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NEW JERSEY
Court of Errors and Appeals.

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JAMES SHANNON, JENNIE M. SHANNON AND JENNIE M. SHANNON, SUBSTITUTED ADMINISTRATRIX WITH THE WILL ANNEXED OF MICHAEL B. SHANNON, DECEASED.

Complainants-Appellants,

vs.

MARY SHANNON, HAROLD SHANNON, ELIZABETH SHANNON, RUTH SHANNON AND THOMAS SHANNON,

Defendants-Appellees.

On Appeal.

20

BILL OF COMPLAINT.

(Filed May 29, 1925.)

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IN CHANCERY OF NEW JERSEY.

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

The complainants, James Shannon and Jennie M. Shannon, of the Township of Holland, in the County of Hunterdon and State of New Jersey, and Jennie M. Shannon, substituted administratrix with the will an-

nexed of Michael B. Shannon, deceased, late of the Township of Holland aforesaid, respectfully show :

1. Michael B. Shannon, father of the complainants, late of the Township of Holland aforesaid, died on March 10th, 1920, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of Hunterdon aforesaid and letters testamentary thereon issued to Anna Elizabeth Shannon, the executrix therein named, who took upon herself
10 the burden of administering the said estate. A true copy of said will is hereunto annexed and made a part hereof.

2. Said Anna Elizabeth Shannon, executrix as aforesaid, after having taken upon herself the burden of administration did on September 5th, 1923, depart this life leaving certain assets of the estate of the said Michael B. Shannon, deceased, unadministered and the Surrogate of the County of Hunterdon aforesaid did in the place and stead of the said Anna Elizabeth Shannon substitute and appoint Jennie M. Shannon as substituted administratrix with the will annexed of the said
20 Michael B. Shannon, deceased.

3. In and by the said will the said Michael B. Shannon provided as follows:

"I further direct that my executor shall have a suitable stone or monument erected at the proper place to my memory, and (if not already erected) shall have the same done as conveniently as possible, and that the money required in the fulfillment of the above directions shall be taken from my estate, and the remainder of the same I do give, bequeath, and devise unto
30

My dear wife Anna Elizabeth my x x x x x x x x all of my estate both real and personal and wheresoever found for her to have and enjoy the profits thereof, and further to be under her direct supervision so long as she shall live, excepting however a certain tract of woodland I own and possess situated on Chestnut Hill in Durham Township which said woodland she shall keep free against any and all taxes and shall pay the same

as may be assessed against the same until my twin children James and Jennie arrives at the age of twenty-one years when the said tract of woodland becomes the property of the said James and Jennie share and share alike, and the interest of my estate ceases in the same.

Second. At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that
10 event my said estate (with the exception of said woodland, shall be equally divided among my surviving children or their heirs, share and share alike."

4. The complainants were the only surviving children of the said Michael B. Shannon, deceased, living at the time of his death, which took place as aforesaid on March 10th, 1920, and the only surviving children living at the time of the death of the said Anna Elizabeth Shannon, which took place as aforesaid on September
20 5th, 1923.

5. Said Michael B. Shannon, now deceased, had one other child, to wit, Michael J. Shannon, who died June 22, 1918, leaving him surviving as heirs at law Mary Shannon, his widow; a son, Harold Shannon, aged about 17 years; a daughter, Elizabeth Shannon, aged about 14 years; a daughter, Ruth Shannon, aged about 11 years; and a son, Thomas Shannon, aged about 9 years; all of whom reside at or near the Village of Kintnersville, in the County of Bucks and State of Pennsylvania.

6. Complainants, James Shannon and Jennie M. Shannon, are each entitled to the undivided one-half of all of the estate of the said Michael B. Shannon, deceased, both real and personal, subject to such sums directed to be paid in and by said last will and testament, if any remain unpaid.
30

7. Said Mary Shannon, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon claim that they are entitled to a portion or share of the said

estate under and by virtue of the said last will and testament of the said Michael B. Shannon, deceased.

8. The personal estate of the said Michael B. Shannon, deceased, has not been distributed and the said Jennie M. Shannon, substituted administratrix with the will annexed of the said Michael B. Shannon, deceased, is in doubt as to who the persons entitled thereto are and cannot safely proceed to distribute said estate without the directions of this court.

10 Complainants are without adequate remedy in the courts of law and therefore pray:

1. That Mary Shannon, widow of Michael J. Shannon, deceased, and Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, children of Michael J. Shannon, deceased, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

20 2. That this court may construe the said last will and testament of the said Michael B. Shannon, deceased, and declare complainants' rights thereunder.

30 3. That this court may direct complainant, Jennie M. Shannon, substituted administratrix with the will annexed of Michael B. Shannon, deceased, to distribute the estate of the said Michael B. Shannon, deceased, remaining in her hands after the payment of the debts of said deceased and the expenses of settling said estate and such disbursements as may be required in and by said last will and testament of said Michael B. Shannon, deceased, by dividing the same into equal shares and paying one of such shares to the said James Shannon and the other of such shares to herself individually.

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.

C. B. BRADY,

Solicitor for and of Counsel with Complainants,
103 South Main Street,
Phillipsburg, N. J.

BE IT REMEMBERED, that I Michael B. Shannon of Lehnenburg, in the County of Bucks and State of Pennsylvania, (Inn Keeper) being in the present time in fair health, and have a good and sound mind and memory, but considering the uncertainties of life, have decided to make, publish and declare this instrument to be my last will and testament, thereby revoking any and all former wills by me at any time heretofore made.

(First) I do order and direct that after my decease my body be decently buried in the Cemetery adjoining the Catholic Church, of John the Baptist at Haccock, Pennsylvania, and that my funeral be conducted in accordance with the rites of my Church, and in a manner corresponding my station in life; 10

And such temporal estate as hath pleased the Almighty God to intrust me with at the time of my decease I do dispose of in manner as follows.

And first I do direct that my just debts and funeral expenses be fully paid and satisfied by my executor to be herein after mentioned, as soon as is convenient for him to do so after my decease. 20

I further direct that my executor shall have a suitable stone or monument erected at the proper place to my memory, and (if not already erected) shall have the same done as conveniently as possible, and that the money required in the fulfillment of the above directions shall be taken from my estate, and the remainder of the same I do give, bequeath, and devise unto

My dear wife Anna Elizabeth my x x x x x x x x all of my estate both real and personal and wheresoever found for her to have and enjoy the profits thereof, and further to be under her direct supervision so long as she shall live, excepting however a certain tract of wood land I own and possess situated on Chestnut Hill in Durham Township which said woodland she shall keep free against any and all taxes and shall pay the same as may be assessed against the same until my twin children James and Jennie arrives at the age of 30

twenty one years when the said tract of woodland becomes the property of the said James and Jennie share and share alike, and the interest of my estate ceases in the same.

Second At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally divided among my surviving children or their heirs, share and share alike.

10

Lastly I nominate and appoint Anna Elizabeth my wife to be Executrix of this my last will and testament.

