New Jersey Court of Errors and Appeals.

Between FRANK B. ALLEN, Executor, etc., of George D. G. Moore, deceased, Complainant-Respondent, and HARRIET E. MOORE, et al., Defendants, M. AMELIA FITCH, et al., Appellants.	On Bill, &c. Brief in Behalf of the Complainant-Respondent.

George D. G. Moore died on October 13, 1891, in the City of Newark, leaving a last will and testament and two codicils thereto which were probated by the Surrogate of Essex County on October 26, 1891, and Frank B. Allen, Esq., qualified as Executor. The Executor filed a bill in the Court of Chancery on January 21, 1892, for a construction of the will.

Mr. Moore left an estate of about $61,000. His bequests amounted to about $58,000. in addition to gifts of furniture and personal effects. By the second codicil to his will he gives $50,000. in trust to his executors with directions to pay the interest thereon to his widow during her life. The Court of Chancery decreed that the $50,000. left in trust for the testator's widow and the $10,000. left in trust for the testator's sister must be set aside for that purpose by the executor and the $500. bequest to the Rosedale Cemetery paid and that all other legacies abate in proportion so that at all events said two trust funds and cemetery bequest be available.

The testator's widow as well as his sister having since died, the trust funds created for their benefit have been released and reverted back into the general estate.

The executor has since paid all the general and specific legacies with the following exceptions:

(1) Legacy for $10,000. bequeathed under the fourth clause of Moore's will to George De Graw Moore (a nephew).

(2) Legacy for $250. bequeathed under the eleventh clause of the said will to George Moore (a grand nephew).

Both of these legatees died before the testator's death intestate and without issue.

It is admitted that the "Home for respectable aged people of both sexes, where husband and wife can be taken care of together and not separated in their old age" mentioned in the twentieth clause of the will was not founded or the scheme for a "home" carried out in any manner.

On November 7, 1913, the executor's final account was allowed by the Essex County Orphans Court and in and by said decree it is shown that the sum of $34,-972.68 then remained in the Executor's hands, since the Executor has paid $13,000. in the payment of general legacies leaving $21,972.68 undisposed of.

The Executor applied to the Orphans Court of Essex County for a decree of distribution, but that Court declined to act claiming lack of jurisdiction, and thereupon he applied to the Court of Chancery for instructions as to what disposition to make of the residue of the Estate of George D. G. Moore, deceased, the testator, and upon notice to all of the interested parties the matter was brought before the Court of Chancery and first referred to the late Vice Chancellor Emery who died without making any decree or filing conclusions in reference thereto and thereafter the matter was referred to Vice Chancellor Foster who heard the same and decided as is shown in the printed case on page 51.

In the hearing before Vice Chancellor Foster, counsel

agreed on the state of facts as above set forth and also agreed on a stipulation as shown on page 34 of the printed case.

There is now no dispute concerning several matters stated in the stipulation above referred to, the only matter still in controversy is in reference to the two legacies given by the testator to his great nephews.

A. The one to George De Graw Moore under the fourth sub-division of the testator's will of $10,000. (who died before the testator, intestate and without any issue).

B. The other to George Moore under the eleventh sub-division of testator's will, of $250. (who died before the testator, intestate and without any issue).

The representatives of the widow claim that the testator died intestate as to these two legacies and that the amount thereof should be paid to the widows representatives and the testator's next of kin under the statutes of distribution of estates of intestates' then in force; while on the other hand the residuary legatees claim that the amount of these two legacies should be paid to them as part of the residuary estate of the testator.

A careful reading of the will and codicils will hardly leave a doubt that the testator intended to make a complete distribution of his estate. He particularly provided the various sums and articles that should be given to his various legatees and undoubtedly intended them to have the whole of his estate including the residue, unless it was used for the founding of a certain home, which purpose failed.

It is a settled rule of law that a will, if possible, should be so construed that all of the estate of the testator will be disposed of and that he will not die intestate as to any part thereof. As Vice Chancellor Van Fleet remarks, in his opinion in this matter cited in 5 Dickinson 554, "The case is one where the rule of

common sense should be applied, where all doubts must be resolved in favor of the testator's having said exactly what he meant and where plain clear words, understood in their ordinary sense must prevail unless repugnant to other words used in other parts of the will. In such case the will expounds itself and an intention different from that plainly expressed cannot be attributed to the testator without making a will for him."

