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New Jersey Court of Errors and Appeals

Between

EDWARD J. MOORE, surviving trustee under the last will and testament of Thomas C. Barr, deceased,
Respondent,

and

KATHERINE V. DOREY, and HELEN L. BIRCH,
Appellants,

and

KATHERINE M. NIPPES, DOROTHY LORRAINE PAYNE, J. NETHERMARK DOWNEY, HELEN L. DOWNEY LEES and FRANK P. NIPPES, JR.,
Respondents.

On Bill, etc.

On Appeal from Court of Chancery.

Brief for Katherine V. Dorey and Helen L. Birch, Appellants.

This is an appeal from the final decree of the Court of Chancery advised by the late Vice Chancellor Howell and bearing date June 9, 1916, on a bill filed by the surviving trustee of the late Thomas C. Barr, to be instructed with reference to the meaning of the thirteenth clause of the will of the said Thomas C. Barr.

The will is printed on pages 5 to 10 of the book and has already been construed in its general features by the late Vice Chancellor Emery in the case of *Moore* v. *Downey,* 83 N. J. Eq. p.

428, whose opinion is printed on p. 31 and following pages of the book.

On the death of the testator Thomas C. Barr, his widow, the late Lorraine Barr and his sisters, who are the appellants, survived him, as did also Mrs. Edith B. Fretz and Miss Katherine M. Nippes, who is now Katherine M. Nippes Payne. The widow, Mrs. Lorraine Barr, subsequently died on May 21, 1913, and her death provoked the litigation which I have referred to. Mrs. Edith B. Fretz has now died without leaving any issue, but Mrs. Katherine M. Nippes Payne is still alive. She is a married woman and has had one child, Dorothy Lorraine Payne, who is still alive. No further children have yet been born to Mrs. Katherine M. Nippes Payne.

Dorothy Lorraine Payne is a great niece of the late Mrs. Lorraine Barr, but was not related in any way to the testator.

The thirteenth clause of the testator's will reads as follows (page 7):

> "I direct, that in case of the death of the aforesaid Katherine M. Nippes or Edith B. Fretz leaving issue, that my executor or trustee pay over out of the principal of my estate, the sum of fifty thousand (50,000) dollars, said sum to be divided (per stirpes), among the issue of each of the beneficiaries mentioned in this 13th paragraph of this my last will, so dying, leaving issue.
>
> "I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue, as described in this paragraph. It being my intention that the

two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz, or to the survivor of either, leaving issue, otherwise to become a part of my estate."

Vice Chancellor Howell held that a sum of $50,000 is now payable to the general guardian of Dorothy Lorraine Payne, p. 18, l. 13; p. 21, l. 30 to p. 22, l. 30. In reaching this decision, the Vice Chancellor held that the last sentence in the second paragraph of the thirteenth clause of the will which reads as follows: "It being my intention that the two sums of $50,000 each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz, or to the survivor of them leaving issue, otherwise to become a part of my estate," was void for uncertainty.

The question before this court is whether the said sum of $50,000 is now payable to the said Dorothy L. Payne or not, and it is the contention of the appellants that it is not so payable and that it cannot be paid to her in whole or in part unless she should survive her mother, the said Katherine M. Nippes Payne.

This question was not actually involved in the decision made by Vice Chancellor Emery in the case of *Moore* v. *Payne,* 83 N. J. Eq., 428.

The contest in that case was whether the trustees under the will should divide the residue into two separate equal funds upon one of which the wife's income was chargeable and upon the other of which the sister's income was chargeable. The sisters of the testator, Mrs. Dorey and Mrs. Birch, contended in that case that no such division of the residue should be made, but that the whole residue was one fund upon which both the wife's income and also the sisters in-

come was chargeable, and that it was the testator's intent that the sisters should have the whole of the income from the estate after the death of the widow, the said Mrs. Lorraine H. Barr, after deducting the annuities provided for in the will.

Vice Chancellor Emery came to this conclusion that the whole principal should remain intact so that the sisters, Mrs. Dorey and Mrs. Birch might have the income thereof during their joint lives except so far as it might be subject to the annuities in favor of the parties mentioned in Secs. 12, 13, 14, and 15 of the will.

His conclusions are found on p. 41 of the book, l. 21:

> "On considering the whole will and the arguments and briefs of counsel, I reach the conclusion (1) that during the joint lives of the sisters, they are equally entitled to the surplus income of the entire estate after deducting the special legacies, and (2) that until the happening of the contingency requiring the payment, out of one-half of the principal fund, of the legacies to the issue of J. Nethermark Downey and Helen L. Downey, or either of them the fund is not divisible under the will, but is to be held as an entire fund."

Argument.

It is now contended here that the fund of $50,000 ordered paid by the Court of Chancery should not now be paid to Dorothy Lorraine Payne either in whole or in part nor until she shall have survived her mother, the said Katherine M. Nippes Payne.

The Court of Chancery struck out the last sentence in the 13th clause.

If Vice Chancellor Howell is correct in his view, certainly very curious results will follow.

In the first place, if the last sentence in the second paragraph of clause thirteen of the will is rejected, and the will is read with that sentence out, there is only one sum of $50,000 which can be paid out at all and that fund must be divided per stirpes among the issue of both Katherine and Edith, p. 7, l. 30.

There is nothing in clause 13 which directs the payment of two sums of $50,000 each except the last sentence, and while the will directs that the trustees should pay over, out of the principal of the estate, the sum of $50,000, said sum to be divided among the issue of each of the beneficiaries so dying leaving issue, there is nothing in that clause which directs the division of two sums of $50,000 each. Nor can it be gathered that two sums were in the mind of the testator by the subsequent clause which directs that in case of the death of either Katherine or Edith without issue then the issue of the survivor of either should receive the whole sum of $50,000.

Moreover, the will directs that the fund should be divided among the issue of Katherine or Edith, and necessarily Dorothy Lorraine Payne could not retain the whole sum of $50,000 unless she should prove to be the sole surviving issue of her mother. In other words, if other children should be born to Katherine, they would be entitled to share in the benefits of this legacy, and if Dorothy should die in the lifetime of her mother and other such children should be born who should survive their mother, they would take the whole sum of $50,000. If Dorothy should die without leaving any brothers or sisters her surviving, would the whole of the legacy go to

her next of kin under the statute? It could not have been the intention of the testator that Dorothy should take this legacy until her mother died.

Yet Vice Chancellor Howell's opinion rejects a clause which makes the testator's intention clear both that there should be two sums of $50,000 each, and also that if Katherine or Edith should die without issue, these two sums should go together to the issue of the survivor upon her death leaving issue.

In other words, the clause which has been rejected by the Vice Chancellor is the very clause which is most convincing as to the whole testamentary scheme.

It is said by Hornblower, Chief Justice, in *McMurtrie* v. *McMurtrie,* 15 N. J. L., p. 276, at p. 280, as follows:

> "But it must be an extreme case before we can relieve ourselves from the duty of giving a construction to the instrument by declaring it void for uncertainty." "Lord Mansfield said, that in order to attain the intent, words of limitation shall operate as words of purchase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar; every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest."

The Court must hesitate long and seriously before it will reject for uncertainty, words which appear in a written document, such as a will.

In this case the will read:

> "I give Abraham the said place during his life, and to John during his life; for default of male issue, the land shall return to the said Abraham and John, and then to the next according to law; but it is not my

> will that none of it be sold—I being the first purchaser, have a right to will it so."

It was held that Abraham and John took estates in tail, male in their respective undivided shares, with a fee expectant on failure of male issue.

No case could be a better illustration of a court's determination to give every word in a will full effect. Moreover, the word "return" was construed to mean "remain," thus creating the fee simple expectant on failure of male issue.

And the courts both in this State and elsewhere, have been zealous to supply the omission of words or to read words in a different meaning from their ordinary meaning in order that doubts and certainties arising upon the face of the will might be cleared up and the whole intent of the instrument ascertained.

I propose to discuss the authorities on this subject on a later page of this brief, but the contention which I now make is that the last sentence of the second clause of the thirteenth paragraph is perfectly clear if after the words "to" on p. 8, l. 13, and before the words "the survivor," the words "the issue of" are inserted as they are undoubtedly intended to be inserted by the sense of the whole sentence.

The clause would then read as follows:

> "It being my intention that the two sums of $50,000 each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz, or to the issue of the survivor of either leaving issue, otherwise to become a part of my estate."

If this be the meaning of this sentence, it is perfectly clear that this fund of $50,000 should not be paid until the death of Dorothy's mother.

Let us examine the testamentary scheme of the testator.

As I have said above, the testator was concerned about income which should be paid to his wife and to his sisters, and in certain events, to his wife's relatives under clause twelve, and his own relatives under clause fifteen. He wanted to keep his estate together until the death of his wife and his sisters. He further knew, that women were unacquainted with the management of affairs, and that an annuity was more beneficial to them than putting the principal from which the annuity would be derived into their hands. He was a business man and knew the usual return from the investment of funds and that 5% income was usual. Having these things in mind, he made the directions in the twelfth and thirteenth clauses of the will for the benefit of his wife's relatives which should come into effect after the death of his wife.

After the death of his wife, he directed that $2,500 annually should be paid to his sister-in-law Edith B. Fretz, (p. 7, l. 10), and that a further sum of $2,500 should be paid to Katherine M. Nippes annually, (p. 7, l. 13.) These sums are each the income of $50,000. He further added that if Edith or Katherine should die without leaving issue, then the survivor should have the whole income bequeathed to the deceased beneficiary. (p. 7, l. 20). Now that Edith is dead and Katherine is surviving, she takes the whole of the income of the two funds that the testator had in mind. But he had not yet disposed of the remainder of the funds, and he took up the disposition of such remainders in the thirteenth clause of his will.

The following contingencies might arise:

1. Katherine might die leaving issue.
2. Edith might die leaving issue.
3. Both might die without leaving issue.
4. One might die without issue and the other die leaving issue.

He attempts to cover these contingencies in the said thirteenth clause. This is solely directed towards benefitting the issue of Katherine or Edith, and the survivor for Katherine and Edith personally, have been fully taken care of under the twelfth clause of the will. The gifts in the thirteenth clause are all in favor of issue of Katherine or Edith, unless the court refuses to supply the words which were understood by the testator in the last sentence of this paragraph.

