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BILL.

(Filed Aug. 18, 1921.)

IN CHANCERY OF NEW JERSEY.

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

10

The complainant, Philip Marot, of the Borough
of Swarthmore, Delaware County, Pennsylvania,
surviving executor and trustee of the last will of
Benjamin Franklin Leeds, deceased, respectfully
shows that:

(1) Said Benjamin Franklin Leeds, a resident
of Hackettstown, Warren County, New Jersey, died
on February 21, 1906, leaving a last will and testa-
ment, bearing date December 28, 1905, and a codicil 20
thereto, bearing date February 12, 1906, which will
was proved before the Ordinary of the State of New
Jersey, and admitted to probate on July 17, 1906.
A true copy of said will and codicil are hereto an-
nexed and made a part hereof.

(2) Said Benjamin Franklin Leeds in his will ap-
pointed his brother, Josiah W. Leeds, and the com-
plainant, his cousin, the executors of his will, and
on January 17, 1906, letters testamentary were is- 30
sued to them as such executors by the Register of
the Prerogative Court of the State of New Jersey,
and they took upon themselves the burden of admin-
istration of said estate.

(3) The first account of said executors, which ex-
tended to February 21, 1907, was duly allowed by

the Orphans' Court of the County of Warren, in the State of New Jersey, on June, 1907. On or about August 3, 1908, said Josiah W. Leeds died, leaving a last will and testament wherein he appointed Austin C. Leeds, John B. Leeds and Sarah B. Leeds, his executors and letters testamentary were duly issued to said executors of Josiah W. Leeds, by the Register of Wills of the County of Chester and State of Pennsylvania. A second account, extending from
10 February 21, 1907, to August 3, 1908, the date of the death of said Josiah W. Leeds, was filed by complainant as surviving executor of Benjamin Franklin Leeds, and by the said executors of Josiah W. Leeds, deceased, and was duly allowed by said Warren County Orphans' Court on July 2, 1909. The third account, extending from August 3, 1908, to August 3, 1913, was filed by complainant as surviving executor and trustee of Benjamin Franklin Leeds, deceased, and was allowed by said Warren
20 County Orphans' Court on April 28, 1914.

(4) Said Benjamin F. Leeds, in his will, gave an annuity of \$300 per year to the children of Irena Bassett and the daughter and daughter-in-law of said Franklin Bassett, the amount of which was to be divided annually among said children, daughter and daughter-in-law. The children of Irena Bassett are Rene Bassett, of West Chester, Pennsylvania; Evan Bassett, of Norristown, Pennsylvania, and
30 Clara B. Stephenson, of Collegeville, Montgomery County, Pennsylvania, the last of whom has since married one Jackson. The daughter of said Franklin Bassett was Helen B. McCurdy, who died on June 3, 1908, intestate, leaving her surviving, a husband, Norris S. McCurdy, and one child, Helen L. McCurdy, who is a minor. The daughter-in-law of said

Franklin Bassett is Miranda D. Bassett, of Weldon, Pennsylvania. Said Evan Bassett assigned his interest in said annuity to his mother, Sarah Bassett, who died in October or November, 1918, intestate, and no letters of administration have been issued upon her estate. She left as her heirs-at-law the said Rene Bassett, Evan Bassett and Clara B. Jackson. Norris S. McCurdy assigned his interest in said annuity to Mary J. Bassett, of Weldon, Pennsylvania, and said Mary J. Bassett is the duly appointed guardian of said minor, Helen L. McCurdy, who resides with her said guardian. 10

(5) Said Benjamin Franklin Leeds also gave to Anna Zillah Hadley, of Honolulu, Hawaii, in his will, an annuity of \$35 per month for the period of fifteen years, or less, if death so determined.

(6) Said period of fifteen years from the death of Benjamin Franklin Leeds terminated on February 21, 1921, and all of said annuitants have been paid in full, except that the annuity which was given to said Evan Bassett and assigned by him to said Sarah Bassett, has not been paid since the death of the said Sarah Bassett. Since February 21, 1921, the income from the said estate of Benjamin Franklin Leeds, deceased, which was paid to said annuitants above-mentioned, has been accumulating in the hands of the complainant. Said Benjamin Franklin Leeds also gave in his will an annuity of \$60 per month to Sarah Arletta Packard, of Brockton, Massachusetts, for the term of her natural life. She is still living. 20 30

(7) Complainant and said executors of said Josiah W. Leeds, deceased, have been entitled to the

surplus net income of the estate of Benjamin Franklin Leeds, deceased, after the payment of the annuities above mentioned.

(8) On about October 6, 1910, the complainant, as surviving executor and trustee, was compelled to pay the sum of \$160.83 for street paving at the property of said testator at San Jose, California, and which he gave in his will to the twin sons of his deceased cousin, Sallie Bassett Houston, who are
10 George Houston and Walter Houston. Said property at San Jose, California, was sold in the latter part of 1914, and the proceeds of the sale of said property, amounting to the sum of \$750, was received by complainant on or about December 11, 1914, and the same was paid to the said George Houston and Walter Houston on or about March 7, 1917. Interest on said sum of \$160.83 has been transferred from the income of said estate to the corpus from October
20 6, 1910. Said George Houston and Walter Houston reside in Philadelphia, Pennsylvania.

(9) On or about September 11, 1920, complainant was compelled to pay assessments for underdraining the houses and premises known as Nos. 109, 111, 113 and 115 Centennial Avenue, in Camden, New Jersey, to the amount of \$181.74.

(10) Said Benjamin Franklin Leeds died seized
30 of real estate situated in Hackettstown and Camden, New Jersey, and Philadelphia, Pennsylvania, in addition to the real estate which he devised to the twin sons of Sallie Bassett Houston, and situated in California and North Carolina. The personal estate of said Benjamin Franklin Leeds is all or nearly all invested in securities.

(11) Complainant, since the death of said Josiah W. Leeds, has received additional sums of the corpus of said estate, upon which he has received no commission.

(12) The following legatees mentioned in the will of Benjamin Franklin Leeds, deceased are still living:

Juliet Hellings Bassett, of Yardley, Pennsylvania.

Emma Burrows Leeds, of Springfield Township, 10
Delaware County, Pennsylvania.

Mary Anna Bassett Griscom, of Frankford, Philadelphia, Pennsylvania.

Sarah Bassett Leeds, Jr., of West Chester, Chester County, Pennsylvania.

Mary Bassett Leeds, of West Haddonfield, New Jersey.

Lucy Margaret Leeds Bacon, of Haddonfield, New Jersey.

Margaretta Reed Leeds, of West Chester, Chester 20
County, Pennsylvania.

Lydia P. B. Leeds, wife of Austin Crenshaw Leeds, of Wallingford, Delaware County, Pennsylvania.

Alice C. H. Leeds, wife of John Bacon Leeds, of Germantown, Philadelphia, Pennsylvania.

Ruth Dalton Leeds Brown, of Germantown, Philadelphia, Pennsylvania, and

Elizabeth Digby Leeds Reid, of New York City, New York, who are the children of testator's 30
brother, Albert Leeds.

William M. Pepper and Ellen Schulz Pepper, of Gainesville, Florida.

Charles W. Pepper, who is insane, and is confined in the Asylum for the insane at Norristown, Pennsylvania.

Harriet French Pepper Smith, of Quitman, Georgia.

The last-mentioned four persons are the children of testator's cousin, E. I. D. Pepper.

Edward H. Marot, son of testator's cousin, Samuel Marot, of Detroit, Michigan.

Edith Bassett Moore, of Haverford, Pennsylvania.

George P. Bassett, of Jenkintown, Pennsylvania.

Roland M. Bassett, of New York City, New York.

10 The last-mentioned three persons are the children of testator's cousin, Josiah Bassett.

Clara Louise Humeston Mort, whose residence is Don Luis, Arizona.

Elizabeth Marot died intestate on January 12, 1921, and the complainant is administrator of her estate.

Mary Pepper Heald, died intestate in 1913, leaving as her only heir-at-law, Edith Heald, of Philadelphia, Pennsylvania. No letters of administration have been taken out upon her estate.

20 Emeline Griscom Marot died leaving a will, and Ada B. Marot, of Swarthmore, Pennsylvania, is her executrix.

Caroline Stucker Bassett died intestate, leaving her surviving as her heirs-at-law, her husband, Nathan Bassett, of Philadelphia, Pennsylvania, and her seven children, Walter Bassett, Beulah Bassett Kempe, George Bassett, Gertrude L. Bassett, Amelia Leeds Bassett, Laura Martin Bassett and Nathan Bassett, Jr., all of Philadelphia, Pennsylvania. No letters of administration have been issued upon her estate.

30 Louise M. Pepper died on August 18, 1919, leaving a will, and Mabel Maxwell French, of Hammon- ton, New Jersey, and J. Barton Rettew, of Philadelphia, Pennsylvania, are her executors. She was the unmarried daughter of Samuel Warren Pepper.

James A. O'Conner, mentioned in testator's will, is deceased.

Christ's Mission, also mentioned in said will, is an incorporated religious society, and its office is located at No. 331 West 57th Street, New York City, New York.

(13) Deborah Crenshaw Leeds, of West Chester, Pennsylvania, is the widow and the following nephews and nieces are the only heirs-at-law, of the said Benjamin Franklin Leeds, deceased: 10

Austin Crenshaw Leeds, of Wallingford, Delaware County, Pennsylvania.

John Bacon Leeds, of Germantown, Philadelphia, Pennsylvania.

Sarah Bassett Leeds, Jr., of West Chester, Chester County, Pennsylvania.

Margaretta Reed Leeds, of West Chester, Chester County, Pennsylvania,

Lucy Margaret Leeds Bacon, of Haddonfield, New Jersey, who are the children of said Josiah W. Leeds, a deceased brother of said testator. 20

Ruth Dalton Leeds Leeds Brown, of Philadelphia, Pennsylvania.

Elizabeth Digby Leeds Reid, of New York City, New York, who are the children of Albert Leeds, a deceased brother of said testator.

(14) Complainant desires to file another account in said estate but it is necessary that portions of said will of Benjamin Franklin Leeds, deceased, should be construed and that complainant should have instruction and direction of this Honorable Court regarding the discharge of his duties as such surviving executor and trustee. 30

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

(1) That Rene Bassett, Evan Bassett, Clara B. Jackson, Helen L. McCurdy, Miranda D. Bassett, Mary J. Bassett, guardian of Helen L. McCurdy, Anna Zillah Hadley, Sarah Arletta Packard, Austin Leeds, John Bacon Leeds and Sarah B. Leeds, executors of Josiah W. Leeds, deceased, Juliet Hellings Bassett, Emma Burrows Leeds, Mary Anna Bassett Griscom, Sarah Bassett Leeds, Jr., Mary Bassett Leeds, Lucy Margaret Leeds Bacon, Margaretta Reed Leeds, Lydia P. B. Leeds, Alice C. H. Leeds, Ruth Dalton Leeds, Ruth Dalton Leeds Brown, Elizabeth Digby Leeds Reid, William M. Pepper, Ellen Schulz Pepper, Charles W. Pepper, Harriet French Pepper Smith, Edward H. Marot, Edith Bassett Moore, George P. Bassett, Roland M. Bassett, Clara Louise Humes-ton Mort, Edith Heald, Ada B. Marot, executrix of Emeline Griscom Marot, deceased, Nathan Bassett, Walter Bassett, Beulah Bassett Kempe, George Bassett, Gertrude L. Bassett, Amelia Leeds Bassett, Laura Martin Bassett, Nathan Bassett, Jr., Mabel Maxwell French and J. Barton Rettew, executors of Louise M. Pepper, deceased, Christ's Mission, Deborah Crenshaw Leeds, Austin Crenshaw Leeds and John Bacon Leeds, George Houston and Walter Houston, who are the defendants in this suit, may answer this bill of complaint without oath and each statement therein made:

(2) That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and abide by such decree as this Court may make in the premises.

(3) That a decree may be made by this Honorable Court construing said will of Benjamin Franklin Leeds, deceased, and giving to the complainant the

instruction and direction of the Court upon the following points relating to the execution of the trusts declared in said last will:

(a) Shall the real estate of which the said Benjamin Franklin Leeds died seized be sold at this time and converted into money?

(b) If said real estate shall now be sold, in what manner can the complainant be authorized to sell the real estate situated in the State of New Jersey. 10

(c) Shall a sufficient sum be set aside out of the corpus of said estate, the income of which shall be used to pay the annuity given by said testator in his will to said Sarah Arletta Packard, and, if so, what sum shall thus be set aside, and in what manner shall the costs of administration be met and what shall be the compensation of the complainant for conserving, administering and investing said sum and paying over said annuity? 20

(d) Shall the balance of the corpus of said estate be distributed at this time among the legatees mentioned in said will, and in what manner shall such distribution be made?

(e) Shall the securities of the estate, except such as are set aside to provide for said annuity of Sarah Arletta Packard, be converted into money for the purpose of making such distribution? 30

(f) If said real estate and securities shall not now be converted into money, and a sum shall not be set aside to provide for the annuity of Sarah Arletta Packard, shall complainant continue to invest the corpus of the personal estate, and collect the

income from the entire estate, both real and personal, and who are entitled to the surplus of the net income of said estate over and above the amount necessary to pay said annuity of said Sarah Arletta Packard?

10 (g) Shall complainant continue to transfer from the income to the corpus of the estate, the interest on said sum of \$160.83 paid for street paving on the property at San Jose, California?