It seems that the testator intended by his original will to give certain specific and general legacies and with the residue of his estate to provide a home for aged people in case such a home should be established within five years from his death and if not then the residue was to be applied to the increasing of the legacies to those of his legatees who by the terms of the will were given monied legacies. The first codicil did not change this intention in any manner. The second codicil executed on the testator's death bed and in view of the marriage shortly of the testator, was to provide, in all events, for the support of his intended wife.

The estate of the testator not being sufficient to pay the general and specific legacies and create the trust fund for the benefit of the widow caused the executor to file his bill in the Court of Chancery for instructions as before mentioned.

Vice-Chancellor Van Fleet in his opinion in Moore vs. Moore 5 Dick. 554 at page 563 says, "By his last codicil when he (the testator) gave expression to his final testamentary purposes he said, in case his residuary estate should not amount to $50,000., then, to speak in his own words, 'I direct that the other legacies (except that to my sister and that to the Cemetery Company shall abate in proportion; so that, at all events, the sum of $50,000. shall be available for said purpose'. This clause paraphrased so as to express the meaning of the testator plainly and fully, will, I

think, read as follows: Every testamentary gift hereinbefore made by me must yield and give way for the purpose of providing a fund of $60,500. $50,000. for the use of my widow. $10,000. for the use of my sister and $500. to be paid to the Cemetery Company, and to this end my will is that all other legacies hereinbefore given by me shall abate in proportion.

It seems quite clear that it was the intention of the testator that all his legacies should yield and give way for the purpose of creating a fund of $60,500. to provide for the trust funds for his widow and sister and the payment to the Cemetery Company and that the word "abate" is used in the sense of yielding for the time being or being suspended until the trust fund objects are accomplished.

The $10,000. set apart for the use of the testator's sister for her life has been disposed of by terms of the decree made by the Court of Chancery in this matter filed January 21, 1892, and has been applied to the payment of specific legacies.

Attention is called to the conclusions of Vice Chancellor Emery on the hearing upon which the last mentioned decree of the Court of Chancery was made.

Vice Chancellor Emery says, on bottom of page 4, "The cases cited by counsel in re Lynes Est. L. R. 8 eq. Cases 482 and others cited in 2 Wm's. Ex'rs. (R. and T. Ed.) 1214 show that as between residuary legatees and pecuniary legatees the general rule is that the abatement of the pecuniary legatees must be made good before the residuary legatees can take, and the same principle applies in favor of the specific legatees as against the general legatees. The direction of the testator depriving the specific legatees of their preference, having been made for the sole expressed purpose of preferring other legatees, does not have the effect of depriving them of the benefit of the general rule preferring them, further then the express deprivation extends."

The contention of the widow's representatives seems to be that the legacies having abated to make up the trust funds are lost forever. This seems to be rather narrow and technical reasoning.

The appellants take the ground that the second codicil to the will, in which testator created a trust fund of $50,000. (using testator's language as appears on page 13 of the printed case) "the interest thereon to be paid to Mary S. Fitch (with whom I am shortly to be joined in marriage) during her life in semi-annual payments, the first to begin six months after my death," completely changed the testator's will and that the legacies given by the testator in his will were by the provisions of said codicil completely wiped out, whereas upon a careful reading of the whole will and codicil it is submitted the testator's intention was simply to provide at all events a fund of $50,000. for the benefit of his widow, for he goes on to say, "and at her (the widows) decease said sum of $50,000. to go as provided in said twentieth clause subject to the same condition as in said clause mentioned."

It is submitted that the word "abate" as used by the testator in this codicil was only in the sense of the legacies being suspended for the time being, that is during the operation of the widows trust fund.

The twentieth clause directs the disposition of the "rest and residue" of the testator's estate, it is submitted this can only mean the rest and residue of the estate after paying the legacies and bequests given under the preceding provision of the will and that therefor the executor did right in making the payments of the legacies under the will after the only available funds, tied up during the widows life time, were released, upon her death.

Assuming that the second codicil to the will did not nullify the legacies bequeathed under the will, but suspended the payment thereof during the operation of

the trust fund created for the widow, it is urged that the two lapsed legacies amounting to $10,250. form a part of the residue and should be distributed under the general residuary clause (No. 20) of the will.

"It is a well established rule that a general residuary clause contained in a will carries with it any legacies which for any reason have lapsed or are void or have been refused, for the testator is supposed to have given the property away from the residuary legatee only for the sake of the particular legatee."

A and E Enc. Law and 2nd Ed. Vol. 18 page 761.
Tindall's Executor vs. Tindall 24 N. J. Eq. 512.
Sandford vs. Blake 45 N. J. Eq. 24.

