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Essex County Orphans' Court

IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

Petition.

10

To the Orphans' Court of the County of Essex:

The petition of Frederick H. Bange shows as follows:

20

First: Your petitioner is the Trustee under the Last Will and Testament of Alice M. Allwood, deceased, and has presented his account of his administration of his trust and has prayed this court for the settlement and allowance of his said account.

Second: The Will of said Alice M. Allwood was admitted to probate in the Essex County Surrogate's Office on September 21, 1928 and letters testamentary thereon were issued to your petitioner, the executor named in her will.

30

Third: The eleventh paragraph of the said Will provided as follows:

"I give and bequeath to my affianced Joel Audubon Webb of Providence Rhode Island, sum of twenty thousand dollars, same to be put in Trust at 5% int. same int. to be paid him and at his death same amount to revert to my Heirs herein mentioned in equal parts, not Charitys encluded."

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Petition

The said Joel Audubon Webb died on the 20th day of February, 1934, and your petitioner is in doubt as to the persons to whom the principal of the said trust fund now in his hands as shown on his said account should be paid.

10 Fourth: So far as your petitioner is advised the only heirs of the said Alice M. Allwood now living or who were alive at the time of her death are her cousins, Alice Staley, Clara Phillips and Winston Coulter. These cousins and Charles Phillips, the son of Clara Phillips, were the residuary legatees and also received separate legacies under the terms of the second, third, fourth, fifth and sixteenth paragraphs of the will of the said testatrix.

20 Fifth: By the sixth, seventh, ninth and tenth paragraphs of her will the said testatrix also gave legacies to Minnie D. Piper, Jennie B. Emerick, Maud McBride and William E. Rounds, and by the thirteenth, fourteenth and fifteenth paragraphs of her will she gave legacies to certain charities.

By reason of the fact that in the said eleventh paragraph of her will the testatrix used the words "not Charities enclused" the question has arisen as to whether it was the intention of the testatrix to include the said Charles L. Phillips, Minnie D. Piper, Jennie B. Emerick, Maud McBride and William E. Rounds, or any of them with the said Alice Staley, Clara Phillips and Winston Coulter as "heirs herein mentioned" as entitled to equal shares in the said trust.

Your petitioner therefore asks that on the approval and settlement of this account this court may direct your petitioner to whom and in what proportions the said principal of the trust shall be distributed in accordance with the terms of the said will and he further asks for an order directing

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Petition

that not less than thirty days notice be given to all parties interested that application has been made for an order of distribution as aforesaid and that such notice may be given by mail to such interested parties.

The names and addresses of all persons interested are as follows:

10

<i>Name</i>	<i>Address</i>	
Mrs. Clara Phillips	181 Bay Ave. East, Jamaica Creek Springfield, L. I. c/o Sub station 40.	
Mr. Charles Phillips	139—226th St. Laurelton, L. I.	
Mrs. Alice Staley	Box 1986 Fort Meyers, Florida	20
Mr. Winston Coulter	c/o Columbia Can Co. 5221 Natural Bridge Ave. St. Louis, Mo.	
Mrs. Minnie D. Piper	904 Emory St., Asbury Park, N. J.	
Mrs. Jennie Emerick	904 Emory St. Asbury Park, N. J.	
Dr. William E. Rounds	1101 West Craig Pl. San Antonio, Texas	30
Mrs. Maud McBride	139 Berkley Pl. Brooklyn, N. Y.	

All these persons are of full age.

Petition

Your petitioner will ever pray, etc.

FREDERICK H. BANGE,
*Trustee under the last will and testament
 of Alice M. Allwood, deceased.*

Dated: Montclair, N. J.

10 April 14th, 1934.

STATE OF NEW YORK }
 COUNTY OF QUEENS } ss.

FREDERICK H. BANGE being duly sworn according to law on his oath deposes and says:

20 That he is the Trustee under the terms of the Last Will and Testament of Alice M. Allwood, deceased, and is the petitioner named in the foregoing petition and that the matters therein contained are true to the best of his knowledge and belief.

FREDERICK H. BANGE.

Subscribed and sworn to before
 me this 14th day of April, 1934,
 at Richmond Hill, Long Island,
 Queens County, State of New
 York.

30 CHARLES L. TIEMANN,
Notary Public.
 (SEAL)

Last Will and Testament of Alice M. Allwood

I, ALICE M. ALLWOOD, Borough of Brooklyn, City of New York, County of Kings, State of New York, being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last Will and TESTAMENT as follows, hereby revoking all other and former wills by me at any time made. 10

FIRST, after my lawful debts are paid, I give and bequeath to the following:

- 1 First) All expenses of funeral and administration.
- 2 Second) I give and bequeath to my cousin Alice Staley my watch and the sum of Three thousand Dollars, absolutely forever.
- 3 Third) I give and bequeath to my cousin Clara Phillips my wearing apparl and sum of Three thousand Dollars, absolutely forever. 20
- 4 Fourth) I give and bequeath the watch belonged to my mother and sum of Five thousand Dollars to Charles L. Phillips, son of Clara Phillips, absolutely forever.
- 5 Fifth) I give and bequeath to Winston Coulter, son of my cousin Mary Coulter (deceased) sum of One thousand dollars, absolutely forever.
- 6 Sixth) I give and bequeath to my friend Minnie D. Piper of Asbury Park New Jersey, sum of Two thousand Dollars, absolutely forever. 30
- 7 Seventh) I give and bequeath to Jennie B. Emerick who now resides with her Mother Minnie D. Piper, sum of One Thousand Dollars, absolutely forever.
- 8 Eighth) I give and bequeath to my friend Maria S. Bange of Brooklyn my diamond ring and sum of One Hundred Dollars, absolutely forever. 40

Last Will and Testament of Alice M. Allwood

9 Ninth) I give and bequeath to my friend Maud McBride of Brooklyn sum of One hundred Dollars, absolutely forever.

10 Tenth) I give and bequeath to my friend William E. Rounds sum of Fifty dollars, absolutely forever.

10

11 Eleventh) I give and bequeath to my affianced Joel Audubon Webb of Providence Rhode Island, sum of Twenty thousand Dollars, same to be put in Trust, at 5% int. same int. to be paid him and at his death same amount to revert to my heirs herein mentioned in equal parts, not charitys enclued.

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12 Twelfth) In addition to the provisions already made for said Lot I give and bequeath to the Greenwood Cemetery the sum of Three hundred Dollars, in trust however to have and to hold the same invested to apply income thereof under protection of board of Trustees for the preservation of any enclosure, monuments or other structure on lot No. 29861, in said Cemetery and to keep same in order Grass, Flowers in said Lot making same in alienable after my interment of which I am sole owner. I also give and to said Greenwood Cemetery sum of One hundred Dollars for perpetual care of grave No. 658 in Lot No. 8515 same being the grave of Henry Tanner my Uncle.

30

13 Thirteenth) I give and bequeath to the Church Charity Foundation of Long Island sum of Five hundred Dollars for the Home for the Aged in memory of my parents, Francis and Jemima Allwood.

14 Fourteenth) I give and bequeath to St. Anns Protestant Episcopal Church of Brooklyn present edifice corner of Clinton and Livingston St. sum of One hundred Dollars.

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Paragraph 12 Twelfth) to read as follows instead of as set forth in printed State of the Case:

12 Twelfth) In addition to the provisions already made for said Lot I give and bequeath to the Greenwood Cemetery the sum of Three hundred Dollars, in trust however to have and to hold the same invested to apply income thereof under protection of board of Trustees for the preservation of any enclosure, monuments or other structure on lot No. 29861, in said Cemetery and to keep same in order Grass, Flowers in said Lot making same same in alienable after my interment of which I am sole owner. I also give and to said Greenwood Cemetery sum of One hundred Dollars for perpetual care of grave No. 658 in Lot No. 8515 same being the grace of Henry Tanner my Uncle.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and affixed my seal, the first day of November in the year One thousand nine hundred and 17.

ALICE M. ALLWOOD (SEAL)

Witnesses:

GEO. W. CUMMINGS

PAUL C. CLOYD

CHAS. H. PUCKHAER

Subscribed by Alice M. Allwood the Testatrix named in the foregoing Will, in the presence of each of us, and at the time of making such subscription, the above Instrument was declared by the said Testatrix to be her last Will and Testament and each of us, at the request of said Testatrix and in her

Paragraph 12 Twelfth) to read as follows instead of as set forth in printed State of the Case:

12 Twelfth) In addition to the provisions already made for said Lot I give and bequeath to the Greenwood Cemetery Trustees of Three hundred Dollars, in trust however to have and to hold the same invested to apply income thereof under protection of board of Trustees for the preservation of any enclosure, monuments or other structures on lot No. 2588, in said Cemetery and to keep same in order Grass Flowers in said Lot making same same in all respects after my interment of which I am sole owner. I also give and to said Greenwood Cemetery sum of One hundred Dollars for perpetual care of grave No. 858 in Lot No. 8513 same being the grave of Henry Tanner my Uncle.

20 In trust to have and to hold the same invested to apply income thereof under protection of board of Trustees for the preservation of any enclosure, monuments or other structures on lot No. 2588, in said Cemetery and to keep same in order Grass Flowers in said Lot making same same in all respects after my interment of which I am sole owner. I also give and to said Greenwood Cemetery sum of One hundred Dollars for perpetual care of grave No. 858 in Lot No. 8513 same being the grave of Henry Tanner my Uncle.

13 Thirteenth) I give and bequeath to the Charity Foundation of Long Island sum of One hundred Dollars for the Home for the Aged in memory of my parents, Francis and Jennie Allen.

14 Fourteenth) I give and bequeath to St. Ann's Protestant Episcopal Church of Brooklyn present address corner of Clinton and Livingston St. sum of One hundred Dollars.

Last Will and Testament of Alice M. Allwood

15 Fifteenth) I give and bequeath to Young Women's Christian Association of Brooklyn sum of One hundred Dollars.

16 Sixteenth) I give and devise and bequeath all the rest, residue of my property both real and personal, of every name and nature wherever same may be situated to the above named Alice Staley, Clara Phillips, Charles Phillips and Winston Coulter or to such of them may be living at the time of my decease, absolutely forever.

10

17 If any of above said Heirs contest this Will or their portion said bequest to be withheld from them and revert to others mentioned.

I hereby appoint my Friend Frederick H. Bange of Brooklyn County of Kings sole Executor without Bonds to be Executor of this my last Will and Testament.

20

IN WITNESS WHEREOF, I have hereunto subscribed my name, and affixed my seal, the first day of November in the year One thousand nine hundred and 17.