(h) If complainant shall not continue to transfer such interest from the income to the corpus of the estate, shall the interest on said sum of \$160.83 that has already been transferred from income to corpus be transferred back to income?

20 (i) Shall the complainant transfer interest on \$181.74 paid for underdraining at the property in Camden, New Jersey, from the income to the corpus of the estate, and if so, for how long a time shall he transfer the same?

(j) Is the complainant entitled to commissions upon the additional corpus that has come into his hands since the death of Josiah W. Leeds, and, if so, to what commissions is he entitled, and are the executors of Josiah W. Leeds, deceased, entitled to any portion thereof?

30 (k) Have the legacies of the above-mentioned deceased legatees lapsed?

(l) If their legacies have not lapsed, who are entitled to receive their respective legacies?

O. D. McCONNEL,
*Solicitor for and of Counsel with
Complainant.*

COPY OF WILL OF B. FRANKLIN LEEDS,
DECEASED.

This writing is the last will and testament of Benjamin Franklin Leeds, a native of the City of Philadelphia, and now a resident of northern New Jersey.

I give to my cousin Elizabeth Marot, daughter of William and Deborah Marot, two thousand (2000) dollars.

10

I give to my cousin Mary Pepper Heald, daur. of Henry J. and Sarah Bassett Pepper, two thousand (2000) dollars.

I give to my cousin Juliet Hellings Bassett widow of my cousin Cranville Bassett, two thousand dollars (2000).

I give to my Cousin, Emeline Griscom Marot, 20 widow of my Cousin William Marot, Jr., two thousand (2000) dollars.

I give to my cousin, Emma Burrows Leeds, daur. of Japheth and Emma Maria Hampton (Burrows) Leeds, two thousand (2000) dollars.

I give to my cousin Caroline Stucker Bassett, wife of my cousin cousin Nathan Bassett two thousand (2000) dollars.

I give to my cousin, Mary Anna Bassett Griscom, daugh. of Mark S. and Margery Ann Bassett two 30 thousand (2000) dollars.

I give to my cousin, Mary Bassett Leeds daur. of Japheth and Emma M. H. B. Leeds, two thousand (2000) dollars.

I give to my niece, Sarah Bassett Leeds, Jr., two thousand (2000) dollars.

12 *Copy of Will of B. Franklin Leeds,
Deceased*

I give to my niece, Lucy Margaret Leeds, two thousand (2000) dollars.

I give to my niece Margaretta Reed Leeds two thousand (2000) dollars.

I give to the wife of my nephew, Austin Crenshaw Leeds, two thousand (2000) dollars.

I give to the wife of my nephew John Bacon Leeds, two thousand (2000) dollars.

10 I give to my brother Alberts two children (daughters) one hundred (100) dollars each.

I give to the children of my cousin E. I. D. Pepper two thousand (2000) dollars, to be equally divided amongst them.

I give to my cousin Samuel Marot's son one thousand dollars, Samuel Marot deceased.

I give to the unmarried daughter of my cousin Samuel Warren Pepper five hundred (500) dollars.

20 I give to the children of my cousin Josiah Bassett son of Josiah and Susan (Levick) Bassett two thousand (2000) dollars.

I give to the twin sons of my deceased cousin Sallie (Bassett) Houston the lot in Wildomar, Riverside Co., California once owned by their mother and also a lot I own in the town of Asheville, Nor. Carolina, also whatever cash may be realized by my executors from the sale of lots now owned by me in the C. and D. tract, outskirts of San Jose, Califa.

30 I give to my friend, James A. O'Connor for Christ's Mission one thousand dollars (1000) Christ's Mission is in New York City at 142 West 21st St.

I give to my friend Clara Louise (Humeston) Mort, one thousand (1000) dollars.

Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end)

These annuities are: One to Sarah Arletta Packard for the sum of sixty (60) dollars monthly to continue during her life and to be for her own use only.

Another, to Anna Zillah Hadley for thirty-five dolls. (\$35.) monthly to cover a period of fifteen (15) years, or less if death do determine.

A third to the children of Irena Bassett (son of Mark S. Bassett) and the daughter and daughter-in-law of Franklin Bassett (son of Mark S.) the amount of which would be divided annually amongst the said children daughter and daughter-in-law. 10

This 3rd annuity would yield about \$300 a year, the probable interest upon six thousand for a period of fifteen years.

Any income my estate may yield in addition to the amounts of the annuities above-mentioned whilst the annuities are still running, is to be equally divided between my executor. And I herewith appoint my brother Josiah W. Leeds and my cousin Philip Marot, of Swarthmore, Pa., son of Wm. Marot, Jr., the executors of this my last will, made this twenty eighth (28) day of the 12 mo. (Decemr. 1905) both trustees renouncing all interest in the property bequeathed except as executors. 20

Before signing I will make this following note: In case of the death of either of the first two annuitants the principal sum from which the income of the annuity was derived shall be at once divided amongst those to whom it was willed. 30

And this additional note both notes having been written before the signing: the wording of this will is altogether the work of B. F. Leeds, who will say, however, that it was glanced over, when completed by a lawyer and approved by him.

The following were witnesses
to the signing:

Francis A. Brimblecom

B. Franklin Leeds.

Lucy A. Brimblecom

Codicil.

Feb. 12, 1906.

It is my will that the above three (3) annuities shall commence immediately after my decease and also that any indebtedness I may have contracted be promptly paid from the proceeds of my estate.

10 The signature of B. F. Leeds is

witnessed by me

B. F. Leeds.

Chas. E. Cox.

ANSWER.

(Filed Nov. 14, 1921.)

20

IN CHANCERY OF NEW JERSEY.

Joint and Several Answer to the Bill in Chancery of Philip Marot, surviving executor and trustee of the last will of Benjamin Franklin Leeds, deceased, by and on behalf the defendants herein-after named.

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

30

These defendants, answering say they admit that the rights and interests of the several parties defendant named in the said bill of complaint, under the said will, are, to the best of their knowledge, truly stated and set forth in said bill.

And these defendants submit themselves to such decree as the Court may make in the premises, for

interpretation of the said will, and for instruction to the representatives of the testator.

Julia Hellings Bassett,
Emma Burrows Leeds,
Sarah Bassett Leeds, Jr.,
Mary Bassett Leeds,
William M. Pepper,
Ellen Schulz Pepper,
Harriet French Pepper Smith,
Edith Bassett Moore, 10
Roland M. Bassett,
Clara Louise Humiston Mort,
Ada B. Marot, executrix under the
will of Emeline Griscom Marot,
decd.

By CARR & CARROLL,
Solicitors.

20

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

10	PHILIP MAROT, surviving executor and trustee of BENJAMIN FRANKLIN LEEDS, deceased, <i>Complainant,</i> and RENE BASSETT, <i>et als.</i> , <i>Defendants.</i>	}	On Bill, &c. Final Hearing.
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20 Before his Honor, E. B. LEAMING, Vice-Chancellor,
 at the Chancery Chambers, Camden, New Jersey, on
 Monday, March 13th, 1922.

APPEARANCES:

O. D. McCONNEL, Esq., for complainant.
 CARR & CARROL, Esqs., for Juliet Hellings Bassett,
 Emma Burrows Leeds, Sarah Bassett Leeds,
 30 Jr., Mary Bassett Leeds, William M. Pepper,
 Ellen Schulz Pepper, Harriet French Pepper
 Smith, Edith Bassett Moore, Roland M. Bassett,
 Clara Louise Humiston Mort, Ada B. Marot,
 executrix under the will of Emeline Griscom
 Marot, deceased, Nathan Bassett, Ruth Leeds
 Brown, Elizabeth Leeds Reed, and Franklin M.
 Potts, trustee of Albert R. Leeds, deceased.

NINA S. RITTER, SWORN.

Direct examination.

By Mr. McConnel:

Q. Miss Ritter, you live in Philadelphia?

A. No; I live in Norristown, Pennsylvania.

Q. I show you a paper dated December 5th, 1913, 10
purporting to be signed by Evan Bassett, and I ask
you if you were present when Evan Bassett signed
that paper?

A. I was.

Q. Did you see him sign it?

A. Well, I presume I will have to amend that. I
don't know at this date whether I saw him sign it
or whether some one brought him into my office and
I took his acknowledgment, it does so often happen,
but if I didn't see him sign it I evidently asked him 20
if he had signed it, I am sure of that, and I rather
think the paper was prepared in Henry I. Fox's
office, I think I recognize —

Q. Are you employed by him?

A. Yes, I am employed by him, and I think that
was prepared in our office, I won't say positively but
I think so, because it is the way I prepare my papers,
it is marked like my typewriting.

Q. You know that is your signature as a subscrib-
ing witness? 30

A. That is my signature, that is my seal.

Q. You are positive that Evan Bassett either
signed that in your presence or acknowledged that
to be his signature?

A. Positive, yes.

Q. And that afterwards you signed it as subscrib-
ing witness—is that correct?

A. Yes.

Q. And took his acknowledgment?

A. Yes.

Q. Was George W. Grubb present at the same time?

A. Yes.

Q. And did he sign it also as a subscribing witness?

A. Yes, he spoke to me about it three or four days ago and said he had heard from Mr. Garrett and he said —

Q. Yes, that is all right, just the fact that he signed it also.

Mr. McConnel: That is all, unless counsel has some cross-examination.

Mr. Carroll: No.

20 Mr. McConnel: We will offer this paper for identification at this time.

(Said paper marked Exhibit C1 for identification.)

At this point a recess was taken until two o'clock P. M.

Hearing of the cause resumed after recess, in the presence of the counsel for the respective parties heretofore noted.

PHILIP MAROT, SWORN.

Direct examination.

By Mr. McConnel:

10

Q. Mr. Marot, where do you live?

A. Swarthmore, Pennsylvania.

Q. And you are the complainant in this suit?

A. Yes, sir.

Q. And are surviving executor and trustee under the last will of Benjamin Franklin Leeds, deceased?

A. I am.

Q. When did Benjamin Franklin Leeds die?

A. February 21st, 1906.

20

Q. February 21st, 1906?

A. Yes.

Mr. McConnel: At this juncture we will offer in evidence a certified copy of the will and the original letters testamentary issued by the Ordinary, William J. Magie.

(Said papers marked Exhibit C2.)

Q. Mr. Marot, you filed a first account in Warren County before the Orphans' Court?

30

A. Yes.

Mr. McConnel: I offer a certified copy of the first account.

(Said paper marked Exhibit C3.)

Q. After filing the first account did Josiah W. Leeds, your co-executor, die?

A. Yes.

Q. And what was the date of his death?

A. August 3d, 1908.

Mr. McConnel: I offer in evidence an exemplified copy of the petition and a certificate of probate
10 of the will of Josiah W. Leeds with letters testamentary to his executors annexed.

(Said papers marked Exhibit C4.)

Q. These executors, Mr. Marot, were Austin C. Leeds, John B. Leeds and Sarah B. Leeds?

A. Yes, sir.

Q. And you filed a second and third account also?

20 A. Yes.

Mr. McConnel: I offer in evidence the second account filed in this estate, if your Honor please.

(Said paper marked Exhibit C5.)

Mr. McConnel: And also the third account which was filed by Philip Marot, as surviving executor and trustee.

30 (Said paper marked Exhibit C6.)

Q. Who were the children of Irena Bassett mentioned in the will?

A. Rene Bassett.

Q. And give their residences.

A. West Chester, Pennsylvania. And Evan Bassett, a son, formerly Norristown, I don't know his present address. And Clara B. Stephenson Jackson, Collegeville, Pennsylvania.

Q. And who was the daughter of Franklin Bassett mentioned in the will?

A. Helen C. MacCurdy.

Q. And when did she die?

A. June 3d, 1908.

Q. Did she leave a will?

10

A. No.

Q. Who did she leave surviving her?

A. Norris S. MacCurdy, and a daughter, Helen L. MacCurdy.

Q. Norris S. Bassett was her husband.

A. Her husband.

Mr. McConnel: We offer an exemplified copy of the letters of guardianship of Mary J. Bassett, guardian of Helen L. MacCurdy, a minor.

20

(Said paper marked Exhibit C7.)

Mr. McConnel: I already have put in evidence the assignment by Evan Bassett of his interest in this annuity to his mother, Sarah J. Bassett.

Q. When did Sarah J. Bassett die?

A. Sarah T. Bassett.

Q. Sarah T. Bassett that is.

A. Died in October or November, 1918.

30

Q. Did she leave a will?

A. No.

Q. What children did she leave and heirs-at-law?

A. Rene Bassett and Evan Bassett and Clara B. Stephenson mentioned.

Q. Rene?

A. Rene.

Q. Who was the daughter-in-law of Franklin Bassett, mentioned in the will?

A. The daughter-in-law of Franklin Bassett was Miranda D. Bassett, Weldon, Pennsylvania, her address.

Q. Is Sarah Arletta Packard, one of the annuitants mentioned in the will, still living?

10 A. So far as we know, yes.

Q. And where does she live?

A. Brockton, Massachusetts.

Q. Do you know whether the payments are still being made to her?

A. Yes, sir.

Q. Well, are you certain that she is still living?

A. At the last accounts, we haven't heard of her death; the checks have been returned signed.

20 Q. Now, will you give us a list of the living legatees mentioned in the will, together with their residences?

Mr. McConnel: If your Honor please, if I could ask him whether they are correctly recited in the bill we would save time.

The Vice-Chancellor: I think that will answer just as well.