Attention is called to the twenty-second clause of the will and which reads:

"I order and direct my executors to sell and convey all the real estate of which I shall die seized for the purpose of paying the above legacies *and distributing the residue, the whole estate real and personal for the purposes of distribution to be taken and considered as personal property* and further that the bequest to testator's wife is made "in lieu of dower in my estate." This makes it clear that the testator's intentions were that his widow should have the income on the trust fund and no further interest in his estate.

There should be no doubt that what remains of the estate should go to the increasing of the monied legacies. The legatees referred to can only be such as were legatees at the time of the testator's death. In the will itself there are specific legatees and those to whom monied legacies are given.

The twentieth clause of the will the provisions of which are directed to be followed by the second codicil, after the widows death "directs the executors to divide and distribute the said residue pro rata among the legatees above mentioned and in proportion to their respective monied legacies."

It is a settled principal of law that where it appears from the will that it was the intention of the testator to make a bequest to a class, the death of one or more persons before testator will not cause a lapse of any part of the fund, but the survivors of the class take as a whole.

Jackson vs. Roberts 14 Gray (Mass.) 546.
Page vs. Gilbert 32 Hund (N. Y.) 301.
Hoppock vs. Tucker 59 N. Y. 212.
Steadman vs. Priest 13 Mass. 293.

The rule laid down in Tindall's Executors vs. Tindall 24. Eq. 512 seem to apply in this case.

"That the residuary legatee is entitled as well to a residue caused by a lapsed legacy or an invalid or illegal disposition as to what remains after payment of debts and legacies.

The only exception to the rule is that where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portion of the estate, such intention as gathered from the whole will must not be defeated, or the rule embracing the exceptions as stated in some of the books is that the residuary legatee must be a legatee of the residue generally and not partially so only."

It is respectfully urged therefor that the amount of the two lapsed legacies to George De Graw Moore and George Moore as well as the residue of the estate in the hands of the executor should be divided pro rata among the legatees who are given monied legacies by the terms of the will.

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New Jersey Court of Errors and Appeals

Between FRANK B. ALLEN, Executor, etc., of GEORGE D. G. MOORE, deceased, Complainant-Respondent, and HARRIET E. MOORE, et al., Defendants, M. AMELIA FITCH, et al., Appellants.	On Bill, &c.

BRIEF.

George D. G. Moore died in the City of Newark, Essex County, New Jersey, on or about October 13th, 1891, which was the place of his last domicile leaving a last will and testament bearing date June 16th, 1889, duly made and executed in due form of law to pass real and personal estate in New Jersey, and two codicils thereto, each executed in like manner, the first thereof dated January 24th, 1891, and the second dated October 5th, 1891. His said will and codicils were, after his death, duly admitted to probate by the Surrogate of Essex County, on October 26th, 1891, and Frank B. Allen qualified as executor of the will, James C. McDonald, Esq., having renounced the executorship. On November 7th, 1913, the executor's account was passed upon, and duly allowed by the decree of the Essex County Orphans' Court, and in and by said decree it is shown that the sum of $34,972.68 then remained in the executor's hands. Since the said date, $13,000 has been used for the

payment of general legacies, and the amount now in the hands of the said executor, and undisposed of, is the sum of $21,972.68. The rest and residue of the said estate has not been applied or paid over to a Home for respectable aged people of both sexes, nor has any such Home been founded or established within the period of five years from the date of the death of the said testator, nor within the period of five years from the date of the death of the testator's widow, no such Home as described in said will and codicils existing at the time, and, in the opinion and judgment of the executor, it was not advisable to establish such a Home. Sums equivalent in amount to the specific and general legacies have been paid over to the various legatees mentioned in the will, excepting those provided in paragraphs 4 and 11, one of which was for $10,000 to George D. G. Moore, and the other $250, to George Moore, for the reason that they both died before the testator, to wit, in April, 1891, without leaving issue.

Harriet E. Moore, the sister of the testator, died on or about January 6th, 1894. Mary S. Moore, the widow of the testator, died on or about July 11th, 1908, leaving a last will and testament which was probated at Halifax, Nova Scotia, in the Dominion of Canada, July 25th, 1908. By her will she bequeathed her entire estate to her five sisters, M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, Edith G. Fitch and Laleah McGhee, and appointed the first three mentioned, her executrixes.