ALICE M. ALLWOOD (SEAL)

Witnesses:

GEO. W. CUMMINGS

30

PAUL C. CLOYD

CHAS. H. PUCKHABER

Subscribed by Alice M. Allwood the Testatrix named in the foregoing Will, in the presence of each of us, and at the time of making such subscription, the above Instrument was declared by the said Testatrix to be her last Will and Testament and each of us, at the request of said Testatrix and in her

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Last Will and Testament of Alice M. Allwood

presence and in the presence of each other, signed
our names as witnesses thereto.

Geo. W. Cummings

Residing 83 Woodruff Ave. Bklyn.

Paul C. Cloyd

10 Residing 14 Oak Ridge Ave. Summit, N. J.

Chas. H. Puckhaber

Residing 520—81st St. Brooklyn, N. Y.

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ESSEX COUNTY ORPHANS' COURT

 IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

 } *On Accounting.* 10
 } *Stipulation.*

It is hereby stipulated and agreed by the following representatives on behalf of the persons they represent that the status of the following named persons mentioned in the will of the above named Alice M. Allwood with respect to her was as follows: 20

Alice Staley

First cousin of Alice M. Allwood

Clara Phillips

First cousin of Alice M. Allwood

Winston Coulter,

Son of Mary Coulter (deceased) who was First
Cousin of Alice M. Allwood

Charles L. Phillips 30

Son of above named Clara Phillips

Minnie D. Piper

Not related in any way to Alice M. Allwood

Jennie B. Emerick

Not related in any way to Alice M. Allwood

Maria S. Bange

Not related in any way to Alice M. Allwood
and died before said decedent 40

Stipulation on Accounting

Maud McBride

Not related in any way to Alice M. Allwood

William E. Rounds

Not related in any way to Alice M. Allwood

Died after said decedent.

10 Dated: June 6, 1934.

ARTHUR H. BISSELL,
Proctor for Frederick H. Bange
Executor and Trustee.

HAROLD BOUTON,
Proctor for Alice Staley, Clara
Phillips, Winston Coulter.

HENRY M. STEVENSON,
Representing William E. Rounds.

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Memorandum

ESSEX COUNTY ORPHANS' COURT

 IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

Memorandum. 10

Harold Bouton, Proctor for Alice Staley, Clara
Phillips, Winston Coulter.

Henry M. Stevenson, Proctor for Estate of William
E. Rounds, Deceased.

Van RIPER, J.

20

This matter comes before the Court on the appli-
cation of the trustee of the estate of Joel Audubon
Webb, deceased, which application in effect asks
for an order distributing the sum of \$20,000 held
in trust for the said Joel Audubon Webb under the
provisions of the will of Alice M. Allwood, deceased,
and which application requires a construction of
paragraph 11 of the will of the said Alice M. All-
wood, deceased.

The latter named decedent in her will designated 30
nine different individuals as legatees therein, in
addition to some charitable institutions. In the
11th paragraph of her will she gives the sum of
\$20,000 in trust for the benefit of the above men-
tioned Joel Audobon Webb and further provides
that at his death the said amount is to "revert to my
heirs herein mentioned in equal parts, not charitys
included." The question now presented for the
consideration of this Court and which it is neces-
sary to decide in order to pass upon the applica- 40

Memorandum

tion herein pending is whether or not the "heirs" mentioned in the last above quoted clause refer to those who may strictly be considered heirs at law and/or next of kin or whether or not it refers to all of those persons, charities excluded, who are mentioned in the will of Alice M. Allwood, deceased.

10

A reading of the authorities in this State forces one to the belief that there can be but one conclusion on this point. The same question with practically the same language seems to have been decided in both *Scudder's Executors vs. Vanarsdale*, 13 N. J. E. 109, and *Edwards vs. Stults*, 128 Atl. 609.

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At first glance at the Allwood will one might almost be inclined to the belief that the word "heirs" as used therein really meant legatees and, as was said in the Scudder case above referred to, such a construction is adoptable where such an intention is manifest. Were all of those who were mentioned in the will persons who by relationship had some right to be considered by the testatrix as her heirs from a legal viewpoint, it would be very easy to decide that the word "heirs" as used herein really meant legatees. However, the language of Chancellor Green in that case, wherein he points out that several of the legatees mentioned in the will in dispute were of no next of kin either to the testatrix or to her husband, and that that fact was responsible for the conclusive objection that the term "heirs" could not be construed to mean legatees, must of necessity govern in this case.

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The fact here is that of the nine individuals mentioned in the will, five were not related in any way to the testatrix. This fact would seem to prevent any other construction of the above mentioned 11th paragraph except in accordance with the law as

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Memorandum

laid down in the two cases above cited, and I therefore conclude that the word "heirs" mentioned in the said 11th paragraph refers only to those next of kin of the said decedent who are entitled under the Statute of Distributions to participate in the funds referred to, and who are Alice Staley, Clara Phillips, and Winston Coulter.

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Counsel may prepare an order accordingly and may apply for counsel fees upon notice.

W. D. VAN RIPER,
Newark, New Jersey, *Judge.*
September 14, 1934.

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Order

ESSEX COUNTY ORPHANS' COURT

10 	IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased.	} <i>Order.</i>
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It appearing from the petition of Frederick H. Bange, Trustee under the last will and testament of Alice M. Allwood, deceased, that he has filed his account herein and has prayed this Court for directions as to the distribution of the principal of the trust fund now remaining in his hands as Trustee under the terms of the said Will; and it further appearing that the court has allowed the petitioner's said account in all things as reported

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And it further appearing that due notice has been given to all parties interested, to wit; Clara Phillips, Charles Phillips, Alice Staley, Winston Coulter, Minnie D. Piper, Jennie Emerick, Maude McBride and Fred W. Maule, Executor under the last will and testament of William E. Rounds, deceased, all of whom are of full age

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And the matter having come on to be heard in the presence of Arthur H. Bissell, of counsel with said petitioner, Harold Bouton, of counsel with Winston Coulter, Clara Phillips and Alice Staley and Joseph Kahrs of counsel with Fred W. Maule, Executor of the Estate of William E. Rounds, deceased, and the court having heard the argument of counsel and examined the Will of the said Alice M. Allwood, and the stipulation submitted by coun-

Order

sel from which it appears that Clara Phillips, Alice Staley and Winston Coulter are the only heirs at law or next of kin of the said decedent who are mentioned in her will and the court being of the opinion that none of the other persons mentioned in the Will are entitled to take as "heirs"

It is thereupon on this 25th day of September, 1934, ordered that the said Trustee distribute the balance remaining in his hands after payment of the expenses of this proceeding in equal shares to the said Clara Phillips, Alice Staley and Winston Coulter. 10

It is further ordered that counsel fee on this application be allowed as follows; to Arthur H. Bissell, proctor of petitioner, \$200.00; to Harold Bouton, proctor of Winston Coulter, Clara Phillips and Alice Staley, \$150.; to Joseph Kahrs, proctor of Fred W. Maule, Executor under the last will and testament of William E. Rounds, deceased, \$150. 20

WALTER D. VAN RIPER,
J.

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Notice of Appeal

ESSEX COUNTY ORPHANS' COURT

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IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

*On Petition
of Appeal.**Notice of
Appeal.*

20

Fred W. Maule, executor under the last will and testament of William E. Rounds, deceased, hereby appeals to the Prerogative Court from the Order entered herein on the 25th day of September, 1934, directing that the trustee under the last will and testament of Alice M. Allwood, deceased, distribute the balance remaining in his hands after payment of the expenses of this proceeding, in equal shares to the said Clara Phillips, Alice Staley and Winston Coulter.

JOSEPH KAHRs,
Proctor for Appellant.

Dated: Newark, N. J.
October 1, 1934.

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Service of copy of the within Notice of Appeal is hereby acknowledged this 10th day of October, 1934.

ARTHUR H. BISSELL,
*Proctor of Respondent Executor
and Trustee.*

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Notice of Appeal

ESSEX COUNTY ORPHANS' COURT

 IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

 On Petition
of Appeal.

 Notice of
Appeal.

10

Fred W. Maule, executor under the last will and testament of William E. Rounds, deceased, hereby appeals to the Prerogative Court from the Order entered herein on the 25th day of September, 1934, directing that the trustee under the last will and testament of Alice M. Allwood, deceased, distribute the balance remaining in his hands after payment of the expenses of this proceeding, in equal shares to the said Clara Phillips, Alice Staley and Winston Coulter.

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JOSEPH KAHRs,
Proctor for Appellant.

Dated: Newark, N. J.
October 1, 1934.

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Service of copy of the within Notice of Appeal is hereby acknowledged as of time.

HAROLD BOUTON,
*Proctor for Alice Staley, Clara
Phillips and Winston Coulter.*

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Petition of Appeal

NEW JERSEY PREROGATIVE COURT

10 IN THE MATTER of the Appeal
 of Fred W. Maule, Executor
 of the Estate of William E.
 Rounds, dec'd from an Order
 of the Orphans' Court of the
 County of Essex, directing the
 distribution of funds in the
 hands of the trustee under the
 last will and testament of Alice
 M. Allwood, deceased.

*On Petition
 of Appeal.*

20 To the Ordinary of the State of New Jersey:

The petition of Fred W. Maule, residing at Los Angeles, State of California, executor under the last will and testament of William E. Rounds, deceased, respectfully shows that:

30 1. On the 25th day of September, 1934, the Orphans' Court of the County of Essex made its Order directing the distribution of certain funds in the hands of the trustee under the last will and testament of Alice M. Allwood, deceased.

40 2. Your petitioner hereby appeals from that part of said Order of the said Orphans' Court stating that Clara Phillips, Alice Staley and Winston Coulter are the only heirs at law or next of kin of the said decedent who are mentioned in her will, and that none of the other persons mentioned in the will are entitled to take as "heirs," where the said word "heirs" in the will of the said Alice M. Allwood refers to those entitled to share in the distribution of certain trust fund in the event of the

Petition of Appeal

happening of a certain event, namely, the death of the cestui que trust, which death has occurred.

3. Your petitioner complains and alleges that the aforesaid order of the Orphans' Court is erroneous, improper and illegal in the foregoing particulars, and that your petitioner is aggrieved thereby.

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JOSEPH KAHRs,
Proctor for Petitioner.

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Petition of Appeal

NEW JERSEY PREROGATIVE COURT

10 IN THE MATTER of the Appeal
 of Fred W. Maule, Executor
 of the Estate of William E.
 Rounds, deceased from an Order
 of the Orphans' Court of the
 County of Essex, directing the
 distribution of funds in the
 hands of the trustee under the
 last will and testament of Alice
 M. Allwood, deceased.

On Petition of Appeal
 PETITION

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JOSEPH KAHRs
Proctor for Petitioner
 810 Broad St., Newark, N. J.