30 A. As given in the will?

Q. As given in the bill in chancery here.

A. Yes; that was in evidence before, at the other case.

Q. No; this is the bill filed in this case.

A. Yes.

Q. You have them there?

A. I have the list here, yes.

Q. You might just read the list.

A. Juliet Hellings Bassett, Yardley, Pennsylvania. Emma Burrows Leeds, Springfield Township, Delaware County, Pennsylvania, post office R. F. D. 3, Media. Sarah Bassett Leeds, Jr., West Chester, Chester County. Mary Bassett Leeds, West Haddonfield, New Jersey. Lucy Margaret Leeds Bacon, Haddonfield, New Jersey. Margaretta Reed Leeds, of West Chester, Chester County. Lydia P. B. Leeds, wife of Austin Crenshaw Leeds, Wallingford, Delaware County, Pennsylvania. Alice C. H. Leeds, wife of John Bacon Leeds, Germantown, Philadelphia, 304 West School Lane. Ruth Dalton Leeds Brown, of Germantown, Philadelphia, Pa., and Elizabeth Digby Leeds Reid, of New York City, New York, children of testator's brother, Albert Leeds. William M. Pepper and Ellen Schulz Pepper, of Gainesville, Florida. Charles W. Pepper, who is insane, confined in the Asylum for the Insane, Norristown, Pennsylvania. Harriet French Pepper Smith, of Quitman, Georgia. The last-mentioned four persons are the children of testator's cousin, E. I. D. Pepper. Edward H. Marot, son of testator's cousin, Samuel Marot, of Detroit, Michigan. Edith Bassett Moore, of Haverford, Pennsylvania. George P. Bassett, of Jenkintown, Pennsylvania. Roland M. Bassett, of New York City. The last three are the children of Josiah Bassett, testator's cousin. Clara Louise Hummeston Mort, whose residence is Don Luiz, Arizona. Mary Anna Bassett Griscom I haven't seen in this list; that is one of those reported to be alive; she died on March 7th.

Q. March 7th, 1922?

A. Yes.

Q. After the filing of this bill?

A. Just a few days ago.

Q. Now, who are the deceased legatees outside of Mary Anna Bassett Griscom?

A. Elizabeth Marot died intestate January 12th, 1921.

Q. Are you administrator of her estate?

A. No; my sister, Ada B. Marot.

Mr. McConnel: Letters of administration upon
10 the estate of Elizabeth Marot are offered in evidence.

(Said papers marked Exhibit C8.)

Q. Mary Pepper Heald?

A. Died in 1913.

Q. With or without a will?

A. I don't know the exact date. Beg pardon?

Q. With or without a will?

20 A. Without a will, intestate.

Q. Any letters of administration upon her estate?

A. No letters of administration.

Q. And who did she leave in the way of heirs-at-law?

A. One daughter, Edith Heald.

Q. And her husband?

A. Her husband, yes. I hadn't Edith Heald's residence—in a West Philadelphia apartment house.

Q. Emeline Griscom Marot?

30 A. She died, I cannot give that date offhand.

Q. About how long ago?

A. Mr. Garrett has it—I don't know whether he has or not; it has been about—something like six years ago, it has been more than that.

Q. Letters testamentary issued in 1910?

A. 1910, yes, about ten years ago, that is correct, Ada B. Marot is her executrix.

Mr. McConnel: We offer letters testamentary with certified copy of will of Emeline Griscom Marot.

(Said papers marked Exhibit C9.)

Q. Caroline Stucker Bassett?

A. I haven't the date of her death.

Q. Do you know about how long ago she died?

A. No, I do not; I had no record of that, even at 10 the time; I didn't know of it until years afterward; it has been quite a number of years ago.

Q. Did she leave any will?

A. No.

Q. Was any administrator appointed on her death?

A. No letters, no.

Q. Did she leave a husband?

A. Husband, Nathan Bassett.

Q. Of what city?

20

A. Philadelphia.

Q. And how many children?

A. Seven children.

Q. What are their names?

A. Walter Bassett, Beulah Bassett Kempe, George Bassett, Gertrude L. Bassett, Amelia Leeds Bassett, Laura Martin Bassett and Nathan Bassett, Jr., all of Philadelphia.

Q. Louise M. Pepper?

A. Died August 18th, 1919.

30

Q. Leaving a will?

A. Will, Mabel Maxwell French, of Hammonton, New Jersey, and J. Barton Retou, of Philadelphia, executors.

Q. Now, she was the unmarried daughter of Samuel Warren Pepper mentioned in the will?

A. Yes, correct.

Mr. McConnel: I offer letters testamentary with certified copy of the will annexed in the estate of Louise M. Pepper.

(Said papers marked Exhibit C10.)

Q. Is the widow of Josiah W. Leeds still alive, or not?

10 A. No, she died; I haven't the date of her death—February 21st.

Q. This year?

A. Yes.

Q. What was her name?

A. Deborah Crenshaw Leeds.

Q. Now, who were the heirs-at-law of Benjamin Franklin Leeds?

20 A. Austin Crenshaw Leeds, Wallingford, Delaware County, Pa.; John Bacon Leeds, of Germantown, Philadelphia; Sarah Bassett Leeds, Jr., West Chester, Chester County; Margaretta Reed Leeds, of West Chester, Chester County; Lucy Margaret Leeds Bacon, of Haddonfield, N. J. Those are the children of said Josiah W. Leeds. Ruth Dalton Leeds Brown, of Philadelphia, and Elizabeth Digby Leeds Reid, of New York City, who are children of Albert Leeds, deceased, brother of the testator.

Q. Deceased brother of Benjamin Franklin Leeds?

A. Benjamin Franklin Leeds.

30 Mr. McConnel: That is all I wanted to ask Mr. Marot. Are there any questions?

Cross-examination.

By Mr. Carroll:

Q. Are you able to tell us what the corpus of the estate is approximately worth?

A. About forty-four thousand.

Q. \$44,000?

A. Yes; that is comprised of the assessed valuation of real estate about \$14,700, and ground rents at \$5,741.67, and bonds quoted at par, \$5,500, mortgages \$14,750, and cash at \$3,332.98. 10

Q. So that the corpus of the estate is more than enough to pay the lagacies?

A. Oh, yes.

Q. Now, what income was derived from the estate during the year 1921, approximately?

A. 1921—well, from February 21st, 1921, to March 1st, 1922, the income was \$2,914.29. 20

Q. More than enough to take care of the annuitants?

A. Yes.

ALBERT N. GARRETT, affirmed.

Direct examination.

30

By Mr. McConnel:

Q. Mr. Garrett, you are an attorney-at-law of Philadelphia, Pennsylvania?

A. Yes, sir.

Q. And for how many years have you been in charge of the collecting of the income and making

disbursements from the estate of Benjamin Franklin Leeds?

A. Since 1909.

Q. I show you a paper purporting to be signed by Norris S. MacCurdy, and will ask you if Norris S. MacCurdy signed that paper in your presence?

A. Yes, sir; I took that paper to Camden and procured his signature.

10 Q. And did you at the same time at his request sign your name as subscribing witness?

A. I did.

Q. And that is your signature as subscribing witness on that paper?

A. Yes, sir.

Mr. McConnel: That is the assignment of Norris S. MacCurdy's interest in the third annuity.

(Said paper marked Exhibit C11.)

20 The Vice-Chancellor: That is one of the two that has expired?

Mr. McConnel: That is one of the two that has expired, yes.

Q. Mr. Garrett, have all of the annuitants mentioned in the second and third annuities under the will of Benjamin Franklin Leeds been paid in full or not?

30 A. They have been paid in full with the exception of the annuity originally given to Evan Bassett, which was assigned by him to his mother.

Q. Sarah T.?

A. Sarah T. Bassett, who died in the fall of 1918, intestate, no letters were taken out of her estate. I

advised Mr. Marot to stop payment until such time as a personal representative would be appointed. No personal representative has been appointed up to the present time, so that under that annuity there is due \$150 from August 3d, 1918, to February 21st, 1921, two and one-half years.

Q. And have all of the other annuitants under the second and third annuities been paid in full?

A. Yes, sir.

Q. Is Sarah Arletta Packard still living?

10

A. Yes, sir.

Q. And you have been sending her the \$60 per month?

A. Been sending it to her each two months; the last payment was made February 21st, 1922, and the receipt was returned in the ordinary course, signed by the signature which I have always supposed to be hers. I do not know her; I have not seen her.

Q. The same signature that has come back to you all these years?

20

A. Yes; and it coincides with the endorsements on the checks which have been returned drawn on the Girard Trust Company.

Q. Now, the income that was paid to the annuitants under the second and third annuities has been accumulating since February 21st, 1921?

A. Yes, sir.

Q. In addition to the unpaid share to Sarah T. Bassett's estate—is that correct?

A. Yes.

30

Q. And how much does the income that would have been paid to these annuitants amount to since February 21st, 1921, which is fifteen years after testator's death?

A. From February 21st, 1921, to February 21st, 1922, \$2,914.29.

Q. Well, now, that is the total income received?

A. That is the total income, yes. Payments, including \$720 paid to Mrs. Packard, \$1,677.31; balance on hand, \$1,236.98.

Q. After making all payments there is still a balance of income of that much on hand?

A. Yes.

Q. What have you paid besides the annuity to Mrs. Packard?

10 A. Expenses of the taking care of the real estate, taxes, water rent, premium on bond, and so forth.

Q. Now, tell us, Mr. Garrett, about the payment of \$160.83 for an assessment for street pavement at the San Jose, California, property?

Mr. McConnel: If your Honor please, one of the requests for instruction here was regarding the transfer of interest from income to principal, interest on this assessment from the income account to the corpus account, on account of making this assessment. The property in this instance was sold, and the question now arises what shall be done with regard to transferring income to corpus. That is the reason I am asking this question.

The Vice-Chancellor: This California property you say was sold?

30 Mr. McConnel: Yes.

The Vice-Chancellor: By the executor?

Mr. McConnel: By the executor in California.

A. He was called administrator; he was evidently administrator cum testamento annexo.

Q. That is, administrator with the will annexed. What was his name?

A. Charles E. Cox.

Q. Did he sell the San Jose property?

A. Yes, sir.

Q. What did it consist of?

A. It was a house, and then there were two other pieces of real estate in California which were vacant lots, so that there were three pieces of real estate in California.

10

Q. It was a house and lot at San Jose?

A. Yes.

Q. And were there two vacant lots at San Jose?

A. There was a tract which was called the C and D tract, which I understand was on the outskirts of San Jose, and then there was another lot at the place called Wildomar.

Q. That was specifically devised under the will, was it not, to the twin sons of Mrs. Houston?

A. Yes.

20

By the Vice-Chancellor:

Q. That was not sold?

A. That was not sold.

Q. But the other real estate was sold by the California—

A. Yes, both pieces.

Q. Sold by the California administrator?

A. Yes.

30

Q. And what disposition was made of the money?

A. An account was filed and the balance was turned over to Mr. Marot after the account was adjudicated in California.

Q. That is, turned over to the executor?

A. Yes, Mr. Marot, the New Jersey executor.

By Mr. McConnel:

Q. So that the corpus representing the proceeds of the sale of the San Jose house and lot—

A. Yes.

Q. And which this street paving was done for, for which this assessment of \$160.83 was made—was passed over by the California administrator to the complainant in this suit?

10 A. Yes.

The Vice-Chancellor: That is to say, there had been an assessment of benefits?

Mr. McConnel: Benefits for street paving, yes, and that was paid out of the corpus, and interest on that had been transferred from the date of its disbursement from income to corpus.

20 The Vice-Chancellor: Well, I did not understand whether this was paid by the estate to the city or by the city to the estate.

Mr. McConnel: Paid by the estate to the city, with a levy made by the city, for the assessment.

Q. The street paving was done by the city and charged to the estate, was it not?

30 A. Yes; the street paving was done on October 6th, or, rather, we paid for it October 6th, 1910. At that time the California administrator had no cash on hand and he asked us to pay for it, so we forwarded a check to him for \$160.83.

Q. Out of the corpus of the estate?

A. Out of the corpus of the estate.

Q. In the hands of the New Jersey executors?

A. Correct.

By the Vice-Chancellor:

Q. Didn't you have occasion also to pay taxes out there?

A. The California administrator had enough in his hands from the rents he procured from this house to pay the taxes.

By Mr. McConnel:

Q. Now, with regard to the real estate of Benjamin Frankiin Leeds outside of California, state briefly what real estate he was seized of at the time of his death. 10

A. He had two tracts of land, the one at Wildomar and the other which was called on our books lots in the C and D tract, I don't know how many there were.

Q. That was in California?

A. California, yes. 20

Q. You have stated that. Outside of California what real estate did he own at the time of his death?

A. Shall I, to save time, give assessments and rents as I go through them, or would you prefer—

Q. I don't know that the Court cares much about the rents at this time, but if you have it there, briefly, you might as well give it.

A. A farm of some ten acres at Hackettstown, N. J., which is assessed at \$1,600, which was formerly 30
rented for \$10 now rents for \$12.50 per month; four houses in Camden, N. J., as follows: 109 Centennial Avenue, assessment \$1,475, formerly rented for \$9.50, now \$15; 111 Centennial Avenue, assessment \$1,100, former rental \$9, present rental \$15; 113 Centennial Avenue, assessment \$1,050, formal ren-

tal \$9, present rental \$15; 115 Centennial Avenue, assessment \$1,050, former rental \$9, present rental \$15. And the following houses in the City of Philadelphia: 336 North Orianna Street, assessment \$3,000; former rental \$20, present rental \$30; 2516 Federal Street, assessment \$1,500, former rental \$13.50, present rental \$20; 302 West York Street, assessment \$2,200, former rental \$18, present rental \$25; 304 West York Street, assessment \$2,200, former rental \$18, present rental \$25. Total assessments, \$14,775; total present rental per month 10 \$172.50, or annual rental of \$2,070.