In witness whereof I Michael B. Shannon the within named testator, to this my last will and testament, have hereunto set my hand and affixed my seal the Eleventh day of September A. D. 1905.

MICHAEL B. SHANNON (Seal)

20

Signed, sealed, published and declared by the said Michael B. Shannon, as and for his last will and testament, in the presence of us, who in his presence, and at his request, and in the presence of each other, have hereunto set our names as witnesses thereto.

JACOB RICHARDS
HUGH F. PURDY,
Witnesses.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

JAMES SHANNON ET AL.,
Complainants,

and

MARY SHANNON ET AL.,
Defendants.

On Bill, Etc.

10

ANSWER.

(Filed June 7, 1926.)

The answer of the defendant, Mary Shannon, and the answer of the defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, by Mary Shannon, their guardian *ad litem*.

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These defendants answering the bill of complaint in the above matter, say that:

1. These defendants neither admit nor deny paragraphs (1), (2) and (3) of said complaint, as all they know about same as therein set out is only what they have heard.

2. So far as defendants know paragraph (4) may be true.

3. Paragraph 5 is admitted.

4. Paragraph 6 is denied.

5. Paragraph 7 is insisted upon by defendants.

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6. Paragraph 8 is denied.

By way of further answering to said bill of complaint defendants say:

1. That the last will and testament annexed to the said bill of complaint and purporting to be the last will and testament of Michael B. Shannon, deceased, is not the last will and testament of Michael B. Shannon. That the said Michael B. Shannon was an un-

lettered man and without any education and at the time of signing the same he was informed that he was disposing of his estate equally share and share alike among his children, and the children of any deceased child to take the parent's share. The defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, are the children of Michael J. Shannon, deceased, and who was a son of Michael B. Shannon, deceased, the testator named in the bill of complaint. The said Michael B. Shannon, deceased, at the time of signing the said will supposed and thought he was equally dividing his property among his children and their heirs, or otherwise he would not have signed the same.

2. The defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, being infants of tender years, submit themselves to the judgment of this honorable court and pray that their interests may be protected and saved to them.

The defendants therefore pray:

1. That the paper purporting to be the last will and testament of Michael B. Shannon, may be corrected so as to conform therein as to what the said Michael B. Shannon supposed and thought the same contained.

2. That the said paper alleged to be the last will and testament of Michael B. Shannon, deceased, may be corrected so as to give to the defendants the share of Michael J. Shannon, deceased, as the said Michael B. Shannon, deceased, intended the same to be.

MARSHALL MILLER,
Solicitor of Defendants.

IN CHANCERY OF NEW JERSEY.

BETWEEN
 JAMES SHANNON ET AL.,
Complainants,
 and
 MARY SHANNON ET AL.,
Defendants. } On Bill, Etc.

REPLICATION.

(Filed June 15, 1926.)

The replication of complainants to the answer of the defendants.

1. The complainants join issue on the answer of the defendants as set forth in paragraphs 1, 2, 3, 4, 5 and 6 of the defendants' answer.

2. Paragraph one of the defendants' further answer is denied and complainants say that paragraph one of defendants' further answer does not set up facts sufficient to constitute a defense in equity and the complainants reserve the right to move to strike out paragraph one of defendants' further answer at the hearing of this cause.

3. Paragraph two of defendants' further answer is not objected to but complainants insist that none of the defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, have any interest or interests in the real and/or personal estate of which the said Michael B. Shannon died seized as in the complainants' bill set forth.

C. B. BRADY,
*Solicitor for and of Counsel
with Complainants.*

IN CHANCERY OF NEW JERSEY.

BETWEEN
 JAMES SHANNON ET AL.,
Complainants,
 and
 MARY SHANNON ET AL.,
Defendants. } On Bill, Etc.

TESTIMONY.

(Taken October 4, 1926.)

Testimony taken in the above entitled cause, at the State House, Trenton, New Jersey, on Monday, the fourth day of October, 1926, at ten-thirty o'clock A. M.

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Before HON. MALCOLM G. BUCHANAN, *Vice-Chancellor.*

Appearances—

C. B. BRADY, *Esquire* (and D. L. MCCARTHY, *Esquire*, of the Pennsylvania Bar), for the Complainants.

MARSHALL MILLER, *Esquire*, for Defendants.

Mr. Brady—I move to strike out paragraph one of the answer, or, rather, all but the last sentence.

The Court—The motion to strike out will be allowed.

Mr. Miller—I will ask to amend so we may be able to be heard as to the construction of the will as to the clause set out in the second section of the will, as to the clause which says: "Shall be divided among my surviving children or their heirs." The defendants insist that the words just quoted mean the surviving children or any that may be dead.

Mr. Brady—No objection.

The Court—It will be allowed.

Mr. Brady—I offer in evidence a certified copy of the last will and testament of Michael B. Shannon, late of the County of Hunterdon, deceased, the petition and letters testamentary thereon, issued to Anna Elizabeth Shannon, and the order admitting the will to probate.

Said document is marked *Exhibit C-1*.

Jennie M. Shannon, a witness produced on behalf of the complainants, being duly sworn, testifies as follows:

Direct examination, by Mr. Brady.

What is your full name?

A. Jennie Marie Shannon.

Q. Where do you reside?

A. Milford, N. J.

Q. You are the daughter of whom?

A. Michael B. Shannon.

Q. Michael B. Shannon died when?

A. March 10th, 1920.

Q. Did your father Michael B. Shannon have other children?

A. Yes. You mean at the time of his death?

Q. No; answer my question. Did he have other children?

A. Yes, sir.

Q. Who were the other children of Michael B. Shannon, your father?

A. Thomas Shannon and Michael Shannon and James Shannon and Jennie Shannon.

Q. Jennie is yourself?

A. Yes, sir.

Q. Now, when did Thomas Shannon die?

A. July 2, 1915.

Q. When did Michael G. Shannon die?

A. June 22, 1918.

Q. Who was your mother?

A. Anna Elizabeth Carroll.

20

30

- Q. She married whom?
 A. Michael B. Shannon.
 Q. When did she die?
 A. September 5, 1923.
 Q. Was she appointed executrix of the will of your father?
 A. She was.

- By the Court.
 10 Q. These four children are all the children that your parents ever had?
 A. They had another daughter who died young.
 Q. And unmarried?
 A. Yes, sir.
 Q. Did Anna Elizabeth Shannon, the executrix of the will of your father, settle up the estate of Michael B. Shannon, if you know?
 A. No, she didn't settle.
 20 Q. When your mother died, or, rather, after your mother died, what arrangement was made in regard to the will of Michael B. Shannon, deceased?
 A. I was appointed the administrator.
 Q. Substituted administratrix with the will annexed?
 A. Yes, sir.
 Q. You were so appointed?
 A. Yes, sir.
 Q. Has the estate of Michael B. Shannon been settled by you yet?
 A. No.
 30 Q. You as substituted administratrix with the will annexed have in your hands all the personal estate of Michael B. Shannon, deceased, have you not?
 A. Yes, I have.
 The Court—How much does it amount to?
 Mr. Brady—\$12,209.21.
 Q. Michael G. Shannon, your brother, who died June 22, 1918, was survived by whom?
 A. My father?