Service of copy of the within Petition is hereby
 acknowledged this 16th day of October, 1934.

ARTHUR H. BISSELL,
Proctor for Trustee.

30 SERVICE of copy of the within Petition is hereby
 acknowledged as of time.

HAROLD BOUTON,
*Proctor for Alice Staley, Clara Phillips
 and Winston Coulter.*

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Answer

NEW JERSEY PREROGATIVE COURT

IN THE MATTER of the Appeal
 of Fred W. Maule, Executor
 of the Estate of William E.
 Rounds, dec'd from an Order
 of the Orphans' Court of the
 County of Essex, directing the
 distribution of funds in the
 hands of the trustee under the
 last will and testament of Alice
 M. Allwood, deceased.

*On Petition
 of Appeal.*

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Answer.

The answer of Clara Phillips, Alice Staley and
 Winston Coulter, respondents to the petition of the
 appeal of Fred W. Maule, Executor of the last will
 and testament of William E. Rounds, deceased,
 says:

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1. These respondents admit the allegations con-
 tained in pars. (1) and (2) of appellant's peti-
 tion of appeal.

2. These respondents are advised, believe and
 submit that the portions of said order complained
 of by appellant are just and lawful, and in every
 way in accordance with law and these respondents
 deny that the aforesaid portions of said order or
 any part thereof are erroneous, improper or illegal
 and these respondents state that on the contrary
 the said order and the said portions of said order
 is and are legal, proper and correct.

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They therefore pray that the said order may be
 in all things affirmed and the said petition of ap-
 peal may be dismissed, with costs to be adjudged
 to these respondents.

HAROLD BOUTON,

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Proctor for and of counsel with respondents.

Answer

NEW JERSEY PREROGATIVE COURT

10	IN THE MATTER of the Appeal of Fred W. Maule, Executor of the Estate of William E. Rounds, dec'd from an Order of the Orphans' Court of the County of Essex, directing the distribution of funds in the hands of the trustee under the last will and testament of Alice M. Allwood, deceased.	} <i>On Appeal.</i> } <i>Answer.</i>
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20 ANSWER OF RESPONDENT, FREDERICK H.
 BANGE, TRUSTEE UNDER THE LAST WILL
 AND TESTAMENT OF ALICE M. ALLWOOD,
 DECEASED, TO THE PETITION OF AP-
 PEAL OF FRED W. MAULE, EXECUTOR
 UNDER THE LAST WILL AND TESTAMENT
 OF WILLIAM E. ROUNDS, DECEASED.

This respondent, answering the petition, says:

1. Paragraph one is admitted.
- 30 2. As to the allegations that the order from
 which the petitioner appeals is erroneous as stated
 in paragraphs two and three, this respondent
 neither denies nor admits the same but asks for
 judgment of this court by which his duty in the
 premises may be determined.

ARTHUR H. BISSELL,
Proctor for Respondent Frederick
H. Bange, Trustee, etc.

Order of Reference

NEW JERSEY PREROGATIVE COURT

 IN THE MATTER OF THE ESTATE

OF

 ALICE M. ALLWOOD, Deceased.

10

To the Prerogative Court of the
State of New Jersey:

20

This matter being opened to the court by Joseph Kahrs, Proctor for Fred W. Maule, executor under the last will and testament of William E. Rounds, deceased, and it appearing that Harold Bouton, Proctor for Clara Phillips, Alice Staley and Winston Coulter, and Arthur H. Bissell, Proctor for Frederick H. Bange, Trustee under the last will and testament of Alice M. Allwood, deceased, respondents, have consented hereto;

It is, on this 24th day of November, 1934, on motion of Joseph Kahrs, Proctor for the Appellant, ordered that the above entitled cause be referred to Hon. Maja Leon Berry, one of the Vice-Ordinaries of this Court, to hear the same for the Ordinary

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40

Order of Reference

and to report thereon to him, and to advise what Order or Decree should be made therein.

LUTHER A. CAMPBELL,
Ordinary.

10 Consent is hereby given to the entry of the foregoing order.

HAROLD BOUTON,
*Proctor for Clara Phillips,
Alice Staley and Winston Coulter.*

ARTHUR H. BISSELL,
*Proctor for Frederick H. Bange,
Trustee under the last will and
testament of Alice M. Allwood,
deceased.*

20

ENDORSED:

"Filed Nov. 24, 1934,
THOMAS A. MATHIS,
Register."

30

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Designation

NEW JERSEY PREROGATIVE COURT

 IN THE MATTER OF THE ESTATE

OF

 ALICE M. ALLWOOD, Deceased.

Designation.

10

This matter being opened to the court by Joseph Kahrs, Proctor for Fred W. Maule, executor under the last will and testament of William E. Rounds, deceased, and it appearing that Harold Bouton, Proctor for Clara Phillips, Alice Staley and Winston Coulter, and Arthur H. Bissell, Proctor for Frederick H. Bange Trustee under the last will and, testament of Alice M. Allwood, deceased, respondents, have consented hereto;

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It is, on this 14th day of December, 1934, ORDERED that the 25th day of February, 1935 at the hour of 10 o'clock in the forenoon, at the Chancery Chambers in the City of Newark be designated as the time and place for the hearing in the above entitled cause.

MAJA LEON BERRY,

V. C.

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Consent is hereby given to the entry of the foregoing Designation.

HAROLD BOUTON,

*Proctor for Clara Phillips,**Alice Staley and Winston Coulter.*

ARTHUR H. BISSELL,

*Proctor for Frederick H. Bange,**Trustee under the last will and**testament of Alice M. Allwood,**deceased.*

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Order

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NEW JERSEY PREROGATIVE COURT

IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

On Appeal.

Order.

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It appearing to the Court that Fred W. Maule, Executor under the last will and testament of William E. Rounds, deceased, one of the parties hereto, has appealed to this Court from the order entered in Essex County Orphans' Court, September 25, 1934, and that the State of the Case and briefs of all parties to said appeal exceed one hundred folios in length, and application having been

30 made to permit the same to be typewritten instead of printed,

It is, on this 25th day of January, 1935, ORDERED that the State of the Case and briefs to

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Order

be presented to this Court on said appeal may be typewritten.

Respectfully advised,

MAJA LEON BERRY,
V.

Consent is hereby given to the entry of the foregoing order. 10

HAROLD BOUTON,
*Proctor for Clara Phillips,
Alice Staley and Winston Coulter.*

ARTHUR H. BISSELL,
*Proctor for Frederick H. Bange,
Trustee under the last will and
testament of Alice M. Allwood,
deceased.* 20

(Filed 1/25/35
M. L. B.
V.)

NEW JERSEY PREROGATIVE COURT

10	IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased. 	<i>On Appeal from the Essex County Orphans' Court. On Final Hearing. Opinion.</i>
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Mr. Joseph Kahrs, for Appellant.

Mr. Arthur H. Bissell, for Respondent
 20 Frederick H. Bange, Trustee, etc.

Mr. Harold Bouton, for Respondents Clara Phillips,
 Alice Staley and Winston Coulter.

SYLLABUS

30 Testatrix made bequests to nine individuals and three charities. Of the nine individuals four were relatives, three of whom would have been entitled to the entire estate in the event of intestacy. She directed that upon the happening of a certain contingency the corpus of a trust fund should "revert to my heirs herein mentioned in equal parts, not charities included." Held that the fact that among the individual legatees there were included persons who were of no kin to testatrix conclusively negatived the claim that by the word "heirs" testatrix intended to designate all her individual legatees as distributees of the trust fund.

40

Opinion

BERRY, V. C.

This is an appeal from the decision of the Essex County Orphans' Court construing the will of Alice M. Allwood, deceased. Decedent's will was probated in the Essex County Orphans' Court on September 21, 1928. By it, after providing for the payment of debts and funeral expenses, testatrix made bequests of various sums of money to nine individuals and to four charities. Of the nine individuals four were relatives, three of whom would have been entitled to the entire estate in the event of intestacy. The remaining five legatees were not related to the decedent. As the relation of these legatees to the testatrix may have some bearing upon the construction to be placed upon the will, these nine bequests are tabulated as follows:

<i>Name</i>	<i>Relationship</i>	<i>Legacy</i>	20
Alice Staley	First cousin	Watch and \$3000	
Clara Phillips	First cousin	Wearing apparel and \$3000.	
Winston Coulter	Son of deceased first cousin	\$1,000.	
Charles L. Phillips	Son of Clara Phillips	Watch and \$5000	30
Minnie D. Piper	Friend	\$2000.	
Jennie B. Emerich	Friend	\$1000.	
Marie S. Bange	Friend (predeceased testatrix)	Diamond ring and \$100.	
Maude McBride	Friend	\$100.	
Wm. E. Rounds	Friend (died after testatrix)	\$50.00	40

Opinion

The portion of the will requiring particular construction is the 11th paragraph, which reads as follows:

10 “11 Eleventh) I give and bequeath to my affianced Joel Audubon Webb of Providence Rode Island, sum of Twenty thousand Dollars, same to be put in Trust, at 5% int. same int. to be paid him and at his death the same amount to revert to my heirs herēin mentioned in equal parts, not charitys enclued.”

20 Joel Audubon Webb died February 20th, 1934, and the question to be now determined is—among whom should the corpus of the trust set up in the 11th paragraph of the will be distributed? Judge Van Riper, relying upon *Scudder's Executors v. Van Arsdale*, 13 N. J. Eq. 109 and *Edwards v. Stults*, 97 N. J. Eq. 44, held that it should go to Alice Staley, Clara Phillips and Winston Coulter, the next of kin who would be entitled to take under the statute of distribution in case of intestacy. From this decision the executor of William E. Rounds, deceased, has appealed. I am of the opinion that the judgment of the Essex County Orphans' Court should be affirmed.

30 Counsel for the appellant claims that the authorities relied upon and above cited have no application to this controversy and contends that the words “not charitys enclued,” as contained in the 11th paragraph of the will, indicate a clear intent on the part of the testatrix to designate all her legatees, except charities, as the distributees of the corpus of the trust fund involved. In the construction of a will the intention of the testatrix, of course, must control, but the court is not privileged to guess at that intent. It must be found in the will itself and if from the language used two or

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Opinion

more constructions are permissible, but none imperative, because of uncertainty as to the sense in which technical terms are used, the only safe rule is to interpret those technical words according to well recognized canons of construction. If the question here raised were now presented to this court for the first time there might be a wider range for speculation as to the intent of the testatrix, and a possible construction would be that testatrix meant to include all legatees except charities in the designation "heirs." This is the position taken by Vice Chancellor Lewis in *Edwards v. Stults, supra*, but he felt himself bound by the previous decision of Chancellor Green in *Scudder's Executors v. Van Arsdale*. If there is any doubt, therefore, as to the intention of testatrix in the instant case, the only safe plan is to follow precedent; and it must be borne in mind that the will here involved was drawn, as appears upon its face, by one not skilled in the use of technical legal terms.

