paragraph 7 is admitted, excepting that it is denied

that there is any property in the estate of Annie M. Zimmerman, deceased, as appears by the account of the executor, Arthur A. Zimmerman, on file in the Monmouth County Orphans' Court, and that there is anything due the complainants as legatees by virtue of the last will of Annie M. Zimmerman, deceased.

6. Paragraph 8 is denied, excepting it is admitted that Arthur A. Zimmerman is one of the creditors of the estate of Theodore A. Zimmerman, and Arthur A. Zimmerman as executor of Annie M. Zimmerman asserts that Theodore A. Zimmerman, in his lifetime, demanded and received the whole of the estate of Annie M. Zimmerman, pursuant to the provisions of the will of Annie M. Zimmerman, his deceased wife, as appears by the account of the said Arthur A. Zimmerman, executor of Annie M. Zimmerman, on file in the Monmouth County Orphans' Court.

7. Paragraph 10 is denied, excepting it is admitted that Arthur A. Zimmerman, as executor of the estate of Theodore A. Zimmerman, deceased, holds his estate for the complainants and others, as their interests appear according to the provisions of the last will and testament of Theodore A. Zimmerman, deceased.

CLARENCE H. MURPHY,
Solicitor of Defendants.

(Arthur A. Zimmerman, as an individual, Arthur A. Zimmerman, Executor of Annie M. Zimmerman, deceased, and Arthur A. Zimmerman, Executor of Theodore A. Zimmerman, deceased.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC.,
Defendants.

10

APPEARANCE.

(Filed June 20, 1917.)

Appearance entered for Arthur A. Zimmerman, Ex-
ecutor, etc., defendants in the above-stated cause, byCLARENCE H. MURPHY,
Solicitor.

20

30

IN CHANCERY OF NEW JERSEY.

BETWEEN
 EMILY McDERMOTT AND CARL
 McDERMOTT,
Complainants,
 AND
 10 ARTHUR A. ZIMMERMAN, Ex-
 ECUTOR OF THE LAST WILL AND
 TESTAMENT OF ANNIE M. ZIM-
 MERMAN, DECEASED, AND Ex-
 ECUTOR OF THE LAST WILL AND
 TESTAMENT OF THEODORE A.
 ZIMMERMAN, DECEASED, AND
 ARTHUR A. ZIMMERMAN, IN-
 DIVIDUALLY,
Defendants.

} On Bill, etc.

20

REPLICATION.

(Filed June 21, 1917.)

The complainants join issue on the answer of the
 defendants.

JOHN S. APPELEGATE & SON,
Solicitors of Complainants.

30

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT AND CARL
McDERMOTT,*Complainants,*

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR OF THE LAST WILL AND
TESTAMENT OF ANNIE M. ZIM-
MERMAN, DECEASED, AND Ex-
ECUTOR OF THE LAST WILL AND
TESTAMENT OF THEODORE A.
ZIMMERMAN, DECEASED, AND
ARTHUR A. ZIMMERMAN, IN-
DIVIDUALLY,*Defendants.*

On Bill, etc. 10

20

ORDER OF REFERENCE.

(Filed June 28, 1917.)

Application being made by solicitors for complainants, and counsel for the defendants consenting thereto,

It is on this twenty-seventh day of June, nineteen hundred and seventeen, ordered, that the above-stated cause be referred to Hon. John E. Foster, one of the Vice 30
Chancellors of our Court of Chancery, to hear the same for the Chancellor, and to report thereon to him and advise what decree should be made therein.

E. R. WALKER,

Chancellor.

We consent to the entry of the above order.

JOHN S. APPLGATE & SON,

Solicitors of Complainants.

CLARENCE H. MURPHY,

Solicitor of Defendants.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT AND CARL
McDERMOTT,*Complainants,*

AND

10 ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC., ET ALS.,*Defendants.*

} On Bill, etc.

NOTICE.

(Filed June 13, 1917.)

20 *To Clarence H. Murphy, Esq., Solicitor of Defendants,
Point Pleasant, N. J.*

DEAR SIR—Take notice that we shall apply to his Honor Vice Chancellor John E. Foster, at the Chancery Chambers in the city of Long Branch, on the sixth day of July, nineteen hundred and seventeen, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order designating day and place of hearing of the above entitled cause.

Very truly yours,

30 JOHN S. APPLIGATE & SON,
Solicitors of Complainants.

Dated June 30th, 1917.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC., ET ALS.,
Defendants.

} On Bill, etc.

10

ORDER.

(Filed June 13, 1917.)

The above entitled cause having been referred to Hon. John E. Foster, one of the Vice Chancellors of our Court of Chancery, to hear the same for the Chancellor, and it appearing that testimony has been taken in the suit between the same parties hereto instituted in the Monmouth County Orphans' Court, upon all material points involved in this cause, and that the questions raised in this cause can be determined upon the same testimony taken in said suit, and the parties hereto having consented to this order:

It is thereupon, on this tenth day of July, nineteen hundred and seventeen, ordered that in lieu of hearing and taking testimony in this cause, the testimony taken in the cause between the same parties hereto in the Monmouth County Orphans' Court, and same exhibits, be used by the Vice Chancellor to whom said cause has been referred, in determining the questions therein involved, without the taking of any further testimony unless it shall appear hereafter necessary so to do.

E. R. WALKER,
Chancellor.

Respectfully advised,

JOHN E. FOSTER,
Vice Chancellor.

Consent is herewith given to the entering of the above order.

JOHN S. APPLIGATE & SON,
Solicitors for Complainants.

CLARENCE H. MUPRHY,
Attorney for Defendants.

10 MONMOUTH COUNTY ORPHANS' COURT.

IN THE MATTER OF THE ES- }
TATE OF THEODORE A. } On Exceptions to Ac-
ZIMMERMAN, DECEASED. } count of Executor.

TESTIMONY.

20 FREEHOLD, N. J., April 26, 1917.

Before HON. RULIF V. LAWRENCE.

Appearance—For Accountant, Clarence H. Murphy, Esq.; for Exceptant, John S. Applegate, Jr., Esq.

ARTHUR ZIMMERMAN, sworn for Exceptant.

DIRECT EXAMINATION, by MR. APPLIGATE.

30 Q. Mr. Zimmerman, you were the executor of the last will and testament of Annie M. Zimmerman?

A. Of Annie M. Zimmerman; yes, sir.

Q. She was your mother?

A. Yes, sir.

Q. When did she die?

A. She died about four years ago.

Q. About 1912?

A. Yes.

Q. And you qualified as her executor?

A. Yes, sir.

Q. And you filed an inventory or appraisement in the Surrogate's Court of this county?

A. Yes, sir.

Q. On March 26, 1912?

A. Yes, sir.

Mr. Applegate—I will offer the inventory by reference to it only. I have not the book here. It is on file in this county.

The Court—The files are always receivable, of course.

Q. In the inventory that you filed, Mr. Zimmerman, as executor of the will of your mother, there is reference to a bond and mortgage made by Emma Wooley and A. P. Wooley to T. A. Zimmerman, on lands in Monmouth county, for \$500. Was that assigned by you to Theodore Zimmerman? 10

A. No, sir.

Q. Where is it?

A. In my hands.

Q. In your hands as executor?

A. I still have it; it is in my hands as executor.

Q. Did you ever assign it over to your father in his lifetime? 20

A. No, sir; I didn't assign that over to him. I gave it to him.

Q. Well, you handed it to him, you mean?

A. I gave him all his papers. I didn't assign them.

Q. Didn't you formally assign it? Didn't you sit down and execute a formal assignment?

A. No, sir.

Q. What did you do, hand them to him? 30

A. I gave him all his papers.

Q. All whose papers?

A. My father's.

Q. But these are your mother's papers.

A. Everything she had was turned over to him.

Q. How did you turn them over?

A. I gave them to him.

BY THE COURT.

Q. Well, by gave them to him you mean a physical delivery. Did you make any assignment?

A. No, sir.

Q. Or take any receipt or discharge?

A. No, sir.

Q. Or anything of that sort?

A. No, sir; he said I didn't need any.

BY MR. APPLGATE.

Q. Did your father have that bond and mortgage at the time of his death?

A. Yes.

10 Q. So that you now hold it as executor of your father?

A. Yes, sir.

Q. And so that is in his estate now?

A. Yes, sir.

Q. And it originally came from the estate of your mother?

A. Yes, sir.

20 Q. A bond and mortgage made by the Point Pleasant and Bay Head Fire Company, on land in Point Pleasant, amounting to \$400, assigned to Annie M. Zimmerman October 8th, 1909. You have included that in your mother's estate. Was that turned over to your father?

A. Yes, sir.

Q. In the same way as the other mortgage?

A. Yes, sir.

Q. And did you collect that after his death?

A. No, sir; that was paid off.

Q. And he collected the money on it?

A. Yes, sir.

30 Q. You think he did?

A. Yes, sir.

Q. Do you know what he did with the money?

A. No, sir.

Q. You filed an inventory of the estate of your father in Ocean county?

A. Yes, sir.

Q. And that inventory shows all the properties, at least the personal properties, that your father possessed at the time of his death?

A. Yes, sir.

Q. And then there is a mortgage made by Thomas

G. Pearce, for lands in Ocean county, to T. A. Zimmerman and Annie Zimmerman for \$500?

A. Yes, sir.

Q. That was part of your mother's estate?

A. Yes, sir.

Q. And was that paid over to your father?

A. Yes, sir; that was paid over to my father.

Mr. Murphy—We admit that all the funds of his mother's estate were turned over to his father as shown by the account. If I am correct in that I do not see what this question will lead to. 10

Mr. Applegate—We do not dispute that.

The Court—It may be pertinent as to the present existence of any assets, and in that view of the case, if the court should determine that this executor should be charged with the remaining assets, or such assets as remained at Mr. Zimmerman's death, the duty would be on him to recover them and account for them as part of the estate of Mr. Zimmerman. I think that is an entirely material inquiry. You may proceed. 20

Q. I call your attention to the Pearce mortgage for \$500. Was that part of your mother's estate?

A. Yes, sir.

Q. And was that turned over to your father?

A. Yes, sir.

Q. And did he have it at the time of his death?

A. No, sir; it was paid off.

Q. Paid off to him and he had the money? 30

A. Yes, sir.

Q. The next is a bond and mortgage made by Hazel Mitchell, the wife, to Sarah N. Gifford, for \$109.72. That was part of your mother's estate?

A. Yes, sir.

Q. Turned over to your father by you?

A. Yes, sir.

Q. In the same manner as the other papers?

A. Yes, sir.

Q. Did he collect that in his lifetime?

A. Yes, sir; he has that.

Q. That is now part of his estate?

A. Yes, sir.

Q. And you hold it as his executor?

A. Yes, sir.

Q. A bond and mortgage made to Willis A. Mount and others—

The Court—Pardon me, Mr. Applegate. You spoke of Theodore Zimmerman's will. Did Mr. Zimmerman make a subsequent will?

10 The Court—He never revoked the first will?
Mr. Applegate—No, sir.

Mr. Murphy—I have the codicil to it. I drew these wills myself. The codicil to the Theodore Zimmerman will was drawn by somebody else. But there is a codicil changing the terms.

Mr. Applegate—I did not know there was a codicil to the will.

Q. A bond and mortgage made by Willis A. Mount to Annie M. Zimmerman for land in Manasquan, \$12,000.

20 A. That was a mortgage held by mother.

Q. At the time of her death?

A. Yes, sir.

Q. Was that turned over to your father's estate?

A. Yes, sir.

Q. The same as the other papers?

A. Yes, sir; that mortgage was assigned over and a new mortgage given for it.

30 Q. And that \$12,000 mortgage was originally made by Willis A. Mount to Annie M. Zimmerman, and then that was assigned by Annie M. Zimmerman and her husband to the First National Bank of Manasquan?