The first paragraph of the thirteenth clause covers the case where Katherine or Edith die leaving issue and provides that if either should die leaving issue, $50,000 should go to her issue. Manifestly this cannot be until that person is dead.

As Edith is dead without issue, and Katherine has survived, neither of the two funds of $50,000 can be paid under this clause of the will, and if either should die leaving issue, each fund must be distributed among the issue of each, so that neither fund could be payable until the death of the person who should leave issue.

This indicates that the words "leaving issue" as used by the testator covers only the situation where the life beneficiary should die and issue should survive her.

But the testator had not provided up to this point of the will for the situation which would arise upon the death of either Katherine or Edith without issue leaving a survivor who should have issue. He wanted to create a cross-re-

mainder in the issue of the survivor in such event, and with this in view, he penned the second paragraph of the thirteenth clause. He directs "*that the issue of the survivor of either*" should receive the whole sum of $50,000 "bequeathed to the issue of the person dying without issue as described in this paragraph." This phrase is clumsy in the extreme for it involves a contradiction in terms; to speak of the issue of a person dying without issue makes nonsense. What he really meant was that the sum which had been bequeathed to the issue of the deceased person in default of such issue should go to the issue of the survivor on her death leaving issue.

And he expressly mentions "the issue of the survivor," thus using the identical words in the main gift which I contend should be supplied in the last sentence.

But he was conscious that he had not clearly expressed himself on this subject and that just such a situation as is here produced might arise, that is, that one should die without issue leaving the other surviving with issue, and it might be thought that the issue of a survivor should take under the language already used, the $50,000 which had previously been bequeathed to the issue of the deceased even though the parent of such surviving issue was still alive, and he therefore inserted the sentence which Vice Chancellor Howell has adjudged has no meaning.

Its meaning is plain enough if the reader of the will supplies the words "the issue of" in the manner that has been above suggested, because omitted by mere inadvertence.

The phrase was put there for a purpose. It adds something to what has already been said

by making clear that there are two sums of $50,000 each, in one of which Katherine's issue is interested, and in the other of which Edith's issue is interested, and in both of which the issue of the survivor is interested. And in supplying this additional light on the meaning of the testator, it can not be treated as of no value. It is not contradictory to what has gone before except in one particular, and that is the direction that the two sums shall go only "to the survivor of either leaving issue." Of course, the survivor cannot leave issue until she dies, and then the issue benefit and not she,—and therefore, the gift apparently is made upon a condition that cannot possibly be fulfilled. The court should not defeat the gift to Mrs. Dorey and Mrs. Birch or the income of these sums unless it is clear that these words are impossible of construction.

As I have urged before, the construction is simple indeed if the words "the issue of" are inserted before the word "survivor."

The sentence sums up what has been directed just before—i. e., $50,000 to the issue of Katherine on her death leaving issue,—$50,000 to the issue of Edith on her death leaving issue; if either die without issue, the issue of the survivor to have the whole on the death of the survivor leaving issue.

Perfectly plain mistakes of this kind have been often corrected by the courts. A few illustrations of them will be helpful.

Thus in the case of *Holcomb* v. *Lake,* 25 N. J. L., p. 605, before this court in the time of Green, *C. J.,* there was a devise to testator's son in fee tail with the following provision—"and if in case my said son, John Holcomb, dies before he comes and arrives to the said age of twenty-

one, or without issue'' then the land devised should go over.

The devisee survived the age of twenty-one, but died without issue, and the question was whether the fee took effect or whether the limitation over in the will, took effect.

The Court held that the word ''or'' would be construed as ''and,'' and that the limitation over did not take effect. The Court cited decisions both from this State and elsewhere for this ruling and said that the limitation over should take effect only upon the death of John dying under age and without issue. If he reached full age without issue or died before full age with issue, the limitation over would be defeated. The decision was made for the purpose of carrying out the chief end of the testator which was that John should take and that this gift should not be defeated by what was manifestly an improper use of the word ''or.''

Another illustration of the same character is found in *Shreve* v. *McCrelish,* 60, N. J. Eq., 198, where there was a gift to a wife for life and a remainder to the testator's son in fee simple, and then the will provided that if the son should die before his mother or under twenty-one or without lawful issue, then there was a limitation over to others. The Court held that the word ''or'' should be construed as ''and'' in both places so that the gift should not be revoked unless the son should die before his mother under twenty-one and without lawful issue.

Another illustration is found in *Standard Underground Cable Co.* v. *Attorney General,* 46 N. J. Eq., 270, p. 272—where in a statute imposing an annual franchise tax upon corporations of this State there was a phrase which exempted from the operation of the act certain

corporations organized for the purposes mentioned "or manufacturing companies; or mining companies, carrying on business in this State." The question was whether the phrase "carrying on business in this State" should qualify "manufacturing companies" as well as "mining companies." In other words, whether the word "or" should be read to mean "and." The Court so held and declared that only manufacturing companies which carried on the business of manufacturing in this State were exempted from the operation of the act.

In *Jarman on Wills,* star page 492, it is said:

> "It is clear, however, that words and even clauses may be supplied in a set or series of limitations or trusts from which they had been omitted without apparent design when those limitations or trusts as they stand are inconsistent with the context and the context shows what must be added to remove the inconsistency."

Surely, no instance could well be imagined where this rule would not more truly apply than in the present case.

For there is no gift at all to Katherine or Edith in this paragraph 13, and there is a series of limitations from one of which the words "issue of" have been omitted without apparent design.

Jarman further says, star page 499:

> "By a settled rule of construction where a clause or expression otherwise senseless or contradictory can be rendered consistent with the context by being transposed, the courts are warranted in making that transposition."

It is said in Cyclopedia of Law:

> "Where the testator's intention is manifest from the context of the will and sur-

rounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language will be subordinated to the intention, and in order to effectuate such intention, as far as possible, the court may depart from the strict words and read a word or phrase in a sense different from that which is ordinarily attributed to it, and for such purpose may mold or change the language of the will, such as by rejecting superfluous, absurd or repugnant words or phrases, or restricting them in their application; by supplying omitted words or phrases, by transposing words, expressions or sentences, or by substituting one word or phrase for another. This rule, however, applies only where it is necessary in order to effectuate the testator's intention, which is clearly apparent, but which has been defectively expressed in the will, and where the language of the will is plain and unambiguous the court cannot give it a meaning different from that warranted thereby, merely for the purpose of carrying into effect a conjecture or hypothesis of the testator's intention, by changing such language, such as by rejecting, supplying, transposing or substituting words or phrases. Furthermore in supplying words in a will, such words only can be supplied as it is evident the testator intended to use." Cyc. 40, pp. 1399 to 1402.

On the question of supplying words the case of *Sisson* v. *Donnelly,* 36 N. J. L., p. 439, before this court, is a leading example. The opinion was written by Beasley, *C. J.,* from which I quote the following:

"The mistake which exists in this deed is clearly apparent upon its face. No person can read it and fail to perceive what it is. It arises from the use of the descrip-

tion, 'the party of the second part,' instead of the description, 'the party of the third part,' as the grantee. That this was a mere slip, no one can doubt. Nor is there any more uncertainty as to the fact that the grantee was intended to be the party of the third part, i. e., Burdon, the mortgagee. As the deed now reads, Harrison is both grantor and grantee, and the instrument in the clearest terms recites that its sole purpose was to pledge the property in fee to Burdon, under his mortgage. The intention of the parties is therefore clear on the face of the conveyance, the only question being whether or not the deed can be read so as to effectuate such intention.

"The rule of construction, which is universal and is applicable to conveyances as well as to all other kinds of deeds is, in the language of Sheppard's Touchstone, that it 'be favorable and as near the minds and apparent intents of the parties as it possibly may be, and the law will permit.' Shep. Touch., ch. 5, p. 85. This has ever since and in a great multitude of cases been recognized as the leading canon in giving effect to every variety of written instruments. In Cholmondeley *v.* Clinton, 2 Jac. & W. 1, Sir T. Plumer, Master of the Rolls, states the rule almost in the same terms. He says: 'That the primary object of inquiry is the intention of the parties and that where that is on the face of the instrument, clearly and satisfactorily ascercertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference.' There is a long line of decisions which are illustrative of the doctrine that the words which are

used will be controlled by an intention clearly expressed in the instrument to be expounded. Among these the following occupy a prominent place: Walsh *v.* Trevanion, 15 Ad. & El (N. S.) 733; Moore *v.* Magrath, 1 Cowp. 9; Thorpe *v.* Thorpe, 1 Ld. Raym 235.

"It will be observed that by the limitations of the rule itself, the intention is to be enforced whenever 'the law will permit.' I take that to mean that the intention will prevail whenever such intention is unmistakably manifested, having regard to all parts of the instruments, unless the law requires the use of technical terms to effectuate such intention, or unless such intent is contrary to legal rules. The first of these classes of cases is aptly exemplified by the imperfect form of the deed to which I first called attention. It created but a life estate, and it was insisted that the intention was to create a fee; but such intention could not have been carried into effect, no matter how plainly apparent, because the law requires the use of certain terms of art in the creation of a fee simple. So, as an illustration of the second branch of the exception 'if one gives land to another and his heirs for twenty years, in that case the executors and not the heir shall have the land after the death of him to whom it was given.' Shep. Touch. 86. But, unless in these instances, where artificial terms are requisite, or an attempt is made to do something inconsistent with established principles, I am not aware of any exception to the rule that the intention of the party must prevail. There appears to be nothing technical in legal regulations respecting the description of the parties to written instruments. Unless a misdescription in this particular renders a deed un-

certain as to its meaning, such defect is of no consequence. A plain misnomer can do no hurt, the only question being whether it is clear who is intended. The authorities strongly favor this common sense result. It has been decided that a mistake in the christian name is immaterial, if the deed explains who is intended. 'A deed,' says Perkins No. 36, 'to Robert, Bishop of E., will be good, though his real name is Roland.' So where a deed purported to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, it was held to be good as a grant of husband as well as the wife. Elliott *v.* Sleeper, 2 N. Hamp. 525. And in the often quoted case of Lord Say and Seal, 10 Mod. 40, an omission by an evident mistake in the name of the grantor in a deed of bargain and sale, was supplied by intendment, 'and the court was of opinion that this deed passed the freehold because such was the intention of it.' I think it is not reasonably to be denied, that if the name of a party which has been altogether omitted in the operative part of a deed, can be inserted, when read by the court, on the ground that the meaning of the instrument to that effect is clear, from the same consideration, the erroneous designation of the grantee may be rectified. In my opinion, the deed under consideration is to be read as though the grantee was described according to what the parties plainly meant, as the party of the third part. Under this construction, no title to the premises in dispute ever came to the defendants by the operation of this tripartite deed."