- Q. No; Michael G. Shannon, your brother, who died June 22, 1918. He was survived by whom?
 A. His widow and four children.
 Q. His widow's name was?
 A. Mary Shannon.
 Q. And the children's names?
 A. Harold, Elizabeth, Ruth and Thomas.
 Q. How old today is Harold Shannon?
 A. Eighteen.
 Q. He was seventeen at the time this suit was started? 10
 A. Yes.
 Q. How old was Elizabeth Shannon when the suit was brought?
 A. Fourteen.
 Q. And how old was Ruth Shannon when the suit was brought?
 A. I don't know how old she is now; thirteen, I think. 20
 Q. And how old was Thomas Shannon when the suit was brought?
 A. Nine.
 Q. Where do they reside?
 A. Kintnersville, Bucks County, Pa.
 Q. Are they all living?
 A. Yes.
 Q. Is Mary Shannon, the widow of Michael G. Shannon, living?
 A. She is.
 Q. Were they the only children living at the time 30 of Michael B. Shannon's death?
 A. Yes, sir.
 Q. And you are one of the complainants in this case?
 A. Yes.
 Q. Who is the other complainant?
 A. James Shannon.
 Q. And you ask the Court to construe this will?
 A. Yes, sir.

Q. Of Michael B. Shannon, deceased, I mean?

A. Yes.

By the Court.

Q. Your brother Thomas had no children?

A. No.

Q. Thomas, your brother, died unmarried, did he?

A. Yes, sir.

10 Q. And this other child which you speak about, that died before you were born, died young and not married?

A. No; she was about six years old.

Mr. Brady—I offer in evidence a certified copy of the order appointing the witness as administratrix.

Said copy of order is marked *Exhibit C-2*.

Q. You are still the substituted administratrix of Michael B. Shannon, deceased, with the will annexed?

A. Yes, sir.

20 Q. And your letters have never been revoked?

A. No.

Cross-examination, by Mr. Miller.

Q. Miss Shannon, your father drew this will of 1905?

A. I believe so.

Q. You lived home then?

A. Yes.

Q. And your brother?

A. Yes.

30 Q. Your co-administrator and your brother, who is dead?

A. Michael G. Shannon.

Q. Your father was Michael B.?

A. Yes.

Q. You were all living at home then?

A. Yes, sir.

Q. And you were all under twenty-one years of age at that time in 1905?

A. No; Michael J. Shannon wasn't.

Q. How old was Michael G. Shannon when he died?

A. Thirty-six, I think.

Q. In 1905 he was just about twenty-one years old at that time. Michael G. married after that, didn't he?

A. Yes, sir.

Q. Did he still remain with your father?

A. No, sir.

Q. Where did he go?

A. To his wife's home.

10 Q. Where was that?

A. Lehnenburg at that time.

Q. How far was that from where you and your father lived?

A. Just across the river.

Q. Where did you live, at Reigelsburg?

A. I lived at Lehnenburg.

Q. That was in Pennsylvania?

A. Yes, sir.

20 Q. You afterwards moved into New Jersey?

A. Yes.

Q. Where?

A. Milford, R. F. D.

Q. You and your brother went with your father when he went to New Jersey?

A. Yes, sir.

Q. Your father frequently visited Michael G., didn't he, after he married?

A. Yes, sir.

Q. And you did, too, didn't you?

A. Yes.

30 Q. How many children did Michael G. have?

A. Four.

Q. And your father visited those children, didn't he?

A. Yes, sir.

Q. And was very friendly with them?

A. Yes.

Q. And thought a lot of them, didn't he?

A. I guess he did.

Q. Do you remember when Michael G. died—your brother?

A. Yes.

Q. Do you remember your father going to Michael G.'s widow after his death?

A. Yes.

Q. And telling her that she should go ahead and keep up the home and he would help her?

A. No, I never heard him say that.

10 Q. You know he did?

A. No, I don't.

Q. Don't you know he paid her grocery bills?

A. No, I don't. I know he gave her money once in a while.

Q. Do you know he told her to keep the home up?

A. No.

Mr. Brady—I object to that.

The Court—What is the purpose of this?

20 Mr. Miller—To show the good will between the father and son.

The Court—That would be taken for granted unless it was disproved.

Q. Did your father ever speak about this will?

A. No. I know he had a will.

Q. Did he ever speak to you about it?

A. He said I would be taken care of.

Q. Did he say anything about the others?

A. Yes, sir.

Q. About a month before he died?

Mr. Brady—Objected to.

30 Q. You never saw the will?

A. No, not until he died.

Re-direct examination, by Mr. Brady.

Q. When was Michael G. Shannon married?

A. August, 1907.

Complainants rest.

Hugh F. Purdy, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Mr. Brady—This man was the witness to the will and the scrivener, and I think Mr. Miller ought to make an offer of what he is to prove by the witness.

The Court—For what purpose are you calling this witness?

Mr. Miller—What I expect to prove by this witness is this: Mr. Shannon came to him about 10 the disposition of the property—living in Pennsylvania; Mr. Shannon lived in Pennsylvania—that he came to Mr. Purdy and that he told Mr. Purdy what he wanted to put in this will and explained to him how he wanted to leave his property; that Mr. Purdy drew the will, and Mr. Purdy, after he had the will drawn, read it to Mr. Shannon. And what I propose to show by Mr. Purdy is that he explained to him this second clause, which reads that it "shall 20 be divided among my surviving children or their heirs," it meant that if any were dead, the heirs would take their part of the share, as he explained it to Mr. Shannon before he signed it. I also expect to prove to you that that was Mr. Shannon's belief as to the wording of the will, showing that he came back to Mr. Purdy one year before he died and then said to Mr. Purdy, "I am coming over to see you; I want to add a codicil to that will, giving my children their father's share and appointing a guardian for 30 them," showing that at that time he believed that the share was going to the children. Unfortunately he never came over and never did it. And Mr. Purdy's interpretation of the clause, as he understood it when he put it in the will and as he explained it to the testator, meant the surviving children. It meant the heirs of any that were dead.

The Court—How do you expect to satisfy me that such evidence is competent?

Mr. Miller—I fell that what the meaning of a certain clause is must be construed by the context of the will as a whole; also by extrinsic evidence showing the relationship of the parties and anything which may be the meaning of the wording if not clear.

10

The Court—Where have you any authority for the admission of statements of intention of that kind?

Mr. Miller—I haven't any authority more than the fact that when the language is doubtful and not clear in itself, ambiguous, that evidence is admissible to explain it.

The Court—You are offering this witness to prove declarations of the testator.

Mr. Miller—Yes, sir.

20

The Court—Have you any authority whatever on that?

Mr. Miller—No, but my impression of the rule has been to admit declarations when there is clearly an ambiguous statement in the will.