A. Yes, sir.

Q. And that was in 1908, and then the receiver of the Manasquan Bank in 1909 reassigned it to Annie M. Zimmerman?

A. Yes, sir.

Q. So that at the time of her death she was the owner of it?

A. Yes, sir.

Q. And then after her death you, as the executor of Annie M. Zimmerman, assigned it to Anthony L. Kuser by an assignment dated September 15, 1914, and re-

corded in Book 68 of Assignments of Mortgages, page 281, etc. Now, the consideration of that mortgage is mentioned as being \$12,325?

A. Yes, sir; I presume that is right.

BY THE COURT.

Q. What was the amount of the mortgage?

A. \$12,000.

BY MR. APPLEGATE.

10

Q. And you, as the executor, assigned that to the Kusers?

A. Yes, sir.

Q. And what became of it then?

A. My father had that

Q. Your father had what?

A. He assigned it over.

Q. The record shows you had it as executor.

A. Then I had it. I forgot about that. That mortgage was traded. My father had this mortgage on Mount's hotel. 20

Q. Why did you assign this mortgage over to Kuser?

A. I went and got the mortgage. Mr. Kuser had a mortgage on the Zimmerman hotel, and he wanted to transfer his mortgage over to the Mount hotel and then from the Mount hotel over to the Zimmerman hotel.

Q. Now, just wait a moment. You owned a hotel in Point Pleasant known as the Marion Hotel?

A. Yes, sir.

Q. And Mr. Mount owned a hotel in Manasquan by the name of the Osborne House? 30

A. Yes, sir.

Q. And there was a mortgage on the Osborne House for \$12,000?

A. Yes, sir.

Q. Which was this mortgage we are speaking of?

A. Yes, sir.

Q. And you wanted to borrow \$12,000 on your hotel?

A. Well, yes, and I had \$12,000 to pay Mr. Kuser and he had a mortgage for \$12,000, and he wanted to change his mortgage for this.

Q. You had a mortgage on your hotel for \$12,000?

A. Yes, sir.

Q. And Kuser wanted his money on that mortgage, so that you assigned to Kuser the \$12,000 mortgage held by your mother's estate, which covered the Osborne Hotel in Manasquan, and you did assign that—

A. No, sir.

Q. You said you did. You said you assigned that mortgage to Kuser?

A. I assigned my mortgage.

10 Q. Not your mortgage.

A. The \$12,000, that covered the Osborne Hotel in Manasquan. That was my mortgage. The Kuser mortgage was on my hotel and he wanted to take his claim and place it on the Mount hotel and take that money.

Q. Now, let's see about that. The mortgage that was held by your mother at the time of her death, the \$12,000 mortgage, covered the Osborne House?

A. Yes, sir.

Q. And that mortgage you assigned to the Kusers?

20 A. Yes.

Q. Didn't you?

A. I presume I did.

Q. Well, you did?

A. Yes, sir.

Q. And you got the money on that assignment?

A. Yes, sir.

Q. And with that \$12,000 you transferred that mortgage over to your hotel in Point Pleasant?

30 A. Well, the transfer was made. The two mortgages were changed is all.

Q. The two mortgages were changed?

A. Yes, sir.

Q. So that now this \$12,000 mortgage covers your hotel in Point Pleasant?

A. Yes, sir.

Q. Whereas it originally covered the hotel in Manasquan?

A. That is right—the hotel in Manasquan.

Q. But the mortgage covering the hotel in Manasquan was assigned over to Kuser and you got \$12,000 on it and loaned that to yourself?

A. No, sir; we just changed mortgages.

Q. You placed a mortgage on your property in Point Pleasant?

A. Yes, sir.

BY THE COURT.

Q. Was there any money paid?

A. No, sir. We executed the mortgages. Kuser held a mortgage on my hotel and wanted to transfer it to Mount, and my father had a mortgage on Mount for that much money.

10

BY MR. APPLGATE.

Q. He holds a mortgage on your hotel, the Zimmerman hotel?

A. Yes, sir.

Q. And you hold a mortgage on his hotel, as executor?

A. Yes, sir.

BY THE COURT.

Q. Was a new mortgage made?

20

A. Yes, sir.

Q. By you, yourself?

A. I didn't draw the mortgage.

Mr. Murphy—I do not want to interrupt, Mr. Applegate, but I drew the papers and had charge of and can explain the whole thing.

The Court—And if it is wrong I suppose you are responsible. You may at the proper time clarify the situation. Proceed. There is no doubt but that this mortgage existed and was an asset of the Zimmerman property?

30

Mr. Murphy—No, sir.

The Court—That is on the record?

Mr. Murphy—Yes, sir.

Mr. Applegate—And our contention is that that mortgage Mr. Zimmerman took, as executor, and if they paid off the mortgage—it makes no difference under what deal or arrangement—that should be considered by this court as an original asset and a part of the estate of Annie M. Zimmerman.

The Court—Yes, sir.

Q. Now, I call your attention to this inventory. Here is a bond and mortgage from Lucetta G. Hancock and Royal A. Hancock to Annie M. Zimmerman for \$1,400. That was a mortgage your mother owned at the time of her death?

A. Yes, sir.

Q. And you turned that over to your father in the manner you have stated.

A. Yes, sir.

10 Q. Did your father have that mortgage at the time of his death?

A. Yes, sir.

Q. That was still in his possession?

A. Yes, sir.

Q. That was the balance due from the sale of a lot. Did your father hold that mortgage at the time of his death?

A. Yes, sir; he has it still.

Q. That is, you have it, as executor of his estate?

20 A. I am ready to turn it over.

Mr. McDermott—This is in the First National Bank at Manasquan.

The Witness—I have it in the bank. I have a right to place it in the bank. I borrowed \$1,400 on the endorsement of my father and put that up for security. It is my endorsement, and I can take it up at any time.

Q. You put it in the bank in your father's lifetime?

A. Yes, sir.

30 Q. And you put that mortgage up as security for your note?

A. Yes, sir; under my endorsement.

Q. The note has been renewed?

A. Yes, sir.

Q. And you as executor, have continued that mortgage as collateral for the notes you have renewed?

A. Yes, sir.

Q. And it is still there?

A. Yes, sir.

Q. And under a formal assignment?

A. Yes, sir; until I pay it.

Q. And here is the last item—\$65, for balance due

on the sale of lots in Manasquan. Is that property of Mr. Zimmerman's or property of your mother's?

(Objected to that it is real estate.)

Q. Is that part of the estate of your father now?

A. It is part of a lot for \$65—part of the sale of a lot in Manasquan to Mrs. Anna Hale. As I understood, she paid \$50.

Q. Who owned the lot?

A. My father. He paid her \$50 down and he has got to get a deed for it yet. They had some agreement of 10 their own about it.

Q. It never came to your father from your mother's estate?

A. I don't think so. I am not sure about that. She hasn't a deed for it yet. She just paid that. I have not found any receipt for the \$50.

Q. I show you an inventory, Mr. Zimmerman, a certified copy—I don't know that it is necessary to show it to the witness.

Mr. Applegate—I offer in evidence a certified 20 copy of the inventory in the estate of Theodore Zimmerman, on file in the surrogate's office in Ocean county.

The Court—I presume there is no objection.

Mr. Murphy—No, sir; none at all.

Mr. Applegate—And I will also offer in evidence a certified copy of the will of Theodore A. Zimmerman, from Ocean county.

(Will marked Exhibit A and inventory 30 marked Exhibit B.)

Mr. Applegate—The two wills still stand the same.

The Court—There seems to be some minor changes in some of these bequests.

Mr. Applegate—The changes are as follows: (Reads from will.) The residuary estate is the same.

The Court—Did the will of Theodore Zimmerman make the same provisions as the will of Mrs. Zimmerman?

Mr. Applegate—They are exactly alike.

The Court—With the same bequests, the same legacies and everything of that sort?

Mr. Applegate—Yes, sir.

The Court—What is your trouble, Mr. Applegate? Why not allow the probate of the Theodore Zimmerman will to be carried out?

Mr. Applegate—One trouble is this: Suppose there were creditors of the estate of Theodore Zimmerman?

10 The Court—Yes, it would make a difference.

Cross-examination:

BY MR. MURPHY.

Q. And did your father, Theodore Zimmerman, subsequent to the death of Annie M. Zimmerman, ask you to turn over all the assets and securities?

A. He did.

Q. And did you thereupon turn them over to him?

A. I did.

20 Mr. Murphy—I find that the fire company mortgage and the Pearce mortgage are cancelled of record in Ocean county, if Mr. Applegate will allow that statement to go on the record.

Mr. Applegate—Are you stating that for the purpose of the record? So far as the cancellation is shown by the record it is all right. But I object to the counsel's remarks and his conclusion that Mr. Zimmerman got the money. The cancellation on the books does not show that.

30 Mr. Murphy—His signature shows up all right and it is presumed that he got the money.

The Court—That is for me to determine.

Mr. Murphy—Now the Mount mortgage, of \$12,000, I think you will find from an examination of the records that the Zimmerman Hotel Company is a corporation and has been for some years, M. A. and Theodore A. Zimmerman.

The Court—You had better examine him for the purpose of the record. I do not mean to say that you will put in anything in your statement that is not a fact, but you had better examine him.

Q. You are an officer of the Zimmerman Hotel Com-

pany, a corporation of the State of New Jersey?

A. Yes, sir.

Q. And did that corporation give a mortgage of \$12,000 to Theodore Zimmerman during his lifetime?

A. Yes, sir, it did.

Q. On your direct examination you stated that the \$12,000 mortgage on property in Manasquan was transferred to the property in Point Pleasant. That was property of this same corporation, the Zimmerman Hotel Corporation, that same property, the Marion Hotel? 10

A. The Marion Hotel; yes, sir.

Q. Your father was living at the time this transfer was made?

A. Yes.

Q. And did he acquiesce in that change in the mortgages?

A. He did, yes.

Q. Did he volunteer to do that?

Mr. McDermott—I wouldn't lead him.

Q. Who suggested this change? 20

A. Why, Mount suggested it. He wanted to get it transferred because he was going to do business with the Kusers. He wanted to get \$12,000, and he asked my father if he would relieve him from \$12,000 on his house. And he took Mr. Kuser's \$12,000 on the Zimmerman house and transferred that over and put his money in the Zimmerman Hotel. So that was why they agreed to that. That is how the transaction happened. It was for their mutual benefit.

Q. I understood you to say on your direct examination that you asked your father for a receipt for the papers that you gave him. 30

A. I did ask him for it.

Q. What, exactly, did he say to you?

A. He said I didn't need it, and I said I would like one. He said, "What do you want a receipt for?" I said, "The other heirs might ask where is my receipt for any of the papers." He said, "Well, you don't need any, and it is none of their business." That is all. He didn't give me one anyhow.

Q. And did your father attend to his own affairs during this time and up to his death?

A. He did; yes, sir.

Q. And why didn't you file an account in this court before the time you did in the Annie M. Zimmerman estate?

A. The reason I didn't file any account was because I had turned everything over to my father, and I presumed that relieved me from my executorship. He said he would attend to his own business. He said it was not mine and he would take care of it, and I presumed
10 that was as far as I went as executor of my mother's estate.

Q. And this Hazel Mitchell mortgage, is that here in the papers?

A. It is among the papers there.

Q. It is still there with your papers, is it?

A. Yes, sir.

Q. \$109.72?

A. That is an assignment from Julia A. Osborne for
a piece of real estate.

20 Q. You still have that?

A. Yes, sir.

The Court—Well, then, practically all of this estate of Annie M. Zimmerman is intact, except the mortgages which were cancelled of record, the \$12,000 which was transferred to the Marion House and this Mitchell mortgage, and one of \$1,400, which was pledged during the lifetime of Theodore Zimmerman.