Theobald on Wills says on p. 755:

"Where the will as it stands is clearly inconsistent so that the choice lies between rejecting some portion of it or supplying

> some word, while at the same time the latter course would make the will consistent, the court will be justified in making the necessary addition."

The leading case in England is *Abbott* v. *Middleton,* 7 H. L. C., 68, where the words "without issue" were supplied as follows: The will gave an annuity to the testator's wife for life and after her death to a son George for life, and the principal which yielded the annuity, to such children as George might leave surviving him.

The testator then added that if George should die before his mother, the principal sum should go to the children of the testator's daughters.

George married and had a son who survived him, but died before his mother, and the question was whether the son took.

In order that this question should be decided in favor of the son, it was necessary that the court should interpolate the words "without issue" in that part of the will which provided for George's death so that it should read—"If "George should die before his mother without "issue, the principal should go to the children "of the testator's daughters."

And the court so held and ordered the principal sum to be paid to George's son.

A similar question arose in this State in the case of *Nelson* v. *Combs,* 18 N. J. L., p. 27.

Here there were gifts to T. and W., to the latter "when he arrives at the age of 21 years." Then followed this language, "Further it is my "will, that if W. or T. should die or either of "them, the remainder to enjoy the other prop-"erty, and if both should die," then the gifts should go over.

The court held that the word "remainder" meant "survivor."

The court further held that the expression, "If T. or W. die," should be construed to mean "if either of them die under full age and without issue."

And the court said:

> "When a testator has omitted words obviously necessary to express his meaning and the intention can be plainly gathered from the contents of the will, courts have considered it their duty to supply such omitted words rather than do violence to his plain intention by pertinaciously adhering to his words without regard to the sense of the instrument."

The court cited other cases on pp. 32, 33 and 34, and all the judges concurred.

In *Endicott* v. *Endicott,* 41 N. J. Eq., p. 93, the court substituted the word "homestead" in the second paragraph of the will on the ground that it had been manifestly omitted by mistake, and thus gave a life estate in the homestead to the widow though the plain language of the will when strictly read did not so give it.

In *Patterson* v. *Read,* 42, N. J. Eq., 146, the words "shall be so applied" were added to complete a paragraph of the will which otherwist was an incomplete statement.

In *Pennington* vs. *Van Houten,* 8 N. J. Eq., p. 272, the English doctrine of *Abbott* vs. *Middleton,* 7 H. L. Cases, 68, was reached independently by our Court of Chancery and our Court of Errors and Appeals. There was a condition that if the legatee should die having no children, then the property should go over. The son reached the age of 21, but died without leaving

children, and it was held that the condition did not operate, but that he took a fee.

The opinion for the Court of Appeals was given by Green, *C. J.*, who said, p. 749:

> "The power of the court to effectuate the manifest intent of the testator by inserting omitted words, by altering the collocation of sentences, or even reading the will directly contrary to its primary signification is well established. By so doing the court do not propose to alter the will, to substitute their will for the will of the testator, but merely to prevent the intention of the testator from being defeated by a mistake in use of language. It is a question simply whether the courts will execute the clear intent of the testator not fully or clearly expressed in the will or whether, by a strict technical adherence to the form of words and their literal meaning, they will suffer the intention of the testator to be defeated. Upon this point the law is well settled, both in regard to real and personal estate."

This case has been followed many times in our reports. See,

Nelson vs. *Combs,* 18 N. J. L. 27,
Wurts vs. *Page,* 19 N. J. Eq., 365,
Baldwin vs. *Taylor,* 37 N. J. Eq., 78,
Barrell vs. *Barrell,* 38 N. J. Eq., p. 60,
Burdge vs. *Walling,* 45 N. J. Eq., p. 10,
Dawson vs. *Schaefer,* 52 N. J. Eq., 341,
Wilcox's Case, 64 N. J. Eq., 322.

In the case of *Monmouth Park Association* v. *Wallace Iron Works,* 55 N. J. L., p. 139, there was a suit upon a written contract for the construction of certain work with a clause evidently designed to impose a penalty for every day's delay in the completion of the work. The contract omitted any effective verb, but the court held that the word "fail" should be supplied

so that it should read "in case the said party of "the first part shall fail to fully and entirely," etc.

In the case of *Greenwood* vs. *Greenwood,* 5 Ch. D., 954, there was a bequest in trust for for testator's widow for her life *in trust* for his children, followed by powers of maintenance and advancement after the widow's death with an ultimate gift over after her death, in default of children attaining vested interests. The question was whether or not the widow took a beneficial interest for her life. The court supplied the words "after her death" after the words of gift in trust for the testator's widow for her life, and thus gave the widow such beneficial interest.

James, *L. J.,* said:

> "We are not bound by the strict meaning of words when the context shews it to be contrary to the true meaning of the testator."
>
> "We are therefore driven to separate the words in the gifts to the children from the gift to the wife for life, the words 'after her death' being implied after the gift of the life estate. This seems the only way in which we can correct the words, and we are bound somehow to correct them in order to avoid a manifest inconsistency."

Where there were limitations to daughters for life with remainder to their children, and *the limitation to the children of one daughter* was omitted, it was supplied upon the general intention of the will.

In *re Redfern,* 6 Ch. D., 133.

The words "without issue" were supplied as in *Abbott* vs. *Middleton* in two cases.

Anon. 1 And., 33.

Spahling v. *Spahling,* Cro. Car., 185.

Words "my property" supplied.

Colvin v. *Colvin,* 27 O. R., 142.

Words of gift supplied where omitted in a will in *May* vs. *Logie,* 23 A, R. (Can.), 785.

Where it is evident that the testator has employed the wrong words by inadvertence, the correct word will be supplied.

Thus "return" was altered to "remain."

Den v. *McMurtrie,* 15 N. J. L., 276.

"Reviving" to "surviving" in a gift to a reviving son.

Pond v. *Bugh,* 10 Paige Ch., 140, 151.

"Living at my death" to "living at her death."

Horton v. *Cantwell,* 108 N. Y., 251.

"Without having issue" to "without leaving issue."

Eastwood v. *Lockwood,* L. R., 3 Eq., 487.

"Die with children" to "die without children."

Johnson v. *Johnson,* 128 Ind., 93.

"Oldest" to "youngest."

Taylor v. *Johnson,* 63 N. C., 383.

"May leave" to "may have."

Du Bois v. *Ray,* 35 N. Y., 162.

In a gift to "A, the legal heirs of B and *of* T., and others share and share alike," the word "of" was made to read "to," because the error was apparent by other clauses of the will.

In re Swainburne, 16 R. I., 208.

In *Sullivan* v. *Strauss,* 161 Pa. St., 145, A, a son, was expressly disinherited. The testator then gave all his estate to his children. The Court supplied the words "except A."

On this general matter there is a full discussion with citation of cases in

Underhill on Wills, pp. 498-501.

The authorities might be multiplied indefinitely in favor of the proposition advanced that the courts will supply words which are obviously necessary to express the testator's meaning where the intention can be plainly gathered from the contents of the will and from the context rather than do violence to the plain intention by pertinaciously adhering to the words used.

I, therefore, respectfully submit that the words "the issue of" should be inserted in the sentence rejected by Vice Chancellor Howell, after the word "to" and before the words "the survivor."

This removes an apparent inconsistency in the will, involved in the implication of a gift to the survivor of Edith B. Fretz or Katherine M. Nippes of the two sums of $50,000., when the testator's wish is clear that they should go to the issue of both, or of their survivor.

It supplies words which are really carried in the mind of the reader while the sentence is read.

The words to be supplied are in strict conformity with the context.

The sentence itself when so read rounds out the testator's whole testamentary scheme, by clearing up the ambiguity of whether there is one fund or two funds, by eliminating a double gift of the income derived from this fund, and by declaring that the funds should be distributed as part of the residue in case both Edith *and* Katherine should die without issue.

The omission of the words suggested was due to a plain inadvertence, and should be supplied in order to carry out the clear intent of testator.

Conclusion.

The decree of the Court of Chancery should be reversed, and that Court should be directed to instruct the surviving trustee that no sum of $50,000 is now due to Dorothy L. Paine.

This Court should order costs and counsel fees to be fixed to be paid out of the estate.

CHAUNCEY G. PARKER,
Of Counsel with Appellants.

November 1, 1916.

New Jersey Court of Errors and Appeals

Between

EDWARD J. MOORE, surviving trustee under the last will and testament of THOMAS C. BARR, deceased,
Respondent,

and

KATHERINE V. DOREY, and HELEN L. BIRCH,
Appellants,

and

KATHERINE M. NIPPES, DOROTHY LORRAINE PAYNE, J. NETHERMARK DOWNEY, HELEN L. DOWNEY LEES and FRANK P. NIPPES, JR.,
Respondents.

On Bill, etc.

Appeal from Court of Chancery.

Brief for Respondent, Edward J. Moore, Surviving Trustee, etc.

The will of Mr. Barr no doubt was unskilfully drawn, but I do not think it is so inscrutable as one might infer from the first and second sentences of the opinion of the late vice chancellor Howell. Mr. Barr was a member of the bar of Pennsylvania, and a man of large affairs, and somewhat indifferent to niceties of expression. The gentleman who drew the will, and who has since passed away, was a member of the bar of New York and of New Jersey, and evidently did not have the gift of lucid expression. Nevertheless, the general purpose of the testator can be

ascertained without much difficulty, and that purpose was entirely natural. Fortunately, subordinate clauses in a will, when ambiguous or obscurely written, should be construed so as to harmonize with the obvious plan of a testator indicated by his will, rather than in derogation of his general purpose. For this reason it will be helpful at the beginning to notice the relation of the testator to his beneficiaries, and with that information in mind to consider what would be a natural and reasonable interpretation of his will. In this way indistinct verbiage in a will often becomes less troublesome.