Q. Now, what ground rents did he own when he died?

A. I haven't got the list of those that he owned when he died; I can give you those in a moment. I can give you the ones he owns at present.

Q. Give us those.

A. 453 Moyer Street, Philadelphia, a ground rental of \$30 per annum on a principal basis of \$575; 20 two ground rents on properties 1235 and 1237 Carlisle Street.

Q. Philadelphia?

A. Yes. \$1,200 each.

Q. Per year?

A. No, that is the capital value, the amount per year is \$120 on a capital value of \$2,400.

Q. That is \$120 upon both?

A. \$120 upon both, yes, they are \$1,200 each. 1171 30 South 11th Street, a ground rent of \$75 per annum on a capitalization of \$1,500, and on 1179 South 11th Street of \$76 per annum on a capitalization of \$1,266.67. Total ground rents, \$301 per annum; total capitalization, \$5,741.67.

Q. Now, can you tell us how the personal estate is invested and made up?

A. The personal estate consists of certain bonds of corporations which formed a part of the corpus of the estate at the time of the death of testator, with the exception of \$3,500, bonds which came to the estate subsequently by a family settlement from the estate of Sarah B. Leeds. Do you wish me to give the properties on which the mortgages are charged or shall I just give the total?

Q. No, just state where the properties are located.

A. The mortgages are on properties located in Pennsylvania, in New Jersey and in Delaware; they aggregate \$14,750. The corporate bonds which I mentioned a moment ago have a par value of \$5,500.

Q. And is the market value less than the par value?

A. Considerably so, I should say. The bonds are one thousand New Lork Interurban, which I imagine are worth about sixty to seventy; Citizens Water Company, worth probably the same, and \$3,500 Muncy Water, which are of doubtful value, I don't know whether they are worth \$10, they pay their interest about once in two years and are about four or five years in arrears. Then in addition to the bonds and mortgages there is cash on hand, on deposit at the Girard Trust Company, principal account, \$3,332.98, making a total of cash, mortgages and bonds of \$23,382.98.

Q. Of corpus?

A. Of corpus. That is the balance of the amount as originally accounted for in the first, second and third accounts. The ground rents and the real estate have never appeared in the accounts, and this balance has been increased from time to time by certain receipts which the executor has received, namely, the money which he received from the California

administrator, and also some money which he has received from extinguishment of certain of the ground rents which were extinguishable.

Q. Now, has the complainant paid for an assessment for underdraining the houses numbers 109 to 115 Centennial Avenue, Camden, New Jersey?

A. Yes.

Q. Was this assessment made by the City of Camden?

10 A. Yes.

Q. And what is the amount of the assessment that complainant was compelled to pay?

A. The assessments for sewer improvements on the Centennial Avenue properties in Camden, N. J., were paid for as follows: 1920, 7/15, for the actual work of the underdraining, \$876, and the City of Camden for the sewer privilege, \$181.75, making a total of \$1,057.74. The first item was not actually paid to the City of Camden; the City of Camden
20 ordered the estate to underdrain the property, and the estate then procured bids and the lowest bidder was a man named William J. Kelly, so that \$876 was paid to William J. Kelly to do work ordered by the city.

Q. And what date was that paid?

A. That was paid July 15th, 1920.

Q. And when was the assessment of the City of Camden, \$181.74, paid?

A. August 11th, 1920.

30 Q. Have you given us the amount of surplus income that has accrued since the second and third annuities stopped running?

A. Yes; I gave you that at the beginning of my testimony, \$2,914.29, less payments of \$1,677.31, balance \$1,236.98.

Q. Now, does that include the payment of the annuity of Sarah Packard?

A. Yes.

Q. And the net balance is how much?

A. \$1,236.98.

Q. And that has been growing since February 21st, 1921?

A. Yes.

Q. Is the complainant about to file another account?

A. Yes, sir.

Q. You have with you the books and papers showing the facts which you have testified to?

A. Yes.

Q. And also the vouchers for these payments that you have made?

A. Yes.

Mr. McConnel: Unless the Court desires them I will not go into the detail regarding that matter.

Q. Now, Mr. Garrett, do you know of anything else that is necessary to prove the facts alleged in this bill that I have overlooked?

A. Unless you want to go into that Houston transaction, money paid to the Houston heirs.

Q. That does not enter into this question at all.

A. It seems to me there was one other thing.

By the Vice-Chancellor:

Q. Are you able to state—if not perhaps the last witness can—whether all of these legatees to whom legacies were given, money legacies, were alive at the death of testator?

A. I do not know, Mr. Marot may tell us.

Mr. Marot (the complainant): I think that they were all living at the time unless it was Mr. James

A. O'Conner—I know of no one who has died in the will.

Mr. McConnel: There was a legacy to his friend, James A. O'Connor, of Christ's Mission, \$1,000.

The Vice-Chancellor: I understand now that he was alive at the death of the testator?

10 Mr. McConnel: He was alive at the time of the death of the testator.

The Witness: There was one question more, Mr. McConnel, if you will excuse me, the items of corpus which have come into the hands of the executors since the third account has been filed. I have them on a sheet here. If it would help the stenographer I can just give him a copy.

20 Mr. McConnel: With the permission of the Court we can put the statement in evidence.

The Vice-Chancellor: Yes; that will be all right, so I know what question is raised by it. What is the general situation?

30 Mr. McConnel: If your Honor please, the question raised is as to the right of the complainant for commissions on additional corpus coming into his hands since the death of the co-executor and since the allowance of commission on the corpus in the Orphans' Court.

The Vice-Chancellor: You may introduce that into the record by offering it as an exhibit, if you choose.

The Witness: I haven't got an additional copy to give counsel on the other side.

The Vice-Chancellor: Dictate it to the stenographer if you want to keep your copy.

The Witness: I have one more copy but I haven't any for Mr. Carroll.

By Mr. McConnel:

Q. Upon which the complainant has received no commission—you have that statement, Mr. Garrett? 10

A. I have a copy of it.

Q. This is your statement?

A. Yes.

Mr. McConnel: We will offer the statement in evidence.

(Said paper marked Exhibit C11.)

Q. Now, Mr. Garrett, that disposes of all of the facts, does it not? 20

A. I think it does.

Q. All of the facts alleged in the bill with the exception of the death of James A. O'Connor?

A. I think so.

No cross-examination.

JAMES PARKER, SWORN.

Direct examination.

By Mr. McConnel:

Q. Mr. Parker, you reside in Jersey City?

A. Yes, sir.

10 Q. And you are the pastor of what church there?

A. Second United Presbyterian Church.

Q. And what position do you hold with reference to Christ's Mission at 142 West 21st Street, New York City?

A. Christ's Mission is now on 57th Street, New York City.

Q. Was it formerly at 142 West 21st Street?

A. Yes.

20 Q. And what position do you occupy with reference to Christ's Mission?

A. President of the board of trustees.

Q. What position did James A. O'Connor hold during his lifetime?

A. He was superintendent of the mission.

Q. When did he die?

A. Well, I can't give the exact date of his death.

Q. About when did he die?

A. I should say about ten years ago, about 1912.

Q. Did he leave a will?

30 A. He did not.

By the Vice-Chancellor:

Q. Isn't this given to James A. O'Connor for Christ's Mission?

A. Yes.

Mr. McConnel: Yes.

The Vice-Chancellor: Haven't you treated this as a trust?

Mr. McConnel: Yes; that is to say, it is to go naturally to the trustees of the mission on distribution. I wanted to show his death and then show the incorporation.

10

By Mr. McConnel:

Q. He died about ten years ago?

A. About ten years ago.

Q. Christ's Mission is incorporated under the laws of New York, is it not?

A. It is.

Q. I requested you to bring the certificate of incorporation of the mission. Did you find it?

A. I have not. I have here a statement in the official minutes of the organization of the incorporation. It was incorporated in 1848; and I applied to the secretary, who has been in office much longer than I have been president, and the secretary, who keeps all of the papers, could not find the act of incorporation and sent me this minute book as the best evidence of the existence of the corporation.

Q. That is of no use to us, Mr. Parker, as I told you.

30

Mr. McConnel: If your Honor please, in case a distribution is decided upon here, of course I will have to ask the Court's permission to produce an exemplified copy of the certificate of incorporation.

The Vice-Chancellor: Well, I think this witness knows that it is an actual and live organization, and

I apprehend it is of little importance whether it is actually incorporated or not if it is a church organization that is in actual existence and functioning as such.

The Witness: It is.

By the Vice-Chancellor:

- 10 Q. That is the situation, isn't it?
A. Yes.

The Vice-Chancellor: They have their regular officers, and the fact of incorporation I think can be assumed.

Mr. McConnel: That puts in evidence all of the facts alleged in the bill.

- 20 The Vice-Chancellor: Do you answer, Mr. Carroll, for some of the defendants?

Mr. Carroll: Yes, sir; we have answered for a number of the legatees who have been made defendants here. We simply admit the facts in the bill and pray for the instruction of the Court on the questions put up to the Court in the bill for answer by the Court. Our position here, on behalf of the legatees, is that we feel that distribution should be made at this time.

30

Mr. McConnel: If your Honor please, we would like to put in evidence a statement made by Mr. Garrett showing the average excess income for the last seven years.

The Vice-Chancellor: Yes, if that does not appear.

(Said paper marked Exhibit C12.)

The Vice-Chancellor: It may also be made to appear on the record that in addition to this the executors have received through the Orphans' Court in their annual settlements a percentage of the corpus of the estate for their services as executors.

Mr. McConnel: On the first account I think the account will show that.

10

The Vice-Chancellor: That was up to what time?

Mr. McConnel: I think the accounts will show.

The Vice-Chancellor: In the account which I have here, which is the first account, the executors were allowed \$400. On the second account there was added two per cent, amounting to \$32, on additional principal, and on income \$217.46. Now, is there another settlement?

20

Mr. McConnel: There was a third settlement but there is nothing in that except on the income.

The Vice-Chancellor: I do not find in the third account any allowance excepting this item—perhaps I have not examined it carefully enough—balance of income due accountant from the estate of Josiah W. Leeds, as directed by the will of testator, as construed by Vice-Chancellor Leaming 7-29-12, \$2,728.-89. Now, that was the balance of income excess.

30

Mr. McConnel: Accumulating for possibly four or five years. I think that account antedates this statement. I think the bill states from what date to what date each account was allowed.

The Vice-Chancellor: Now, since this C12 have the executors received any commissions?

Mr. McConnel: No commissions whatever; they have received no commissions since the first date in that account. They received commissions in the first settlement but those commissions are much less than they would be calculated at their usual rates, the total commissions would have amounted to
10 about \$700, I think.

The Vice-Chancellor: Then in the second settlement they were allowed no commissions but retained the excess, the accumulations?

Mr. McConnel: That is the third account, yes.

The Vice-Chancellor: This represents what they have received since?

20

Mr. McConnel: If your Honor please, that is so, yes. Now, if your Honor desires, with the consent of Mr. Carroll, we can just read into the record the dates showing the periods covered by these three accounts.

The Vice-Chancellor: Yes.

Mr. Carroll: Isn't that in the bill?

30

Mr. McConnel: It is in the bill.

Mr. Carroll: Well, the answer admits all those allegations.

Mr. McConnel: Yes, but there is an infant defendant; we have to prove all the facts, otherwise,

we wouldn't have to prove a thing. The first account extended from the death of the testator to February 21st, 1907, and was allowed by the Warren County Orphans' Court on June 7th, 1907. The second account extending from February 21st, 1907, to August 3d, 1908, the date of the death of Josiah W. Leeds, complainant's co-executor, was allowed by the same court on July 2d, 1909. The third account, extending from August 3d, 1908, to August 3d, 1913, was allowed by the same Court on August 28th, 10 1914. I think those dates will show your Honor exactly the period of each account.

The Vice-Chancellor: Yes. I do not think I will retain these exhibits, counsel may as well keep them. I will not undertake to dispose of the matter now; I will give it further consideration.

20

30

CONCLUSIONS.

(Filed Mch. 16, 1922.)

IN CHANCERY OF NEW JERSEY.

10

Between
 PHILIP MAROT, surviving
 executor, etc.,
Complainant,
 and
 RENE BASSETT, *et al.*,
Defendants.

Final Hearing on Bill
 for further instruc-
 tions touching a
 trust under the will
 of Benjamin Frank-
 lin Leeds, deceased.
 Conclusions.

20

O. D. McCONNEL, Esq., for complainant.
 MESSRS. CARR & CARROLL, for defendants.

LEAMING, V. C.:

This is a bill for instructions to executors and trustees under the will of Benjamin Franklin Leeds, deceased.

30

In a suit of the same title, file number 32-16, conclusions were filed by me on June 28, 1912, touching certain features of the will here in question. Subsequently in a suit of the same title, file number 32-757, supplemental conclusions were filed by me on March 26, 1913, touching certain other questions arising under the same will.

It is disclosed in the present suit that the fifteen years' limitation of the second and third annuities

referred to in the will here in question has expired and the present bill is for determination of matters arising by reason of the termination of the two annuities referred to.

The first annuity named in the will is still in force and will continue during the life of Sarah Arletta Packard, therein named.