30 Mr. Sullivan—There is a little gain in the Ocean county inventory. We filed it in Ocean county, because the old gentleman lived there and in the case of his wife she had property in Manasquan, a little house there, and they boarded there a while, prior to her death, and you will find that the inventory shows a slight gain in the estate of Theodore Zimmerman. In other words he did not use up the funds of the estate. Now the inventory will show as follows:

(Reads from inventory.)

Now, the fact is that the two mortgages, it shows from the record, were taken up, the Pearce mortgage and the other mortgage, during the life-

time of the old gentleman, and this \$12,000 Mount mortgage was given on the hotel—it stands that way—and the Hancock mortgage in the bank, pledged. The inventories speak for themselves, your Honor.

RE-DIRECT EXAMINATION, by MR. APPLE-GATE:

Q. You spoke of the Zimmerman Hotel Company. Do you say that is the company that gave the mortgage 10 that now is in your hands as executor?

A. Yes, sir.

Q. And that is a corporation?

A. A corporation.

Q. And the stock is all held by you with the exception of two shares?

A. Yes, sir.

Q. So that you are the company, really?

A. Yes, sir.

Q. Now, in regard to the assignment of mortgage 20 given as collateral security in the bank—

A. Yes, sir.

Q. You say that was done on your father's advice?

A. Yes, sir.

Q. And also in your mother's lifetime?

A. Yes, sir.

Q. And made by her?

A. Yes, sir; she endorsed it.

Q. And she endorsed it over to the bank?

A. Yes, sir. 30

Q. And it has remained there ever since?

A. Yes, sir; it has been there ever since.

The Court—It is a pure question of law involved. Now let me get this clear: The Theodore Zimmerman estate now has in its custody practically all of the estate of Annie M. Zimmerman, the \$12,000 mortgage and the \$1,400 mortgage, excepting as it has been pledged, the \$109 mortgage, and the two mortgages which have been satisfied, or that is to say, been paid. There is no proof here as to what Mr. Theodore Zimmerman did with the money. The presumption would be that he had exer-

cised his right under the will of Mrs. Zimmerman and reduced it to possession and used it as he saw fit. Now, it is a question of law whether this court shall require the executor of Mr. Theodore Zimmerman to restore to the Annie M. Zimmerman estate these assets and accounts for them, and then that that distribution be made in accordance with the provisions of the will of Mrs. Zimmerman.

Mr. Applegate—Yes.

10 The Court—I think the issue is very narrow.

(Briefs to be submitted to the court within ten days.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

20

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC., ET ALS.,
Defendants.

STIPULATION

(Filed July 18, 1917.)

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It is hereby stipulated and agreed, by and between the solicitors of the respective parties heerto, that briefs be submitted to Hon. John E. Foster, the Vice Chancellor to whom this cause has been referred, and that no oral argument be made in this cause. Said briefs to be submitted on or before a date to be designated by the said Vice Chancellor.

Dated July 9th, 1917.

JOHN S. APPLGATE & SON,
Solicitors for Complainants.

CLARENCE H. MURPHY,
Solicitor for Defendants.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,
Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC.,
Defendants.

10

Submitted July 24th, 1917.

Decided August 6th, 1917.

Messrs. John S. Applegate & Son, for Complainants.
Mr. Clarence H. Murphy, for Defendants.

(Filed August 14, 1917.)

20

FOSTER, V. C.

The bill seeks an accounting from defendant as executor of Theodore A. Zimmerman, deceased, for certain property claimed to be part of the estate of Annie M. Zimmerman, deceased.

In March, 1917, defendant, as executor of Annie M. Zimmerman, made a final accounting in the Orphans' Court of Monmouth County, to which complainants filed exceptions, which after hearing were dismissed because the questions raised could not be considered and disposed of in such proceeding. Thereupon this bill was filed, and it was stipulated that the testimony taken and exhibits used in the Orphans' Court on the hearing of the exceptions should be used in these proceedings to determine the questions at issue without any further testimony being taken.

30

From this record it appears that on January 7th, 1908, Theodore A. Zimmerman and Annie M. Zimmerman, husband and wife, made mutual wills. Mrs. Zimmerman died February, 1912. In November, 1915, Mr. Zimmerman made a codicil to his will, and in August, 1916, he died. The complainant, Emily McDermott,

is their daughter, and the complainant, Carl McDermott, is her son.

Both wills contained provisions similar to the following, which was copied from Mrs. Zimmerman's will:

10 "*First*—I hereby give, devise and bequeath unto my beloved husband, Theodore Zimmerman, all my estate, both real and personal, of whatsoever kind or wheresoever same may be situate, to have and to hold unto my said husband for and during the term of his natural life, with full power and authority to sell or otherwise dispose of, mortgage, or in any way encumber the whole or any part of said property, as he shall see fit.

20 "*Second*—Upon the death of my said husband I give and bequeath out of any of my estate which may remain unto my grandchildren, Theodore Zimmerman, Harold Zimmerman and Carl McDermott, four hundred dollars (\$400) each, and to my grandchildren, Carl Zimmerman and Anna M. Zimmerman, one hundred dollars (\$100) each.

 "*Third*—All the residue of my estate, if any, I give, devise and bequeath to my three children, Harold Zimmerman, Emily McDermott and Arthur Zimmerman, equally to be divided among them, share and share alike."

30 By the codicil to his will, which Mr. Zimmerman executed after the death of his wife, he made some slight reductions in some of the bequests. The defendant, Arthur A. Zimmerman was named and has qualified as executor of both wills.

 On March 2d, 1912, he filed an inventory of Mrs. Zimmerman's estate, showing that it consisted of household effects and bonds and mortgages amounting to \$15,750.22, and on the same day, at the request of Theodore A. Zimmerman, the executor delivered to him all the property constituting Mrs. Zimmerman's estate, and in his accounting filed on March 12th, 1917, the executor prays allowance for "All personal property delivered to Theodore A. Zimmerman, sole legatee or beneficiary under the will of Annie M. Zimmerman, deceased," for the above mentioned value of the estate.

In January, 1917, defendant, as executor of Theodore A. Zimmerman, filed an inventory of his personal estate, showing it to be valued at \$16,053.56.

This controversy arises because complainants, who are entitled to the same interests in the estate of Mr. Zimmerman that they are in that of his wife, who had no creditors, are fearful that the creditors of Mr. Zimmerman, including the defendant Arthur A. Zimmerman, may claim the assets received by Mr. Zimmerman from his wife's estate are part of his estate, and that they will resort to and possibly exhaust such assets in the settlement of their claims against his estate. 10

It is conceded that Mr. Zimmerman's interest in his wife's estate was expressly limited to a life estate with power to sell or dispose of the whole or any part of it as he saw fit, and complainants claim that under the rule of *Borden v. Downey*, 6 Vr. 74; S. C., 7 Vr. 460; *Pratt v. Douglas*, 11 Stew. 516, and *Wooster v. Cooper*, 8 Dick. 682, that the annexing of the power of disposal to the certain and express words of the will limiting Mr. Zimmerman's estate for his life only, will not enlarge his interest so that he will receive the estate absolutely. 20

Defendant insists, however, that the circumstances present in this case except it from the general rule, because he claims that Mr. Zimmerman exercised the power of disposal given him by the will, by demanding and receiving as the life beneficiary, the entire estate of his wife; and *Robeson v. Shotwell*, 55 Eq. 318, affirmed at p. 824, is relied on to support this contention. But I do not find this case to support this contention, or the facts to establish the exception claimed. 30

It appears from the record that at the time of his death, Mr. Zimmerman was in possession of the greater part of his wife's personal estate that he had received from her executor; that when the executor delivered her estate to him he did so by delivery merely, and did not formally execute and deliver to him any assignments of the bonds and mortgages and other securities constituting the valuable part of her estate. It also appears that a few mortgages for small sums and amounting to less than \$1,000 were paid to Mr. Zimmerman, and that he had consented to the substitution of security for a bond and

mortgage of \$12,000 from one hotel property, owned by one Mount, to another hotel property owned by the Zimmerman Hotel Company, and that defendant individually owns all but two shares of the stock of this company, and that at the time defendant delivered his mother's estate to his father he obtained no receipt therefor and his father refused to give him any.

From these facts I have reached the conclusion that Mrs. Zimmerman did not intend to bequeath an absolute estate to her husband, but gave him a life estate only, with a power of disposal during his life as he saw fit, and I also find that Mr. Zimmerman did not by the mere demand for and the receipt of her estate thereby exercise his power of disposal and in consequence enlarge her bequest of a life estate into an absolute gift. This latter conclusion is based on these considerations: The transfer of Mrs. Zimmerman's estate by her executor to her husband was merely the delivery of the possession of her securities to him as the life beneficiary; this occurred before her estate was administered or settled, and Mr. Zimmerman as the legatee for life with absolute power of disposal was entitled to their possession if he desired them, as the bequest was made by testatrix's will to him personally, and not to her executor or in trust for him. The defendant as her executor could under the statute have refused to deliver them to him, unless he gave security for their return, but this he did not do. C. S., p. 3089, Sec. 8; *Executors of Rowe v. White*, 16 Eq. 411; *Courter v. Howell*, 33 Eq. 80; *In re Ryerson*, 26 Eq. 43; *Dodson v. Sevars*, 52 Eq. 611, at p. 617. The demand for and receipt of his wife's estate by Mr. Zimmerman was merely the exercise of his right to their possession as the legatee for life, independent of the power of disposal given him by her will; and judging from the result, this demand for the possession of her assets was probably made with the intent to preserve instead of to dispose of them. Had his demand for possession of the assets of the estate been made with the intention of disposing of them, it is reasonable to assume that he would have demanded the formal assignment of them to him in order to have evidence of his title to them. Furthermore, I find that Mr. Zimmerman,

except to a very limited extent, never attempted to exercise the power of disposal given him by her will. The terms of this power are that he is to enjoy her estate for life, "with full power and authority to sell or otherwise dispose of, mortgage or in any way encumber the whole or any part of said property as he shall see fit."

From the proofs it appears he did not sell or otherwise dispose of the whole or any part of her property, or do any act in relation to it, with the exception of collecting the few small mortgagae I have mentioned, and the proceeds of which can well be considered as part of his inventoried estate. It also appears that he did not "mortgage or in any way encumber" the whole or any part of the property; and it also appears that at the time of his death he was in possession of most, if not all of her estate, in substantially the form in which he received it, and that the same is now in the possession of the defendant as his executor; and I regard it as significant that the inventoried value of his personal estate is but a few hundred dollars in excess of the value of his wife's estate turned over to him by her executor, and this excess can probably be accounted for as part of the unexpended income received from her investments. I am satisfied that Mr. Zimmerman, instead of intending or attempting to exercise the power of disposal granted him, exercised his control over his wife's estate to preserve it intact for the object of his wife's and his own bounty, and did not dispose of any part of it.

With the exception of the small mortgages he collected, I find Mr. Zimmerman did not exercise the power of disposal of her property given him by his wife's will, and that her declarations as expressed in her will can be carried into effect by holding, that Mr. Zimmerman's estate in her property was not absolute, but was limited to his life, and that so much of her estate as remained undisposed of at his death, should be distributed in accordance with the express provisions of her will.

A decree will be advised that the defendant individually and as executor of both wills account in this court for such undisposed portion of Mrs. Zimmerman's estate and make distribution thereof among those entitled thereto under the terms of her will.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,

Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-

ECUTOR, ETC., ET ALS.,

Defendants.

} On Bill, etc.

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STIPULATION.

(Filed October 30, 1917.)