Mr. Barr, after making a number of bequests of personal property and money, undertook to make provision for his devisees, arranged in three classes: (1) his wife and two sisters; (2) the nieces and nephews of himself and his wife, and his wife's sister, whom he seems to have classified with the nieces and nephews; and (3) the issue of his and of his wife's nieces and nephews, and of his wife's sister, if they should leave any.

The testator first provided for the payment of his debts and funeral expenses; bequeathed his furniture, paintings, jewelry, etc., to his wife, with a gift in cash of twenty-five thousand dollars. The next seven paragraphs of his will, numbered third to ninth inclusive, make bequests in money: (1) to his two sisters, Katherine V. Dorey and Helen L. Birch; (2) to his nephew and niece, J. Nethermark Downey and Helen L. Downey; (3) to the nephew and niece of his wife, Frank P. Nippes, Jr., and Katherine M. Nippes; and (4) to Edith B. Fretz, sister of his wife. Then follows a bequest to his coachman of $1,000. Following these bequests the testator devised and bequeathed the remainder of his

property to his trustees, and directed that one-half of the income of the residue should be paid to his wife quarterly during her life. The will makes further provision, after the death of the testator's wife, for her sister, niece and nephew, by way of annuities. Then follows the fourth clause of the eleventh paragraph of the will, which states that in case of the death of Edith B. Fretz or Katherine M. Nippes without issue the survivor shall be entitled to the annuities that both received during their joint lives.

By the first clause of paragraph 13 the testator directs that in case of the death of either Katherine M. Nippes or Edith B. Fretz leaving issue his executors or trustees shall pay to such issue out of the principal of his estate the sum of fifty thousand dollars, to be divided among them *per stirpes*. So far there is no uncertainty about the will. Then follows the troublesome paragraph (case, pp. 7 and 8) as follows:

> "I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, shall receive the whole sum of fifty thousand dollars bequeathed to the issue of the person dying without issue, as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz, or to the survivor of either, leaving issue, otherwise to become a part of my estate."

I think the whole difficulty caused by the scrivener in writing this part of the will grew out of his effort to dispose, by a single clause, of

the two sums of fifty thousand dollars among the issue either of Katherine M. Nippes or Edith B. Fretz, if one or the other should die without issue, and so used relative words many times, which would have been unnecessary if he had undertaken to dispose of the two sums of fifty thousand dollars among the issue of either Katherine M. Nippes or Edith B. Fretz by two separate clauses. Perhaps it would help to elucidate the matter if this clause should be rewritten making disposition by two separate clauses of the two sums of $50,000 in case either Katherine M. Nippes or Edith B. Fretz should die without issue. In that event the provision would have read as follows:

> "I further direct that in case of the death of the aforesaid Katherine M. Nippes, without issue, then and in that event the issue left by Edith B. Fretz, if any, shall receive the sum of fifty thousand dollars which would have gone to the issue of Katherine M. Nippes if she had died leaving issue.
>
> "I further direct that in case of the death of the aforesaid Edith B. Fretz, without issue, then and in that event the issue left by Katherine M. Nippes, if any, shall receive the sum of fifty thousand dollars which would have gone to the issue of Edith B. Fretz if she had died leaving issue."

These two clauses would have expressed clearly the disposition that the testator intended to make of the two sums of $50,000 by the expression which was in fact used.

The second clause of the thirteenth paragraph, without much change of verbiage, can be made to express more clearly what I understand the intention of the testator to have been. I will

re-write the clause, inserting in brackets the words which I think will clear up its meaning, although it would still be left in an unskilful form:

> "I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or Edith B. Fretz without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz shall receive the whole sum of fifty thousand dollars bequeathed [meaning which would have gone] to the issue [if she had left any] of the person dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz or to [the issue of] the survivor of either [who shall die] leaving issue, otherwise to become a part of [the residue of] my estate."

There is a serious objection to the part of the opinion of the vice chancellor which states that a whole sentence of the second clause of the thirteenth paragraph should be rejected as meaningless. That sentence was inserted for the purpose of clearing up the uncertainty of the preceding part of the clause, and therefore some meaning, if possible, should be given to it, instead of rejecting it altogether. The authorities seem much more inclined to permit an interpolation of words necessary to clear up the meaning of a doubtful clause in a will, than to reject entire sentences, although it is permissible to reject redundant or misused words in order to ascertain the testator's meaning.

There are two reasons why I think the sum of $50,000 involved in this case should not be paid over at present to the guardian of Dorothy Lorraine Payne:

First. The will states that a sum of $50,000 shall go, in one event, to the issue of Katherine M. Nippes, and, in another event, to the issue of Edith B. Fretz, if either of them shall die *leaving* issue. The will does not say that the money shall go to the issue of Katherine *while she is living,* or to the issue of Edith while she is living. The issue who are entitled to receive the money must be motherless. In other words, the money can not be paid over to the child or children or issue of the mother *having* issue, but to the child or children or issue of the mother *leaving* issue.

Second. If the sum of $50,000 should now be paid to the guardian of Dorothy Lorraine Payne, and her mother should bear other children, the sum so paid would be beyond the control of the trustee of Mr. Barr's estate, and could not be divided among the children of Mrs. Payne or among her descendants *per stirpes.*

FRANK BERGEN,
Counsel for Edward J. Moore,
Surviving Trustee, Respondent.

INDEX.

Bill of Complaint.

Filed November 24, 1915.

In Chancery of New Jersey.

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

The complainant, Edward J. Moore, of the City of Philadelphia, State of Pennsylvania, surviving trustee under the last will and testament of Thomas C. Barr, deceased, respectfully shows:

1. That on February 25, 1908, the said Thomas C. Barr, then residing in the City of Orange, Essex County, New Jersey, departed this life, leaving a last will and testament dated February 9, 1904, of which a copy, marked Exhibit A, is hereto annexed and made a part hereof.

2. That in and by said will the complainant and Lorraine H. Barr, widow of the said Thomas C. Barr, were appointed executor and executrix and trustees under said will; that on March 9, 1908, the said will was duly admitted to probate by the surrogate of Essex County, New Jersey, and that letters testamentary were thereupon issued to the said Lorraine H. Barr and to the complainant, who thereupon took upon themselves the burden of executing the said will.

3. That in or about the month of April, 1912, the complainant and the said Lorraine H. Barr, as executor and executrix under the said will, filed an account as such executors in the office of the surrogate of the County of Essex, New Jersey, and that the same was allowed by the Or-

phans Court of the said county on June 7, 1912, and that the said executors thereupon turned over to themselves as trustees under said will the corpus of the estate remaining in their hands, amounting to the sum of $805,268.10, to hold and administer as such trustees under said will.

4. That on May 21, 1913, the said Lorraine H. Barr departed this life, leaving a last will and testament, which was duly admitted to probate on June 2, 1913, by the register for the probate of wills and granting letters of administration in the City of Philadelphia, Pennsylvania, where the said Lorraine H. Barr resided at the time of her death. That in and by her said will Edward J. Moore, John MacFaden and Edward W. Moore were appointed executors thereof; and that letters testamentary were issued to them, and that thereupon they took upon themselves the burden of executing the said will, and that all claims of her estate against the estate of Thomas C. Barr, deceased, have been settled.

5. That in the month of July, 1913, the complainant filed in the office of the surrogate of the County of Essex, New Jersey, his account as surviving trustee under the said will of Thomas C. Barr, and that on September 19, 1913, the said account was passed and approved by the Orphans Court of the County of Essex, New Jersey, the amount then in his hands as such trustee being the sum of $808,255.60 *corpus,* and $8,521.98 income.

6. That subsequent to the death of the said testator, Thomas C. Barr, Katherine M. Nippes, one of beneficiaries under said will of said Thomas C. Barr, married Clarence S. Payne, and

has a daughter five years old named Dorothy Lorraine Payne.

7. That on August 9th last Edith B. Fretz, one of the beneficiaries under said will of said Thomas C. Barr, departed this life at Atlantic City, New Jersey, without leaving issue.

8. That a question of doubt and difficulty has arisen between the complianant and Katherine V. Dorey, Helen L. Birch, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, Katherine M. Nippes Payne, and Dorothy Lorraine Payne, as to the interpretation of paragraph 13 of the said will of said Thomas C. Barr, deceased, the said Katharine M. Nippes Payne claiming that her daughter, the said Dorothy Lorraine Payne, is entitled to the sum of $50,000 mentioned in the second clause of the 13th paragraph of said will, and the said Katherine V. Dorey, Helen L. Birch, J. Nethermark Downey, and Helen L. Downey Lees, formerly Helen L. Downey, claiming that the said sum of $50,000 has become part of the residue of the estate of the said Thomas C. Barr, deceased, and should be disposed of as provided in the 17th paragraph of said will; and that the complainant has been advised that the said sum of $50,000 should be paid immediately to the guardian appointed or to be appointed for the said Dorothy Lorraine Payne, or held for her during the lifetime of her mother, and then paid to said Dorothy Lorraine Payne or to her guardian; and that complainant is unable to determine what his duties are in that particular under the provisions of said will.

9. That the following persons are interested in the estate of the said Thomas C. Barr, deceased; Katharine M. Nippes Payne, formerly

Katharine M. Nippes, Dorothy Lorraine Payne, Katherine V. Dorey, Helen L. Birch, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr.

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

1. That the said Katharine M. Nippes Payne, formerly Katharine M. Nippes, Dorothy Lorraine Payne, Katherine V. Dorey, Helen L. Birch, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr., who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made.

2. That a decree may be made defining the duty of the complainant in the premises and instructing and directing him whether he should pay to the guardian appointed or to be appointed of Dorothy Lorraine Payne the sum of $50,000 mentioned in the 2nd clause of paragraph 13 of the said will of the said Thomas C. Barr, deceased, or retain the same to be disposed of as part of the residue of the estate of said Thomas C. Barr under paragraph 17 of his said will, or hold the same during the lifetime of Katharine M. Nippes Payne, and then pay the same to her issue, if any, then surviving; and if the said sum of $50,000 should be retained by complainant during the lifetime of the said Katharine M. Nippes Payne what disposition of the income thereof should be made during that time.