The primary question presented for solution at this time is whether or not the termination of the second and third annuities renders the several bequests of money named in the will payable at this time. 10

It seems to me entirely clear that the bequests of money named in the will cannot be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity, without violating the specific directions of testator.

The provisions of the will relating to the payment of these bequests are as follows:

“Before, however, any of the above bequests 20
can be passed to those to whom they will be due
the following three annuities must needs mature
(end).”

The only qualification to that absolute and unqualified direction is to be found in a subsequent paragraph of the will providing as follows:

“Before signing I will make the following
note: In case of the death of either of the two
annuitants the principle sum from which the 30
income of the annuity was derived shall be at
once divided among those to whom it was
willed.”

Since neither of the first two annuities have died this qualification of the preceding direction above quoted obviously is in no way operative. Accord-

ingly, it seems impossible to determine at this time that the bequests referred to have become payable without disregarding the plain directions of testator. In the last quoted paragraph testator may have intended that at the termination of either the first or second annuity by death or otherwise, there should be a pro rata distribution of a portion of the estate among the several legatees; but whether testator intended that or not he has clearly stated to
10 the exact contrary.

This conclusion disposes of inquiries annexed to the bill numbered "a" to "f" inclusive.

Inquiries annexed to the bills numbered "g" and "h" relate to certain money paid to satisfy a street paving assessment on certain real estate. Obviously the money so paid was in the nature of a betterment to the real estate and complainant properly transferred from the income to the corpus of the estate the interest on the sum so paid up to the time
20 the property was sold; but should not do so thereafter. I also entertain the view that the income which has already been transferred from income to corpus on the amount of the street improvement assessment should remain in the corpus.

Inquiry "i" is of a similar nature and relates to money paid for underdraining certain real estate in Camden. I entertain the view that the transfer of interest on the amount so paid from income to the corpus of the estate was necessary and should
30 be continued until the property is sold.

Inquiry "j" relates to commissions of the executors. The views expressed by me in the conclusions filed March 26, 1912, touching the provisions of the will in favor of the executors and trustees answer this inquiry. I think it impossible to escape the conclusion that testator intended to definitely fix and limit the compensation which should be received by

his executors. That compensation he defines as the amount of the income of the estate in excess of the annuities while they are running; the requirement for the trustees to renounce all interest in the property bequeathed except as executors can be understood by me in no other way. The testator has not made it entirely clear whether he intended his executors to receive as their compensation the excess income after the termination of the second and third annuities by lapse of time, the first annuity being 10 still alive; but since no distribution is permitted by testator except in case of the death of either of the first two annuitants it seems impossible to escape the conclusion that the compensation of the executors and trustees shall be the excess income until some distribution of the estate can be made.

Inquiry numbered "k" seeks to determine whether the several money legacies have lapsed. The legacies are absolute in form and are presently given; the postponement of the payment of the legacies for 20 the convenience of the estate in no way renders them conditional. As vested legacies the representatives of the deceased legatees will take at distribution.

Inquiry numbered "f" may be intended to relate to the rights of the representative of the deceased executor. If so I think his rights are fully and adequately defined in conclusions heretofore filed by me to the effect that although bequests of that nature are to be treated as limitations of compensation as well as marks of personal regard such bequests cannot be regarded as so far removed from the aspect 30 of manifestations of testator's bounty as to justify an implied condition extending further than the *bona fide* acceptance of the office of executor. This view necessarily determines the right of the executor to share the bounty of testator defined by the will as

vested at the time of his qualification and passing to his legal representatives at his death.

I will advise a decree in conformance to the views above expressed.

Submitted: March 13, 1922.

Determined: March 14, 1922.

10

FINAL DECREE.

(Filed May 18, 1922.)

IN CHANCERY OF NEW JERSEY.

	Between	
20	PHILIP MAROT, surviving executor and trustee under the will of Benjamin Franklin Leeds, deceased,	}
	<i>Complainant,</i>	
	and	
	RENE BASSETT, <i>et al.</i> ,	
	<i>Defendants.</i>	On Bill, etc. Final Decree.

30 This cause coming on to be heard in the presence of O. D. McConnel, of counsel with the complainant, and Messrs. Carr and Carroll, of counsel with the defendants, Julia Hellings Bassett, Emma Burrows Leeds, Sarah Bassett Leeds, Jr., Mary Bassett Leeds, William M. Pepper, Ellen Schulz Pepper, Harriet French Pepper Smith, Edith Bassett

Moore, Roland M. Bassett, Clara Louise Humiston Mort, and Ada B. Marot, executrix under the will of Emeline Griscom Marot, and upon notice to the clerk of this court as guardian *ad litem* of Helen L. MacCurdy, infant defendant, the complainant's bill having been heretofore taken as confessed against the other defendants in this cause; and the pleadings having been read and considered and the proofs having been submitted and the arguments of counsel having been heard; and it appearing that the complainant prays for the instruction and direction of the Court regarding his duties under the last will of Benjamin Franklin Leeds, deceased, and the Court being of the opinion that said prayer should be granted; and the Court being of the opinion that the bequests of money named in the said last will of Benjamin Franklin Leeds, deceased, should not be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity mentioned in said will; and the Court being also of the opinion that the sum of \$160.83 paid by the complainant out of the corpus of said estate for assessments for street paving on the real estate of said Benjamin Franklin Leeds, deceased, at San Jose, California, was in the nature of a betterment to said real estate and that complainant properly transferred from the income to the corpus of the estate the interest on the sum so paid up to the time the property was sold, but should not transfer interest thereon from the income to the corpus of the estate thereafter, and that the income which has already thus been transferred from income to corpus on the amount of the said street improvement assessment should remain in the corpus of said estate, and the Court being also of the opinion that the sum of \$876 paid by the complainant out of said corpus for the expense of underdraining houses known as Nos. 109, 111,

113 and 115 Centennial Avenue, in Camden, New Jersey, and the lots of land whereon the same are situated, and that the sum of \$181.74 paid by the complainant out of said corpus for assessments for benefits to said real estate by reason of said underdraining, were in the nature of a betterment to the said real estate, and that legal interest on said sums of \$876 and \$181.74 should be transferred by the complainant from the income to the corpus of the

10 estate until said real estate is sold; and the Court being also of the opinion that the only compensation which the executors of the said Benjamin Franklin Leeds, deceased, are entitled to receive by virtue of the provisions of his said last will is the amount of the income of his estate in excess of the annuities given in said will while they are running, and that the complainant, as surviving executor and trustee under the last will of said Benjamin Franklin Leeds, deceased, is entitled to one-half of the in-

20 come of said estate in excess of the annuities given in said will, while they, or any of them, are running, and until the death of the said Sarah Arletta Packard, and that the personal representative of Josiah W. Leeds, the deceased co-executor of the complainant, are entitled to the remaining one-half of the income of said estate in excess of said annuities, while they, or any of them, are running, and until the death of the said Sarah Arletta Packard; and the Court being also of the opinion that the pecuniary

30 legacies bequeathed by said Benjamin Franklin Leeds, in his said last will, are vested legacies, and that the personal representatives of deceased legatees will take at distribution:

It is, on this 18th day of May, 1922, on motion of O. D. McConnel, of counsel with the complainant, ordered, adjudged and decreed that the bequests of

money named in the last will of Benjamin Franklin Leeds, deceased, to wit:

- \$2000 to testator's cousin, Elizabeth Marot;
- \$2000 to his cousin, Mary Pepper Heald;
- \$2000 to his cousin, Juliette Hellings Bassett;
- \$2000 to his cousin, Emma Burrows Leeds;
- \$2000 to his cousin, Emeline Griscom Marot;
- \$2000 to his cousin, Caroline Stocker Bassett;
- \$2000 to his cousin, Mary Anna Bassett Griscom;
- \$2000 to his cousin, Mary Bassett Leeds; 10
- \$2000 to his niece, Sarah Bassett Leeds, Jr.;
- \$2000 to his niece, Lucy Margaret Leeds;
- \$2000 to his niece, Margaretta Reed Leeds;
- \$2000 to his nephew, Austin Crenshaw Leeds;
- \$2000 to his nephew, John Bacon Leeds;
- \$100 each to his brother Albert's two children;
- \$2000 to be equally divided amongst the children of his cousin, E. I. D. Pepper;
- \$1000 to his cousin, Samuel Marot's son;
- \$500 to the unmarried daughter of his cousin, Samuel Warren Pepper; 20
- \$2000 to the children of his cousin, Josiah Bassett, son of Josiah and Susan Levick Bassett;
- \$1000 to his friend, James A. O'Connor, for Christ's Mission;
- \$1000 to his friend, Clara Louise Hummeston Mort; shall not be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity mentioned in said will.

And it is further ordered, adjudged and decreed 30 that the said sum of \$160.83 paid by the complainant out of the corpus of said estate of Benjamin Franklin Leeds, deceased, for assessments for street paving on the real estate of said testator situated at San Jose, California, was in the nature of a betterment to said real estate, and that the interest was upon said sum, transferred from the income

to the corpus of said estate up to the time the said real estate was sold, shall remain in the corpus of said estate, and that no interest upon said sum shall be transferred from the income to the corpus of said estate after the date when said property was sold.

And it is further ordered, adjudged and decreed that the sum of \$876 paid by the complainant out of the corpus of said estate for the expense of underdraining houses known as Nos. 109, 111, 113 and
10 115 Centennial Avenue, in the City of Camden, New Jersey, and the lots upon which the same are situated, and also the sum of \$181.74 paid by the complainant out of the corpus of said estate for assessments for benefits to said real estate by reason of said underdraining were in the nature of a betterment to the said real estate, and that legal interest on said sums of \$876 and \$181.74, respectively, shall be transferred from the income to the corpus of said estate until said real estate is sold.

20 And it is further ordered, adjudged and decreed that the only compensation which the executors of the last will of the said Benjamin Franklin Leeds, deceased, are entitled to receive by virtue of the provisions of his said last will is the amount of the income of his estate in excess of the annuities given in said will while they, or any of them, are running, and that the complainant, as surviving executor and trustee under the last will of said Benjamin Franklin Leeds, deceased, is entitled to one-half of the
30 income of said estate in excess of the annuities given in said will, while they, or any of them, are running, and until the death of the said Sarah Arletta Packard, and that the personal representatives of Josiah W. Leeds, the deceased co-executor of the complainant, are entitled to the remaining one-half of the income of said estate in excess of said an-

nuities, while they, or any of them, are running, and until the death of the said Arletta Packard.

And it is further ordered, adjudged and decreed that the said pecuniary legacies bequeathed by said Benjamin Franklin Leeds, in his said last will, are all vested legacies, and that the legacies bequeathed to any of said legatees that may be deceased at the time of the distribution of said estate, shall be paid to the respective personal representatives of such deceased legatees.

10

And it is further ordered, adjudged and decreed that a counsel fee of seven hundred and fifty dollars be allowed and paid unto O. D. McConnel, the solicitor of the complainant, and that a counsel fee of three hundred dollars be allowed and paid to Messrs. Carr and Carroll, solicitors for Julia Hellings Bassett, Emma Burrows Leeds, Sarah Bassett Leeds, Jr., Mary Bassett Leeds, William M. Pepper, Ellen Schulz Pepper, Harriet French Pepper Smith, Edith Bassett Moore, Roland M. Bassett, Clara Louise Humiston Mort and Ada B. Marot, executrix under the will of Emeline Griscom Marot, answering defendants.

20

And it is further ordered that the costs of the complainant and answering defendants, to be taxed, be paid out of the estate of Benjamin Franklin Leeds, deceased, and that the said counsel fees and costs be paid from the corpus of the said estate.

E. R. WALKER, C.

Respectfully advised:

E. B. LEAMING, V. C.

30

NOTICE OF APPEAL.

(Filed Jan. 24, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

PHILIP MAROT, surviving
 executor and trustee un-
 der the will of Benjamin
 Franklin Leeds, de-
 ceased,

Complainant,

and

RENE BASSETT, *et als.*,

20

Defendants.

On Bill, &c.
 Notice of Appeal.

The defendant, Julia Hellings Bassett, hereby ap-
 peals from so much of the final decree made in this
 court in the above stated cause as declares that the
 bequests of money named in the last will of Ben-
 jamin Franklin Leeds, deceased, to wit: \$2000 to
 30 testator's cousin, Elizabeth Marot; \$2000 to his
 cousin, Mary Pepper Heald; \$2000 to his cousin,
 Juliet Hellings Bassett; \$2000 to his cousin, Emma
 Burrows Leeds; \$2000 to his cousin, Emeline Gris-
 com Marot; \$2000 to his cousin, Caroline Stocker
 Bassett; \$2000 to his cousin, Mary Anna Bassett
 Griscom; \$2000 to his cousin, Mary Bassett Leeds;
 \$2000 to his niece, Sarah Bassett Leeds, Jr.; \$2000
 to his niece, Lucy Margaret Leeds; \$2000 to his

niece, Margaretta Reed Leeds; \$2000 to his nephew, Austin Crenshaw Leeds; \$2000 to his nephew, John Bacon Leeds; \$100 each to his brother Albert's two children; \$2000 to be equally divided amongst the children of his cousin, E. I. D. Pepper; \$1000 to his cousin, Samuel Marot's son; \$500 to the unmarried daughter of his cousin, Samuel Warren Pepper; \$2000 to the children of his cousin Josiah Bassett, son of Josiah and Susan Levick Bassett; \$1000 to his friend, James A. O'Connor, for Christ's Mis- 10
sion; \$1000 to his friend, Clara Louise Hummeston Mort; shall not be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity mentioned in said will, to the Court of Errors and Appeals in the last resort in all causes.