20 It is hereby stipulated and agreed between counsel for the complainant and defendant, respectively, in the above entitled cause that the testimony heretofore taken and used in this cause shall include the following statement:

30 "That on the fifth day of October, 1911, the Zimmerman Hotel Company, a body corporate of this State, made and executed a certain bond to the Trenton Brewing Company, a body corporate, which bond was in the penal sum of \$24,000.00, conditioned for the payment of \$12,000.00 in three years from that date, with interest at the rate of five per cent. per annum, and that accompanying said bond was a mortgage given as collateral security for the payment thereof by the said Zimmerman Hotel Company, body corporate, to the Trenton Brewing Company, to secure the payment of \$12,000.00 as provided by said bond, and covering the property known as the Hotel Marion at Point Pleasant, in the County of Ocean, and State of New Jersey, which mortgage was duly recorded in the Clerk's Office of the County of Ocean October 5th, 1911, in Book 105 of Mortgages, page 352, etc."

It is further stipulated that on October 5th, 1911, the Trenton Brewing Company, by assignment in writing, assigned the above bond and mortgage to Anthony R.

Kuser and John L. Kuser, which assignment was recorded in the Ocean County Clerk's Office on November 14, 1911, in Book 14 of Assignments, page 267, etc., and afterwards, on the twenty-eighth day of September, 1914, the said Anthony R. Kuser and John L. Kuser assigned the first mentioned bond and mortgage to Theodore A. Zimmerman by assignment in writing, which assignment was recorded in the Ocean County Clerk's Office on October 7th, 1914, in Book 15 of Assignments of Mortgages, page 177, etc. 10

The consideration for the last mentioned assignment was as follows, namely: A bond and mortgage made by Willie A. Mount to Annie M. Zimmerman (who was the wife of Theodore Zimmerman, deceased), covering hotel property of one Willie A. Mount in the Borough of Manasquan, Monmouth County, New Jersey, in the sum of twelve thousand dollars, and assigned by Arthur A. Zimmerman, as executor of Annie M. Zimmerman, deceased, to Anthony R. Kuser by assignment dated September 15th, 1914, and recorded in Book 68 of Assignments of Mortgages, pages 281, etc. 20

JOHN S. APPLGATE & SON,

Solicitors of Complainants.

CHARLES E. COOK,

Solicitor of Defendants.

IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,

Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-

ECUTOR, ETC., ET ALS.,

Defendants.

} On Bill, etc.

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NOTICE.

(Filed November 3, 1917.)

20 *To Charles E. Cook, Esq., Solicitor of Defendants in
above entitled cause.*

You are hereby notified that upon Friday, November 2d, 1917, at 10 o'clock in the afternoon, or as soon thereafter as counsel can be heard, application will be made before his Honor Vice Chancellor Foster, at his chambers in the city of Long Branch, for his approval of draft of final decree in said cause.

Dated October 25th, 1917.

JOHN S. APPLGATE & SON,

Solicitors of Complainant.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

EMILY McDERMOTT ET ALS.,

Complainants,

AND

ARTHUR A. ZIMMERMAN, Ex-

ECUTOR, ETC., ET ALS.,

Defendants.

} On Bill, etc.

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FINAL DECREE.

(Filed November 3, 1917.)

This cause, coming on to be heard in the Court of Chancery, in the presence of John S. Applegate & Son, of counsel with the complainants, and Clarence H. Murphy, of counsel with the defendants, and the pleadings having been read and the evidence considered and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the pleadings, proofs and arguments, and it appearing to the Court that by virtue of the last will and testament of Annie M. Zimmerman, deceased, Theodore A. Zimmerman, the surviving husband of said Annie M. Zimmerman, deceased, did under the terms and provisions of said last will and testament become vested with a life estate only, with the power of disposal during his life as he saw fit, and that said life estate did not become enlarged into an absolute gift;

And it further appearing that the said Theodore A. Zimmerman at the time of his decease had not disposed of the entire estate vested in him under the provisions of the last will and testament of said Annie M. Zimmerman, deceased, and that so much of the estate of said Annie M. Zimmerman as remained undisposed of at the time of the death of said Theodore A. Zimmerman, should be distributed in accordance with the express provisions

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of the last will and testament of said Annie M. Zimmerman, deceased;

And it further appearing that the complainant, Carl McDermott, according to the terms and provisions of said last will and testament is entitled to receive a legacy of four hundred dollars therein bequeathed to him; and that the complainant Emily McDermott is entitled, according to the terms and provisions of said will, to receive a one-third interest in the residuary estate of said

10 testatrix;

And it further appearing that the defendant, Arthur A. Zimmerman, either as individual or as executor of the last will and testament of Annia M. Zimmerman, deceased, or as executor of the last will and testament of Theodore A. Zimmerman, deceased, has in his possession or under his control the property of the estate of said Annie M. Zimmerman, deceased, remaining undisposed of by her said husband, Theodore A. Zimmerman, deceased, at the time of his death;

20 It is therefore, on this second day of November, 1917, ordered, adjudged and decreed that the complainants, Carl McDermott and Emily McDermott, are entitled to have and receive their respective legacies according to the terms and provisions of the last will and testament of Annie M. Zimmerman, deceased, and to have the same paid to them according to their respective interests from and out of the property of the estate of said Annie M. Zimmerman, deceased, remaining undisposed of by Theodore A. Zimmerman, at the time of his decease, in accordance with the expressed provisions of said last will and testament of Annie M. Zimmerman, deceased.

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And it is further ordered that the said defendants, Arthur A. Zimmerman, individual, Arthur A. Zimmerman, executor of the last will and testament of Annie M. Zimmerman, deceased, and Arthur A. Zimmerman, executor of the last will and testament of Theodore A. Zimmerman, deceased, within fifteen days after service upon them of a copy of this decree, which said copy of decree shall be served upon said defendants or their solicitor within ten days from the date hereof, account in this court for such undisposed portion of the estate of said Annie M. Zimmerman, deceased, and make distri-

bution therof to the said complainants and to those entitled thereto under the terms of the said last will and testament of the said Annie M. Zimmerman, deceased.

E. R. WALKER,
Chancellor.

Respectfully advised,
JOHN E. FOSTER, *V. C.*

IN CHANCERY OF NEW JERSEY.

EMILY McDERMOTT ET ALS.,
Complainants,

vs.

ARTHUR A. ZIMMERMAN, Ex-
ECUTOR, ETC., ET ALS.,
Defendants.

} On Bill, etc.

NOTICE OF APPEAL.

(Filed November 13, 1917.)

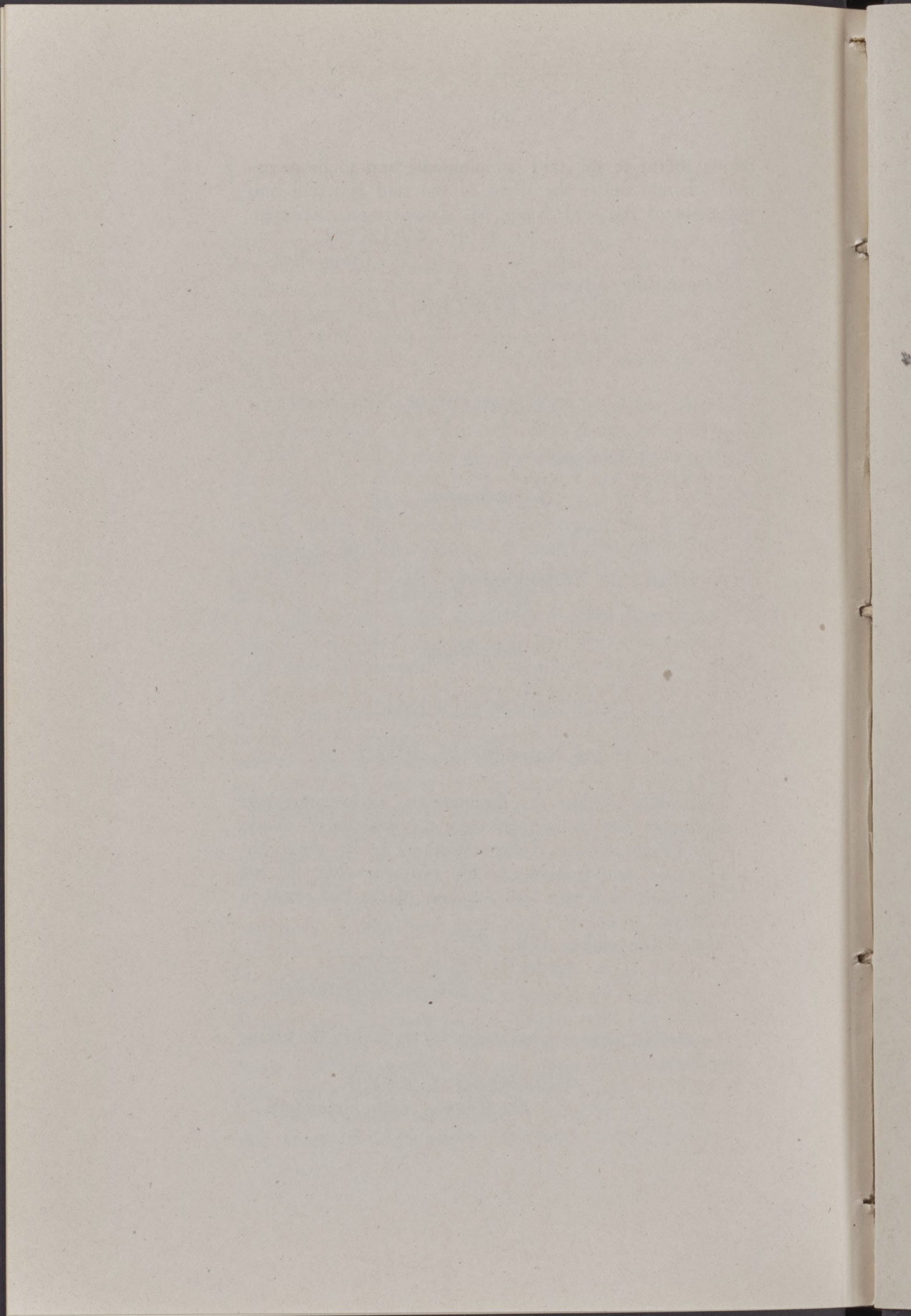
Defendant Arthur A. Zimmerman, as executor and individually, hereby appeals from the final decree made by his Honor Edwin Robert Walker, in the above entitled cause, and from the whole and every part thereof to the Court of Errors and Appeals of the last resort in all causes.

Dated November 12th, 1917.

CHARLES E. COOK,
Solicitor of Defendant.

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

CHARLES E. COOK,
Of Counsel with Defendant.



New Jersey Court of Errors and Appeals

EMILY M. McDERMOTT, ET ALS,
Complainants-Respondents.

vs.

ARTHUR A. ZIMMERMAN, EXECU-
TOR, ETC., ET ALS.,
Defendants-Appellants.

On Appeal from
Final Decree.

Sat below:
Foster, V. C.