3. That the complainant may have such other and further instructions in respect of the matters aforesaid as shall be agreeable to equity and good conscience.

4. 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.

FRANK BERGEN,
Solicitor and Counsel with Complainant.

WILL OF THOMAS C. BARR.

EXHIBIT A.

I, THOMAS C. BARR, residing at the corner of Centre street and Central avenue, in the City of Orange, Essex County, State of New Jersey, do make, publish and declare this to be my last Will and Testament.

First:—I order and direct my executors and trustees hereinafter named, to pay all my just debts and funeral expenses as soon after my decease as practicable.

Second:—I give and bequeath to my beloved wife Loraine H. Barr, all my household goods and furniture, including my paintings, pictures. piano, jewelry, silver-ware, also my horses, carriages, harness and automobiles. I also give and bequeath to my said wife the sum of twenty-five thousand (25,000) dollars in money.

Third:—I give and bequeath to my sister Katherine V. Dorey the sum of ten thousand (10,000) dollars in money.

Fourth:—I give and bequeath to my sister Helen L. Birch the sum of ten thousand (10,000) dollars in money.

Fifth:—I give and bequeath to my nephew J. Nethermark Downey the sum of two thousand five hundred (2,500) dollars in money.

Sixth:—I give and bequeath to Frank P. Nippes, Jr., the sum of two thousand five hundred (2,500) dollars in money.

Seventh:—I give and bequeath to my niece Helen L. Downey the sum of two thousand five hundred (2,500) dollars in money.

Eighth:—I give and bequeath to Katherine M. Nippes, the sum of two thousand five hundred (2,500) dollars in money.

Ninth:—I give and bequeath to my sister-in-law Edith B. Fretz, the sum of two thousand five hundred (2,500) dollars in money.

Tenth:—I give and bequeath to my coachman Matthew Cavanagh, the sum of one thousand (1,000) dollars in money.

Eleventh:—I give, devise and bequeath to my executors and trustees hereinafter named all the rest, residue and remainder of my estate both real, personal and mixed of which I may die seized and possessed, or to which my estate may hereafter become entitled or possessed, IN TRUST however, for the uses and purposes hereinafter named.

I direct that my executors and trustees hereinafter named invest and keep invested the estate conveyed to them in such manner as they may deem just and expedient; to collect and receive all the rents, issues and profits accruing therefrom; that after payment of all taxes, interest or other debts or charges against the same to pay over such balance or balances in the manner following:

1st: I direct that my said executors or trustees pay to my beloved wife Loraine H. Barr annually in quarterly payment, during her nat-

ural life, an amount equal to one half the net income accruing from my said estate.

Twelfth:—I direct that after the death of my beloved wife, my said executor or trustee pay over as follows:

1st: To my sister-in-law Edith B. Fretz, the sum of two thousand five hundred (2,500) dollars, annually, during her natural life, in semi-annual payments.

2nd: To Katherine M. Nippes, the sum of two thousand five hundred (2,500) dollars annually, during her natural life, in semi-annual payments.

3rd: To Frank P. Nippes, Jr., the sum of five hundred (500) dollars, annually, during his natural life, in semi-annual payments.

4th: I further direct that in case of the death of either of the aforesaid Edith B. Fretz or Katherine M. Nippes, without leaving issue, then and in that event, the survivor of the said Edith B. Fretz or Katherine M. Nippes shall be entitled to the whole income mentioned in subdivision 1 and 2 of paragraph 12 of this my last will, which the deceased would have taken if living.

Thirteenth:—I direct, that in case of the death of the aforesaid Katherine M. Nippes or Edith B. Fretz leaving issue, that my executor or trustee pay over out of the principal of my estate, the sum of fifty thousand (50,000) dollars, said sum to be divided (*per stirpes*), among the issue of each of the beneficiaries mentioned in this 13th paragraph of this my last will, so dying, leaving issue.

I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or

Edith B. Fretz, without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue, as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz, or to the survivor of either, leaving issue, otherwise to become a part of my estate.

Fourteenth:—I further direct that out of the remaining one half of the income of my estate not yet disposed of, and so held in trust, my executors or trustees, after payment of taxes, interest and lawful claims as hereinbefore directed shall pay over such balance or balances in the following manner:

Ist: To my nephew J. Nethermark Downey, the sum of two thousand five hundred (2,500) dollars, annually in semi-annual payments, during his natural life.

2nd: To my niece Helen L. Downey, the sum of two thousand five hundred (2,500) dollars, annually, in semi-annual payments, during her natural life.

Fifteenth:—I direct that in case of the death of the aforesaid J. Nethermark Downey or the said Helen L. Downey, leaving issue, that my executor or trustee pay over out of the principal or *corpus* of the second one half of my estate the sum of fifty thousand (50,000) dollars to be divided (*per stirpes*) among the issue or issues of each of the beneficiaries mentioned in the 15th paragraph of this my last will.

I further direct that in case of the death of either of the aforesaid J. Nethermark Downey or Helen M. Downey, without leaving issue, then and in that event the issue of the survivor of either of the aforesaid beneficiaries mentioned in the 15th paragraph of this my last will, shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the beneficiaries dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand (50,000) dollars each shall go only to the issue of the aforesaid J. Nethermark Downey or Helen M. Downey (*per stirpes*) or to the survivor of either, leaving issue, otherwise to become part of my estate.

Sixteenth:—I further direct that all remaining surplus income be divided equally and annually between my two sisters Katherine V. Dorey and Helen L. Birch, during their natural lives.

Seventeenth:—I further direct that all the rest, residue and remainder of my estate, real, personal and mixed, remaining undisposed of, be divided into nine equal parts and paid over as follows:

1st: To my sister Katherine V. Dorey, three ninth, her heirs and assigns forever.

2nd: To my sister Helen L. Birch three ninths, her heirs and assigns forever.

3rd: To my nephew J. Nethermark Downey, one ninth, his heirs and assigns forever.

4th: To my niece Helen L. Downey one ninth, her heirs and assigns forever.

5th: To Katherine M. Nippes one ninth, her heirs and assigns forever.

Eighteenth:—I hereby constitute and appoint my beloved wife Loraine H. Barr, executrix and testamentary trustee and also my friend, Edward J. Moore banker of the City of Philadelphia executor and testamentary trustee of this my last will and testament.

I also direct that neither my executrix, executor or testamentary trustee shall be required to give a bond, undertaking or security for the faithful performance of their aforesaid respective duties.

I further direct that my said executrix, executor and testamentary trustees shall have entire discretionary power to sell any or all my real or personal property at public or private sale, and also to invest my estate in such manner as they in their discretion may deem most expedient.

In Witness Whereof I, Thomas C. Barr have to this my last Will and Testament, consisting of seven sheets of typewritten paper, subscribed my name and set my hand and seal this Ninth day of February, one thousand nine hundred and four.

THOS. C. BARR, (L. S.)

Signed, sealed, published and declared by the above named Thomas C. Barr, to be his last Will and Testament, in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of the testator and each other.

Before the execution of the foregoing Instrument on page 6 line 17 after the letter "J" and before the word "Banker," the word "Morse"

stricken out, and the word "Moore" written above the same by the Testator.

Witnesses

Harry C. Stevenson, 38 Camp street, Newark, N. J.

Francis M. Eppley, West Orange, Essex Co., N. J.

Answer of Katherine V. Dorey and Helen L. Birch, Defendants.

Filed December 28, 1915.

The Answer of Katherine V. Dorey and Helen L. Birch, to the Bill of Complaint of Edward J. Moore, surviving trustee under the last will and testament of Thomas C. Barr, deceased.

These defendants jointly and severally answering say:

(1) They admit that Thomas C. Barr, then residing in the City of Orange, Essex County, New Jersey, died on February 26th, 1908, leaving a last will and testament dated February 9th, 1904, and that a copy thereof is annexed to the bill marked Exhibit "A," but as to its being a true and accurate copy this defendant prays reference to the original or the record thereof when produced.

(2) These defendants admit the truth of paragraph 2.

(3) These defendants admit the truth of paragraph 3.

(4) These defendants admit the truth of paragraph 4.

(5) These defendants have no knowledge of the truth of the allegations of paragraph 5 and call upon the complainant to make proof thereof.

(6) These defendants admit the truth of paragraph 6.

(7) These defendants admit the truth of paragraph 7.

(8) These defendants admit that Katharine M. Nippes Payne has claimed that her daughter, the said Dorothy Lorraine Payne, is entitled to the sum of fifty thousand dollars by virtue of the second clause of the thirteenth paragraph of the said will, but these defendants say that the said sum of fifty thousand dollars is not payable to the said Dorothy Lorraine Payne at this time, and, furthermore, that the same has become part of the residue of the estate of the said Thomas C. Barr, deceased, and is disposed of as provided in the seventeenth paragraph of the said will and the other portions and provisions of the said will applicable thereto, and these defendants deny that the said sum of fifty thousand dollars should be paid immediately to a guardian appointed or to be appointed for the said Dorothy Lorraine Payne or held for her during the lifetime of her mother and then paid to the said Dorothy Lorraine Payne or to her guardian.

(9) These defendants admit the truth of paragraph 9.

(10) These defendants join in the prayer of the bill of complaint that a decree may be made defining the duty of the complainant in the premises and instructing and directing him how and in what manner the said sum of fifty thou-

sand dollars should be held or paid and what disposition of the income thereof, if any, should be made at this time.

CHAUNCEY G. PARKER,
Solicitor and of Counsel for Katherine V. Dorey and Helen L. Birch, Defendants.

Answer of Dorothy Lorraine Payne.

Filed December 26, 1915.

The answer of Dorothy Lorraine Payne, by Clarence S. Payne, her guardian *ad litem,* duly appointed in the above stated cause.

This defendant, answering the bill of complaint, says that:

1. The facts stated in said bill of complaint in paragraphs 1, 2, 3, 4, 5, 6, 7 and 9 are true, and this defendant does not dispute the same.

2. This defendant has no knowledge of the doubts and difficulties set forth in paragraph 8 of said bill of complaint, and leaves the complainant to such proof thereof, as he may be advised to offer.

3. This defendant submits herself and her rights in this suit to the jurisdiction of this court, and prays that all her rights mentioned in said bill of complaint may be conserved to her, and that she may receive what in good conscience and equity she is entitled to.