In *Scudder's Executors v. Van Arsdale, supra*, the particular language requiring construction was "And if there is anything over and above left, let it be equally divided among all the heirs." Chancellor Green said :

"A great variety of constructions is sought by parties in interest to be put upon this clause. It is claimed that the testatrix intended that the residue should be divided, as the clause literally imports, among her heirs at law, among her next of kin, among her own and her husband's next of kin, among all the *legatees* named in the will. Among these and other conjectures that may plausibly be made as to the meaning of the testatrix, the further conjecture may be hazarded, that neither the

Opinion

testatrix herself nor the *in*expert scrivener who drew the will had any very clear apprehension of her own meaning.

10 "Fortunately for the cause of justice and the rights of the legatees, the construction of the will is not to be left to conjecture, but must be settled by well defined principles and according to acknowledged rules of interpretation."

20 And the Chancellor there laid down the rule "that the term 'heir' is to be construed in reference to the species of property which is the subject of disposition and that when used with reference to personal property it means 'next of kin.'" He then said that the intention to include all the legatees in the term "heirs" was not apparent on the face of the will and that "a conclusive objection, moreover, to this construction is that there are included among the legatees servants and others who are of no kin either to the testatrix or her husband." This decision was cited with approval by the Court of Errors and Appeals in *Leavitt v. Dunn*, 56 N. J. L. 309, at page 311, and, so far as I know, the correctness of the decision has never been questioned in any of the courts of this state. In *Edwards v. Stults*, *supra*, Vice Chancellor Lewis considered

30 himself bound by the decision. In that case, the language the subject of construction was as follows: "The residue of my estate to be divided equally between the heirs specified herein." All of the relatives of the testatrix named in the will claimed a right in the residue and a third possible contention was that all of the legatees were entitled to participate in the distribution. In the course of his opinion, referring to *Scudders' Executors v. Van Arsdale*, he said:

40 "and inasmuch as it was there ruled that the

Opinion

fact that among the legatees were persons who were of no kin to the testatrix, conclusively negated the proposition that the term 'heirs' was equivalent to 'legatees,' I feel obliged to so rule in the present case. I think there can be no middle ground. Either all the legatees must be permitted to participate under the phraseology of the eleventh clause of the will, or the participants under that clause must be limited to the next of kin specifically mentioned in the will." 10

That language is peculiarly applicable to the present controversy. It may be conceded that the question is not free from doubt, but the testatrix' intention must be found in the will itself and not from pure conjecture. And where a contrary intention is not plain, the testator is presumed to have intended the legal import of the language used. The words "not charitys enclued" as used by the testatrix in the 11th paragraph of her will, do not, in my judgment, show a clear intent on her part to include as distributees of the corpus of the trust fund all her individual legatees, some of whom, it will be noted "are of no kin to" her. This fact conclusively negatives the construction claimed by appellant. The fund is to be divided among those entitled "in equal parts." That the testatrix intended that the appellant, who was bequeathed only \$50.00, and who evidently occupied a minor position in testatrix' affections, should share equally in this fund with near relatives is inconceivable, without a clear expression of intent that he should do so. Such clear intent is not apparent. There being no "middle ground" the strict construction of the word "heirs" must be applied and the decree of the Orphans' Court is affirmed. 20 30 40

Decided April 4, 1935.

Decree

NEW JERSEY PREROGATIVE COURT

10	IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased.	} <i>On Appeal from the Essex County Orphans' Court. Decree.</i>
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20 This cause having been brought to a hearing on an appeal from the Essex County Orphans' Court and the court having heard Henry M. Stevenson and Joseph Kahrs of counsel with the appellant, Fred W. Maule, Executor of the Estate of William E. Rounds, deceased, and Harold Bouton of counsel with the respondents Clara Phillips, Alice Staley and Winston Coulter in the presence of Arthur H. Bissell of counsel with the respondent Frederick H. Bange Trustee under the last will and testament of Alice M. Allwood, deceased and the court having duly considered the questions brought up by this appeal;

30 It is on this 16th day of April, 1935 on motion of Harold Bouton of counsel with the respondents Clara Phillips, Alice Staley and Winston Coulter, Ordered, Adjudged and Decreed that the order of the Essex County Orphans' Court made on the 25th day of September, 1934 from which the appellant appealed be and the same is hereby in all things affirmed and that the petition of appeal be and the same hereby is dismissed;

40 It is further ordered that the record in this cause be remitted to the Essex County Orphans' Court

Decree

for further proceedings thereon according to law and the practice of that court;

It is further ordered that a counsel fee of \$100.00 be allowed to Arthur H. Bissell, counsel for the respondent Frederick H. Bange and that a counsel fee of \$200.00 be allowed to Joseph Kahrs, counsel for the appellant, Fred W. Maule and that a counsel fee of \$200.00 be allowed to Harold Bouton, counsel for the respondents Clara Phillips, Alice Staley and Winston Coulter. 10

Respectfully advised,

MAJA LEON BERRY,
V. O.

We hereby consent to the making and entry of the foregoing decree. 20

JOSEPH KAHRs,
*Counsel with the appellant, Fred W.
Maule, Executor of the Estate of
William E. Rounds, deceased.*

ARTHUR H. BISSELL,
*Counsel with the respondent Frederick
H. Bange Trustee under the last
will and testament of Alice M. All-
wood, deceased.* 30

Stipulation

NEW JERSEY PREROGATIVE COURT

10 	IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased.	} <i>On Appeal</i> } <i>from the</i> } <i>Essex</i> } <i>County</i> } <i>Orphans'</i> } <i>Court.</i> } <i>Stipulation.</i>
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It is hereby stipulated and agreed by the counsel for the parties hereto that counsel fees may be allowed as follows, if this court approves. That an allowance of \$100.00 may be made to Arthur H. Bissell, counsel for the respondent Frederick H. Bange; that an allowance of \$200.00 may be made to Joseph Kahrs, counsel for the appellant, Fred W. Maule and that an allowance of \$200.00 may be made to Harold Bouton, counsel for the respondents Clara Phillips, Alice Staley and Winston Coulter.

Dated April 15, 1935.

JOSEPH KAHRS,
*Counsel with the appellant, Fred W.
 Maule, Executor of the Estate of
 William E. Rounds, deceased.*

ARTHUR H. BISSELL,
*Counsel with the respondent Frederick
 H. Bange Trustee under the last will
 and testament of Alice M. Allwood,
 deceased.*

HAROLD BOUTON,
*Counsel with the respondents Clara
 Phillips, Alice Staley and Winston
 Coulter.*

Notice of Appeal

NEW JERSEY PREROGATIVE COURT

 IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

*On Petition
of Appeal.*

*Notice of
Appeal.* 10

Fred W. Maule, executor under the last will and testament of William E. Rounds, deceased, hereby appeals to the Court of Errors and Appeals from the decree entered herein on the 16th day of April, 1935, wherein it was Ordered, Adjudged and Decreed that the order of Essex County Orphans' Court, made on the 25th day of September, 1934, from which the appellant appealed, be and the same was thereby in all things affirmed, and that the petition of appeal be and the same was thereby dismissed. 20

Dated: Newark, N. J.

April 24, 1935.

 JOSEPH KAHRS,
Proctor for Appellant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 25th day of April, 1935. 30

 ARTHUR H. BISSELL,
*Proctor for Respondent Executor
and Trustee.*

Service of a copy of the within Notice of Appeal is hereby acknowledged this 26th day of April, 1935.

 HAROLD BOUTON,
*Proctor for Alice Staley,
Clara Phillips and Winston
Coulter.* 40

*Petition of Appeal*NEW JERSEY COURT OF ERRORS AND
APPEALS

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IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

*On Appeal
from the
Prerogative
Court.*

*Petition
of Appeal.*

20

To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:

The petition of Fred W. Maule, Executor under the last will and testament of William E. Rounds, deceased, the appellant in the above entitled cause, respectfully shows that:

30

1. Petitioner finds himself aggrieved by a decree made in the Prerogative Court, which decree was respectfully advised by his Honor Maja Leon Berry, Vice-Ordinary, and made by his Honor Luther A. Campbell, Ordinary of the State of New Jersey, bearing date the 16th day of April, 1935, on a certain cause in the said Prerogative Court wherein the said Fred W. Maule, Executor of the Estate of William E. Rounds, deceased, was appellant, and Clara Phillips, Alice Staley and Winston Coulter and Frederick H. Bange, Trustee under the last will and testament of Alice M. Allwood, deceased, were respondents, in this respect, to wit, that the said decree adjudges that the order of the Essex County Orphans' Court made on the 25th day of

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Petition of Appeal

September, 1934, wherein it was stated that Clara Phillips, Alice Staley and Winston Coulter are the only heirs at law or next of kin of the said decedent who are mentioned in her will, and that none of the other persons therein mentioned are entitled to take as "heirs" where the said word "heirs" in the will of the said Alice M. Allwood refers to those 10
entitled to share in the distribution of a certain trust fund in the happening of a certain event, namely, the death of the cestui que trust, which death occurred.

2. Petitioner further states that on or about February 5, 1935, the above mentioned Frederick H. Bange, Trustee under the last will and testament of Alice M. Allwood, deceased, died, and that on April 30, 1935, by order of the Orphans' Court of Essex County, the Montclair Trust Company, a corporation of New Jersey, was appointed substituted trustee. 20

And petitioner appeals from the decree of the Ordinary, which decrees as aforesaid, upon the ground that the same is erroneous in that it ordered the distribution of the trust be made to Clara Phillips, Alice Staley and Winston Coulter, and did not include other individual legatees mentioned in the will in the said distribution, as provided for by the testatrix in her last will and testament wherein she states: 30

"11 Eleventh) I give and bequeath to my affianced Joel Audubon Webb of Providence Rode Island, sum of Twenty thousand Dollars, same to be put in Trust, at 5% int. same int. to be paid him and at his death same amount to revert to my heirs herein mentioned in equal parts, not charitys encluded."

Petition of Appeal

Petitioner therefore prays that the said decree of the said Ordinary may be reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as to this court shall seem proper.

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JOSEPH KAHRs,
Solicitor for and of Counsel with
Petitioner.

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*Affidavit of Service*NEW JERSEY COURT OF ERRORS AND
APPEALS

IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

*On Appeal
from the
Prerogative
Court.*

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*Affidavit
of Service.*STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss:

RAYMOND G. PILLER being duly sworn according to law upon his oath, deposes and says:

That he is employed in the office of Joseph Kahrs, solicitor for petitioner, Fred W. Maule, Executor under the last will and testament of William E. Rounds, deceased.