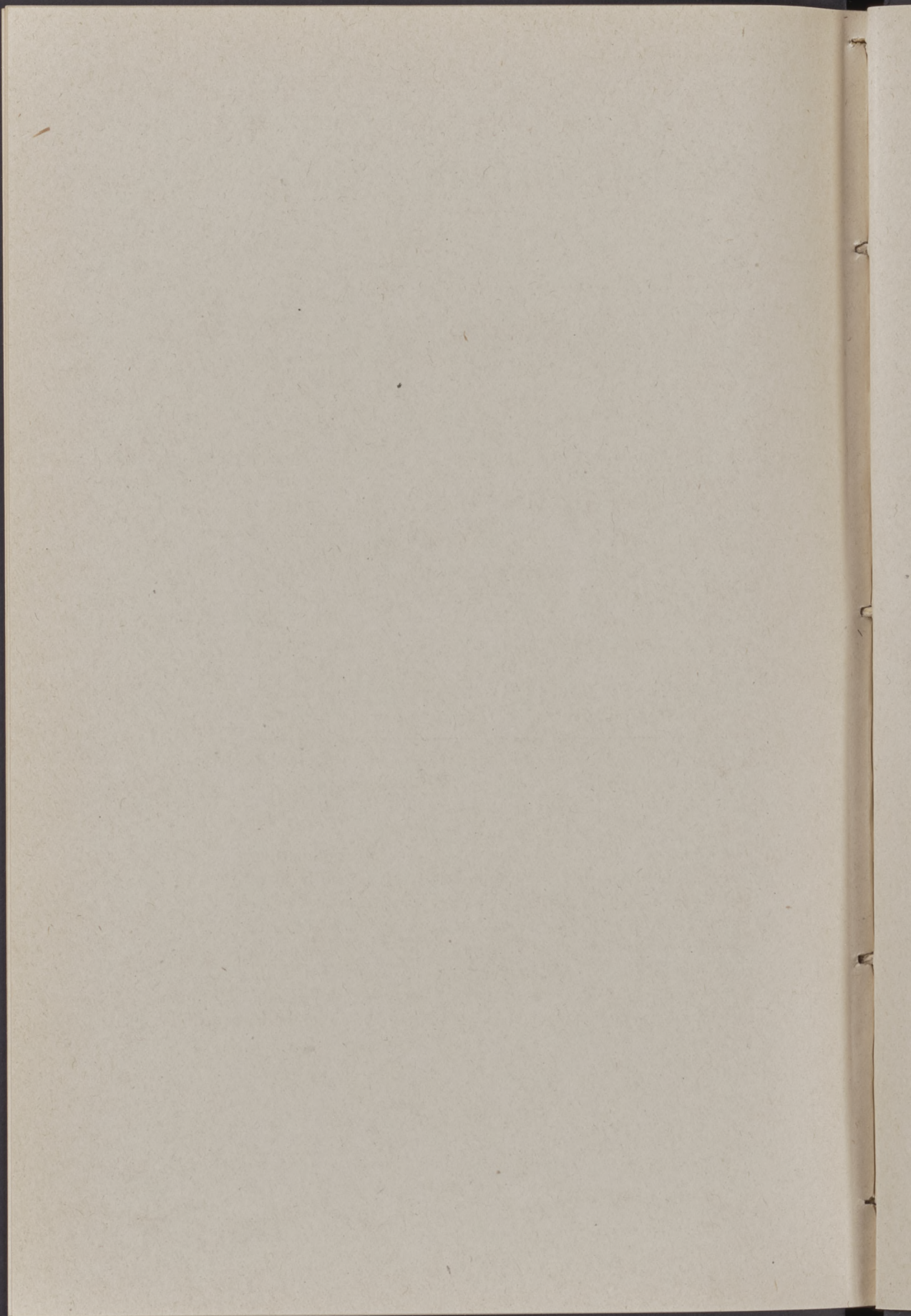
BRIEF OF Defendants-Appellants

CLARENCE H. MURPHY

CHARLES E. COOK

Counsel for Defendants-Appellants

Schuyler Press  Asbury Park, N. J.



NEW JERSEY COURT OF ERRORS AND APPEALS

EMILY M. McDERMOTT, ET ALS,
Complainants-Respondents.

AND

ARTHUR A. ZIMMERMAN, EXECU-
TOR, ETC., ET ALS.,
Defendants-Appellants.

Memoranda of
Defendants-
Appellants.

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STATEMENT OF FACTS

The complainants filed a bill in the Court of Chancery for an accounting from the defendant as the executor of Theodore A. Zimmerman, deceased, for certain property claimed to be part of the estate of Anna M. Zimmerman, deceased.

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In March, 1917, the defendant as executor of Anna M. Zimmerman, made a final accounting in the Orphans Court of the County of Monmouth, to which complainants filed exceptions, which after hearing, were dismissed and this bill was filed.

It is stipulated that the testimony taken and exhibits used in the Orphans Court on the hearing of the exceptions should be used in these proceedings to determine the questions at issue without further testimony, and such proceedings, etc., are printed and made a part of this case and were used on the hearing of this cause before the Vice Chancellor.

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Theodore A. Zimmerman and Anna M. Zimmerman were husband and wife. On January 7, 1908, the husband and wife made mutual wills. Mrs. Zimmerman died in February, 1912. In November, 1915, Mr. Zimmerman made a codicil to his will, and in August, 1916, he died. The complainant Emily McDermott is their daughter and the complainant Carl McDermott is her son. Arthur A. Zimmerman is a son of Theodore A. and Anna M. Zimmerman.

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He was named as executor in both wills and took upon himself the burden of administration thereof. Both wills contained provisions similar to the following:

10 1. "I give, devise and bequeath unto my beloved husband Theodore A. Zimmerman all my estate, both real and personal, of whatsoever kind or wheresoever the same may be situate, to have and to hold unto my said husband for and during the term of his natural life with full power and authority to sell or otherwise dispose of, mortgage, or in any way encumber the whole or any part of said property, as he shall see fit.

20 2. "Upon the death of my said husband I give and bequeath out of any of my estate which may remain unto my grandchildren, Theodore Zimmerman, Harold Zimmerman and Carl McDermott, Four hundred (\$400.00) dollars each; and to my grandchildren Carl Zimmerman and Anna M. Zimmerman, One hundred (\$100.00) dollars each.

3. "All the residue of my estate, if any, I give, devise and bequeath to my three children, Howard Zimmerman, Emily McDermott and Arthur Zimmerman, equally to be divided among them, share and share alike."

By a codicil to his will which Mr. Zimmerman executed after the death of his wife he made some slight reductions in some of the bequests.

30 On March 2, 1912, the executor filed an inventory of Mrs. Zimmerman's estate showing it consisted of household effects and bonds and mortgages amounting to \$15,750.22, and on the same day, at the request of Theodore A. Zimmerman, the executor, delivered to him all the property constituting Mrs. Zimmerman's estate and in his accounting filed on March 12, 1917, the executor prays allowance for all personal property delivered to Theodore A. Zimmerman, sole legatee or beneficiary under the will of Anna M. Zimmerman, deceased, for the above-mentioned value of the
40 estate.

In January, 1917, the defendant executor of Theodore A. Zimmerman filed an inventory of his estate showing it to be valued at Sixteen thousand, fifty-three dollars and fifty-six cents (\$16,053.56).

The defendant-appellant insists that the circumstances present in this case clearly show that Theodore A. Zimmerman exercised the power to have and to hold said estate with full power to sell or otherwise dispose of, mortgage, or in any way encumber the whole or any part of said property, as he shall see fit, as given to him by this will and by the fact that he demanded and received as such beneficiary from the executor the entire estate of his wife. 10

It is undisputed that at the time of the death of the said Theodore A. Zimmerman he was in possession of the greater part of his wife's estate which he had received from her executor. This estate was passed over to Theodore A. Zimmerman by delivery of bonds and mortgages and other securities constituting the valuable part of her estate and was so delivered upon the demands of Theodore A. Zimmerman made upon the executor who complied therewith. 20

The executor is uncontradicted in his testimony that on March 2, 1912, he did on the demand of Theodore A. Zimmerman deliver to the latter the personal estate of Anna M. Zimmerman.

(See printed case, pages 24-38.)

In paragraph 4 of the complaints' bill it is admitted that the executor did so deliver the assets to Theodore A. Zimmerman upon the demand of the said Theodore A. Zimmerman. The controversy in this case arises because complaints, who are entitled to the same interest in the estate of Theodore A. Zimmerman as they are in the estate of his wife, felt that the creditors of Theodore A. Zimmerman, including the defendant Arthur A. Zimmerman, may claim the assets received by Mr. Theodore A. Zimmerman from his wife's estate are part of his estate, and that they will resort to and might exhaust such assets in the settlement of their claims against his estate. 30
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ARGUMENT

The specifications of appeal will be argued together as it is therein claimed generally that the decree in this cause is inequitable to the defendant-appellant in all things, being predicated upon erroneous findings of the learned Vice Chancellor both in fact and in law.

10 It is contended that Theodore A. Zimmerman died seized of the personal estate of Anna M. Zimmerman and had a right to dispose of it as he pleased under the terms of the will of Anna A. Zimmerman, he having in his lifetime demanded and received from the executor the entire estate, which put him in position to do as he pleased with it.

20 Robeson vs. Shotwell, 55 Eq. 318, affirmed at p. 824, is a later case than any referred to by Vice Chancellor Foster, and the cases of Borden vs. Downey, 6 Vr. 74; S. C., 7 Vr. 460, Pratt. vs. Douglass, 11 Stew. 516, and Wooster vs. Cooper, 8 Dick. 682, are all considered in the Shotwell case. The case of Pratt vs. Douglass, 11 Stew. 516, is a case in which the testator coupled the word "executrix" with the name of the beneficiary. No such qualification appears in the will of Annie M. Zimmerman. On the contrary she appointed Arthur A. Zimmerman executor.

30 Relative to the contention of the Vice Chancellor that Zimmerman as executor could have refused to deliver to his father the assets, unless his father gave security for their return, does not apply in this case because some of the cases quoted by the Vice Chancellor refer to life tenants only and in others it was held not to be obligatory. The question of security is immaterial in this case anyway, as it has nothing to do with the issue. In this case Theodore A. Zimmerman became more than a life tenant the moment he demanded all the assets from the executor, because under the Shotwell case he thus evidenced his intention to execute the power conferred upon him by the will of Annie M. Zimmerman. The language of the Shotwell case, after a recitation of the decisions aforesaid referred to by Vice Chancellor Foster, says: "The real question in such cases is whether there was any intention to execute the power." [p. 327].

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The Vice Chancellor in holding that the evidence in the Zimmerman case does not fit under the Shotwell case goes against the testimony in this case and the admission by McDermott (Part 4 in Bill)⁶ that the executor did deliver the assets to Theodore A. Zimmerman. The Vice Chancellor refers to the fact of Theodore A. Zimmerman disposing of a minor part of the estate of his wife, and seems to draw the conclusion that because he did not see fit or have an opportunity to dispose of all of it that said Theodore A. Zimmerman intended to preserve the estate of his wife for the heirs. There is nothing in the evidence to support this view of the Vice Chancellor. The fact that he exercised his right in disposing of a part of the estate, no matter how little, coupled with the fact that he demanded of the executor the delivery to him of all of the estate prior to his having so disposed of a part thereof, indicates that Theodore A. Zimmerman took absolute control of the estate of his wife. The Vice Chancellor states that the executor did not deliver to Theodore A. Zimmerman duly executed assignments of the securities. However, it appears from the fact that Theodore A. Zimmerman disposed of part of the assets, that the executor made formal assignments as and when requested. The executor made actual delivery of all the assets to Theodore A. Zimmerman as appears from the uncontradicted testimony and the admission of McDermott. Such mere delivery, in law, is sufficient. Under the decisions of this state the executor properly so delivered the assets upon demand, and he was not required, in this case, to accept security. Supposing an executor refused to make formal assignments of securities when properly requested? If he were legally obligated to make said assignments surely his refusal to do so would not alter the law as to the rights of the beneficiary demanding said formal assignments. That being the case, what difference can it make in the case at bar whether or not the executor made formal assignments to Theodore A. Zimmerman? The decision of Vice Chancellor Foster, it is respectively contended, is entirely unsupported by the evidence in this case, and the decision in the Shotwell case still stands as the law in a case of this

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character, where the beneficiary evidenced his "intention" of exercising the powers conferred upon him by the will.