4. This defendant prays to be hence dismissed with her costs.

CHARLES C. PILGRIM,
Solicitor for Clarence S. Payne, Guardian ad litem for the Defendant, Dorothy Lorraine Payne.

***Decree Pro Confesso,* against Katharine M. Nippes Payne, formerly Katharine M. Nippes, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr., defendants.**

Filed January 23, 1916.

This cause being opened to the court by Frank Bergen, of counsel with the complainant, and it appearing that process of subpoena for the defendants to appear and answer the complainant's bill has been duly issued and returned served on all the defendants, and that the defendants, Katharine M. Nippes Payne, formerly Katharine M. Nippes, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr., have not appeared and pleaded, answered or demurred to said bill, within the time limited by law, but have wholly failed and neglected so to do;

It is, thereupon, on this 22nd day of January, in the year of our Lord one thousand nine hundred and sixteen, on motion of Frank Bergen, solicitor for the complainant, ORDERED, ADJUDGED and DECREED, that the complainant's bill be and the same is hereby taken as confessed against the said defendants, Katharine M. Nippes Payne, formerly Katharine M. Nippes, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr., to the end that such decree may be made against them as the chancellor shall think equitable and just.

E. R. WALKER,

C.

Opinion of Vice-Chancellor Howell.

IN CHANCERY OF NEW JERSEY.

Between

EDWARD J. MOORE, trustee, etc.,

Complainant,

and

KATHERINE M. NIPPES PAYNE, *et als.*,

Defendants.

On final hearing on bill, answer, replication and proofs.

Mr. Frank Bergen, for the complainant.

Mr. Chauncey G. Parker, for Mrs. Dorey and Mrs. Birch.

Mr. Charles C. Pilgrim, for Dorothy Lorraine Payne.

Memorandum.

HOWELL, *V. C.*

This is a suit to ascertain the meaning of a will which has the distinction of being almost invulnerable to construction. It deals with a large estate, with many contingencies and much legal phraseology, but is so constructed as that one may not compare paragraph with paragraph, but, on the contrary thereof, is so loosely connected and so largely unconnected and contains so many apparently repugnant provisions that one may hesitate to make the attempt to declare what the testator meant. The will makes a provision for the wife, Lorraine Barr, who died on

May 21, 1913. Her death provoked a litigation over the meaning of the will which was heard by Vice Chancellor Emery and is found reported in *Moore* v. *Downey,* 83 N. J. Eq., 428. A reading of that opinion will disclose the difficulties attending an attempted construction of the document. Miss Edith B. Fretz, one of the legatees, has recently died, and it becomes necessary to bring another suit in order that the trustees may ascertain what course should be taken with respect to a certain legacy which appears to be contingent upon her death. She died without issue. The difficulties arise out of the 13th paragraph of the will. The first clause of that paragraph directs that in case of the death of Miss Nippes or Miss Fretz leaving issue the trustee should pay over out of the principal of the estate the sum of fifty thousand dollars *per stirpes,* among the issue of the one so dying. The second clause of the same paragraph is the one which presents the difficulty. It reads as follows: "I further direct that in case of the death of either of the aforesaid Katharine M. Nippes or Edith B. Fretz without issue then and in that event the issue of the survivor of either of the aforesaid Katharine M. Nippes or Edith B. Fretz shall receive the whole sum of the fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katharine M. Nippes or Edith B. Fretz or to the survivor of either leaving issue, otherwise to become a part of my estate." It was well said by Vice Chancellor Emery in his opinion in *Moore* v. *Downey,*

supra, that the fund comprising the *corpus* of the estate could not be divided until the death of Mrs. Dorey and Mrs. Birch, the testator's sisters; but he was not called upon to construe the 13th paragraph of the will, and I feel certain that his attention was not called to that paragraph, nor its inconsistencies pointed out to him before he wrote his opinion. His conclusion might very well be drawn from an examination of other parts of the will, but, as I remarked, this will is so constructed as that there can be no effective comparison made between the different and very often conflicting provisions.

Addressing ourselves, therefore, to the second clause of the 13th paragraph, we find the situation to be that Miss Fretz died without issue leaving Katharine M. Nippes, now Katharine M. Nippes Payne, surviving her. Mrs. Payne also has a child, which has attained the age of five years, and so it appears that a situation has arisen by virtue of which the trustee is required to pay out to some one the sum of $50,000, which, according to the provisions of the clause in question, is to be paid out to the issue of the survivor of the two women therein named. Mrs. Payne being the survivor, and she having as issue a child now living, it would seem clear that the child would take the fund, and it would be clear were it not for the last sentence of the clause, in which the testator attempts to explain what his intention is. This explanation is to my mind perfectly meaningless and is a mere jumble of words from which no purpose or design can be extracted. It is impossible that either one or both of the two sums of fifty thousand dollars each should go only to the

issue of these two women or to the survivor of either leaving issue, for immediately the question arises whether it could be said that the survivor of either was dead.

I, therefore, conclude that the last sentence of the second clause of the 13th paragraph of the will is void for uncertainty and can have no place whatever in determining the title to the property in question.

I will advise a decree directing the trustee to pay the said sum of fifty thousand dollars to the general guardian of Dorothy Lorraine Payne, the daughter of the defendant, Katharine M. Nippes Payne.

Final Decree.

Filed June 10, 1916.

IN CHANCERY OF NEW JERSEY.

EDWARD J. MOORE, surviving trustee under the last will and testament of Thomas C. Barr, deceased, *Complainant,* *vs.* KATHERINE M. NIPPES PAYNE, *et als.,* *Defendants.*	*On Bill, etc.* *Final Decree.*

This cause coming on to be heard in the presence of Frank Bergen, of counsel with the complainant, Chauncey G. Parker, for the defendants, Katharine V. Dorey and Helen L. Birch, and Charles C. Pilgrim, for the infant defendant, Dorothy Lorraine Payne (the bill having been heretofore taken as confessed against the other defendants, Katherine M. Nippes Payne, formerly Katherine M. Nippes, J. Nethermark Downey, Helen L. Downey Lees, formerly Helen L. Downey, and Frank P. Nippes, Jr.); and the pleadings and proofs having been read, and the arguments of the respective counsel heard and considered, and the court having duly considered the said pleadings, proofs and arguments; and it appearing to the court that Thomas C. Barr, late of the county of Essex, New Jersey, departed this life on February 26th, 1908, leaving a last will and testament bearing date Feb-

ruary 9th, 1904, which said will was duly admitted to probate on March 9th, 1908, by the surrogate of the said county of Essex, and letters testamentary issued thereon to the complainant and to Lorraine H. Barr, therein named as executors and trustees, and it appearing that the said executrix, Lorraine H. Barr, departed this life on May 21st, 1913, and that the complainant, Edward J. Moore, is the surviving executor and trustee under the said will of the said Thomas C. Barr, deceased; and it further appearing that on August 9th, 1915, Edith B. Fretz, one of the beneficiaries under said will of said Thomas C. Barr, deceased, departed this life without leaving issue; and it further appearing that subsequent to the death of the said testator, Thomas C. Barr, Katherine M. Nippes, one of the beneficiaries under the said will of said Thomas C. Barr, married Clarence S. Payne, and has a daughter five years of age named Dorothy Lorraine Payne; and it further appearing that the said Clarence S. Payne has been appointed by this court guardian *ad litem* for the said defendant, Dorothy Lorraine Payne; and it further appearing that a question of doubt and difficulty has arisen as to the interpretation of paragraph 13 of the said will of Thomas C. Barr, deceased, the said Dorothy Lorraine Payne through her guardian *ad litem,* claiming that she is entitled to the sum of $50,000 mentioned in the second clause of the 13th paragraph of said will, and the said Katharine V. Dorey and Helen L. Birch claiming that Dorothy Lorraine Payne is not presently entitled to the said sum of $50,000, and that the same has become part of the residue of the estate of the said Thomas C. Barr, deceased, and should be dis-

posed of as provided in the 17th paragraph of said will, and the complainant being advised that the said sum of $50,000 should be paid immediately to the guardian appointed for the said Dorothy Lorraine Payne, or held for her during the lifetime of her mother and then paid to said Dorothy Lorraine Payne or to her guardian, and complainant being unable to determine what his duties are in that particular under the provisions of said will; and the court being of opinion that the complainant is entitled to have the will of the said Thomas C. Barr, deceased, construed by this court and the rights of the several persons making claim thereunder ascertained, and the powers, rights and duties of the complainant as trustee in the administration of the said trust ascertained and defined in the particulars aforesaid and the complainant given direction as to the meaning of the said will and as to his duties in the administration of the trusts thereby created;

It is, on this 9th day of June, 1916, on motion of Frank Bergen, solicitor of complainant, by Edwin Robert Walker, chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said chancellor by virtue of the power and authority of this court doth hereby ORDER, ADJUDGE and DECREE:

1. That under the following trust created by said will, to wit:

"Thirteenth—I direct, that in case of the death of the aforesaid Katherine M. Nippes or Edith B. Fretz, leaving issue, that my executor or trustee pay over out of the principal of my estate, the sum of fifty thousand (50,000) dollars, said sum to be divided (*per stirpes*), among the issue of each of the beneficiaries mentioned

in this 13th paragraph of this my last will, so dying, leaving issue.

"I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or Edith B. Fretz without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz or to the survivor of either, leaving issue, otherwise to become a part of my estate,"—the last sentence of the second clause of the 13th paragraph is void for uncertainty, and that the said Katherine M. Nippes Payne having survived the said Edith B. Fretz, and the said Dorothy Lorraine Payne being the issue of the said Katherine M. Nippes Payne, in esse at the time of the death of the said Edith B. Fretz, the said sum of $50,000 should now be paid to the general guardian of Dorothy Lorraine Payne, the daughter of the defendant, Katherine M. Nippes Payne.

2. It is further Ordered, Adjudged and Decreed, that out of the principal of the residuary estate the said complainant do pay the costs of the complainant and of all the answering defendants herein, to be taxed by the clerk of this court, together with a counsel fee of five hundred dollars to be paid to Frank Bergen, of counsel with the complainant, a counsel fee of five hundred dollars to Chauncey G. Parker, of counsel with the defendants Katherine V. Dorey and Helen L. Birch, and a counsel fee of five hundred

dollars to Charles C. Pilgrim, of counsel for the defendant Dorothy Lorraine Payne.