20

That on May 8th, 1935, he served a true copy of Petition of Appeal upon Harold C. Bouton, solicitor for Clara Phillips, Alice Staley and Winston Coulter, by leaving a copy of same with his secretary, at his office No. 20 Church Street, Montclair, N. J., and upon Arthur H. Bissell, solicitor for Frederick H. Bange, Trustee under the last will and testament of Alice M. Allwood, deceased, by leaving a copy of the same with his secretary, at his office, 22 South Park Street, Montclair, New Jersey.

30

RAYMOND G. PILLER.

Sworn and subscribed to before me
this 9th day of May, 1935.

JOSEPH KAHRs, JR.,

An Attorney at Law of New Jersey.

40

*Notice of Argument*NEW JERSEY COURT OF ERRORS AND
APPEALS

10	IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased.	} <i>On Appeal, &c.</i> <i>Notice of</i> <i>Argument.</i>
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To Harold Bouton, Esq., Proctor for Clara Phillips,
 Alice Staley and Winston Coulter, and Arthur H.
 Bissell, Esq., Proctor for Respondent Executor
 and Trustee:

20 Take Notice, that on the 21st day of May, 1935,
 at the hour of 11 A. M. in the forenoon, or as soon
 thereafter as counsel can be heard at the State
 House in the City of Trenton, New Jersey, I will
 move the above entitled cause for argument.

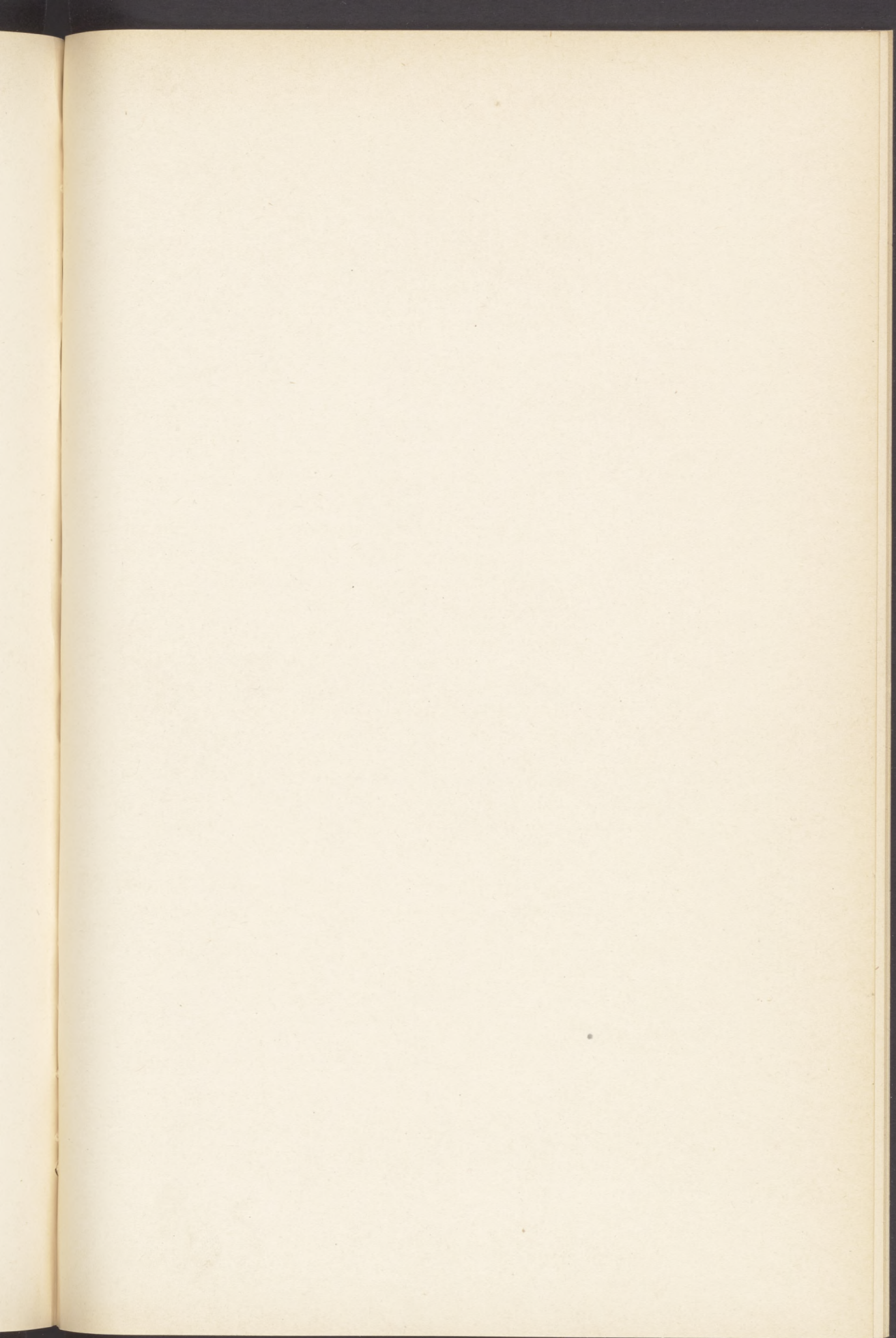
JOSEPH KAHRs,
Proctor for Fred W. Maule, Executor
under the last will and testament of
William E. Rounds, deceased.

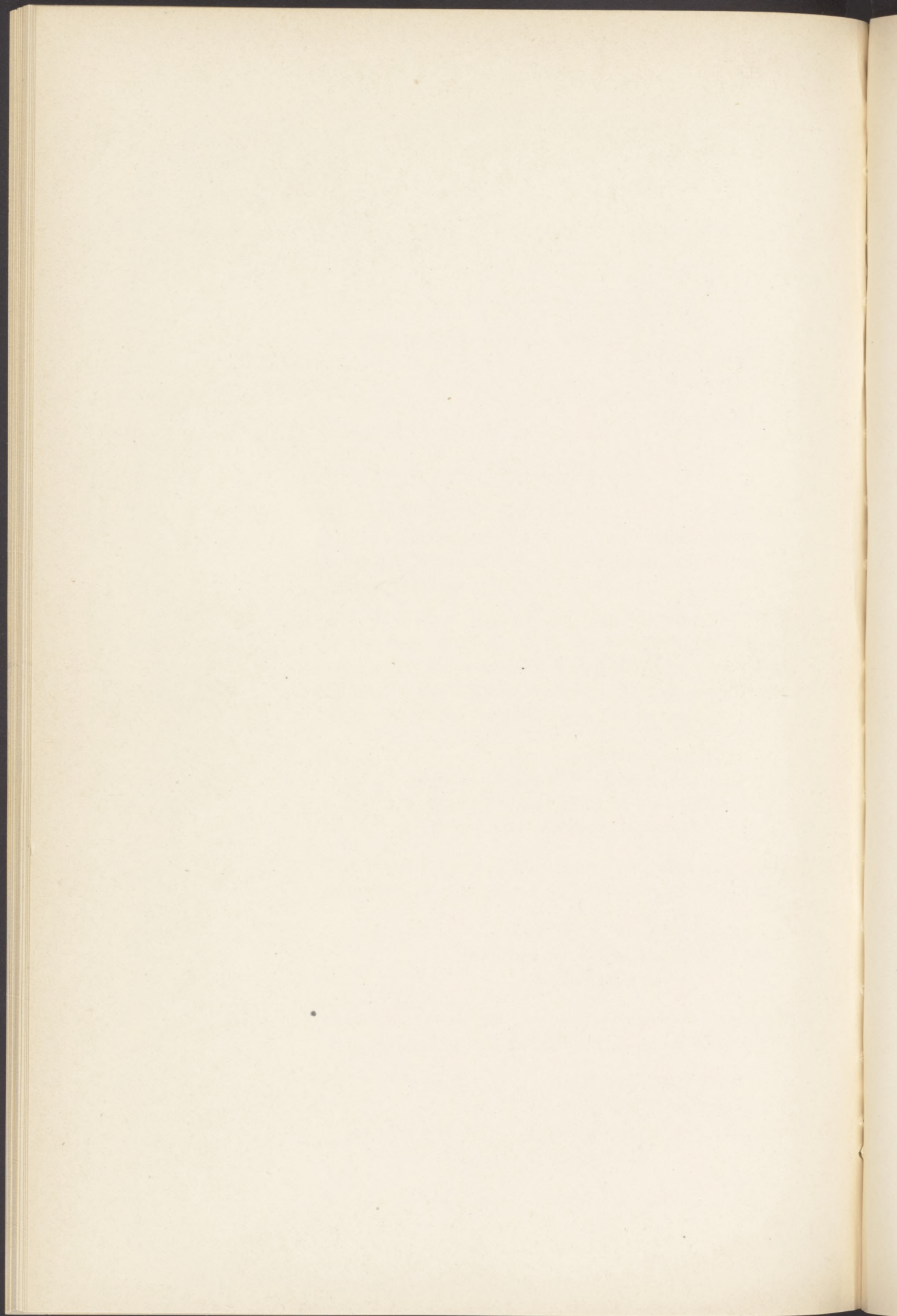
30 Service of copy of the within Notice of Argument
 is hereby acknowledged this 11th day of May, 1935.