Vice Chancellor Foster seems to lay stress upon the fact that no formal assignments of the bond and mortgages and securities were made by the executor to Theodore A. Zimmerman. Under the law of this state no formal assignments were necessary to pass to Theodore A. Zimmerman the equitable title in said securities. In the case of *Daly vs. the New York and Greenwood Lake Railway Co.*, 10 Dick. 595, Vice Chancellor Pitney, inter alia, stated as follows: "And it seems to be well settled at this day in New Jersey — in fact, familiar and common learning — that a mere delivery of a bond and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered." This is the substance of the ruling by Mr. Justice Drake, speaking for the Supreme Court, in the case of *Hutchings v. Lowe*, 1 Gr. 246; and in the same direction is what was said by Master Wilson in *Morris Canal Co. v. Fisher*, 1 Stock. 667 (at p. 686). The same doctrine was declared by Chancellor Runyon in *Kamena v. Huelbig*, 8 C. E. Gr. 78 (at p. 80), where he says: "This assignment was in writing, but had it been by the mere handing over of the bond and mortgage it would have been sufficient." And Master Weart, in *Galway v. Fullerton*, 2 C. E. Gr. 389 (at p. 394) states the same doctrine, citing authorities from New York and elsewhere."

The Vice Chancellor seems to place some significance in the fact that Arthur A. Zimmerman, executor, owns all of the stock, excepting two shares, of one of the hotels to which a \$12,000 mortgage was transferred. Surely in view of the stipulation on file in this case relative to said mortgage transfer, ^{p. 44} the ownership of the hotel stock can have no evidential value, and there is no testimony that the mortgage is not well secured. This \$12,000 mortgage is in the name of Theodore A. Zimmerman and so stands of record. Certainly Theodore A. Zimmerman owned this mortgage at the time of his death and it is properly in his estate. The Vice Chancellor refers to the fact that the executor asked Theodore A. Zimmerman for a receipt and that same was refused.

This fact can have no evidential value in face of the admission by McDermott (Part 4 of Bill) that the assets were so delivered.

The Vice Chancellor refers to the filing of an inventory of Mrs. Zimmerman's estate on March 2, 1912, and that on the same day the executor delivered to Theodore A. Zimmerman, at his request, all of the said inventoried property. Theodore A. Zimmerman certainly exercised his power to convert to his own use a \$12,000 mortgage on October 7, 1914, when he received an assignment of such a mortgage from Anthony R. Kuser and John L. Kuser covering a hotel property in Point Pleasant owned by his son, Arthur A. Zimmerman, executor. The estate of Annie M. Zimmerman had held a \$12,000 mortgage on a hotel in Manasquan owned by one Mount. This mortgage was exchanged with Anthony R. Kuser for the Point Pleasant mortgage aforesaid. Yet the Vice Chancellor refers to only lesser mortgages which Theodore A. Zimmerman converted to his own use (\$1,000 in the aggregate), apparently dismissing the \$12,000 exchange of security as of no evidential value. Surely it is of sufficient evidential value to show that Theodore A. Zimmerman converted to his own use and possession, with all due legal formalities, a \$12,000 mortgage held by his wife, Annie M. Zimmerman, on a hotel in one town to his own name on a hotel in another locality. The Vice Chancellor refers to the defendant-executor owning all but said two shares of stock of the hotel company which gave this \$12,000 mortgage to the Kusers in 1911 and which the Kusers assigned to Theodore A. Zimmerman in 1914. There is no question as to the value of the security and the mortgage was not made direct to Theodore A. Zimmerman, nor is there any testimony that Theodore A. Zimmerman was not at all times competent. Furthermore Theodore A. Zimmerman caused this assignment of mortgage to him to be recorded. Therefore the stock ownership seems not to be material. The Vice Chancellor also deducts that Theodore A. Zimmerman held the greater part of the estate of his wife intact for the benefit of those who would gain by his and his wife's bounty, because the inventory of the estate of

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Theodore A. Zimmerman showed a few hundred dollars gain over the amount of the inventory of his wife—not considering those creditors the Vice Chancellor referred to earlier in his decision among whom is the executor. The complainants injected into their complaint that the defendant-executor is a creditor. The defendant admits he is a creditor. The Vice Chancellor says “This controversy arises because complainants, who are entitled to the same interests in the estate of Mr. Zimmerman that they are in that of his wife, who had no creditors, are fearful that the creditors of Mr. Zimmerman, including the defendant Arthur A. Zimmerman, may claim the assets received by Mr. Zimmerman from his wife’s estate are part of his estate, and that they will resort to and possibly exhaust such assets in the settlement of their claims against his estate.”

The fact that Arthur A. Zimmerman is a creditor of the estate of Theodore A. Zimmerman has no bearing on the case before the court, because he may be rightly a creditor, even if his claim absorbed the entire estate (together with the claims of other creditors), as creditors must first be paid before there is any estate to be distributed. Furthermore, Arthur A. Zimmerman, executor-creditor is entitled to “his day in court” and in Chancery he did not get it. When he presents his account as executor of Theodore A. Zimmerman in the Ocean County Orphans’ Court the complainants (who may cite it) will have an opportunity to dispute it. If that court allows it, the complainants have their appeal to the Prerogative court. Therefore they have not been injured and cannot be injured. But suppose there were enough creditors to exhaust the whole estate of Theodore A. Zimmerman, still that fact would have no bearing in law as to whether Theodore A. Zimmerman exercised his power to reduce to his possession the estate of his wife. It might as well be argued that the complainants seek to evade the payment of the just debts of Theodore A. Zimmerman by endeavoring to have it decreed that he did not convert the property of his wife to his own use and possession during his life. The fact that Theodore A. Zimmerman had creditors does not vest the Court of Chancery

with power on that account to construe the will of Annie M. Zimmerman any differently than it would if he had no creditors.

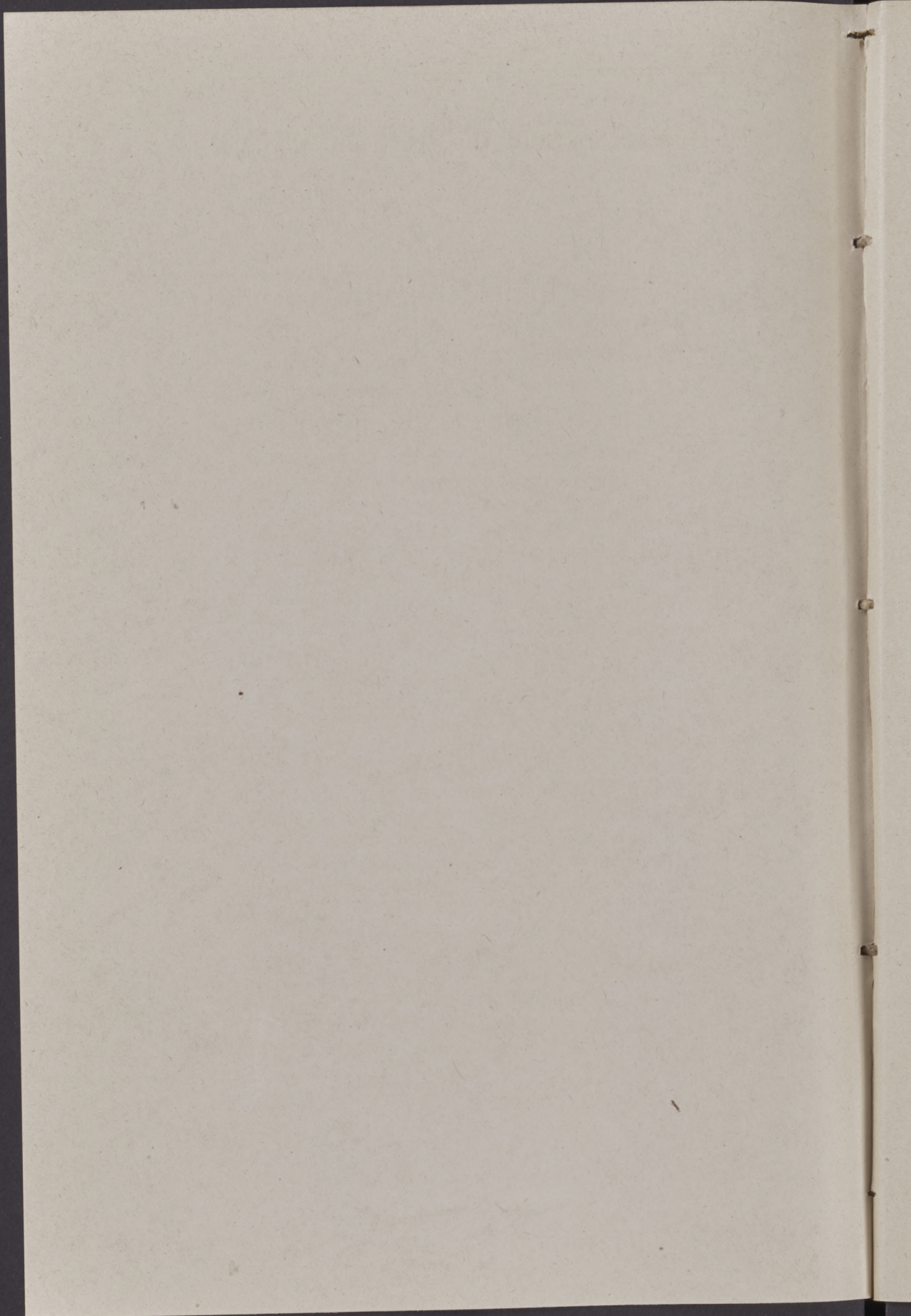
In the Shotwell case, ante, it was held the life beneficiary did not exercise the power of disposal, because the assets were held by the executor. In the case at bar, however, all of the assets were demanded and received by Theodore A. Zimmerman, and he not only thereby exercised his power of disposal, but he also cashed in \$1,000 of said securities and caused to be assigned a \$12,000 mortgage formerly belonging to his wife, and took in exchange therefor a mortgage in his own name for \$12,000 on another property. 10

It will be noticed there is no limitation of the mode in which the power of "disposal" may be exercised, and it would seem that the donee can unlimitedly exercise that power of disposal in a manner as he may see fit. The words "otherwise dispose of" the whole or any part of said property, coupled with the words "as he may see fit" are very broad — so broad in the case at bar as to preclude the right of any one to call upon this Executor for an accounting of said estate. There is an unlimited authorization of disposition: The acts of Theodore A. Zimmerman exhibit such exercise as will convert such estate to himself, when he demanded and received of the Executors the entire estate, in one instance (the \$12,000 mortgage) taking over the entire fund, and merging it into another mortgage of like amount in his own name, recording it upon the public records and dying seized thereof. 20

The bill of complaint, not alleging the executor mismanaged the estate or used any of his funds for his personal benefit, said executor should not be obliged to make an individual accounting. 30

It is respectfully contended that under the ruling of this court in the Shotwell case, said Theodore A. Zimmerman exercised his power of disposal for the reasons aforesaid.

CLARENCE H. MURPHY
CHARLES E. COOK
Counsel with Defendants-Appellants 40



New Jersey Court of Errors and Appeals

BETWEEN

EMILY McDERMOTT AND
CARL McDERMOTT,

Complainants-Respondents.

—and—

ARTHUR A. ZIMMERMAN,
Exr., &c., et als.,
Defendants-Appellants.

On Bill &c.
Brief on part of
Complainants-
Respondents.