The Court—I will not permit you to introduce this witness for the purpose you state. Your objection may be noted on the record.

If you have anything else that you want to prove by this witness except declarations of intention by the testator, you may put him on.

30

Direct examination, by Mr. Miller.

Q. Mr. Purdy, you are a justice of the peace, are you not?

A. Yes, sir.

Q. Where do you live?

A. Reigelsville, Pa.

Q. How long have you lived in Reigelsville?

A. About forty years.

Q. Did you know Michael B. Shannon in his lifetime?

A. Yes, sir.

Q. Did you ever transact any business for Michael B. Shannon?

A. Yes, sir, I did.

Q. Did you ever draw a will for Michael B. Shannon?

A. Yes, sir.

Q. Did Michael B. Shannon come to you at the time he made the will, at the time you drew the will? 10

A. No, I came to him.

Q. Did you talk with him as to how you wanted that will drawn?

Mr. Brady—Objected to.

A. Yes.

Q. And did you draw that will as he told you?

A. Yes, sir.

Q. Did you read it to him?

A. Yes, sir; I read it to him.

Q. Did you explain to him what the second section 20 of that will reading as follows: "Shall be divided among my surviving children or their heirs," meant?

A. No, sir.

Q. Second. At the decease of my said wife my estate as above except said portion, shall be divided among my surviving children or their heirs share and share alike. Did you read the whole will to him?

A. Yes, sir; the whole will.

Q. You read that part, too?

A. No, sir; I didn't read that part separate.

Q. It is in the will? 30

A. Yes, sir.

Q. You read the whole will?

A. Yes.

Q. Did you explain to him what it meant?

A. Yes, I explained to him what the will meant, not any special part.

Q. Did you explain what that clause meant?

A. No, sir.

Q. Did you explain what that clause meant I have just read?

A. No.

Q. You didn't explain it to him?

A. No.

Q. Did you know what it meant?

A. I suppose so.

Q. Did he tell you that if he had any grandchildren he didn't want them to have anything?

10 A. No, he never said anything.

Q. Did he tell you he wanted the children if any were dead to have their parent's share?

A. No, sir.

Mr. Brady—Objected to.

Q. He did not?

A. No, there was none at the time.

Q. They were all living, weren't they?

A. Yes, sir.

Q. And when you added the words, "Or their heirs,"

20 what did you mean by that?

Mr. Brady—Objected to.

The Court—Objection sustained.

Q. When you added the words, "Surviving children or their heirs," what did you mean by that?

Mr. Brady—Objected to.

The Court—Objection sustained.

Q. Mr. Purdy, Mr. Shannon came to you later about this will, didn't he, before he died?

A. Not about that will, no.

Q. About what, then?

30 A. Why, he spoke to me one time about making a codicil.

Q. That would be a codicil to this will?

A. I suppose so.

Q. I ask you what he said about that?

Mr. Brady—Objected to.

The Court—Objection sustained.

Q. Did you draw that codicil?

A. No, sir; he didn't come back.

Q. How soon did he die after that?

A. Probably a year; maybe less. I couldn't tell you.

Q. You don't know?

A. No.

Q. You knew the father and the son very well, didn't you, Mr. Purdy?

A. Yes, sir.

Q. And did you know these grandchildren

A. Yes, sir; I know them.

Mr. Brady—No questions.

10

Both sides rest.

IN CHANCERY OF NEW JERSEY.

BETWEEN

JAMES SHANNON ET AL.,
Complainants,

20

and

MARY SHANNON ET AL.,
Defendants.

On Final Hearing.

VICE-CHANCELLOR'S MEMORANDUM.

(Filed October 29, 1926.)

BUCHANAN, V.-C.

The bill is filed for the construction of the will of 30
Michael B. Shannon, deceased.

The will gives the residuary estate to testator's wife
for life, and then proceeds:

"At the decease of my said wife my estate
* * * shall be divided among my surviving chil-
dren or their heirs share and share alike. Pro-
viso. If my wife dies before I do * * * my
estate * * * shall be equally divided among my

surviving children or their heirs share and share alike."

The will was drafted by a justice of the peace of Pennsylvania and executed in 1905. At that time testator had four children—Thomas, Michael, James and Jennie—none of whom were married. (There had been only one other child, who had died in infancy.)

10 Thomas died in 1915, unmarried. Michael died in 1918, leaving a widow and four children (the present defendants). Testator died in 1920, and his widow died in 1923. The other two children, James and Jennie, are the present complainants.

They claim the entire estate; the defendants claim one-third, as the "heirs" of the deceased son Michael.

I am satisfied the interpretation contended for by defendants is the correct one. Testator uses the same language in each instance—both with reference to the time of his own death, and the time of the death of the life-tenant: "my surviving children or their heirs."

20 Literally the property is left "to those of my children who survive me, or to the heirs of those of my children who survive me." Obviously the will does not mean that. Children who survive have no heirs, or next of kin. For the same reason it cannot mean that the division is to be among the surviving children "and" the heirs or next of kin of the same surviving children.

Nor is the word "heirs" used to indicate the quality of the estate given. The use of the word "or" contradicates that. True, the word "or" may be construed "and," where it is clear that such was the meaning of the testator: but that is not the case here. There is nothing to indicate any intent to prefer or to exclude: all four children were equally the possible recipients of testator's bounty. He could not know which would die and which would survive. Possibly all might die. In that event who would take under this will?

30 It seems clear that testator meant that the distribution was to be among those children who survived and the "heirs" of any child who might have died, *per stirpes*.

The property is personalty. Under well known rules of construction "heirs" here means those who would take under the statute of distribution.

IN CHANCERY OF NEW JERSEY.

BETWEEN JAMES SHANNON ET AL., <i>Complainants,</i>	}	10
<i>and</i>		
MARY SHANNON ET AL., <i>Defendants.</i>	}	On Bill, Etc.

STIPULATION.

(Filed November 1, 1926.) 20

In the last paragraph of the conclusions filed by his honor, Vice-Chancellor Buchanan, there appears the statement, "The property is personalty." To avoid a misunderstanding and to avoid a formal reopening of the matter, it is stipulated that the estate left by Michael B. Shannon, deceased, consisted of realty and personalty, the fact being that Michael B. Shannon died seized of two separate tracts of land in the State of New Jersey, one whereof is situate in the Township of Holland, in the County of Hunterdon and State of New Jersey, 30 and the other whereof is situate in the Town of Phillipsburg, in the County of Warren and State of New Jersey, and neither of which has at the date of this stipulation been converted into cash; and further that this stipulation shall be considered as evidence adduced before his Honor, Vice-Chancellor Buchanan, at the hearing of the above matter. If upon the presentation of this stipulation to his honor, Vice-Chancellor Buchanan,

24 *Amendment to Vice-Chancellor's Memorandum.*

any addition or revision of his conclusions shall be deemed by him to be necessary, the same may be filed by his honor, Vice-Chancellor Buchanan, without notice to us.