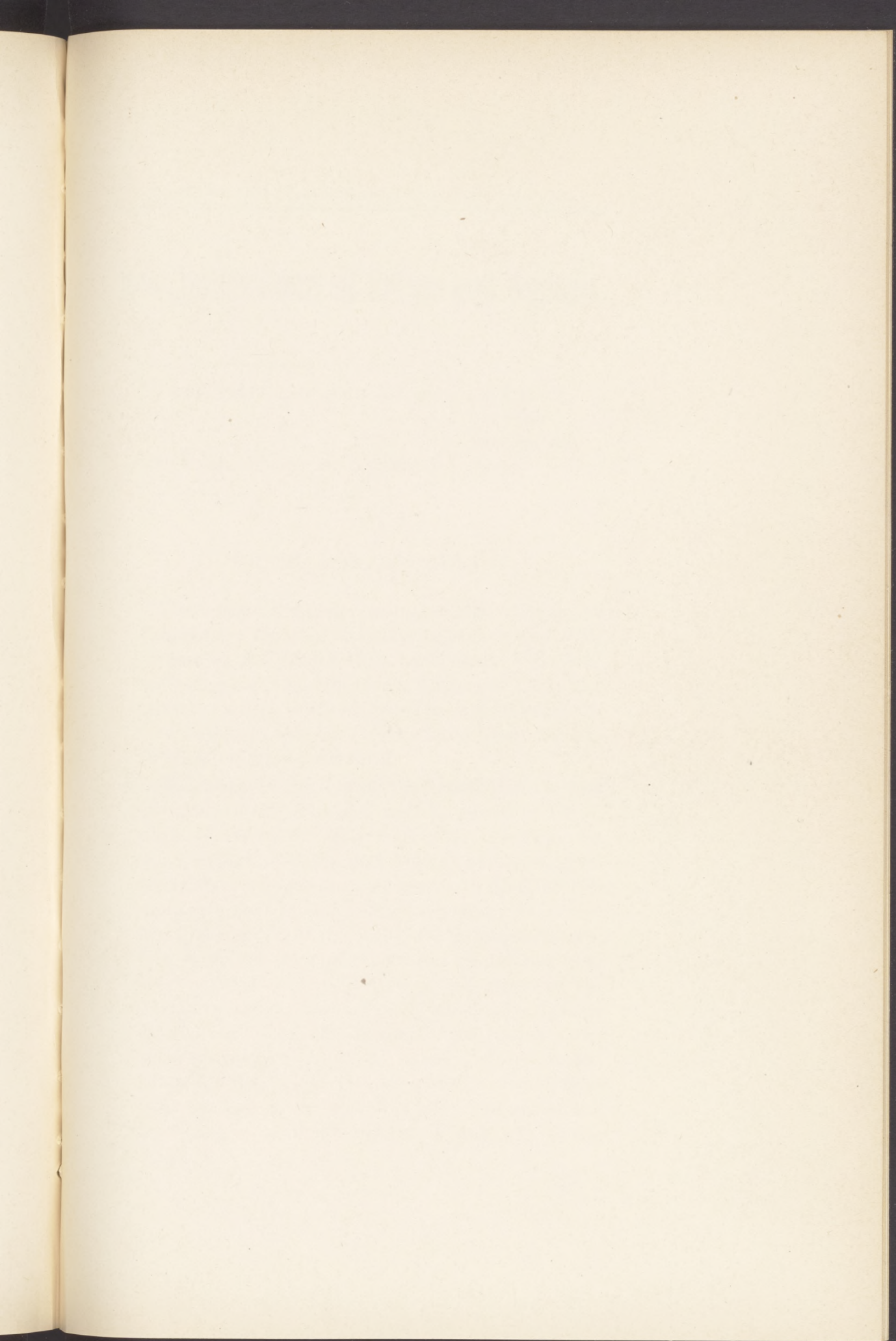
ARTHUR H. BISSELL,
Proctor for Respondent Executor
and Trustee.

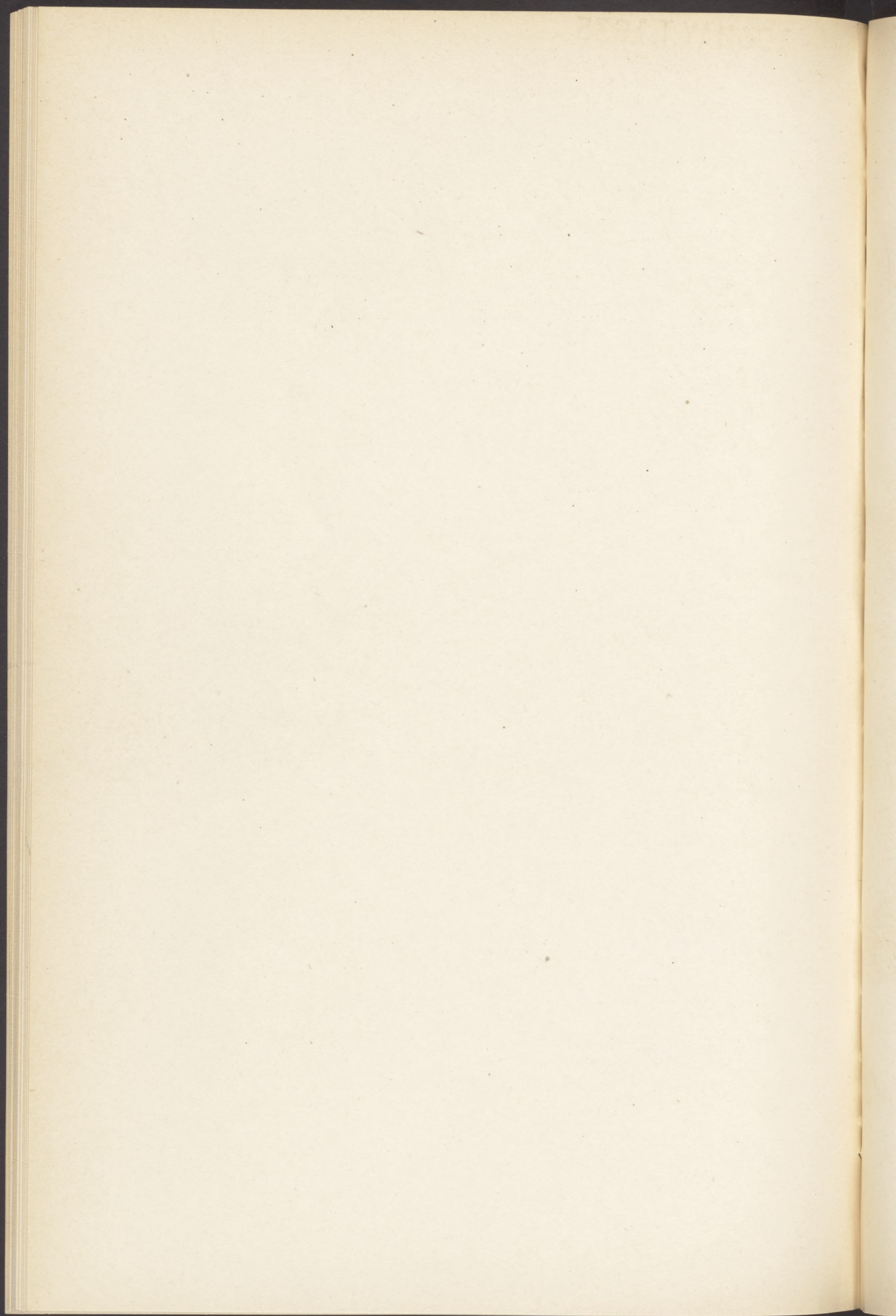
Service of copy of the within Notice of Argument
 is hereby acknowledged this 11th day of May, 1935.

40 HAROLD BOUTON,
Proctor for Alice Staley,
Clara Phillips and Winston
Coulter.









New Jersey Court of Errors and Appeals

IN THE MATTER OF THE ESTATE OF ALICE M. ALLWOOD, Deceased.	}	<i>On Appeal from the Prerogative Court.</i>
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BRIEF FOR APPELLANT

This appeal was taken from a decree made in the Prerogative Court, which decree was respectfully advised by His Honor Maja Leon Berry, Vice-Ordinary, and made by His Honor Luther A. Campbell, Ordinary of the State of New Jersey, and which decree adjudged that an Order of the Essex County Orphans' Court be affirmed.

This appeal brings up for determination the construction of the Will of the above named decedent, Alice M. Allwood. This Will, after providing for the payment of debts and funeral expenses, gives bequests of various sums of money to nine individuals, each bequest being separately stated in a numbered paragraph of the Will. Of these individuals, four were relatives of whom one would not have been entitled to any portion of the estate of the Testatrix under intestacy laws which governed its disposition. Had the decedent died intestate the remaining three relatives, namely, Alice Staley, Clara Phillips and Winston Coulter, would have been entitled to the entire estate. The remaining five legatees were not related in any way to the decedent.

The portion of this Will which calls for construction at this time is paragraph Eleventh which is as follows:

"11 Eleventh) I give and bequeath to my affianced Joel Audobon Webb of Providence Rode Island, sum of Twenty thousand Dollars, same to be put in Trust, at 5% int. same int. to be paid him and at his death same amount to revert to my heirs herein mentioned in equal parts, not charitys enclued."

Following this paragraph are bequests to three charities, which are followed by the residuary clause whereby Testatrix gives her residuary estate "to the above named Alice Staley, Clara Phillips, Charles Phillips and Winston Coulter". It will be noted that these residuary beneficiaries are the four relatives above referred to, of whom but three would have inherited under the intestacy laws.

The life tenant of the trust created by paragraph Eleventh having died, the trust has fallen in and it must now be determined who are entitled to receive the corpus of this trust in accordance with the above quoted provisions of paragraph Eleventh of the Will. In other words, whom did the Testatrix intend to designate when she provided that this trust was to "revert to my heirs herein mentioned in equal parts, not charitys enclued."

Courts in all jurisdictions have uniformly held that a testamentary intent must not be defeated regardless of words or phrases which may be employed in a Will unless such intent is contrary to some rule of law or public policy. The following quotations from Cyc, volume 40, give an excellent statement of this elementary legal principal: Pages 1386-1389:

"The cardinal rule in the construction and interpretation of wills or codicils is that the

intention of the testator must be ascertained if possible, and if it is not in contravention of some established rule of law or public policy, must be given effect, and by this is meant the actual, personal, individual intention, and not a mere presumptive intention inferred from the use of a set phrase or a familiar form of words. For this purpose the will should be construed liberally; but it cannot be construed so as to effectuate an intention which is contrary to some rule of law or public policy.

The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used, or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will."

Page 1396:

"There are no arbitrary or unbending rules in the construction of the language of a will, as no two wills are in all respects alike; and in construing such language, substance rather than form must be regarded, and if the testator's intention can be ascertained to a reasonable certainty from the whole will, it must be given effect however informal or inartificial the terms or language employed."

Page 1399:

"Inasmuch as each case must be governed by its own particular facts and circumstances, but little aid can be derived in the construction of wills from adjudged cases; but where the

meaning of the language used in the will has been settled by usage and sanctioned by judicial decisions, it is presumed to be used in the sense that the law has appropriated to it, and should be so construed, unless the context of the will shows a clear intention to the contrary."

Page 1461:

"In order to effectuate the intention of the testator as ascertained from the context of the will and the surrounding circumstances, the words 'heirs' may be construed to mean heirs of the body, lineal descendants, such collaterals as would inherit, issue, next of kin, or those who have been previously designated in the will as devisees, or legatees."