CARR & CARROLL,
*Solicitors for and of Counsel
with Julia Hellings Bassett,
Defendant.*

Dated, December 29, A. D. 1922. 20

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

WALTER R. CARROLL,
*Of Counsel with Julia Hell-
ings Bassett, Defendant.*

[ENDORSED] 30

Due and legal service of a copy of the within notice of appeal is hereby acknowledged this 18th day of January, A. D. 1923.

O. D. McConnel,
Solr. of Complainant.

PETITION OF APPEAL.

(Filed Jan. 25, 1923.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

	Between	
	PHILIP MAROT, surviving executor and trustee un- der the will of Benjamin Franklin Leeds, de- ceased, <i>Complainant-Appellee,</i>	}
	and	
20	RENE BASSETT, <i>et als.</i> , <i>Defendants-Appellants.</i>	On Appeal from the Court of Chancery. Petition of Appeal.

*To the Court of Errors and Appeals in the last Re-
sort in all Causes:*

The petition of Juliet Hellings Bassett, appellant in the above stated cause, respectfully shows:

30 That your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the eighteenth day of May, A. D. 1922, wherein the said Philip Marot, surviving executor and trustee under the will of Benjamin Franklin Leeds, deceased, was complainant, and Rene Bassett, Evan Bassett, Clara B. Jack-

son, Helen L. McCurdy, Miranda D. Bassett, Mary J. Bassett, guardian of Helen L. McCurdy, Anna Zillah Hadley, Sarah Arletta Packard, Austin C. Leeds, John Bacon Leeds and Sarah B. Leeds, executors of Josiah W. Leeds, deceased, Juliet Hellings Bassett, Emma Burrows Leeds, Mary Bassett, Anna Bassett Griscom, Sarah Bassett Leeds, Jr., Mary Bassett Leeds, Lucy Margaret Leeds Bacon, Margaretta Reed Leeds, Lydia P. B. Leeds, Alice C. H. Leeds, Ruth Dalton Leeds, Ruth Dalton Leeds 10
Brown, Elizabeth Digby Leeds Reid, William M. Pepper, Ellen Schulz Pepper, Charles W. Pepper, Harriet French Pepper Smith, Edward H. Marot, Edith Bassett Moore, George P. Bassett, Roland M. Bassett, Clara Louise Humeston Mort, Edith Heald, Ada B. Marot, executrix of Emeline Griscom Marot, deceased, Nathan Bassett, Walter Bassett, Beulah Bassett Kempe, George Bassett, Gertrude L. Bassett, Amelia Leeds Bassett, Laura Martin Bassett, Nathan Bassett, Jr., Mabel Maxwell French 20
and J. Barton Rettew, executors of Louise M. Pepper, deceased, Christ's Mission, Deborah Crenshaw Leeds, Austin Crenshaw Leeds and John Bacon Leeds, George Houston and Walter Houston are defendants, in this respect, to wit:

That the said decree adjudges that the bequests of money named in the last will of Benjamin Franklin Leeds, deceased, to wit: \$2000 to testator's cousin, Elizabeth Marot; \$2000 to his cousin, Mary Pepper Heald; \$2000 to his cousin, Juliet Hellings 30
Bassett; \$2000 to his cousin, Emma Burrows Leeds; \$2000 to his cousin, Emeline Griscom Marot; \$2000 to his cousin, Caroline Stocker Bassett; \$2000 to his cousin, Mary Anna Bassett Griscom; \$2000 to his cousin, Mary Bassett Leeds; \$2000 to his niece, Sarah Bassett Leeds, Jr.; \$2000 to his niece, Lucy Margaret Leeds; \$2000 to his niece, Margaretta

Reed Leeds; \$2000 to his nephew, Austin Crenshaw Leeds; \$2000 to his nephew, John Bacon Leeds; \$100 each to his brother Albert's two children; \$2000 to be equally divided amongst the children of his cousin, E. I. D. Pepper; \$1000 to his cousin, Samuel Marot's son; \$500 to the unmarried daughter of his cousin, Samuel Warren Pepper; \$2000 to the children of his cousin Josiah Bassett, son of Josiah and Susan Levick Bassett; \$1000 to
10 his friend, James A. O'Connor, for Christ's Mission; \$1000 to his friend, Clara Louise Hummeston Mort; shall not be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity mentioned in said will.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that said bequests of money should be paid at this time, and payment thereof should
20 not be postponed until the death of Sarah Arletta Packard.

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

CARR & CARROLL,
WALTER R. CARROLL,
30 Solicitors for and of Counsel
with Appellant.

[ENDORSED]

Due and legal service of a copy of the within petition of appeal is hereby acknowledged this 18th day of January, A. D. 1923.

O. D. McConnel,
Solr. of Complainant-Appellee.

10

ANSWER TO PETITION OF APPEAL.

(Filed February 15, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

PHILIP MAROT, surviving
executor and trustee
under the will of BEN-
JAMIN FRANKLIN LEEDS,
deceased,

*Complainant-
Respondent,*
and

RENE BASSETT, *et al.*,

*Defendants-
Appellants.*

On Appeal from
Court of Chancery.
Answer to Petition of
Appeal.

20

30

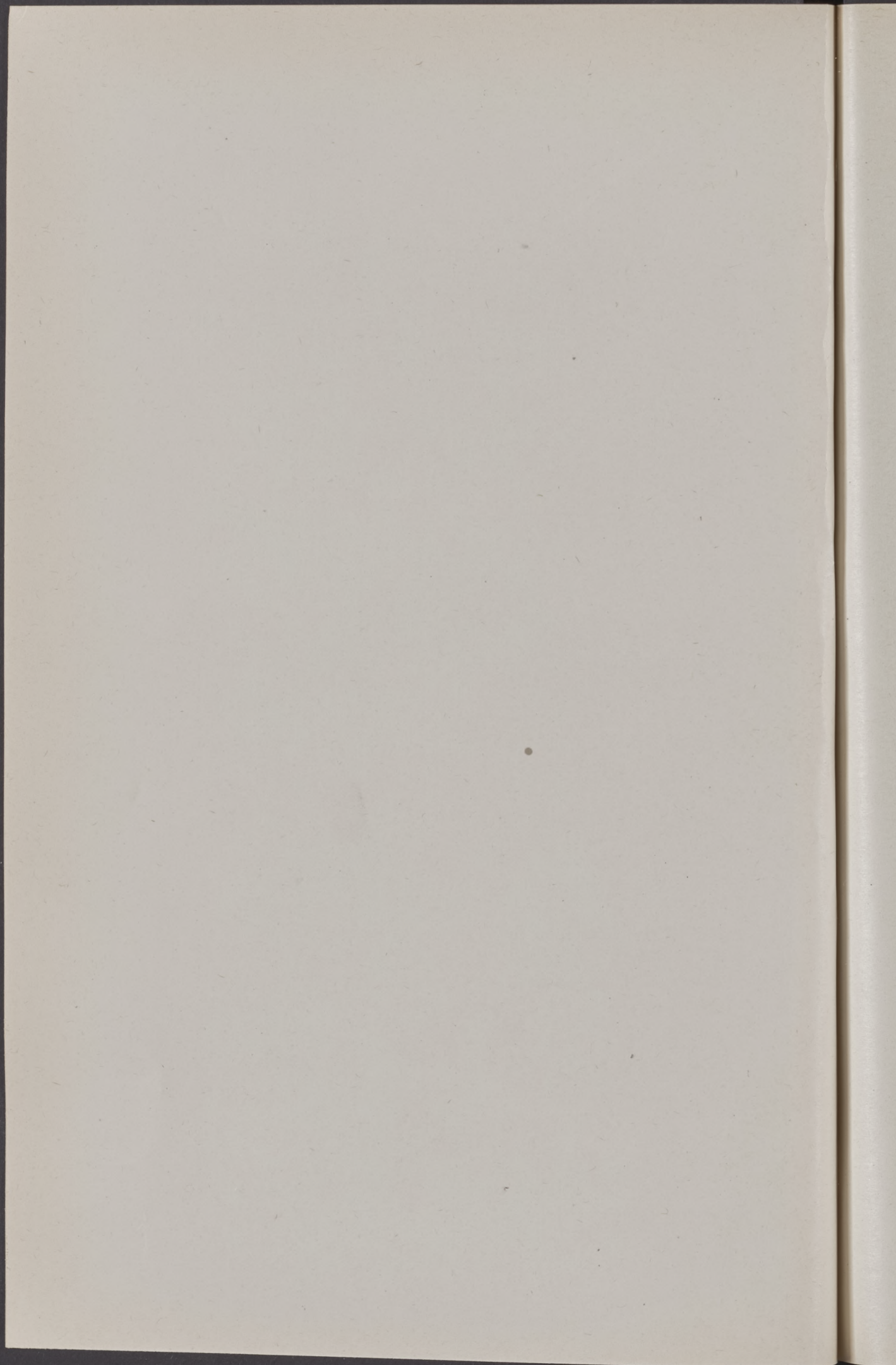
The answer of the above-named respondent to the petition of appeal of Juliet Hellings Bassett, appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a final decree was, on the eighteenth day of May, 1922, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall
10 be produced, and this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

O. D. McCONNELL,
*Solicitor for and of Counsel
with Respondent.*

20

30



NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

PHILIP MAROT, surviving executor, etc., of BENJAMIN
FRANKLIN LEEDS, deceased,
Complainant-Respondent,

10

and

RENE BASSETT, *et al.*,
Defendants-Appellants.

ON APPEAL FROM COURT OF CHANCERY.

20

BRIEF FOR COMPLAINANT-RESPONDENT.

The scope of this appeal is confined to one single question, although counsel for appellant attempt to enlarge it in their brief.

The notice of appeal states that Julia Hellings Bassett, the appellant, "hereby appeals from so much of 30 the final decree made in this court in the above-stated cause as declares that the bequests of money named in the last will of Benjamin Franklin Leeds, deceased, to wit, \$2000 to testator's cousin, Elizabeth Marot; \$2000 to his cousin, Mary Pepper Heald; \$2000 to his cousin, Juliet Hellings Bassett; . . . shall not be paid until the death

of Sarah Arletta Packard, the annuitant named in the first annuity mentioned in said will, etc." (State of Case, pp. 56 and 57.)

The petition of appeal states that the decree appealed from adjudges that the bequests of money aforesaid shall not be paid until the death of Sarah Arletta Packard, the annuitant mentioned in the first annuity mentioned in said will, and the appellant "*appeals from that part of the decree of the Chancellor which decrees as*
10 *aforesaid.*" (State of Case, pp. 58-60.)

(The italics are mine.)

Counsel for the appellant, in their brief, also claim as erroneous another portion of the decree, which gives to the respondent, and the executors of his deceased co-executor, the surplus income until the death of the last annuitant, Sarah Arletta Packard.

The appellant receives nothing under the will except the legacy of \$2000. The corpus of the estate is more than enough to pay the legacies. (State of Case, p. 27,
20 lines 1-16.) Consequently appellant has no interest whatever in the surplus income, and can not appeal from any decree respecting the same. As there is no residuary clause in the will, the heirs-at-law of the testator are the only persons who can appeal from that portion of the decree.

THE TESTATOR'S INTENTION IS CLEARLY EXPRESSED IN THE WILL.

After bequeathing the legacies, the testator uses the
30 following language:

"(1) Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end)."

This paragraph will hereinafter be referred to as paragraph (1). He then gives the annuities as follows:

"These annuities are: One to Sarah Arletta Pack-

ard for the sum of sixty (60) dollars monthly to continue during her life and to be for her own use only.

Another, to Anna Zillah Hadley for thirty-five dolls. (\$35) monthly to cover a period of fifteen (15) years, or less if death do determine.

A third to the children of Irena Bassett (son of Mark S. Bassett) and the daughter and daughter-in-law of Franklin Bassett (son of Mark S.) the amount of which would be divided annually amongst the said children daughter and daughter-in-law.

This 3rd annuity would yield about \$300 a year, 10
the probable interest upon six thousand for a period of fifteen years."

Near the end of the will he adds the following note, which will be hereinafter referred to as paragraph (2):

"(2) Before signing I will make this following note: In case of the death of either of the first two annuitants the principal sum from which the income of the annuity was derived shall be at once divided amongst those to whom it was willed." (State of the Case, pp. 20
12, 13.)

In *Burnet vs. Burnet*, 30 N. J. Eq. 595, Vice-Chancellor Van Fleet, on page 597 of the opinion, states the primary rule observed in the construction of wills as follows:

"All doubts must be resolved in favor of the testator's having said exactly what he meant, and plain, clear words, read in their ordinary sense, must always control in searching for the intention of a testator, unless repugnant to other words used in another part of the will. 30
Courter v. Stagg, 12 C. E. Gr. 305; *Graydon's ex'rs. v. Graydon*, 10 C. E. Gr. 561; *Hand v. Marcy*, 1 Stew. 59; 1 Redf. on Wills 421, § 35. In the absence of something in the context in the circumstances of the case to exclude the natural import of the words of a will, the

court is bound to give them effect according to their plain grammatical sense."

In *Deats v. Ziegner*, 82 N. J. Eq. 605, the present Chief Justice, speaking for this court, says that this primary rule is, "that the intention of the testator as exhibited by the will, shall prevail."