It is the contention on the part of the complainants that by the terms of the will of one Annie M. Zimmerman, deceased, (see Exhibit C, printed case page 9), Theodore A. Zimmerman, her surviving husband, received a life estate only with the right to dispose of the same during his lifetime and that he did not receive an estate in fee simple, and therefore the assets and property originally a part of the estate of Annie M. Zimmerman, deceased, which remained undisposed of by Theodore A. Zimmerman are to be disposed of according to the terms of the will of his deceased wife, and the complainants are entitled to their legacy as vested remaindermen.

The above matter was originally heard in the Monmouth County Orphans Court on exceptions filed on the part of the complainants to the account of Arthur A. Zimmerman as Executor of the estate of Annie M. Zimmerman, deceased. The judge of the said Orphans Court dismissed the exceptions on the ground that the Orphans Court was not the proper forum, but did determine that under the will of Annie M. Zimmerman

her husband, Theodore A. Zimmerman, received a life estate only with the right of disposition during his lifetime.

Accordingly, the complainants brought this suit in the Court of Chancery and an order was entered dated July 10th, 1917, consented to by the respective Solicitors that the testimony taken in the Monmouth County Orphans Court and the exhibits used therein should be used in this cause before the Vice Chancellor in determining the questions involved, without the taking of any further testimony. (Printed case page 23).

The Vice Chancellor (Hon. John E. Foster) advised a decree that Theodore A. Zimmerman received a life estate only under his wife's will, that the defendant Arthur A. Zimmerman, individually and as Executor of both estates account in the Court of Chancery for the undisposed portion of Mrs. Zimmerman's estate, and make distribution thereof according to the terms of her will; and finding as a fact that Mr. Zimmerman had not exercised the power of disposal of his wife's property given him by his wife's will, excepting as to an amount less than \$1,000. (Case page 39). (Final Decree, case page 47).

Defendant appeals to this Court from the Final Decree so advised.

FACTS.

Annie M. Zimmerman died testate in 1912. Her will was probated in Monmouth County Surrogate's Court in February 1912, and Arthur A. Zimmerman, decedent's son, qualified as Executor. (Case page 24).

By said will decedent disposed of her estate as follows:

FIRST: "I hereby give, devise and bequeath
 "unto my beloved husband, Theodore A. Zimmerman, all my estate, both real and personal of
 "whatsoever kind or wheresoever same may be
 "situate to have and to hold unto my said hus-

“band for and during the term of his natural
 “life, with full power and authority to sell or
 “otherwise dispose of, mortgage or in any way
 “encumber the whole or any part of said property
 “as he shall see fit.

“SECOND: Upon the death of my said hus-
 “band, I give and bequeath out of any of my es-
 “tate which may remain, unto my grandchildren,
 “Theodore Zimmerman, Harold Zimmerman and
 “Carl McDermott, four hundred (\$400.) dollars
 “each and to my grandchildren, Carl Zimmerman
 “and Anna M. Zimmerman, one hundred (\$100.)
 “each.

“THIRD: All the residue of my estate, if any,
 “I give, devise and bequeath to my three children,
 “Howard S. Zimmerman, Emily McDermott and
 “Arthur A. Zimmerman, equally to be divided
 “among them share and share alike,” &c. (Case
 page 9).

The complainants, namely, Emily McDermott
 and Carl McDermott, her son, are two of the lega-
 tees by that name mentioned in said will, there
 being bequeathed to Carl McDermott the sum of
 four hundred dollars, and to Emily McDermott a
 one-third share of the residuary estate.

The Executor filed an inventory of the estate
 March 26th, 1912. (Case 25, line 1).

No account was filed until March 1917, five
 years after the death of testatrix.

The inventory shows, and likewise the testi-
 mony of the Executor, that the estate of decend-
 ent consisted of certain household furniture and
 bonds and mortgages, the inventory totaling the
 sum of \$15,750.22.

Theodore A. Zimmerman, the surviving hus-
 band of Annie M. Zimmerman, died December,
 1916, a resident of the County of Ocean, and his
 will was duly admitted to probate in the Surro-
 gate's Court of that county, his son, Arthur A.
 Zimmerman, qualifying as Executor. Arthur A.
 Zimmerman thus became Executor of both his
 father's and mother's estates under their respect-

ive wills. The will of Theodore A. Zimmerman is substantially the same as that of Mrs. Zimmerman, identical so far as the provisions thereof relate to the complainants. (Case page 10, Exhibit A).

In view of the similarity of said wills the query might properly be made: "Why this litigation if the complainants are legatees under both wills and in the same interests?" The answer is that Arthur A. Zimmerman as Executor of Theodore Zimmerman claims to be a creditor of said estate by virtue of a claim for the board and lodging of his father for some years before his death and is endeavoring to take the assets received by Theodore A. Zimmerman under his wife's will as part of the estate of said testator, said estate being insolvent; whereas there are no creditors of the estate of Annie M. Zimmerman, deceased.

The Executor of Theodore A. Zimmerman, deceased, filed an inventory in the Surrogate's Court of Ocean County Jaunary 1917. (Case page 12, Exhibit B). No account has been filed.

At the time of the death of Theodore A. Zimmerman there remained of his wife's estate the following assets in form of bonds and mortgages, none of which had been formerly assigned to Mr. Zimmerman by the Executor of Mrs. Zimmerman's estate, and one, namely a mortgage of \$1,400.00, was retained by the Executor of Mrs. Zimmerman and pledged by him as collateral security for his individual note. (Case pages 25-32 inclusive).

Mortgage of \$500. (Woolley mortgage), property of Mrs. Zimmerman.

Mortgage of \$109.72 (Mitchell mortgage).

Mortgage of \$1,400. (Hancock mortgage) placed in Bank by Zimmerman as collateral security for his individual note in lifetime of father.

A bond and mortgage made by Willis A. Mount to Annie M. Zimmerman on land at Manasquan in the sum of \$12,000. (See stipulation, printed case pages 23 and 44, and both inventories). (The inventory of the estate of Annie M. Zimmerman

was omitted from the printed case. It was offered in evidence. (See printed case, page 25). It totaled \$15,750.22. That part relating to bonds and mortgages will be found at the conclusion of this brief). This mortgage was held by Annie M. Zimmerman at the time of her death and covered the Hotel Osborn at Manasquan. It was assigned by the Executor of Annie M. Zimmerman September 15th, 1914 to Arthur R. and John L. Kuser for \$12,325. and a mortgage in the sum of \$12,000. was given by The Zimmerman Hotel Co. covering the Marion Hotel, its property at Point Pleasant, to the Trenton Brewing Company, and which had been assigned by that company to said John L. and Arthur R. Kuser, and assigned by the Kusers to Theodore A. Zimmerman as the consideration of the assignment of the mortgage by the Executor of Annie M. Zimmerman to the Kusers. Arthur A. Zimmerman held all the stock of the Zimmerman Hotel Co. with the exception of two shares, and he testified that he was really the company.

The Executor testified that he turned over to his father all his mother's estate. (Case page 25, lines 21-35). That statement is untrue for he did not deliver to his father the Hancock mortgage of \$1,400., but assigned it to the First National Bank of Manasquan in his father's lifetime as security for an individual note. (Case 32, lines 1-40). Nor did he receive a receipt from his father, evidence of having delivered to the latter the assets of Mrs. Zimmerman's estate. (Case 25, lines 30-40).

ARGUMENT.

I.

It is the contention on the part of the complainants that by the terms of the will of Annie M. Zimmerman, Theodore A. Zimmerman received a life estate only with the right to dispose of the same during his lifetime, and therefore the assets

and property originally a part of the estate of Annie M. Zimmerman, deceased, which remained undisposed of by Theodore A. Zimmerman are to be disposed of according to the terms of the will of his deceased wife, and the complainants are entitled to their legacy thereunder.

No formal construction of the will of Annie M. Zimmerman is necessary to determine its effect. Whatever may have been the law of New Jersey as to the effect of a bequest for life in express words coupled with an absolute power of disposal, it is now well settled by the case of *Wooster v. Cooper*, 8 Dick. 682, Court of Errors and Appeals. The facts in that case were as follows:

Testator died leaving his property real and personal to his wife for life, with power to do with it as she saw fit, "use, sell or dispose," with remainder over to the respondents. The wife survived the testator and took possession of his estate until her death. By her Will she left her property to the appellant. The latter claimed the entire estate including that which had come to the widow from her husband's estate. The Court in its opinion says:

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

"This exception was recognized and enforced
 "by this Court in the case of *Downey v. Borden*,
 "7 Vr. 460, and again in the case of *Pratt v. Doug-*
 "*lass*, 11 Stew. Eq. 533, and in the latter case it
 "was declared to apply to bequests of personal
 "estate as well as to devises of reality. These
 "cases have definitely settled the law on this sub-
 "ject in New Jersey, and the propriety of the rule

“laid down in them is no longer open to discussion.”

Where the will by express terms gives a life estate the intention of the testator is conclusively indicated, leaving no room for the application of the general rules applied to the construction of wills. The cases are innumerable, all recognizing this real distinction.

See Tuerk v. Schueler, 71 N. J. L. 331.
 McClellan v. Larchar, 18 Stew. Eq. 17.
 Benz v. Fabian, 9 Dick. 615.
 Deats v. Ziegener, 82 N. J. Eq. 605.
 (Court of Errors and Appeals).
 40 Cyc. 1626.
 1 L. R. A. (N. S.) Note 782.

It must be clear therefore that Mr. Zimmerman received a life interest only and whatever remained of the estate of his deceased wife undisposed of by him in his lifetime should go to the legatees in remainder under his wife's will.

II.

It is, however, contended by defendant that Mr. Zimmerman did actually dispose of his wife's estate by demanding and receiving said estate as life tenant.

Mr. Zimmerman never did receive all his wife's estate as has been noted, and will be commented on later. He never got title to the Hancock mortgage of \$1,400. (32, lines 1-40), the Woolley mortgage of \$500. (25, lines 10-23), nor the Mitchell mortgage of \$109.72, (27, lines 31-40). But conceding for argument's sake, without admitting that Mr. Zimmerman actually received the legal title to his wife's estate, we dispute defendant's contention.

The property was not left in trust for Mr. Zimmerman, but given to him direct. In demanding and receiving the estate from the Executor he was

but taking what was his according to the terms of the will. He was reducing said estate into possession not parting with any right. The power "to sell or otherwise dispose of, mortgage, or in any way to encumber," given him by the terms of the will could not be effective until he had acquired possession of the property of the estate. This was a right independent of the power of disposal given him by will. He was legally entitled to possession of the corpus and could have compelled the transfer of it to him from the Executor, giving a bond if required so to do. *Dodson v. Sevars*, 52 N. J. Eq. 617; *Rowe v. White*, 16 N. J. Eq. 411.

If the act of receiving the estate from the Executor of Mrs. Zimmerman is of itself as contended by defendants an exercise of the power of disposal given in the will, then the question under discussion can never arise in any case. The very act of receiving is a final disposal. The estate to the remaindermen would be defeated in every such case and likewise the intent of the testator. The words of the will forbid such an interpretation of Mr. Zimmerman's act in taking over a part of the estate of his deceased wife; the remaindermen are given what may remain of the estate of testatrix after the death of Mr. Zimmerman. This language authorizes the use of the corpus of the estate by the life tenant. To use it he must have possession of it. He may take possession of the entire estate with the intent of using it in his own interest, but there must be some evidence of such intent to warrant such a finding, as the act of taking and receiving is not of itself evidence of such an intent. It is at most equivocal.

It is the power of disposal given, not the absolute property subject to the former. Whether there has been an exercise of the power depends upon the intent of Mr. Zimmerman, but the act of taking over the property itself was not and could not be an exercise of the power: the two

acts are separate and distinct. The intent of testatrix that the remaindermen should receive a part of her estate, if any remained upon the death of her husband, is express, and the Court will lean in favor of an interpretation that will carry out that intention, rather than defeat it, placing the burden of proof upon him whose insistence, if favored, would defeat that intention.