Let us now analyze Miss Allwood's Will with a view to reaching a correct conclusion as to whom she intended to designate when she used the word "heirs" in the above quoted paragraph Eleventh of her Will. It is very apparent from a reading of the entire Will that it was not drafted by a lawyer. Either the Testatrix drew it herself, or she had the assistance of someone who was not an attorney. Not only that but it appears that the Will was somewhat carelessly drawn as evidenced by the misspelling of several words. One thing, however, is we think absolutely certain and that is that had it been the intention of the Testatrix to designate as recipients of the trust fund her heirs in the legal adaptation of the word, that is the three relatives above mentioned, she would not have specifically excluded as a class the charities (namely, three institutions who received legacies in subsequent paragraphs in her Will) and not also have excluded the individuals who were not her heirs in the technical

sense. It is even more likely that instead of adopting the method of excluding a class of beneficiaries, she would have specifically named the individuals (only three in number) whom she intended to receive the trust fund. This is what she did in disposing of her residuary estate and there is no apparent reason why she would not have done the same in disposing of the trust. She certainly knew that the charitable institutions were not her "heirs" in the sense that they would inherit her estate in case of intestacy and, therefore, there was no possible reason why she would have specifically excluded them as a class and not also have specifically excluded any individual or class of individuals whom she intended to exclude.

In our investigation of legal authorities we have not found any case where a similar question is presented; that is, a case construing a testamentary provision similar to the one here under consideration. Applying the legal principals laid down by the foregoing quotations from Cyc that each Will must be considered without relation to some other Will or the construction of some other Will, we have presented, the simple question as to whether by excluding the class of legatees designated as charities, the Testatrix could possibly have intended that the personal legatees named in her Will were to be divided into two classes, one consisting of the three relatives who were her heirs in the sense that they would have inherited under intestacy and the other consisting of the remaining relative and the five legatees who were not related to her at all, and that she intended that one of these classes consisting of the three "heirs" above named were to receive the trust fund and that the remaining relative and the five legatees who were not related to her, consisting of the other class, were not to receive any part of it.

The learned Judges in both Courts below, from whose decisions this appeal is taken, appear to have been impressed with the contention of Counsel for the respondents that the cases of *Scudder vs. Vanarsdale*, 13 N. J. Eq. 109 and *Edwards vs. Stults*, 97 N. J. Eq. 44, constitute legal precedent which, applied to the instant case, must be taken as in effect compelling a construction of the Will whereby the word "heirs", as employed in the quoted paragraph under consideration, must be given its technical legal sense with the result that the three out of the four relatives of decedent named in her Will became entitled to the principal of the trust fund which has fallen in to the exclusion of all other individuals mentioned in the Will. We are wholly unable to understand how any such conclusion could have been reached.

We have carefully read the opinions in both the cases above referred to. All that these cases hold is that unless there is something in the context of a Will or in the circumstances surrounding the testator at the time of its execution *which indicates a contrary intent*, the word "heirs", if used, must be taken to designate those who would be entitled to a decedent's estate in intestacy.

The circumstances which surrounded this Testatrix at the time of the execution of her Will appear to be that she drew it herself either with or without the assistance of a layman, no better versed in preparations of Wills than she was; that the only reasonable presumption is that she did not understand the technical meaning of the word "heirs" and did not or could not have known whether it meant blood relatives who would inherit in intestacy or individuals, whether related or not, named in a Will as legatees. These circumstances coupled with the very persuasive fact that she in clear and unmistak-

able language excluded from a participation in this trust fund the charitable institutions, three in number, mentioned in her Will in paragraphs following the one under construction, impress us as absolutely conclusive evidence that she intended to exclude these three charitable institutions and not to exclude any individual named in her Will as a legatee. If this Court agrees with the writer that this was her intent, we submit that neither the cases above referred to nor any other cases which have been decided in the Courts of the State of New Jersey or in the Courts of any other State constitute legal precedent which requires this Court to make a decision in this case contrary to what the Court believes to have been the wishes of the Testatrix.

The appellant therefore respectfully prays that the decree of the Prerogative Court advised by Vice Ordinary Berry, from which this appeal is taken, be reversed, and for such other relief as may be equitable and proper in the case.

Respectfully submitted,

JOSEPH KAHRS,

*Solicitor for and of Counsel
with Appellant.*

The Printing Co., 125 West 11th St., New York, N.Y.

THE NEW YORK COURT OF APPEALS

in the
Court of
Appeals,
New York,
January

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IN THE MATTER OF THE ESTATE

OF

ALICE M. ALLWOOD, Deceased.

*On Appeal
from
Prerogative
Court.*

BRIEF OF RESPONDENTS,

Alice Staley, Clara Phillips, and Winston Coulter.

The above named decedent left a last will probated by the Surrogate of Essex County, New Jersey.

The will names as beneficiaries four relatives, Alice Staley, a first cousin, Clara Phillips, a first cousin, Winston Coulter, son of Mary Coulter, a deceased first cousin and Charles L. Phillips, son of said Clara Phillips. (See stipulation in State of Case page 9.)

The will also names as beneficiaries five persons including William E. Rounds, whose estate is the appellant herein and four of which beneficiaries the decedent designates as "friends" in her will. None of the five was or is related to decedent in any way. (See stipulation in State of Case page 9.)

These nine bequests are tabulated as follows for the convenience of the court:

Name	Relationship	Legacy
Alice Staley	First cousin	Watch and \$3000
Clara Phillips	First cousin	Wearing apparel and \$3000
Winston Coulter	Son of deceased First cousin	\$1000
Charles L. Phillips	Son of Clara Phillips	Watch and \$5000
Minnie D. Piper	Friend	\$2000
Jennie B. Emerich	Friend	\$1000
Maria S. Bange	Friend (predeceased testatrix)	Diamond ring and \$100
Maude McBride	Friend	\$100
Wm. E. Rounds	Friend (died after testatrix)	\$50.00

The will also names as beneficiaries several charities.

The appeal is made on behalf of the said estate of William E. Rounds who has died since the decedent and who is mentioned as a special legatee for \$50. in her will. None of the other "friends" raise the question.

The question raised by the appellant requires the determination by this court as to who are the "heirs" mentioned and intended by testatrix in paragraph "11 Eleventh)" of the will and therefore who, now that Joel Audubon Webb therein mentioned has died, are entitled to the fund of \$20,000, all of it personal property.

The appellant claims that the estate of William E. Rounds is entitled as an "heir" to an equal distributive share of the \$20,000.

The appellant raised the question in the Essex County Orphans' Court and said court found against such contention and in favor of Alice

Staley, Clara Phillips and Winston Coulter, these respondents.

The appellant again appealed to the Prerogative Court which again found against such contention and in favor of these respondents.

It is respectfully claimed on behalf of Alice Staley, Clara Phillips and Winston Coulter that they alone are the "heirs" and as such are the only next of kin entitled to the fund and that the Prerogative Court should be sustained.

POINT I.

Alice Staley and Clara Phillips as first cousins of the decedent and Winston Coulter as the son of Mary Coulter, deceased, a first cousin of the decedent are the heirs intended to take and who do take by the provisions of paragraph "11 Eleventh)" of the will.

The law is settled in this state as to what is meant by the use of the word "heirs" in such clauses as here in question.

There are two cases that in many respects are identical with the circumstances of this case. The first of these cases is *Scudder v. Vanarsdale*, 13 Eq. 109 which says at p. 110:

"The testatrix died in 1855, seized and possessed of personal and real estate. By her will she directs that her real estate should be sold by her executors as soon as they conveniently can, and the accounts settled. She distributes (principally among her relatives and the relatives of her deceased husband) numerous pecuniary legacies, amounting to \$16,950. She also bequeaths a few specific legacies. After giving these legacies, the testatrix adds, "and if there is

anything over and above, let it be equally divided among all the heirs."

Said case continues at said page,

"A great variety of constructions is sought by parties in interest to be put upon this clause. It is claimed that the testatrix intended that the residue should be divided, as the clause literally imports, among her heirs-at-law, among her next of kin, among her own and her husband's next of kin, among all the legatees named in the will. Among these and other conjectures that may plausibly be made as to the meaning of the testatrix, the further conjecture may be hazarded, that neither the testatrix herself nor the inexpert scrivener who drew the will had any very clear apprehension of her own meaning.

"Fortunately for the cause of justice and the rights of the legatees, the construction of the will is not to be left to conjecture, but must be settled by well-defined principles and according to acknowledged rules of interpretation."

Said case continues at page 112,

"The more rational rule of interpretation, and the one more likely to attain the end of all construction, viz., to effect the intent of the testator, is, that the term 'heir' is to be construed in reference to the species of property which is the subject of disposition, and that when used with reference to personal property it means next of kin."

Said case continues at page 113,

"Among other constructions sought to be given to the residuary clause, it is claimed that the testatrix, by the term 'heirs,' meant 'legatees,' and that the design was to distribute the residue as well among her husband's relatives as her own. This construction may be adopted where such intention is manifest.

But no such intention is manifest on the face of this will, nor is there anything from which such intention can be legitimately inferred. A conclusive objection, moreover, to this construction is, that there are included among the legatees servants and others, who are of no kin, either to the testatrix or her husband."

The second case on which we support our contention is also one in Chancery namely *Edwards v. Stults*, 97 Eq. 44, 128 At. 609 where Vice Chancellor Lewis says that the above case of *Scudder v. Vanarsdale* should be followed and that where there are included among the legatees persons of no kin to the testatrix the word "heirs" in such cases means next of kin.

In this last mentioned case the bill was filed to obtain a construction of the will of the decedent. The text of the case at page 610 of 128 At. is as follows:

"At the time of her death she left surviving her numerous relatives. She had no children. There were three sisters, viz. Roxanna Applegate, Maria L. Stults, and Laura B. Stults. There was also a niece, Jennie Patton, a daughter of Adelaid Stults, a deceased sister of the testatrix, and Jennie Patton had four children. The sister, Laura B. Stults had one child, Lillian Anderson, and Lillian Anderson had five children. In the will bequests were made specifically to each one of these relatives of the testatrix, except the two sisters, Roxanna Applegate and Maria L. Stults. Those two sisters are not named in the will. In addition to the legacies to the relatives specified bequests were also made to Kate Bohen, a household servant of the testatrix, but not a relative; to the Universalist Church at Highstown; and to Edna Applegate, a relative of her husband, but not of the testatrix.

"The testatrix then provides in the eleventh clause of the will as follows:

'The residue of my estate to be divided equally between the heirs specified herein.'

"The contest arises upon the construction to be given this clause. It is contended by one group of the beneficiaries under the will that the residue of the estate, under this clause, is to be divided between the strict heirs at law of the testatrix who are specified in the will, and it is stipulated that the next of kin of the testatrix are the same persons as the heirs at law, viz., the sister Laura B. Stults and the niece, Jennie Patton.

"On the other hand it is contended that the group that is to take the residue of the estate, under the provisions of the eleventh clause of the will, should include, in addition to the strict heirs at law or next of kin, all the relatives of the testatrix who are specified in the will.