Dated: October 28, 1926. _____

C. B. BRADY,
Solicitor for Complainants.

MARSHALL MILLER,
Solicitor for Defendants.

10

IN CHANCERY OF NEW JERSEY.

BETWEEN
JAMES SHANNON ET AL.,
Complainants,

and

MARY SHANNON ET AL.,
Defendants. } On Bill, Etc.

20

AMENDMENT TO VICE-CHANCELLOR'S
MEMORANDUM.

I have amended the last paragraph of the memorandum which I filed so as to read as follows: "Part of the property is personalty. Under well known rules of construction 'heirs' as to personalty, means those who take under the statute of distribution."

30

MALCOLM G. BUCHANAN,
Vice-Chancellor.

Final Decree.

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IN CHANCERY OF NEW JERSEY.

BETWEEN
JAMES SHANNON ET AL.,
Complainants,

and

MARY SHANNON ET AL.,
Defendants. } On Bill, Etc.

10

FINAL DECREE.

(Filed December 13, 1926.)

This cause coming on to be heard in the presence of C. B. Brady, solicitor for the complainants, and Marshall Miller, solicitor for the defendants, and the court having examined the pleadings and having taken proofs orally in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the court that by the true construction of that paragraph of the last will and testament of Michael B. Shannon, deceased, late of the Township of Holland, in the County of Hunterdon and State of New Jersey, designated "Second" and which reads as follows: "Second At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally divided among my surviving children or their heirs, share and share alike," the said complainants, James Shannon and Jennie M. Shannon, two of the children of the said Michael B. Shannon, deceased, are each entitled to one-third of the estate of the said deceased excepting thereout the lot of woodland in said last will and testament of Michael B. Shannon

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referred to, and that Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased, are each entitled to one-twelfth of said estate of said Michael B. Shannon, deceased, excepting thereout said lot of woodland in said last will and testament of Michael B. Shannon referred to;

10 It is thereupon on this eleventh day of December, 1926, ordered, adjudged and decreed that under the provisions of that paragraph of the last will and testament of Michael B. Shannon, deceased, late of the Township of Holland, in the County of Hunterdon and State of New Jersey, designated as "Second" and which reads as follows: "Second At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally divided among my
20 surviving children or their heirs, share and share alike," the said complainants, James Shannon and Jennie M. Shannon, two of the children of the said Michael B. Shannon, deceased, are each entitled to one-third of the estate of the said deceased excepting thereout the lot of woodland in said last will and testament of Michael B. Shannon referred to, and that Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased, are each entitled to one-twelfth of the said estate of said Michael B.
30 Shannon, deceased, excepting thereout said lot of woodland in said last will and testament of Michael B. Shannon referred to.

It is further ordered that a counsel fee of four hundred dollars be allowed to C. B. Brady, solicitor of the complainants, and that a counsel fee of three hundred dollars be allowed to Marshall Miller, solicitor of the defendants, said counsel fees together with the costs of this suit to be paid by the complainant, Jennie M. Shan-

non, substituted administratrix with the will annexed of Michael B. Shannon, deceased, out of the corpus of the estate in her hands.

E. R. WALKER, C.

Respectfully advised,
MALCOLM G. BUCHANAN, V.-C.

I consent to the entry of the above decree.

MARSHALL MILLER,
Solicitor for Defendants. 10

A true copy.
THOMAS BARBER, Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JAMES SHANNON ET AL.,
Complainants,

and

MARY SHANNON ET AL.,
Defendants.

On Bill, Etc. 20

NOTICE OF APPEAL.

(Filed January 12, 1927.)

The complainants, James Shannon, Jennie M. Shannon and Jennie M. Shannon, substituted administratrix with the will annexed of Michael B. Shannon, deceased, hereby appeal from the final decree made in the above entitled cause on December 11, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all cases.

Dated: January 11, 1927.

C. B. BRADY,
Solicitor for and of Counsel with
all of the Complainants.

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

C. B. BRADY,
Of Counsel with all of the Complainants.

IN CHANCERY OF NEW JERSEY.

10	BETWEEN JAMES SHANNON ET AL., <i>Complainants,</i>	}	On Bill, Etc.
	<i>and</i>		
	MARY SHANNON ET AL., <i>Defendants.</i>		

20 ACKNOWLEDGMENT OF SERVICE OF NOTICE OF APPEAL.

(Filed February 23, 1927.)

Service of notice of appeal is hereby acknowledged this 11th day of January, 1927.

MARSHALL MILLER,
*Solicitor for and of Counsel
with all Defendants.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES SHANNON, JENNIE M. SHANNON AND JENNIE M. SHANNON, SUBSTITUTED ADMINISTRATRIX WITH THE WILL ANNEXED OF MICHAEL B. SHANNON, DECEASED,
Complainants-Appellants,

vs.

MARY SHANNON, HAROLD SHANNON, ELIZABETH SHANNON, RUTH SHANNON AND THOMAS SHANNON,
Defendants-Appellees.

On Appeal
From the Court 10
of Chancery.

PETITION OF APPEAL.

(Filed January 17, 1927.)

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

The petition of James Shannon and Jennie M. Shannon and Jennie M. Shannon, Substituted Administratrix with the will annexed of Michael B. Shannon, deceased, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 11, 1926, in a certain cause in said Court of Chancery wherein the said James Shannon and Jennie M. Shannon and Jennie M. Shannon, Substituted Administratrix with the will annexed of Michael B. Shannon, deceased, were complainants, and the said Mary Shannon, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon were defendants, in this respect, to wit, that the said decree adjudges under the provisions of that paragraph

of the last will and testament of Michael B. Shannon, deceased, late of the Township of Holland, in the County of Hunterdon and State of New Jersey, designated "Second" and which reads as follows: "Second At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally
 10 divided among my surviving children or their heirs, share and share alike," the said complainants, James Shannon and Jennie M. Shannon, two of the children of the said Michael B. Shannon, deceased, are each entitled to one-third of the estate of the said deceased excepting thereout the lot of woodland in said last will and testament of Michael B. Shannon referred to, and that Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon,
 20 deceased, are each entitled to one-twelfth of the said estate of said Michael B. Shannon, deceased, excepting thereout said lot of woodland in said last will and testament of Michael B. Shannon referred to. And further, petitioners find themselves aggrieved by said final decree made in the said Court of Chancery as aforesaid in this further respect, to wit, that the said decree orders, among other things, that a counsel fee of Three Hundred Dollars be allowed to Marshall Miller, Solicitor of the defendants.