The intention of the testator in the will in this case must be gathered from his own language in the will. In paragraph (1) he very clearly says that before *any* of the above bequests can be passed to those to whom they
 10 will be due the three annuities must needs mature and end.

The language of this paragraph is not used in an explanatory or advisory capacity, nor is it even precatory in its nature. He says emphatically that the three annuities must end before any of the bequests can be passed.

It is noticeable that he uses a double imperative in order to make the language emphatic. He not only says that the annuities *must* mature and end, but, in the quaint
 20 language of the Friends, he says that these three annuities *must needs* mature and end. In other words he wishes to make it plain that these three annuities *must of necessity* mature and end before any of the legacies can be passed.

Moreover, as if to put the meaning of his language beyond any question, he does not seem to be satisfied with the word "mature," and so adds the word "end" after it, in parenthesis.

This paragraph is a positive direction of the
 30 testator.

The Vice-Chancellor, in his opinion, speaks of this paragraph as an "absolute and unqualified direction." (State of Case, p. 47, lines 25 and 26.)

In paragraph (2) above mentioned, he provides that in case of the death of either of the first two annuitants, Sarah Arletta Packard or Anna Zillah Had-

ley, "the principal sum from which the income of the annuity was derived shall be at once divided amongst those to whom it was willed."

But neither of those contingencies has happened, and consequently this paragraph can not change the positive direction contained in the other paragraph, designated as (1). The Vice-Chancellor, in his opinion, also says:

"It seems to me entirely clear that the bequests of money named in the will can not be paid until the death of Sarah Arletta Packard, the annuitant named in the first annuity, without violating the specific directions of testator." (State of the Case, p. 47, lines 13-17.) 10

The contention of the appellant's counsel is that notwithstanding this plain direction of the testator, there should be an immediate pro tanto distribution to the legatees, including the appellant, and they make this contention after citing authorities which hold that a gift by implication should never be made unless the implication be a necessary one.

As a matter of fact, the cases which they cite strongly disapprove of such a course. In the case of *Hewitt vs. Green*, 77 N. J. Eq. 345, cited by appellant's counsel, Vice-Chancellor Stevenson says, on page 357 of the opinion: 20

"In connection with this subject the views of Lord Halsbury in *Higgins v. Dawson* (1902), A. C. 1, 6, are of value. The lord-chancellor is referring to the practice of construing a will by dealing with different possible situations and extracting 'the whole subject matter' which the testator might have had or ought to have had in his mind, and he concludes that this process 'is not to construe or to interpret the language which the testator himself has used, but to make a will for him which you think he ought to have made if he had had the whole circumstances present to his mind.'" 30

In *Burrougs vs. Jamieson*, 62 N. J. Eq. 651, also

cited by appellant's counsel, Vice-Chancellor Grey says on page 655 of the opinion:

"The testator has himself plainly said what he intended. No court, under profession of the construction of his will, should defeat his expressed purpose by interpolating an additional or varying condition."

None of the authorities cited by appellant's counsel are parallel. In fact, only two of the cases cited relate to the question of a distribution of a portion of a trust fund. These cases are *Hewitt v. Green, supra*, and *Camden Safe Deposit and Trust Company v. Guerin*, 89 N. J. Eq. 556.

In *Hewitt v. Green*, the testator created a trust to pay annuities during the lives of certain persons named, and then made a disposition of the remainder of the income and also of the corpus of the fund that was contrary to the rule against perpetuities. The annuities were sustained, but the trustees were directed to make distribution among the persons entitled thereto of such portion of the corpus as was not necessary for the payment of the annuities.

In the case of *Camden Safe Deposit and Trust Company v. Guerin*, there was a trust to collect and pay, for life, the income of a fund with a gift over of the fund itself. The gift over was held to be void by reason of its violating the rule relating to perpetuities. The result was that the testator died intestate of the fund, and the persons entitled to the income for life were the same persons to whom the remainder of the fund was payable. It was held that the trust became a passive or a simple trust, and that the owners of the fund were entitled to its possession, except such part of the fund as was subject to an active trust remaining.

It is apparent that neither of these cases can be of any assistance in construing the will in this case.

There can be no acceleration of the legacies in remainder *contrary to the express directions of the will*.

The definition of "acceleration," cited by counsel for appellant and taken from 21 *C. J.* 994, shows that this principle can not apply in the present case. The definition says that "a vested remainder is said to be accelerated where the time for its vesting in possession is shortened by the preceding estate being *prematurely determined*, or for some reason *incapable of taking effect*."

(The italics are mine.)

The annuities in the will in this case have not been prematurely determined, nor has there been any question about their taking effect. 10

The case of *Collins vs. Wardell*, 63 *N. J. Eq.* 271, affords an instance of acceleration. The clauses of the will which came up for construction in that case are as follows:

"FIFTEENTH. I direct my executors hereinafter named, out of the residue of my estate, to set apart a fund sufficient to produce an income of six thousand dollars a year and out of said income to pay to my brother William Phyfe four thousand dollars a year and to my brother Duncan Phyfe two thousand dollars a year for the term of their lives, respectively, and after their death I direct the capital of said fund to be divided equally among the said Mary Wardell, Maria Wintringham, Thomas Wintringham, Joseph Wintringham, William Wintringham and Henry C. Wintringham. 20

"SIXTEENTH. It is my will that if any or either of the above-named legatees or devisees shall die before my death, the bequest to the person so dying shall lapse. 30

"SEVENTEENTH. All the rest, residue and remainder of my estate, real or personal, of or to which I shall die seized, possessed or in any way entitled, I do give, devise and bequeath to the said Emma P. Purdy,

Mary Wardell, Emily Haight, Henry C. Wintringham, William Wintringham and to Franca Wintringham, grand-niece of my late husband, and the two children now living of the said Thomas Wintringham, to be divided equally among said persons, share and share alike, and I direct that any inheritance tax to be levied or charged against my estate be paid out of that portion thereof bequeathed in this paragraph."

10 William Phyfe, one of the brothers of testatrix, predeceased her. Chancellor Magie held that the death of William Phyfe before the death of testatrix did not operate to defeat the gift of the fund to the persons to whom she bequeathed it by the fifteenth paragraph. On that point the decree was affirmed by this court. 65 *N. J. Eq.* 366.

20 The Chancellor further held that by reason of the words "after their death," referring to testator's two brothers, there could be no distribution of the capital fund until the death of Duncan Phyfe, the other brother. He was reversed by this court on that question. This court held that by the use of the term "after their death" testatrix meant "their respective deaths," "and that William Phyfe, to whom two-thirds of the income of \$6000 a year was by the will to go, having predeceased testatrix, and the interest of those in this fund who survived her having become vested by her death, no reason exists, *unless it so appears from the will itself*, why any more of the fund than is sufficient to raise the annuity of \$2000 for Duncan Phyfe should be retained by the executors."

30 (The last part of the preceding paragraph is quoted from the opinion and the italics are mine.)

In the Leeds will the testator expressly and positively says that before any of the bequests could be passed to those to whom they will be due, the three annuities must needs mature (end).

The following paragraph in the opinion, (on page

370,) also shows that the case of Collins vs. Wardell is distinguished from the present case:

"The testatrix made no disposition of any accumulation of income beyond that necessary to pay the annuities, respectively; such accumulation would arise because of the death of any annuitant before the other, unless the capital sum necessary to raise the annuity of the one who died first were distributed upon his death, *and this circumstance bears upon the intention of the testatrix.*"

(The italics are mine.)

10

In the present case the testator gave the surplus income while the annuities are running to his executors. It has been held that this surplus income is the only compensation to which they are entitled for all their risk, labor and pains in the management of this large estate. The decree in this case adjudicates that the respondent and the representatives of his deceased co-executor are entitled to this surplus income whilst the annuities, or any of them, are running, and until the death of Sarah Arletta Packard, the last annuitant. Counsel for appellant object to the use of the words "or any of them" in the decree and say that the construction placed by the Vice-Chancellor upon that portion of the will, which gave the surplus income to the executors, virtually gives to them a legacy of the amounts of the two fifteen-year annuities, and that a *pro tanto* distribution of the fund among the legatees is held up solely for that purpose.

20

The decree was made after the expiration of the fifteen-year period during which the first two annuities were to run, and consequently it can apply only to the remaining annuity of Sarah Arletta Packard.

30

Moreover, the testator gives pecuniary gifts to a number of distant relatives, but respondent, who was a cousin of the testator, and his deceased co-executor, Josiah W. Leeds, who was testator's only surviving brother, receive absolutely nothing except the gift of

the surplus income. The will explicitly states that the executors must renounce all interest in the property bequeathed except that which is given to them as executors. The testator's estate is of considerable size, and the duties of the executors consisted not only in investing the money and collecting the income, but also have involved the collection of ground rents and the management and care of a small farm and a number of houses and lots, including the collection of rents, the making of repairs and providing for assessments for improvements. (State of Case, pp. 30-36.) That the compensation of the executors was comparatively small during the first fifteen years after the death of the testator, which occurred in 1906, is shown by the fact that the surplus income for the year ending February 21, 1922, after deducting all the annuities, taxes and other expenses, amounted to only \$516.98 (State of Case p. 29, line 31, to p. 30, line 12). The testator selected his brother and cousin as his executors because he had confidence in their ability and integrity, and unquestionably also because of his esteem for them. Is it not reasonable to suppose that he intended that these two near relatives should not only be paid for the responsibility and services entailed by the proper administration of his estate, but that they should also be recipients of his bounty? The appellant is described in the will as the "widow of my cousin, Cranville Bassett." (State of Case, p. 11, lines 17-19). How can she set up any claim to testator's bounty that would be superior to that of these two kinsmen, one of whom was his own brother, and both of whom he held in such high regard and esteem that he entrusted to them the management and settlement of his estate?

In the case of *Pennsylvania Co., etc. vs. Riley*, 89 N. J. Eq. 252, the following paragraph of the will of Fietta Alsfelt was construed:

"7. I direct that the twenty-six thousand dollars coming to my estate from the sale of the Norwood, shall be held in trust by my executor, and the income therefrom shall be divided equally between my children, Mrs. Mary Riley and Mr. William H. Alsfelt, during their lifetime; and after their death, the principal shall be divided equally between my grandchildren, Frank S. Riley, Robert Riley, Joseph H. Riley, Mary Riley, Fietta J. Alsfelt, Knight Alsfelt, Robert Alsfelt and Rachel Alsfelt and Robert Lewis Read, son of Florence S. Read—nee Riley, or the survivors or heirs of them." 10

At the death of testatrix all the persons named in this 7th paragraph of the will were alive. Robert Riley, one of the reversionary legatees, and William H. Alsfelt, one of the life beneficiaries, died after the death of the testatrix.

Vice-Chancellor Leaming, following *Collins vs. Wardell, supra*, and other cases, held that the expression "during their lifetime" as used in this paragraph, must be understood to mean "during their lifetime respectively," and that at the death of William H. Alsfelt one-half of the corpus of the trust fund became distributable. 20

It is to be noted that there is nothing in the Alsfelt will which shows a contrary intent, and that there is no disposition of the surplus income.

In the present case, the postponement of the payment of the pecuniary legacies until the death of Sarah Arletta Packard, the last annuitant, is in accordance with the express direction of the testator in his will, and the legacy of the surplus income to the respondent and the representatives of his deceased co-executor, prevents intestacy as to the surplus income accruing during the period between the expiration of the two fifteen year annuities and the death of Sarah Arletta Packard, the last annuitant. 30

A pro tanto distribution at this time to the pecuniary legatees would reduce the trust fund to an amount that would produce no income except enough to pay the last annuity. This would compel the respondent to serve as trustee during the rest of the life of Sarah Arletta Packard without any compensation whatever. The testator certainly never intended that his executors should, during all of that period, be burdened with the responsibility and labor entailed by the care, management, investment and administration of the trust fund, as well
10 as the payment of the annuity, and receive nothing for it.

The decree of the Court of Chancery should be affirmed.

O. D. McCONNEL,
*Solicitor for and of Counsel with
Complainant-Respondent.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

PHILIP MAROT, surviving executor, etc., of BENJAMIN
FRANKLIN LEEDS, decd.,
Complainant-Appellee,

and

RENE BASSETT, *et als.*,
Defendants-Appellants.

ON APPEAL FROM COURT OF CHANCERY

BRIEF FOR DEFENDANTS-APPELLANTS.

The bill in this case was filed by the complainant for the construction of the will of Benjamin Franklin Leeds, deceased. After providing for a number of pecuniary bequests the will contained the following provisions:

“Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end).

“These annuities are:

“One to Sarah Arletta Packard for the sum

of sixty (60) dollars monthly to continue during her life and to be for her own use only.

“Another, to Anna Zillah Hadley for thirty-five dolls. (\$35) monthly to cover a period of fifteen (15) years, or less if death do determine.

“A third to the children of Irena Bassett (son of Mark S. Bassett) and the daughter and daughter-in-law of Franklin Bassett (son of Mark S.) the amount of which would be divided annually amongst the said children daughter and daughter-in-law.

“This 3rd annuity would yield about \$300 a year, the probable interest upon six thousand for a period of fifteen years.

“Any income my estate may yield in addition to the amounts of the annuities above-mentioned whilst the annuities are still running, is to be equally divided between my executor. And I herewith appoint my brother Josiah W. Leeds and my cousin Philip Marot, of Swarthmore, Pa., son of Wm. Marot, Jr., the executors of this my last will, made this twenty-eighth (28) day of the 12 mo. (Decemr. 1905) both trustees renouncing all interest in the property bequeathed except as executors.”