"There is a third possible contention, and that is that the residuary legatees are all the beneficiaries named in the will, including the non relatives of the testatrix, and the church at Highstown."

Vice-Chancellor Lewis says that the decedent was not shown to have possessed any technical legal knowledge of the terms employed in the will and the scrivener who drafted the will was a layman. The Vice-Chancellor points out that the possibility that she meant others than her legal heirs or next of kin is not sufficient to go against the fundamental rules of construction in such cases even though she might have made her intention clearer in a very simple manner by mentioning her heirs or next of kin by name. He quotes and rests his decision in this case on the part of the opinion in the *Scudder v. Vanarsdale* case above quoted from page 113, and says that he is bound by that view.

The contention is made on behalf of the estate of the legatee, William E. Rounds, for a strained construction of paragraph "11 Eleventh)" of the will. It is claimed that the word "heirs" in that clause should apply to and include all the legatees in the will except charities because the surplusage of the words "not charitys encluded" happens to be in that paragraph. This although the said William E. Rounds and the other "friends" were and are not legal heirs, next of kin or related in any way to the decedent.

If the appellant's contention were sound, if it were logical and fair and according to the legal construction adopted in such cases, as shown by the foregoing cases, then Vice-Chancellor Lewis should have held to and supported the contention which he mentions in his opinion, namely,

"There is a third possible contention, and that is that the residuary legatees are all the beneficiaries named in the will, including the nonrelatives of the testatrix, and the church at Highstown."

and the Vice-Chancellor should have done so according to the theory advanced by the appellant because the will in the *Edwards v. Stults* case which he was considering provided:

"The residue of my estate to be divided equally between the heirs specified herein."

But such is not the manner of construction and the law in this state as shown in the said two cases.

If there could be any doubt by reason of the "11 Eleventh)" paragraph as to whom the decedent meant as her "heirs", it is disposed of by paragraph "17" of the will as follows:

"17. If any of above said Heirs contest this Will or their portion, said bequest to be

with held from them and revert to others mentioned."

The decedent conclusively by paragraph "17" designates who she means and intends to be her "heirs." The only persons who could benefit by such a contest of her will would be her legal heirs and next of kin.

By paragraph "17" she protected the legatees who were not her legal heirs and not her next of kin and also the charities against any attack by her heirs.

Can it be seriously claimed that the decedent feared a contest of her will by one of her "friend" legatees. Or that she considered and intended them to be her "heirs," when not one of them was related to her, not one of them a natural object of her bounty, not one of them entitled to any financial consideration by her, but whom as "friends" she was generously and gratuitously giving sums varying from several thousand dollars to \$50.00 for appellant, and \$100. each for two others. It is beyond belief.

It is not reasonable that testatrix intended to describe them as her "heirs" or to give them equal parts of the fund of paragraph "11 Eleventh)" when she was treating them in such vastly different degrees of attachment as shown by the amounts of their legacies.

POINT II.

Alice Staley and Clara Phillips as first cousins of the decedent and Winston Coulter as the son and as the "legal representative" of his mother, Mary Coulter, (deceased) a first cousin of the decedent are the only ones entitled to take the fund of paragraph "11 Eleventh)" of the will.

Our claim is that the said Alice Staley and Clara Phillips and Winston Coulter as such "legal representative" alone take such fund of paragraph "11 Eleventh)" as shown by the case in Chancery on opinion by Vice-Chancellor Buchanan, *in re Miller's Estate*, 103 Eq. 86-141 At. 679 affirmed on the Vice-Chancellor's opinion by the Court of Errors and Appeals 104 Eq. 491-146 At. 915. It says that "legal representatives" are distributees.

Paragraph "4 Fourth)" of the will makes Charles L. Phillips a legatee of a specific sum. He is the son of the said Clara Phillips, but she is alive and he cannot take as a "legal representative" and is of a different degree so is excluded for the latter reason also, as shown by the statute hereinafter quoted.

All the other persons mentioned definitely in the will and as shown in stipulation (S. of C. p. 9) are not related to the decedent and as shown by the "Point I" cases are not entitled to distribution under the said paragraph of the will and this includes the estate of William E. Rounds, who was a legatee for \$50.

The part of the Statute of Distribution which it is submitted includes and supports the claim of the said Alice Staley, Clara Phillips and

Winston Coulter and which it is submitted excludes all the others mentioned, is as follows:

Laws of 1918, Chap. 63, page 181, IV.

“If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, nor the representative of a deceased brother or sister, then all of the estate to be distributed equally to the next of kindred, in equal degree, of or unto the intestate and their legal representatives as aforesaid.”

And that as explained and decided in the said case of *In re Miller's Estate* the said Winston Coulter is the “legal representative” of his mother, Mary Coulter, (deceased) who was the first cousin of the decedent and of equal degree with the said Alice Staley and Clara Phillips.

It is respectfully submitted and claimed on behalf of the said Alice Staley, Clara Phillips and Winston Coulter that under such circumstances where there is personal property only the word “heirs” can only mean next of kin of the decedent and that such next of kin can only be those entitled as aforesaid to their shares under the aforesaid provision of the aforesaid Statute of Distribution so that they, Alice Staley, Clara Phillips and Winston Coulter, are the only ones so entitled and are the only ones to whom the word “heirs” applies, in the said paragraph of the will.

POINT III.

Superfluous or repugnant words will be rejected by the court.

“The predominant idea of the testator’s mind, if apparent, will be heeded as against all doubtful and conflicting provisions which might of themselves defeat it.”

Gluckman v. Robertson, 116 E. 531, 174 At. 488, a case in the New Jersey Court of Errors and Appeals at page 491.

69 *Corp. Juris* 83, 84 “*Wills*” says, citing cases in many jurisdictions in support,

Note (30) “The court in construing a will may reject superfluous or repugnant words whenever necessary to effectuate the testator’s intention as expressed therein
* * *

Note (31) “and false words such as mistakes in identification or description may be eliminated or corrected.”

Some examples of how far the courts have gone in doing so are shown by the following:

United States Supreme Court in the case of *Patch v. White*, 117 U. S. 210, 215, 6 S. Ct. 617, 710, 29 L. Ed. 860 says:

“Devise of ‘lot numbered 6, in square 403’ which he did not own and never had owned Held that he intended it to be Lot No. 3 in square 406.”

The same court in *Wright v. Page*, 10 *Wheat*. 204, 391, 6 L. Ed. 303 in a New Jersey will case says, p. 391:

“If then it is asked, what interpretation the court put upon the words ‘all the rest’ in connection with ‘lands and tenements’ the answer is that no definite meaning can

in this will, be annexed to them. * * * But if words are used by him which are insensible in the place where they occur, or their common meaning is deserted, and no other is furnished by the will, courts are driven to the necessity of deeming them as merely insignificant or surplusage, and to find the true interpretation of the will without them."

Bartlett v. King, 12 Mass. 537 was a will case where the question arose as to a legacy in trust for "the said American Board of Commissioners for Foreign Missions and their Associates."

This case says at page 541:

"It is difficult to find, in the manner in which it is here used, that it (Associates) has any meaning; and, if it has not, or is absurd, or repugnant to the clear intention of the testatrix manifested in other parts of the will, it may be rejected as surplusage. At most, it is only an inaccuracy in the description of the persons, who are, nevertheless sufficiently certain; and which does not go to defeat the legacy."

Davis v. Biggs, 20 Ohio St. 550, says at p. 560:

"The operative words of the bequest, by themselves considered, unmistakably and admittedly, give to Mrs. Taylor a mere trust. The bequest is plainly expressed to be 'in trust,' and as if to make it more certain, it is declared to be 'in trust only.'"

"* * * It is true also * * * that there is no other distinct word or clause in this will, so in conflict with the clause in question, as necessarily to require the rejection of one or the other. I apprehend, however, that a direct repugnancy of that nature is not always necessary for that purpose, but that the repugnancy may consist in the fact that the clause to be rejected is in conflict with the general scope and tenor of the will, including as well its

implications and omissions, as its positive provisions.

"The words 'in trust only' importing clearly an intention to give the wife a mere trust, the question to be decided is whether, a contrary intention is more clearly manifested elsewhere, or otherwise, in the will."

p. 567. "Upon the whole, we are of the opinion that the words 'in trust only' in their ordinary legal sense, are so in conflict with the general scope and tenor of the will, that they must be rejected, or held to have no legal effect in its construction, and that the wife took an absolute property in the rents, dividends and interests specified in the fourth clause of the will."

Moulton v. Chapman, 108 Me. 417-81 At. 1007, says, col. 2, p. 1008:

"The claim of the nephews arises under the second paragraph of the second item of the codicil. In construing a will it is true that every clause and word are to be taken into consideration, and no clause or material matter of description rejected, but, in view of the provisions of the will and codicil and the admitted facts, it seems hopeless to give a consistent or intelligent interpretation to this clause. It speaks of 'nieces' mentioned in the second item of the will, yet but one niece was mentioned. It alleges that the 'nieces' mentioned have deceased, but the preceding sentence bequeaths the remainder to the only niece mentioned, and she was then living. The paragraph itself was wholly unnecessary, since revocation of the second item of the will was unquestionably effected by the first paragraph of the codicil. It is unnecessary, inconsistent with, and repugnant to other provisions of the will and codicil, and unexplainable except upon the supposition that it is the result of a misconception by the scrivener of something said by testatrix. We are forced to conclude that an attempt to reconcile this clause with the other clear and unambiguous

expressions of the will and codicil will be futile."

Tilden v. Green, 130 N. Y. 29, a famous case in the New York Court of Appeals concerning the will of Samuel J. Tilden, states a fundamental at pages 51, 52 as follows:

"At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator as expressed in the whole instrument. It may transpose words, and phrases and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary * * *."

2 *Williams on Executors* (Am. Ed.) 334 says:

"To effectuate, therefore, the clear intention, as apparent upon the whole will, words and limitations may be * * * rejected."

It also says p. 335 in its quotation from an English case:

"In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being upon a careful perusal of an instrument not to be satisfied from the contents that a literal, a strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument read as a whole persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

The will was evidently not drawn by a lawyer. Its provisions in a number of places are irregularly stated. The very expression in question "not charitys enclued" is a misstatement

of expression and spelling. The looseness and irregularity of other provisions of the will is forcibly called to attention at the very start of the will as follows:

“FIRST, after my lawful debts are paid, I give and bequeath to the following:

1 First) All expenses of funeral and administration.”

This of course is in form a legacy without naming to whom it is given and an incorrect position in the will for the usual provision to pay such expense.

These respondents respectfully submit that the decree of the Prerogative Court should be sustained and the appeal dismissed with costs against the appellant.

Respectfully submitted,

HAROLD BOUTON,
Proctor and of Counsel
with the Respondents.