3. And it is further Ordered, that the said parties, or any of them, be at liberty to apply to this court for further directions, if occasion shall require.

E. R. WALKER,
C.

Respectfully advised,

J. E. Howell,
V. C.

Appeal.

Filed July 7, 1916.

IN CHANCERY OF NEW JERSEY.

EDWARD J. MOORE, surviving trustee under the last will and testament of Thomas C. Barr, deceased, *Complainant,* *vs.* KATHERINE M. NIPPES PAYNE, *et als.,* *Defendants.*	*On Bill, etc.* *Appeal.*

The defendants Katherine V. Dorey and Helen L. Birch appeal to the Court of Errors and Appeals from so much of the final decree in the above cause, dated June 9, 1916, as orders and adjudges as follows:

"1. That under the following trust created by said will, to wit:

'Thirteenth—I direct, that in case of the death of the aforesaid Katherine M. Nippes or Edith B. Fretz leaving issue, that my executor or trustee pay over out of the principal of my estate, the sum of fifty thousand (50,000) dollars, said sum to be divided (*per stirpes*) among the issue of each of the beneficiaries mentioned in this 13th paragraph of this my last will, so dying, leaving issue.

'I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or

Edith B. Fretz without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz or to the survivor of either, leaving issue, otherwise to become a part of my estate,'—the last sentence of the second clause of the 13th paragraph is void for uncertainty, and that the said Katherine M. Nippes Payne having survived the said Edith B. Fretz, and the said Dorothy Lorraine Payne being the issue of the said Katherine M. Nippes Payne, in esse at the time of the death of the said Edith B. Fretz, the said sum of $50,000 should now be paid to the general guardian of Dorothy Lorraine Payne, the daughter of the defendant Katherine M. Nippes Payne."

CHAUNCEY G. PARKER,
Solicitor and of Counsel for Katherine V. Dorey and Helen L. Birch, Defendants.

Petition of Appeal.

Filed July 8, 1916.

New Jersey Court of Errors and Appeals

Between

EDWARD J. MOORE, surviving trustee under the last will and testament of Thomas C. Barr, deceased,
Respondent,

and

KATHERINE V. DOREY and HELEN L. BIRCH,
Appellants,

and

KATHERINE M. NIPPES PAYNE, DOROTHY LORRAINE PAYNE, J. NETHERMARK DOWNEY, HELEN L. DOWNEY LEES and FRANK P. NIPPES, JR.,
Respondents.

Petition of Appeal.

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

The petition of Katherine V. Dorey and Helen L. Birch, the appellants in the above stated cause, respectfully shows:

That your petitioners find themselves aggrieved by final decree made in the Court of Chancery by his honor, E. R. Walker, Chancellor of New Jersey, bearing date the 9th day of June, 1916, wherein the said Edward J. Moore,

surviving trustee as aforesaid, was complainant, and the said Katherine V. Dorey, Helen L. Birch, Katherine M. Nippes Payne and Dorothy Lorraine Payne, or her guardian *ad litem,* were defendants, in this respect, to wit:

That the said decree adjudges that:

"1. That under the following trust created by said will, to wit:

'Thirteenth—I direct, that in case of the death of the aforesaid Katherine M. Nippes or Edith B. Fretz leaving issue, that my executor or trustee pay over out of the principal of my estate, the sum of fifty thousand (50,000) dollars, said sum to be divided (*per stirpes*) among the issue of each of the beneficiaries mentioned in this 13th paragraph of this my last will, so dying, leaving issue.

'I further direct that in case of the death of either of the aforesaid Katherine M. Nippes or Edith B. Fretz, without issue, then, and in that event, the issue of the survivor of either of the aforesaid Katherine M. Nippes or Edith B. Fretz shall receive the whole sum of fifty thousand (50,000) dollars bequeathed to the issue of the person dying without issue as described in this paragraph. It being my intention that the two sums of fifty thousand dollars each shall go only to the issue of the aforesaid Katherine M. Nippes or Edith B. Fretz or to the survivor of either, leaving issue, otherwise to become a part of my estate,'—the last sentence of the second clause of tht 13th paragraph is void for uncertainty, and that the said Katherine M. Nippes Payne having survived the said Edith B. Fretz, and the said Dorothy Lorraine Payne being the issue of the said Katherine M. Nippes Payne, in esse at the time of the death of the

said Edith B. Fretz, the said sum of $50,000 should now be paid to the general guardian of Dorothy Lorraine Payne, the daughter of the defendant Katherine M. Nippes Payne."

And your petitioners humbly appeal from that part of the said decree which decrees as aforesaid, upon the ground that the same is erroneous, for that the said sum of $50,000 should not be paid to the general guardian of the said Dorothy Lorraine Payne, the daughter of the defendant Katherine M. Nippes Payne, as directed by the said decree.

Your petitioners, therefore, pray that the said decree of the said chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

CHAUNCEY G. PARKER,
Solicitor for and of Counsel with the Appellants.

ENDORSED:

"Filed July 7, 1916.

THOMAS F. MARTIN,
Clerk."

State of New Jersey,
Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and *ex-officio* clerk of the Court of Errors and Appeals in the last resort in all causes, DO HEREBY CERTIFY, that the foregoing is a true copy of Petition of Appeal, Between Edward J. Moore, surviving trustee

under the last will and testament of Thomas C. Barr, deceased, respondent, and Katherine V. Dorey and Helen L. Birch, Appellants, and Katherine M. Nippes Payne, Dorothy Lorraine Payne, J. Nethermark Downey, Helen L. Downey Lees and Frank P. Nippes, Jr., respondents, as the same is taken from and compared with the original filed July 7, 1916, and now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said court, at Trenton, this seventh day of July, A. D. 1916.

THOMAS F. MARTIN,
Secretary of State.

Answer to Petition of Appeal.

Filed July 17, 1916.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

EDWARD J. MOORE, surviving trustee under the last will and testament of Thomas C. Barr, deceased,

Respondent,

and

KATHERINE V. DOREY and HELEN L. BIRCH,

Appellants,

and

KATHERINE M. NIPPES PAYNE, DOROTHY LORRAINE PAYNE, J. NETHERMARK DOWNEY, HELEN L. DOWNEY LEES and FRANK F. NIPPES, JR.

Respondents.

Answer to Petition of Appeal.

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

The answer of Dorothy Lorraine Payne, by Clarence S. Payne, her guardian *ad litem,* duly appointed in the above stated cause, respectfully shows:

1. This respondent admits the making of the final decree in the Court of Chancery, as set forth in the petition of appeal herein.

2. This respondent avers that the said final decree is in all respects just and proper, and the same should be affirmed in all things.

3. This respondent prays to be hence dismissed with her costs in this behalf sustained.

CHARLES C. PILGRIM,

Solicitor for and of Counsel with Respondent Dorothy Lorraine Payne.

Opinion of Emery, *V. C.*, Construing Barr Will.

Filed June 26, 1914.

In Chancery of New Jersey.

Between

EDWARD J. MOORE, surviving trustee, etc., of Thomas C. Barr, deceased,
Complainant,

and

J. NETHERMARK DOWNEY, *et als.*,
Defendants.

On Bill for Construction of Will.

Heard on bill, answers and proofs.

Mr. Frank Bergen for complainant.

Mr. Chauncey G. Parker for defendants, Dorey and Birch.

Mr. H. M. Barrett with Mr. William R. Brinton of the Pennsylvania Bar for defendants, Downey and Lees.

(Barrett & Barrett, solicitors.)

Mr. Norman W. Harker for defendants, executors of Mrs. Barr.

CONCLUSIONS.

EMERY, *V. C.*

This bill is filed by Edward J. Moore, the surviving trustee under the will of Thomas C. Barr, for a construction of his will on three

contested points. The first is a question arising on the claim of the executors of the widow of the testator for the payment to them of certain income of the estate, amounting to $2,760.76, now in the hands of the trustee, and being a portion of the income of the residue of the estate which was given and devised to the executors and trustees by the eleventh clause of his will, upon trusts therein specified. The first trust (as to payments) was as follows: "1st. I direct that my said executors or trustees pay to my beloved wife, Loraine H. Barr, annually in quarterly payments, during her natural life, an amount equal to one-half the net income accruing from my said estate." The testator died February 26th, 1908, and during the lifetime of the widow payments to her under this clause were made quarterly on the 28th day of February, May, August and November of each year. The last payment to her was made on February 28, 1913, and she died on May 21, 1913. If the income is apportionable, then the sum of $2,760.76 is the proportion of the quarterly payment to which the widow at the time of her death would have been entitled out of the entire income up to the quarter ending on the 28th of May, 1913. Her executors claim that they are entitled to such apportionment of this entire income. The ground upon which counsel for these executors base this claim is that this bequest to the widow is a gift of an annuity, and while admitting that annuities are not generally apportionable, claim that this annuity was in lieu of dower and for the maintenance and support of the widow, and therefore, under the decisions of our courts, is excepted from the general rule and is apportionable. This bequest of

income is not, however, in my judgment, an annuity. An annuity is the bequest of a sum certain, and even the gift of the interest of a fixed and certain sum of money is not an annuity. 3 *Pom. Eq. Juris,* 1134 (3rd Ed.), citing *inter al Whitson* v. *Whitson,* 53 N. Y. 479, 481, (1873); 2 *Redf. Wills,* 453. Much less can the gift of the income or of a specified portion of the net income of the general residue of the estate, including, as here, real as well as personal estate, be considered an annuity or the gift of a sum certain.

Treating this devise and bequest to the wife not as the gift of a sum certain by way of annuity, but as a gift of the gift of a sum certain by way of annuity, but as a gift of the income payable at fixed times, her executors are, however, under the general rule well settled, entitled to such an apportionment of the income as will give to the widow the benefit of so much of the income as accrued from day to day during her life. *Brombacher* v. *Berking,* 11 Dick. (56 N. J. Eq.) 251, 255, (Reed, V. Ch., 1897). This would include interest accruing on mortgages and also dividends declared during her lifetime, although not payable until after her death. The case does not show what the apportionment would be on this basis, and this may be the subject of further inquiry, if necessary.