The testator left numerous blood relatives, who would have been entitled to share in his estate, had he died intestate. The said executor, Frank B. Allen, applied to the Orphans' Court of Essex County, for a decree of distribution, but that court declined to act, claiming lack of jurisdiction, and

thereupon he applied to the Court of Chancery for instructions as to what disposition to make of the funds in his hands belonging to the estate of the said George D. G. Moore, deceased, the testator, and upon notice to all of the interested parties, the matter was brought before the Court of Chancery, and first referred to Vice Chancellor Emery, who died without making any decree of distribution, or filing conclusions with reference thereto, and, secondly, to Vice Chancellor Foster, who heard the case and decided it as shown in the decree in the printed case, page 51.

There are certain facts brought out on the application of the executor for instructions of the Court of Chancery with regard to Mr. Moore's will, of which a report may be found in 50 N. J. Eq. (5 Dick.) 554, which may be of value to the court in further understanding the situation. Vice Chancellor Van Fleet, among other things, tells that the testator owned about $60,000 worth of property at the time of his decease, and says that the testator's pecuniary legacies amount to $51,500. My own computation shows that in the $51,500 spoken of by the Vice Chancellor, Harriet Moore's trust fund of $10,000 could not have been included, nor was the trust fund of $50,000 provided for by second codicil. Vice Chancellor Van Fleet puts in quotations what is to be done with the said trust fund after the widow's decease, in 50 N. J. Eq., 556, and hints that it may be used, "to and for the purpose of a home for respectable aged people of both sexes, where husband and wife can be taken care of together and not separated in their old age." This quotation is taken by the Vice Chancellor from the twentieth paragraph of the will itself, to which reference is made by the second codicil, to ascertain what disposition is to be made of the trust fund of $50,000. Vice Chancellor Van Fleet

(50 N. J. Eq., 561) expressly refuses to determine what should become of this trust fund, "until the rights of all persons in respect to it are so far matured and settled that a judgment respecting them may be safely pronounced."

These are substantially all the matters that the opinion of Vice Chancellor Van Fleet deals with, in which we are interested at this time, except, possibly, with reference to the disposition of specific legacies.

Later, Vice Chancellor Emery decided that on Harriet Moore's decease her trust fund should be used, after supplying what was needed to complete the trust fund of $50,000, for the purpose of satisfying the specific legacies, for which is was scarcely sufficient, and this left the $50,000 trust fund, set aside by the order of the testator, the only source from which the general legatees could look for the payment of any legacies. When the petition on the present application states that the legacies mentioned in the will have all been paid and satisfied, it means paid and satisfied from Mr. Moore's $50,000 and $10,000 trust funds. It may also be well to note here that these payments spoken of were the amounts the testator bequeathed by his will to each of his legatees and not the amounts that he directed his executor to pay by his will and second codicil. The executor chose to ignore the directions of the second codicil for the time, and made the payments as if no such additional testamentary directions had been given.

The executor upon the decease of the widow continued to hold the funds and made payments from them to the legatees named in the will, till he paid all the amounts specified in that document except two that he was unable to pay, because of the death of the legatees in the lifetime

of the testator, and one or two others, concerning which latter there is now no dispute.

The two legacies about which the controversy exists are those found in the fourth, eleventh and twentieth clauses of the will, and in the second codicil, both to great nephews; the one to George D. G. Moore and the other to George Moore, the first $10,000, and the latter $250, with a right to share in the residue. The reasons for dispute with regard to these bequests are that the other residuary legatees, who survive the two deceased great nephews, claim that the shares that would have been paid to them, had they survived the testator, should be paid to the remaining residuary legatees, while on the other hand, the representatives of the widow of the testator claim that the testator died intestate as to these two shares of the residue and that the amount of said shares should be paid to the widow's representatives and the next of kin of testator.

The decree of the Court of Chancery is alleged to be erroneous because it holds that the testator's widow's representatives have no right to share in any part of testator's estate, and that the legacies lapsed as aforesaid go to the surviving residuary legatees, and that testator did not die intestate as to them.

In discussing the questions that naturally rise from the difference of opinion about the proper disposition of the shares of the two nephews, they seem to fall at once under three divisions:

1. The language of the instruments on which the rights of the respective parties are based.

2. The law applicable to such a state of affairs as is shown to exist, and the cases decided in this State and elsewhere so far as necessary and relevant.

3. Consideration of Vice Chancellor's conclusions.

I.