And petitioners appeal from the decree of the Chan-
 30 cellor which decrees as aforesaid, upon the ground that the same is erroneous in that said decree construes the said last will and testament of said Michael B. Shannon, deceased, as giving an interest to the said defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, because of their being children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased, and upon the ground that the same is erroneous in that it does not construe

the said last will and testament of the said Michael B. Shannon, deceased, so that the entire estate may be divided equally, share and share alike, between the complainants, James Shannon and Jennie M. Shannon, who were at the time of the death of Michael B. Shannon, deceased, the only surviving children of the testator, the said Michael B. Shannon, deceased, and who were at the time of the death of Anna Elizabeth Shannon, widow of the said Michael B. Shannon, the only surviving children of the testator, the said Michael B. Shannon, deceased, and upon the further ground that the same is erroneous in that said decree orders the payment of a counsel fee of Three Hundred Dollars to Marshall Miller, solicitor of the defendants, because petitioners insist that the defendants in and by said last will and testament of Michael B. Shannon, deceased, were not nor was any one of them entitled to an interest in the estate of Michael B. Shannon, deceased, and therefore were not and should not be entitled to have counsel fees allowed to them or to their solicitor
 10 out of the estate of Michael B. Shannon or any costs in connection with their said defense to the bill of the complainants in the Court of Chancery upon which said final decree in the Court of Chancery as aforesaid was founded.
 20

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

C. B. BRADY, 30
Solicitor for and of Counsel with Appellants,
103 South Main Street,
Phillipsburg, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES SHANNON, JENNIE M. SHANNON AND JENNIE M. SHANNON, SUBSTITUTED ADMINISTRATRIX WITH THE WILL ANNEXED OF MICHAEL B. SHANNON, DECEASED,

Complainants-Appellants,

10

vs.

MARY SHANNON, HAROLD SHANNON, ELIZABETH SHANNON, RUTH SHANNON AND THOMAS SHANNON,

Defendants-Appellees.

On Appeal From the Court of Chancery.

ACKNOWLEDGMENT OF SERVICE OF PETITION OF APPEAL.

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(Filed January 22, 1927.)

Due and legal service is hereby acknowledged this 20th day of January, 1927, of a copy of the petition of appeal filed in the above stated cause.

MARSHALL MILLER,
Solicitor for all of the Defendants-Appellees.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES SHANNON, JENNIE M. SHANNON AND JENNIE M. SHANNON, SUBSTITUTED ADMINISTRATRIX WITH THE WILL ANNEXED OF MICHAEL B. SHANNON, DECEASED,

Complainants-Appellants,

10

vs.

MARY SHANNON, HAROLD SHANNON, ELIZABETH SHANNON, RUTH SHANNON AND THOMAS SHANNON,

Defendants-Appellees.

On Appeal From the Court of Chancery.

ANSWER TO PETITION OF APPEAL.

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(Filed February 16, 1927.)

The answer of Mary Shannon, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, the above named appellees, to the petition of appeal of James Shannon, Jennie M. Shannon and Jennie M. Shannon, Substituted Administratrix with the will annexed of Michael B. Shannon, deceased, the above named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on December 11, 1926, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

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These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be confirmed with costs to be taxed in favor of these appellees.

MARSHALL MILLER,
Solicitor for and of Counsel with Appellees.

10 NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES SHANNON ET AL.,
Complainants-Appellants,

vs.

MARY SHANNON ET AL.,
Defendants-Appellees.

On Appeal
from the Court
of Chancery.

20 AGREEMENT AS TO STATE OF CASE.

(Filed February 23, 1927.)

Complainants-Appellants and Defendants-Appellees hereby agree that the foregoing bill of complaint, answer, replication, evidence, Vice-Chancellor's memorandum, stipulation, amendment to Vice-Chancellor's memorandum, final decree, notice of appeal, acknowledgment of service, petition of appeal, acknowledgment of service and answer to petition of appeal shall make up state of case.

30 C. B. BRADY,
*Solicitor for and of Counsel
with Complainants-Appellants.*

MARSHALL MILLER,
*Solicitor for and of Counsel
with Defendants-Appellees.*

NEW JERSEY
Court of Errors and Appeals

JAMES SHANNON, JENNIE M.
SHANNON, AND JENNIE M.
SHANNON, SUBSTITUTED
ADMINISTRATRIX WITH THE
WILL ANNEXED OF MI-
CHAEL B. SHANNON, DE-
CEASED,
Complainants-Appellants,

On Appeal from
Court of Chancery.

vs.

MARY SHANNON, HAROLD
SHANNON, ELIZABETH
SHANNON, RUTH SHANNON
AND THOMAS SHANNON,
Defendants-Appellees.

BRIEF OF COMPLAINANTS-APPELLANTS

STATEMENT OF THE CASE.

This appeal comes up by reason of an order and decree made by the Court of Chancery on December 11, 1926, after hearing before Hon. Malcolm G. Buchanan, Vice-Chancellor.

The bill alleges that Michael B. Shannon, father of the complainants, died March 10, 1920, leaving a last

will and testament which was duly admitted to probate by the Surrogate of the County of Hunterdon, New Jersey, and that letters testamentary thereon were duly issued to Anna Elizabeth Shannon, the administratrix therein named, who took upon herself the burden of administering the estate, and that said Anna Elizabeth Shannon, after having taken upon herself the burden of administration, did, on September 5, 1923, depart this life, leaving certain assets of the estate of the said Michael B. Shannon, deceased, unadministered and that the Surrogate of the County of Hunterdon aforesaid did substitute and appoint Jennie M. Shannon, one of the complainants, substituted administratrix with the will annexed of the said Michael B. Shannon, deceased; that in and by the said will of the said Michael B. Shannon, deceased, it was provided as follows:

"I further direct that my executor shall have a suitable stone or monument erected at the proper place to my memory, and (if not already erected) shall have the same done as conveniently as possible, and that the money required in the fulfillment of the above directions shall be taken from my estate, and the remainder of the same I do give, bequeath, and devise unto

My dear wife Anna Elizabeth my xxxxxxxxxxxxxxxx
xxxx all of my estate both real and personal and where-
soever found for her to have and enjoy the profits thereof, and further to be under her direct supervision as long as she shall live, excepting however a certain tract of woodland I own and possess situated on Chestnut Hill in Durham Township which said woodland she shall keep free against any and all taxes and shall pay the same as may be assessed against the same until my twin children James and Jennie arrives at the age of twenty-one years when the said tract of woodland becomes the property of the said James and Jennie share and share alike, and the interest of my estate ceases in the same.

Second. At the decease of my said wife my estate as above (except said woodland, shall be divided among

my surviving children or their heirs share and share alike Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally divided among my surviving children of their heirs, share and share alike."