Josiah W. Leeds is deceased and Philip Marot is the surviving executor. The fifteen year period from the death of the testator, applicable to the annuities given to Anna Zillah Hadley and the group consisting of the children of Irena Bassett and the daughter and daughter-in-law of Franklin Bassett, has expired. Sarah Arletta Packard is living.

This presents the question as to whether or not the capital fund provided for the annuities other than Sarah Arletta Packard is now distributable among the legatees, or whether the annuities shall

be paid to Philip Marot, surviving executor, as additional compensation. By a former adjudication in a case of the same title in this court considering this will, in an opinion filed June 28, 1912 (Docket 32-757), it was held that the testator intended to definitely fix and limit the compensation which should be received by his executors, and held that the representative of the deceased executor was entitled to one-half of the commissions, which right should continue during the administration of the estate.

The learned Vice-Chancellor has held that the capital sum producing the above annuities is not distributable until the death of Sarah Arletta Packard, and that the income produced therefrom shall be payable to the executors and trustees as excess income until some distribution of the estate can be made, and a decree made in pursuance of the above opinion contains the following provision:

“And it is further ordered, adjudged and decreed that the only compensation which the executors of the last will of the said Benjamin Franklin Leeds, deceased, are entitled to receive by virtue of the provisions of his said last will is the amount of the income of his estate in excess of the annuities given in said will while they, *or any of them*, are running, and that the complainant, as surviving executor and trustee under the last will of said Benjamin Franklin Leeds, deceased, is entitled to one-half of the income of said estate in excess of the annuities given in said will, while they, *or any of them*, are running, and until the death of the said Sarah Arletta Packard, and that the personal representatives of Josiah W. Leeds, the deceased co-executor of the complainant, are entitled to

the remaining one-half of the income of said estate in excess of said annuities, while they, *or any of them*, are running, and until the death of the said Arletta Packard."

(The italics are ours and do not occur in the opinion.)

It is to be noted that the denial of the right of present distribution is based upon the following language:

"Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end)."

Commenting upon this paragraph the learned Vice-Chancellor in his opinion says:

"In the last quoted paragraph testator may have intended that at the termination of either the first or second annuity by death or otherwise, there should be a pro rata distribution of a portion of the estate among the several legatees; but whether testator intended that or not he has clearly stated to the exact contrary."

The award of the surplus to the executor and the personal representative of the deceased executor is based upon the following paragraph:

"Any income my estate may yield in addition to the amounts of the annuities above-mentioned whilst the annuities are still running, is to be equally divided between my executor."

It is to be observed that the reference to the annuities in this clause is in the plural number equally with reference to the paragraph providing that before any of the "bequests can be passed to those

to whom they will be due the following three annuities must needs mature (end),” and that in order to work out the conclusions of the court it became necessary in the decree to interpolate in the provision dealing with the surplus the following words: “Or any of them;” so that there is embodied ~~into~~ the language of the will the above words, ~~and~~ producing the following completed sentence: “Any income my estate may yield in addition to the amounts of the annuities above mentioned whilst the annuities, *or any of them*, are still running is to be equally divided between my executor.”

The interpolation of the same or equivalent phrase into the paragraph of the will relating to the maturity of the annuities would, of course, produce exactly the opposite result. If this were done the obstacle to the present *pro tanto* distribution of the estate would be removed. This paragraph would then read:

“Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities, *or any of them*, must needs mature (end).”

or

“Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs *respectively* mature (end).”

The specific provision made by the testator for his executors was a compensation in lieu of commissions and of all their interest in the estate, which compensation was the excess income *beyond* the three annuities mentioned “*whilst the annuities are still running*.” It absolutely excluded the annuities themselves, or any of them, from the surplus income payable to the executors. By the opinion and

decree the curious result is produced of *including* things actually *excluded*. The executors' title to these two annuities must be derived from the paragraph above referred to which is not a donation or grant of the annuities, or any of them, to the executors, but of a surplus beyond the annuities. It is difficult to understand by what process of mental legerdemain the thing which was absolutely excluded by the positive language of the testator become included by judicial decree. A double violence to the language of the instrument had to be done to force such a result:

1. By including that which was excluded by the terms of the will.
2. By interpolating into the will the words "or any of them."

If the construction applied by the court to the provision that "Before any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end)," be valid, it is equally applicable to the provision of the will dealing with the surplus income to go to the executors as compensation, because if the literal language of the will be applied the surplus income was only payable while the three annuities were running, and not while the annuities, *or any of them*, are still running.

The effect of the will as construed by the decree.

1. *Pro tanto* distribution in payment to the legatees is postponed until the death of Sarah Arletta Packard.

2. The capital fund producing the annuities is held intact for the sole purpose of transferring the two annuities in question to the executors as compensation.

Is this what the testator intended as gathered from the language of the entire instrument? If Sarah Arletta Packard had died within the fifteen year period there can be no question but what the estate would be presently distributable. Was it intended that the annual *compensation* of the executors at the end of the fifteen year period should be increased \$720 depending upon the fortuitous circumstance of the survivorship of Sarah Arletta Packard? Did the testator intend the compensation of his executors to turn upon a throw of the dice? Did he intend to delay the payment of the numerous personal pecuniary bequests to cousins, nieces and brothers in order that the administration of the estate might be prolonged so as to provide compensation for an executor? or did he intend that the primary objects of his bounty should be paid as soon as the reason for postponement of the enjoyment thereof should cease, to wit, the expiration of any of the annuities?

It is impossible in dealing with the plural number in the two paragraphs in question to make fish of one and fowl of the other. If the bequests are not distributable until all of the three annuities are ended, then by the same token the surplus income is only payable to the executors while *all of the said annuities are running*, and not "All or any of them are running."

In such a situation, if the annuities are not payable to the executors, and the scheme for which the annuities were provided has ended, then obviously distribution must take place unless the machinery of administration and distribution is kept revolving for the purpose of preventing a distribution.

THE COURT BY IMPLICATION MAKES A BEQUEST OF THE TWO ANNUITIES TO THE EXECUTORS.

The Vice-Chancellor does not make this gift by implication because the probability of an intention to make such a gift appears to be so strong that an intention to the contrary to that which is imputed to the testator cannot be supposed to have existed in his mind, but makes this donation merely because he is unable to find any other disposition to make of the two annuities. In his opinion the Vice-Chancellor says:

“The testator has not made it entirely clear whether he intended his executors to receive as their compensation the excess income after the termination of the second and third annuities by lapse of time, the first annuity being still alive; but since no distribution is permitted by testator except in case of the death of either of the first two annuitants, it seems impossible to escape the conclusion that the compensation of the executors and trustees shall be the excess income until some distribution of the estate can be made.”

This is violative of the following rule of construction:

“In order that the devise or bequest may be effectual, the implication must be a necessary one, that is, the probability of an intention to make the devise or bequest implied must appear from the will to be so strong that a contrary intention cannot reasonably be supposed to have existed in the testator's mind.”

40 *Cyc.* 1390.

“A gift may arise from implication but the implication must be a necessary one. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind.

“A construction in favor of a gift by implication should never be adopted except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make the gift.”

Bishop v. McClelland, 44 N. J. Eq. 450.

“HEIRS AND DISTRIBUTEES FAVORED. Where any ambiguity exists in the will, unless there is a manifest intention to the contrary, the presumption that the testator intended that his property should go in accordance with the laws of descent and distribution will be applied as an aid in construing the will, hence such a construction will be given to the will as favors heirs-at-law or next-of-kin in preference to disinheritance, or to strangers, or to persons not so closely related to the testator, and the heirs-at-law will not be disinherited by mere conjecture, but only by express words in the will or by necessary implication arising from them.”

40 *Cyc.* 1412;

Sanford v. Blake, 45 N. J. Eq. 248.

It is well settled that the intention of the testator controls in the construction of a will as gathered expressly or by necessary implication from the language of the will, as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was ex-

ecuted, although technical words are not used; or as, as is sometimes said, the testator's intention must be ascertained from the four corners of the will. See 40 Cyc. 1388,

Burroughs v. Jamison, 62 N. J. Eq. 651.

What is the reasonable interpretation of the whole instrument? It is evident that the will was not drawn by a lawyer or skilled draftsman, and this fact must be taken into consideration.

As to the title of the legatees, the testator plainly holds the conception that their rights are to vest at once, being suspended as to enjoyment by the annuities. The words of gift are immediate and outright; the restraint of the enjoyment operates only as to the unavoidable consequence of the annuities. Just before providing for these the testator says:

“(1) Before, however, any of the above bequests can be passed to those to whom they will be due the following three annuities must needs mature (end).

“(2) In case of the death of either of the first two annuitants, the principal sum from which the income of the annuity was derived, shall be at once divided amongst those to whom it was willed.”

Aside from such manifestation of the testator's purpose, the law would so interpret the body of the will. If the annuitants had renounced the legatees would have taken without any postponement. Had none of the three above quoted directions appeared in the will the funds realized by the termination of either one or two annuities would have been distributed *pro tanto* to the legatees. Should a different

result be reached because paragraphs 1 and 2 above appear in the will?

Paragraph designated as No. 1 does not state that no part of the legacies are to be paid until all the annuities had ended. This would have been flatly inconsistent with paragraph 2. None of the legacies could be *fulfilled* before all annuities should end; that is to say, that there could not be full payment of the legacies until the funds necessary to pay them should be released by the expiration of the annuities. This is all that is declared. Paragraph 2 undertakes to direct part of what would have taken place if the three paragraphs which have been especially referred to had been omitted.

Does one declaratory provision exclude inference of other matters which would be drawn from the body of the will? There is nothing in the words used which implies this by specific declaration. Is it not far more logical to assume that the testator contemplated that in all probability the first and second annuitants were likely to die before the expiration of the fifteen year period, and for that reason made use of the language specified in paragraph designated as No. 1?

The paragraph in question is not in form a definite direction or declaration that there shall be no distribution, but is more in the nature of a recital by an unskilled draftsman of the legal consequences which would result from the creation of the annuities and the necessary postponement of the enjoyment of the legacies. It was a partial attempt to make clear that which was already provided for by law if the expression had not been used at all.

By adopting the view that the testator intended to provide *pro tanto* distribution among the various legatees rather than to attempt to force by implication an additional donation of two annuities to the

executors, the problem is solved. In such a situation the trust terminated on the expiration of the fifteen year period, and would result in an acceleration of the remainder.

“The court in discovering the actual intention of testator and in applying the rule presuming a legal rather than an illegal intent, must consider the express provision which the testator made for a situation which he contemplated as possible or perhaps probable at the time of his death.

“Where two constructions of a will are possible, that construction should be chosen which fits a possible situation liable to occur after testator’s death, and which he may justly be presumed to have contemplated, and with reference to the possibility of which he may be presumed to have framed his will.

“The court has power to make a division of a single trust fund which has been created for two independent objects, one valid and the other invalid, so as to reduce the fund to such amount as is required for the accomplishment of the legal object—the amount the testator would presumably have fixed in case he had known how much of the contemplated trust scheme would be adjudged void, and, where the illegal and legal objects are to be accomplished successively, the whole income of the trust fund will be appropriated first to the accomplishment of the legal object, and will then be terminated, and the fund disposed of on the theory that the whole trust has been executed.”

Hewitt v. Green, 77 N. J. Eq., p. 345.

“ACCELERATION. A vested remainder is said to be accelerated where the time for its vesting in possession is shortened by the preceding estate being prematurely determined or for some reason incapable of taking effect, whether by reason of death, forfeiture, incapacity, remarriage, renunciation, revocation, or any other circumstance resulting in the termination of the whole particular estate, and not merely of the interest of one among several interested in it.”

21 C. J. 994.

The purpose of the trust in this case was to limit the interest of the children and grandchildren to the income alone and to preserve the fund for a remainderman who cannot take because the gift over is void, creating an intestacy as to the fund which is now vested in the life tenant, in which event the separation of the two estates comes to an end. Where the purposes of the trust fail, either in whole or in part, by lapse or otherwise, the trustee holds the fund in favor of those who are entitled to it under the statute as the next of kin of the testator (*Skellenger's Executors v. Skellenger's Executor*, 32 N. J. Eq. 659), and the trustee can only hold it so far as is necessary to perform the duties of any part of the trust remaining active.

Camden Safe Deposit & Trust Co. v. Guerin, 89 N. J. Eq. 556, 559.

“It is not a requirement that the trustee divest itself, from time to time, of different parcels of a trust estate, but of the right to hold more than sufficient to satisfy the only remaining trusts—that is, to pay the income from one-

third of the shares given to surviving husbands and widows of testator's deceased children as to the residue of the corpus the possession of the trustee is only that of a naked trust to pay over to those whom it has descended by inheritance."

Camden Safe Deposit & Trust Co. v. Guerin, supra, at p. 561.

In conclusion, it is respectfully submitted that that portion of the decree which adjudges that no part of the specific legacies shall be paid until the death of Sarah Arletta Packard, and that portion thereof that awards to the complainant as surviving executor, and to the personal representatives of Josiah W. Leeds, executor, each one-half of the income of the estate in excess of such annuities while they, or any of them, are running, and until the death of the said Sarah Arletta Packard, should be reversed, and that the Court of Chancery should be directed to decree the immediate distribution *pro tanto* to the legatees named in said will, that portion of the corpus of the estate theretofore required to support the two annuities other than that to Sarah Arletta Packard.

CARR & CARROLL,
*Solicitors for and of Counsel with
the Defendants-Appellants.*