The defendant relies upon the case of Robeson vs. Shotwell, 10 Dick. Ch. 318, in support of his theory that the alleged receipt of the estate by Mr. Zimmerman was of itself a disposal of it to his own use, and a final and conclusive exercise of the power of appointment.

The real questions decided in that case were two fold. First, that under the construction of the will in that case whereby testator gave all his estate to his wife "for her sole use, benefit and enjoyment during her life, with full power to sell and dispose of any of said property * * * and to use the proceeds thereof in such manner as she may desire," the wife took a life estate only. Second, upon the question whether the power had been exercised, the Court expressly held that depended upon the intention of the widow. "The real question in such case is whether there was an intention to execute the power." The Court found that the following circumstances did not show an intention on the part of the donee of the power to exercise her power of appointing the principal fund to her own use:

The Executor of the testator took possession of the personal estate amounting to some \$19,000. During the lifetime of the widow the Executor sold and converted some of the personal estate with the knowledge and consent of the widow, but she received no part of the principal, only the interest. The sales made by the Executor were of corporate stock and a bond and mortgage which were surrendered to the mortgagor, the Executor receiving from the mortgagor a deed for

the mortgaged property, done with the knowledge and consent of the widow.

"I fail to find in this case sufficient evidence of any intention on the part of the widow to exercise her power of appointing the principal fund derived from proceeds of the sale of the stock to her own benefit, and hold, therefore, that this power over the principal fund was not exercised."

An examination of the case shows that the determining factor was the intent of the donee of the power. The case is not an authority as alleged by defendant for the proposition that the taking over of the property of the estate or consenting that the same be sold or transferred for the benefit of the donee of the power, (in the principal case, Mr. Zimmerman) constitutes an exercise of the power.

Intent is the controlling factor, and the circumstances appearing in the proofs, relating to the acts and conduct of Mr. Zimmerman, subsequent to his receiving possession of the property constituting his wife's estate, concerning the same, do not indicate an intent on his part to exercise the power vested in him under his wife's will to convert it to his own use, or otherwise dispose of it, as to vest him with the absolute title thereto.

The legal title to the Woolley mortgage of \$500. and the Hancock mortgage of \$1,400. and the mortgage of \$109.72. remained in the Executor of Mrs. Zimmerman. He subsequently assigned the \$1,400. mortgage to the Manasquan National Bank as security for his individual note. So far as the proofs show Mr. Zimmerman never exercised dominion over them.

The Mount mortgage of \$12,000. subsequently replaced by the Zimmerman Hotel Co. mortgage is in no different class. The Executor continued to hold the legal title thereto until September 15th, 1914 when he assigned it to Anthony R. Kuser, two years after the death of Mrs. Zimmerman, and the Kusers assigned to Mr. Zimmerman the mortgage covering the hotel property of the Zim-

merman Hotel Co. of which the Executor was in reality the owner. The exchange was effected at the suggestion and request of Mount, (case page 35, line 20), who was about to commence business dealings with the Kusers, who were brewers. The change was apparently in the interest of Mount, Mr. Zimmerman consenting to it, if he did at all, as an accommodation to Mount. It does not appear that he had any personal interest in the transaction or that it was for his benefit. He did become the legal owner of the mortgage assigned to him by Kuser, but there was nothing in the transaction to indicate an intent on his part to convert the security to his own use and make it his absolute property, thereby cutting off the rights of the remaindermen thereto; nor was the identity of the property destroyed. The exchange in effect is no different than that in the case of Robeson v. Shotwell (*supra*), of the transfer of a mortgage by the Executor and the delivery to him by the mortgagor of a deed of the property, which was held not to constitute an exercise of the power of disposal given to the life tenant; true, the title remained in the Executor in that case, but the exchange was made with the consent of the life tenant and for his benefit. The transfer to Mr. Zimmerman of the Zimmerman Hotel Co. mortgage had no greater effect than would the transfer to him of the Mount mortgage by the Executor; and a transfer from the Executor to the life tenant of the property of the estate is a matter of legal right, at most an equivocal act, not evidence of itself of an intent on the part of the life tenant to exercise his power.

The mortgage assigned to Theodore Zimmerman by the Kusers and covering the son's property at Point Pleasant took the place of the mortgage covering the Mount property at Manasquan, which latter mortgage was a part of the estate of Mrs. Zimmerman. There was no disposal of the principal moneys by Theodore Zimmerman. That sum remained intact at the time of his death and

its identity as a part of the estate of Mrs. Zimmerman was not destroyed by the change of securities. There is a vast difference between a reduction into possession, and a disposal. He could dispose of it during his lifetime as he saw fit, but if any remained at the time of his death, it passed to the remaindermen according to the terms of the will of Mrs. Zimmerman. If, instead of an exchange of mortgages as actually occurred, Mr. Zimmerman had called in the principal and deposited it in bank in his name it is clear that the moneys would be considered as a part of Mrs. Zimmerman's estate and not disposed of within the meaning of the terms of her will. To uphold defendant's contention is in effect to declare that mere reduction to possession is a disposal.

In *Bradway v. Holmes*, 5 Dick. Ch. 311, a will contained this clause: "Third. I give and bequeath unto my beloved wife, Harriet Bradway, the rest and residue of my personal property, and the issue and profits of all my real estate for her maintenance so long as she shall live, with power to sell and dispose of so much of my personal property or real estate as in her judgment may be necessary for her comfortable support and maintenance, and apply the proceeds for her support and maintenance as aforesaid." "At the death of my said wife, I give and bequeath the rest and residue of my estate remaining in her hands undisposed of, both real and personal, her debt and funeral expenses first being defrayed therefrom to" certain beneficiaries. The bill was filed by Administrator de bonis non &c. against the Administrator of the Executor named in the will, to procure a decree that a sum of money which at the death of the Executor stood to the individual credit of testatrix in bank, was, in fact, the money of the estate of the testator. It was held that the bill would not lie because an Administrator de bonis non &c. could not maintain an action against the personal representative of a deceased Executor to recover from him such part of the estate as he

has converted into money and that his right as Administrator de bonis non &c. is limited to possessing himself of so much of the testator's estate as remains in specie.

But the Court further held that the remaindermen were entitled to the relief prayed for in the bill, namely, a distribution of the moneys in bank representing the proceeds of a sale of the estate.

In the case of *Parker v. Travers*, 74 N. J. Eq. 812, the testator devised and bequeathed all his property to his widow, with power of disposition, the remainder, as to all property not disposed of by the widow, to testator's daughter in case she survived the widow, and in event of the widow marrying again she should have only one-third of the property remaining, the balance to be invested for, and to be paid to the daughter on her attaining majority. The widow conveyed all the real estate devised to her to B., whom she afterwards married, and he immediately after the conveyance conveyed to his son who reconveyed to the widow. "It is admitted by the complainant that two-thirds of the personal estate remaining in the hands of the widow when she married immediately became a trust fund for the benefit of the daughter, but he insists that, as to the real estate, the widow, having exercised her power of disposal, thereby became entitled to an absolute estate and title in the lands, thus defeating the gift over to the daughter which was to become effective at the termination of the life estate. I find myself unable to accept this result, for, assuming that the contention of the complainant that the conveyance was executed for the purpose of defeating the gift over is correct, it could not be supported as a bona fide exercise of the power conferred, which must always be executed in good faith, looking to the carrying out of the expressed intention of the party creating the power. By gift over of what remained undisposed of at the death of the life tenant, and the substituted disposition on the remarriage of the widow of what

then remained, the testator plainly indicated that it was his intention that his widow should exercise the power of disposal and alienation to such extent as might be required for the beneficial enjoyment of the property during her tenancy, **but clearly a transference of title which did not alter the identity of property or owner**, for the purpose of defrauding the remainderman, was not such an exercise of the power of disposal granted as to change a life estate to a fee-simple, **nor do I think it would have made any difference in this case if there had been an actual sale and the property converted into money, for the proceeds thereof which remained in her hands undisposed of when the tenancy ended would have been a part of the estate 'that remains', and be subject to the alternative bequest.'**

In *Andrews v. Bank of Cape Ann*, 3 Allen (Mass.) 313, testator left all his estate to his wife and after her death all the estate "that may remain at her decease to be divided equally" among his children. Creditors of the estate of the widow claimed her Administrator's account should be charged with certain promissory notes which said Administrator had turned over to the Executor of testator. The notes were payable to the widow, but had been taken in renewal of notes given to testator in his life time which were received by the widow as part of his estate under his will. We quote the following extract from the opinion of the Court: "The notes are identified as being those which were held by the widow under the will of her husband. If there had been no means of distinguishing them from other property which belonged to her absolutely, then the person entitled would be obliged to come in as a general creditor and share with other creditors in her assets."

See *Johns v. Johns*, 86 Va. 333, that the investment of funds in land under a power gives the life tenant only a life estate in the land.

The fact that Mr. Zimmerman made no attempt

to part with possession of his deceased wife's estate, nor change its identity, is material evidence of an intention on his part not to exercise the power of disposal but to keep the estate intact and undisposed of, so that the remaindermen might take according to the terms of her will.

Considering all the circumstances, it clearly appears that Mr. Zimmerman never exercised the power of disposal, and that at the time of his death the greater part of his wife's estate remained intact, undisposed of, and unconverted, and readily identified, and should be disposed of under the provisions of the will of Mrs. Zimmerman.

For the foregoing reasons it is respectfully submitted that the complainants are entitled to the relief sought and that the decree of the Court of Chancery should be affirmed.

JOHN S. APPLGATE & SON,

Solicitor for and of Counsel with
Complainants-Respondents.

**Extract From Inventory of Estate of
Annie M. Zimmerman, deceased, Omitted From
Printed Case and Referred to in the
Foregoing Brief.**

Bond and mortgage made by Emma E. Woolley and husband to T. A. Zimmerman, on lands in Monmouth County. Recorded in Mon. Co. Clerk's Office in Book 365 of Mortgages, Pages 245 &c. Assigned to Annie M. Zimmerman, Oct. 8, 1909, and said assignment duly recorded.. \$ 500.00

Bond and Mortgage made by the Point Pleasant & Bay Head Fire Company to T. A. Zimmerman on lands in Point Pleasant, Ocean County. Recorded in Ocean County Clerk's Office in Book 97, Pages 131, &c. Assigned to Annie M. Zimmerman, Oct. 8, 1909, and said assignment duly recorded, (balance due on principal) 400.00

Bond and Mortgage made by Thomas G. Pearce on lands in Ocean County. Mtge. made to T. A. Zimmerman. Recorded in Ocean County Clerk's Office in Book 99 of Mortgages, Pages 226 &c. Assigned to Annie M. Zimmerman, Oct. 13, 1909, and said Assignment duly recorded..... 500.00

Bond and Mortgage made by Hazel Mitchell and wife to Sarah Ann Gifford on lands in Mon. Co. Recorded in Mon. Co. Clerk's Office in Book V.-5 of Mortgages, Pages 166 &c. Assigned to Annie M. Zimmerman, Meh. 21, ———, and said assignment duly

recorded. (Assigned by Sarah Ann Gifford to Julia Osborn and from Julia Osborn to Annie M. Zimmerman) 109.72

Bond and Mortgage made by Willis A. Mount, et als., to Annie M. Zimmerman, on lands in Manasquan, Mon. Co., N. J. Recorded in Mon. Co. Clerk's Office in Book 319 of Mortgages, Pages 226 &c. 12,000.00

Bond and Mortgage made by Lucetta G. Hancock on lands in Mon. County. Mtge. made to Annie M. Zimmerman. Recorded in Mon. County Clerk's Office in Book 327, Pages 223 &c. 1,400.00