The bill further alleged that the complainants, James Shannon and Jennie M. Shannon, were the only surviving children of the said Michael B. Shannon, deceased, living at the time of his death and the only surviving children of the said Michael B. Shannon, deceased, living at the time of the death of the said Anna Elizabeth Shannon, widow of the said Michael B. Shannon. Michael B. Shannon died March 10, 1920, and his widow, Anna Elizabeth Shannon, died September 5, 1923. The bill further alleged that the said Michael B. Shannon had one other child, to wit, Michael J. Shannon, who died June 22, 1918, leaving him surviving as heirs at law, Mary Shannon, his widow; a son, Harold Shannon, aged about 17 years; a daughter, Elizabeth Shannon, aged about 14 years; a daughter, Ruth Shannon, aged about 11 years, and a son, Thomas Shannon, aged about 9 years; all of whom resided at or near the Village of Kintnersville, in the County of Bucks and State of Pennsylvania. The bill alleged that the complainants, James Shannon and Jennie M. Shannon, are each entitled to the undivided one-half of all of the estate of the said Michael B. Shannon, deceased, both real and personal, subject to such sums directed to be paid in and by said last will and testament, if any remain unpaid. Complainants pray, among other things, that the court might construe the said list will and testament of the said Michael B. Shannon, deceased, and declare complainants' rights thereunder and that the Court might direct complainant, Jennie M. Shannon, substituted administratrix, with the will annexed of Michael B. Shannon, deceased, to distribute the estate of the said Michael B. Shannon, deceased, remaining in her hands after the payment of the debts of the said deceased and the expenses of settling said estate and

such disbursements as may be required in and by the said last will and testament of the said Michael B. Shannon, deceased, by dividing the same into equal shares and paying one of such shares to the said James Shannon and the other of such shares to herself individually. (State of the Case, pp. 1-4.)

The allegations of the answer are, briefly, as follows:

The defendants neither admitted nor denied paragraphs 1, 2 and 3 of the said bill of complaint; they admitted that paragraph 4 might be true; they admitted paragraph 5; they denied paragraph 6; they insisted upon the claims repeated in paragraph 7, and they denied paragraph 8. By way of further answer the defendants claim that the last will and testament annexed to the bill of complaint and purporting to be the last will and testament of Michael B. Shannon, deceased, was not the last will and testament of Michael B. Shannon; that the said Michael B. Shannon was an unlettered man and without any education and at the time of his signing the same he was informed that he was disposing of his estate equally, share and share alike, among his children, and the children of any deceased child to take the parent's share; that the defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, are the children of Michael J. Shannon, deceased, and who was a son of Michael B. Shannon, deceased, the testator named in the bill of complaint; and that the said Michael B. Shannon, deceased, at the time of signing the said will supposed that he was equally dividing his property among his children and their heirs or otherwise he would not have signed the same. The answer further alleged that the defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, were infants of tender years and that they submitted themselves to the judgment of the Court and pray that their interests might be protected and saved to them. The defendants' prayers in said answer were, first, that the paper purporting to be the last will and testament of Michael B. Shannon may be corrected so

as to conform therein as to what the said Michael B. Shannon supposed and thought the same contained; and, second, that the said paper alleged to be the last will and testament of Michael B. Shannon, deceased, may be corrected so as to give to the defendants the share of Michael J. Shannon, deceased, as the said Michael B. Shannon, deceased, intended the same to be. (State of the Case, pp. 7 and 8.)

The complainants by replication joined issue on the answer of the defendants and denied paragraph 1 of defendants' further answer and set up that paragraph 1 of the defendants' further answer did not set up facts sufficient to constitute a defense in equity and reserved the right to move to strike out paragraph 1 of defendants' further answer at the hearing of this cause. Complainants further insisted that none of the defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, had any interest or interests in the real and/or personal estate of which the said Michael B. Shannon died seized. (State of Case, p. 9.)

A hearing was had before his Honor Malcolm G. Buchanan, Vice-Chancellor, October 4, 1926, and the testimony adduced at said hearing appears in State of the Case, pp. 10 to 21, both inclusive.

Subsequent to said hearing, the Vice-Chancellor filed a memorandum (State of the Case, pp. 21 to 24, both inclusive), and on December 11, 1926, final decree was filed in the office of the Clerk of the Court of Chancery. The final decree ordered, adjudged and decreed that under the provisions of that paragraph of the last will and testament of Michael B. Shannon, deceased, late of the Township of Holland, in the County of Hunterdon and State of New Jersey, designated as "Second" and which reads as follows: "Second. At the decease of my said wife my estate as above (except said woodland, shall be divided among my surviving children or their heirs share and share alike. Proviso, If my wife dies before I do then in that event my said estate (with the exception of said woodland, shall be equally divided

among my surviving children or their heirs, share and share alike," the said complainants, James Shannon and Jennie M. Shannon, two of the children of Michael B. Shannon, deceased, are each entitled to one-third of the estate of the said deceased, excepting thereout the lot of woodland in the said last will and testament of the said Michael B. Shannon, referred to and that Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased, are each entitled to one-twelfth of the said estate of Michael B. Shannon, deceased, excepting thereout said lot of woodland in said last will and testament of Michael B. Shannon referred to. (State of Case, p. 26, lines 8 to 33, both inclusive.)

GROUNDS OF APPEAL.

The said order and decree is erroneous in that said decree construes the said last will and testament of said Michael B. Shannon, deceased, as giving an interest to the said defendants, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, because of their being children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased. (State of the Case, p. 26, lines 8 to 33, both inclusive.)

The said order and decree is erroneous in that it does not construe the said last will and testament of the said Michael B. Shannon, deceased, so that the entire estate may be divided equally, share and share alike, between the complainants, James Shannon and Jennie M. Shannon, who were at the time of the death of Michael B. Shannon, deceased, the only surviving children of the testator, the said Michael B. Shannon, deceased, and who were at the time of the death of Anna Elizabeth Shannon, widow of the said Michael B. Shannon, the only surviving children of the testator, the said Michael B. Shannon, deceased. (State of the Case, p. 26, lines 8 to 33, both inclusive.)

The said order and decree is erroneous in that the said decree orders the payment of a counsel fee of \$300 to Marshall Miller, solicitor of the defendants, the insistence of the complainants being that the defendants in and by the said last will and testament of Michael B. Shannon, deceased, were not nor was any one of them entitled to an interest in the estate of Michael B. Shannon, deceased, and the defendants were not and should not be entitled to have counsel fees allowed to them. (State of the Case, p. 26, line 36 *et seq.*)

ARGUMENT.

The discussion of the case will be confined strictly to the interpretation of the phrase "My surviving children or their heirs" as embodied in the will of Michael B. Shannon, deceased. (State of the Case, p. 6, line 7, and p. 6, lines 10 and 11.)

His Honor, the Vice-Chancellor, was satisfied that the interpretation contended for by the defendants was the correct one. (State of the Case, p. 22, lines 15 and 16.)

The complainants insist that his Honor, the Vice-Chancellor, was wrong in his construction of those particular phrases and insist that the testator meant and a true construction of those phrases as contained in his said will should be "surviving children" or those of his children who should be living at the time of his death. The words "Surviving children" constitute a class. The word "Or" is tantamount to the words "In case of the death."

The true construction then of the phrase "Surviving children or their heirs" as used in the will of said Michael B. Shannon, deceased (State of the Case, p. 6, line 7 and lines 10 and 11), is and should be "Those of the children of Michael B. Shannon, deceased, who were living at the time of the death of Michael B. Shannon, deceased, to wit, March 10, 1920, and in case of the death of any of those children of Michael B. Shannon,

deceased, who were living at the time of the death of Michael B. Shannon, deceased, to wit, March 10, 1920, then to their heirs." This in case of the death of any of such surviving children after the death of Michael B. Shannon, deceased, and before the death of the life tenant.