The second and third questions are connected and involve the general question whether the entire principal trust estate or fund in the hands of the surviving trustee must be held intact for the purpose of paying the income of the entire estate (after certain deductions) to the two sisters of the testator during their joint lives,

or whether, after the death of the widow, who was entitled to one-half of the net income during her life, one-half of the principal of the estate becomes immediately divisible among the persons entitled as residuary legatees to the estate, and whether, therefore, the sisters of testator are entitled to require only one-half of the principal to be retained for the payment of income to them on this half for their lives. For the sisters it is contended that the entire principal must be held at least during their joint lives for the payment to them equally of all the income thereon, including that previously enjoyed by the wife, after deducting specific annual payments of income or other relatives under the will. These payments to other legatees, together amounting to $10,500 annually, are much less than the income of the estate, which exceeds $800,000 and which as now invested yields an annual income of about $48,000.

The sisters are also the residuary legatees to the extent of one-third each of the entire fund not otherwise disposed of, but they claim that no portion of the principal is yet divisible. The residuary legatees of the trust fund, other than the sisters, being a nephew and nieces of the testator and a niece of his wife, and who are each entitled to one-ninth of the residue, claim that the sisters are entitled only to the income of one-half of the principal fund (less the special deductions) and that after the death of the wife, one-half of the principal became immediately divisible among the residuary legatees. These two questions, the right of the sisters to the income of the entire fund, and the right to distribute any portion of the principal, are thus inseparately connected, and decision

upon one point affects the disposition of the other. The difficulty in reference to the construction of the will on these questions—for there is a difficulty—arises from the fact that the will is not only inartificially drawn, but in reference to the particular point now in question, it is drawn confusedly, as will appear from a recitation of its provisions.

The will after a direction for payment of debts and funeral expenses, and for the payment of specific legacies (all of which amounted to about $50,000) gave and devised the entire residue of his estate to his executors and trustees, in trust for the uses thereafter named. This residuary clause vested in the executors the legal estate in the entire residue, leaving, however, the equitable or beneficial estate therein to be further declared. Directing that the trustees invest and keep the estate invested and collect the rents and profits therefrom, pay all taxes or other charges, the testator then directed that they pay over the balance after such payment. This "balance" must be taken on the face of it to relate to and include only the payment of net income of the estate, considered as a whole. The first payment to be made is to his wife annually in quarterly payments during her life "of an amount equal to one-half of the net income." This direction contemplates apparently a division into two parts of the net income of the whole estate invested as one trust fund. A provision for the payment of one-half of the net income of an entire principal fund is manifestly a different thing from a direction to pay the net income of one-half of the principal fund. And under this direction, I think the trustees have no authority to make such division of the

principal fund into two separate parts or funds. This direction completes the eleventh item or paragraph, and the next or twelfth paragraph provides for the payment after death of his wife, to each of two legatees, Mrs. Fretz and Miss Nippes, of $2,500 during their respective lives, with cross survivorship to each of these legatees, and to Frank P. Nippes, Jr., of $500 during his life, without survivorship provision. These three legatees are, it is said, of testator's wife's kin, but although these payments are not to be made until after his wife's death, there is no direction that they are to come out of the half of the net income, which would have been paid to the wife, had she been living, nor is there any direction which would make them payable otherwise than out of the income generally after his wife's death. Following this is the thirteenth paragraph, which provides for the payment out of the principal of the estate of two sums of $50,000 each to the issue of these two legatees, Mrs. Fretz and Miss Nippes, in certain contingencies. These contingencies have not yet occurred and at present only have a bearing, as being required to be provided for in case any distribution of principal be now directed. The important features of the thirteenth paragraph, on the present questions, are (1) that this payment of principal is not specially directed to be made out of a half of the principal, nor is there any provision that would indicate it is not payable out of the principal generally, and (2) that these payments of principal to the issue of these two life tenants are not, by this clause or any other, made expressly dependent on Mrs. Barr's death. They only become so dependent by reason of the fact that

such payment out of the principal (considered as a single trust fund), would *pro tanto* deprive Mrs. Barr during her life of one-half of the net income of the whole estate, previously given upon this trust, and might, therefore, by implication, be payable only after her death. After these directions, which, it will be seen, fall far short of one-half of the net income and do not dispose at all of the balance of the one-half of the net income payable to the wife during her life, the testator without any further special express reference to this balance of the one-half of the net income which the wife had received, seems to assume by the next paragraph of his will that he had in fact already made such direction as to this balance of income.

The fourteenth paragraph reads: "I further direct that out of the remaining one-half of the income of my estate *not yet disposed of*" (the italics are mine), "there be paid two annual payments of $2,500 each" to a nephew and niece during their respective lives. This clause apparently treats the "remaining one-half income," i. e., the income which remained after the half income given to the wife for life, as a separate fund, and apparently authorizes the inference that the payments of income to the wife's relatives after her death were by the testator considered as being made as, in part at least, "disposing of" the one-half income previously given to the wife. But while the entire income is apparently divided, there is so far no indication or suggestion that the principal is to be divided, or is not to remain entire.

The next paragraph, the fifteenth, provides for a payment to the issue of this nephew and niece respectively of the sum of $50,000 with

cross remainders on survivorship, and these two sums of $50,000 each, are to be paid on contingencies, which have not yet occurred. These payments, however, are specially directed to be made "out of the principal or corpus of the second one-half of my estate." Up to this point in the will, as I have said, there had been no indication of an intention that the entire principal of the trust estate should at any time be divided into two portions, and this direction for manner of payment at this time by a division of principal cannot, in my judgment, avail or be considered sufficient to establish the right to make such division or principal into two funds from the inception of the trust. It seems to be, however, a plain clear direction that these payments, when made, shall be made in this manner, and when the contingency arises requiring the payments, or either of them, to be made, under this clause, a division of the principal into two trust funds may then be required, in order to carry out all the express provisions of the will. Had similar directions been given that the $50,000 legacies previously given to the issue of the wife's kin be paid "out of the first half of my estate," I am inclined to think that the division of the entire estate into two trust funds would then have been required on the happening of the contingencies therein provided for payment, and that in the absence of any special direction for a previous division, the division into two funds must have taken place, as soon as the contingency for payment out of either specified half of the principal first arose. But no such provision for payment of the two $50,000 legacies to the issue of the wife's kin was made, and in the absence of any other

provision controlling the holding of the trust estate as an entire estate, it must, I think, be so held, at least, until this contingency for payment under this fifteenth paragraph arises, and the trustee under the will has no authority to divide the principal of the trust estate into two portions until that time. The matter of the disposition of the "surplus income" until the time arrives for the division of the principal, remains to be specially considered.

Up to this point in his will (the fifteenth paragraph), the testator had made provision, first, for the entire one-half of the net income during *her* wife's life, with an express disposition after her death, among her relatives, of a portion only of this one-half income which would have come to her, leaving the balance of this one-half undisposed of by any express direction, and he had also, secondly, made express provision for only a portion of the other one-half of the income of the entire estate.

Then follows a separate distinct paragraph, the sixteenth, dealing with income alone, as follows: "I further direct that all remaining surplus income be divided equally and annually between my two sisters Katherine V. Dorey and Helen L. Birch, during their natural lives." This provision gives rise to the principal dispute, which is, whether "surplus income" under this clause means the income not previously effectively disposed of by the previous bequests of income, or whether the "surplus income" bequeathed by this clause is the surplus only of the second half of the income, being that not given to the wife during her life. The later contention is based on the general claim above discussed that it sufficiently appears on the whole

will, that a division of the principal into two funds from its inception is contemplated, and that if this be established as the true construction of the will, then the "surplus income" referred to in this paragraph must be the surplus only of the income of the second or remaining half of the principal fund referred to in the fourteenth paragraph as being the surplus "of the remaining one-half of the income not yet disposed of" by the legacies to the wife and others after her death, by the paragraph preceding the fourteenth.

The "surplus" income, taking this in the sense of income not actually or effectively disposed of, certainly included a balance of income after the wife's death not absorbed by the payments to the previous legatees, and the precise question is whether this express direction as to "surplus income" includes all income not actually disposed of, or whether this bequest of the surplus income is to be treated as a specific bequest of the surplus of the remaining or second one-half. If so, the "surplus" of the first one-half falls into the general residuary bequest of the equitable or beneficial estate in which the trustee has the residuary legal title. This clause, the seventeenth, directs all the residue to be divided into nine equal parts and paid over, three-ninths to each of his sisters, her heirs and assigns, and one-ninth each to his nephew J. N. Downey, his niece Helen L. Downey, and Katherine M. Nippes, his wife's niece. The time for this payment is not expressly fixed, but treating the previous clause as one disposing of the entire surplus income of the estate, not merely of the surplus of one-half of the income, this last residuary clause applies to the principal

fund alone of the equitable estate, leaving the previous clause to be construed as the residuary clause applying to the income.

It must be conceded, I think, that by reason of the confused and inartificial character of the will as bearing on these points of dispute, the contention can fairly be made that such division of principal into two funds from its inception and a separation of the incomes into two distinct portions is suggested or indicated, but, as I have stated, it cannot be safely said, that taking the whole will, such division has been directed, or that there are any directions in the will sufficient to justify the conclusion that the testator intended in the sixteenth paragraph to restrict the "surplus income" to that of the second half of the fund referred to in the fourteenth paragraph.

On considering the whole will and the arguments and briefs of counsel, I reach the conclusion (1) that during the joint lives of the sisters, they are equally entitled to the surplus income of the entire estate after deducting the special legacies, and (2) that until the happening of the contingency requiring the payment, out of one-half of the principal fund, of the legacies to the issue of J. Nethermark Downey and Helen M. Downey, or either of them the fund is not divisible under the will, but is to be held as an entire fund. And this construction as to the time of division does, I think, carry out all the provisions of the will. Any construction fixing either the inception of the trust or any other time for the division, of the principal must necessarily rest more on a supposed plan, indicated or suggested by the partial and incomplete provisions rather than on the construction of the words of

the entire will actually used by the testator and from which his intention must finally be determined.

Whether on the death of either of the sisters, the payment to the survivor of either the entire or any portion of this surplus income is to be continued, is not decided. Decision upon this point should not take place until the question arises and the parties then interested are heard, and at this time would be premature.