A will ordinarily speaks from time of death of testator.

Harris vs. Harris, 97 N. J. E. 190.

Supp vs. Second National Bank & Trust Company, 98 N. J. E. 242.

Goetter vs. Berth et al., 133 Atl. 872.

A will speaks from death of testator unless contrary intention indicated.

Y. M. C. A. of Matawan vs. Appleby, 97 N. J. E. 95; affirmed 98 N. J. E. 704.

Where there is a testamentary gift to a class, persons to take are to be ascertained as of the date of testator's death, unless will expressly or by implication otherwise directs.

Gaston et al. vs. Ford et al., 133 Atl. 531.

Where a bequest is made to a class of persons or their heirs it is held that the word "Or" is tantamount to the words "In the case of the death."

Brent vs. Washington's Administrator (Va.), 18 Grat., 526-533.

The words "Surviving children" constitute a class. The testator used the word "Surviving" and its ordinary meaning must be given to it. His Honor, the Vice-Chancellor, has brushed aside altogether the word "Surviving." He was wrong. Anybody could have arrived at the same construction as did his Honor, the Vice-Chancellor, by using the word "Children" and leaving out the word "Surviving." The Court cannot construe a will by leaving out any portion of which may be used for the purpose of expressing the true intent of the testator.

The will must be read from its four corners to determine testator's intent.

Supp vs. Second National Bank & Trust Company, 98 N. J. E. 242.

It is insisted that the true meaning of the expression, "Surviving children or their heirs" as used in the will of Michael B. Shannon, deceased (State of the Case, p. 6, line 7, and p. 6, lines 10 and 11), is and should be "Those of the children of Michael B. Shannon, deceased, who were living at the time of the death of Michael B. Shannon, deceased, to wit, March 10, 1920, and in case of the death of any of those children of Michael B. Shannon, deceased, who were living at the time of the death of Michael B. Shannon, deceased, to wit, March 10, 1920, then to their heirs." This in case of the death of any of such surviving children after the death of Michael B. Shannon, deceased, and before the death of the life tenant.

If his Honor, the Vice-Chancellor, has erred in his construction of the said will, then costs should not be allowed to the defendants and no counsel fee should be allowed to the solicitor and counsel for the defendants.

For the reasons above given, the Court of Chancery should have decreed that the said complainants, James Shannon and Jennie M. Shannon, two of the children of the said Michael B. Shannon, deceased, are each entitled to one-half of the estate of the said deceased, excepting thereout the lot of woodland in said last will and testament of Michael B. Shannon referred to, and that Mary Shannon, Harold Shannon, Elizabeth Shannon, Ruth Shannon and Thomas Shannon, the widow and children of Michael J. Shannon, deceased, who was a son of Michael B. Shannon, deceased, are not nor is any one of them entitled to any interest whatever in the estate of the said Michael B. Shannon, deceased.

For the reasons above given, the Court of Chancery of New Jersey should not have allowed costs to the defendants nor a counsel fee to the solicitor or counsel for the defendants.

It is respectfully submitted that the order and decree
 appealed from should be reversed.

C. B. Brady
 C. B. BRADY,
Solicitor for and of Counsel with Appellants,
 103 South Main Street,
 Phillipsburg, N. J.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY Court of Errors and Appeals.

JAMES SHANNON, JENNIE M.
 SHANNON AND JENNIE M.
 SHANNON, SUBSTITUTED AD-
 MINISTRATRIX WITH THE WILL
 ANNEXED OF MICHAEL B.
 SHANNON, DECEASED,
Complainants-Appellants,

v.

MARY SHANNON, HAROLD SHAN-
 NON, ELIZABETH SHANNON,
 RUTH SHANNON AND THOMAS
 SHANNON,
Defendants-Appellees.

On Appeal from the
 Court of Chancery.

BRIEF OF DEFENDANTS-APPELLEES.

The State of the Case set out in the above appeal fully discloses all the pertinent facts in reference to the same and counsel for defendants deem it unnecessary to repeat the same herein or any part of the same. The brief of counsel will therefore be confined strictly to the grounds of appeal as set out in complainants' brief.

1. Complainants set out for their first ground or reason of appeal that the Court erroneously construed the last will and testament of Michael B. Shannon, deceased. Defendants contend that the said will has been properly construed by the court and has given the proper meaning to said last will and testament as in-

tended by Michael B. Shannon, deceased. A will is said to be ambulatory and takes effect only at the time of the death of the testator: when ambiguity appears in a will or the meaning is not clear the Court will construe the said will to give it the intent of the testator. This intent is to be gathered from the will as a whole or any extraneous facts assisting the Court to arrive at a proper meaning of said will. In the instance at bar it is the contention of counsel for defendants that the Court has properly construed said will, giving the meaning thereto as intended by the testator.

2. The second ground of appeal sets out that the Court of Chancery erred in that it does not construe the said last will and testament of the said Michael B. Shannon, deceased, so that the entire estate may be divided equally, share and share alike, between the complainants, James Shannon and Jennie M. Shannon, who were the only surviving children of the said Michael B. Shannon, deceased, at the time of taking effect of said last will and testament. The whole difficulty in said will arises in the interpretation of the phrase "My surviving children or their heirs," as embodied in the will of Michael B. Shannon, deceased. Had the testator stopped at the words "my surviving children" and had not added the words "or their heirs" the meaning would have been clear. There can be no heirs of the living until after their death; therefore the testator meant to convey to the heirs of deceased children. If the position of complainant was tenable then the heirs or children of the surviving children might have a right equally with them to the estate. The fact must not be forgotten that Michael B. Shannon, deceased testator, was very friendly with his son Michael J. Shannon and his infant children, the defendants herein.

3. The third ground of appeal sets out that the Court erred in allowing a counsel fee of three hundred dollars to Marshall Miller, solicitor of the defendants. It seems to me that this objection is not well founded. The complainants filed a bill in the Court of Chancery

for construction of the said last will and testament of Michael B. Shannon, deceased, evidently being a doubt in their mind as to the meaning of the said last will and testament of deceased. The minor children were made defendants therein and brought into Court by complainants. The defendants herein and minor children of Michael J. Shannon, deceased, had a right beyond question to appear in court by counsel and ask the Court to protect their interest therein. Furthermore, being infants, their interest should be jealously guarded. There would have been no reason to file this bill in the Court of Chancery for construction of the said will if the meaning of said will was so clear as complainants now contend it is. Counsel for defendants insist that the defendants, minor children, had a right and it was their duty to ask the Court for protection and undoubtedly it should be allowed, their costs and counsel fee, irregardless of what the outcome may be. Counsel for defendants insists that the Court of Chancery has properly construed said last will and testament.

It is respectfully submitted that the order and decree appealed from should be sustained.

MARSHALL MILLER,
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