The language of the instruments on which the rights of the respective parties are based, are,

Clause 4 (page 4 printed case).
Clause 11 (page 6 printed case).
Item printed case, page 7, line 30.
Twentieth clause, page 8 of printed case, last paragraph.
Paragraph at page 11, printed case, line 30.

Second codicil, page 13 printed case.

A perusal of the will and its codicils will show that besides gifts of money of certain amounts there were other bequests of chattels and this explains the reason why the testator referred to his residuary legatees as the legatees "above named and in proportion to their respective moneyed legacies." (Page 9 printed case, line 20.) The two or three legatees who could not be intelligently included in this designation he further particularly specified by naming them, as no doubt he considered their stock bequests the same as money bequests or desired them to share with those who had definite sums of money bequeathed to them, and in case of the Rosedale Cemetery, which might have been otherwise entitled to share as a moneyed legatee he specified particularly a limit beyond which it should not be increased. He no doubt felt with this slight additional description there could be no mistake as to whom he desired to share as residuary legatees in the proportions stated.

The court may have no difficulty in interpreting

the language found in the papers referred to, but as I have devoted much thought to their meaning, and was not, at once, able to grasp what appears as I study the matter more closely, I take the liberty of calling attention to certain results that seem to me to follow the use of the language to which I have referred. Vice Chancellor Van Fleet's views of the documents under consideration can not be examined without feeling that he had reached the effect of the second codicil on the will in a very complete manner when he said (50 N. J. Eq., p. 561), "The $50,000 which the testator now gives 'in place' of the residue, and which he still calls 'said residue,' he makes his paramount gift, declaring that it shall outrank all other legacies except two. So that the effect of his last codicil is to change his testamentary scheme from top to bottom and to make that first which before was last." At the foot of the same paragraph he adds, "it is manifest that no attempt should be made to determine its" (the $50,000) "ultimate destination until the rights of all persons, in respect to it, are so far matured and settled that a judgment respecting them may be safely pronounced." The rights of all parties have now matured and should be determined by this court.

It will be seen from the above references to the will and its codicils that in the first instance the testator gave definite sums to the persons whom he particularly designated to receive them in his will and then subsequently by his second codicil made those sums uncertain by declaring that they should abate so that the legatees would receive only what was left after providing for other fixed sums. This made the general moneyed legatees assume the position of residuary legatees at the start of the executor's duties. He was directed to pay them only what was left after providing for

the cemetery bequest and the two trust funds of $10,000 and $50,000. There is no doubt that the testator meant them to assume such a position. Then again when he defines how they are to receive a second distribution if any out of the $50,000 trust fund he refers only to the residuary clause to show how it is to come to them, in this language (Printed case, page 13, line 13), "at her decease, said sum of fifty thousand dollars to go as provided in said twentieth clause," which, as above mentioned, is the residuary clause.

It seems to me of very great importance that the testator directed his executor to be guided in the disposition of the $50,000 by the twentieth clause of his will, and not by the will as a whole. The executor followed the directions of the will as a whole, and not its twentieth clause. The method of distribution the executor used makes no special difference in the final result, if this court directs him to pay the balance over in such a manner as to make the sum of both payments correspond to what would have been the single payment had he followed the directions of the twentieth paragraph. The importance of this distinction is found in this, that, in the one way, the general legatees will take part in the distribution as such, while in the other way, they will take all moneys distributed as residuary legatees, only, and this makes a difference of about $4,000 to the appellants, if the court holds that they are entitled to share in the estate, on account of two of the residuary legacies lapsing because of the legatees' deaths in the testator's lifetime. Hence the importance of determining whether this $50,000 is to go all as residue, or part as general bequests and the rest as residue. The exact language of the testator is (page 13, line 13), "said sum of fifty thousand dollars to go as provided in said twentieth clause subject to the same

conditions as in said clause mentioned, and to the modifications of the same contained in the prior codicil dated January 24, 1891."

If this language had not been interpreted in another way in the Court of Chancery, it would seem almost needless to call attention to it, particularly to show that it had the meaning I attribute to it, but, there, it was insisted that my construction of the language was too technical. A little consideration may convince the court that I am not likely to be far wrong in considering that the testator intended to change his whole testamentary disposition of his property, when we consider that he was desirous of founding such a home as the twentieth paragraph indicates. He was not sure whether he would have enough to do this, but he made certain of accomplishing his purpose, so far as money was concerned, by saying that if the residue should not amount to so much (Printed case, page 13, line 20) then the other legacies should abate "for said purpose" (line 26), meaning as I understand it for the purpose of establishing the trust fund contemplated by the second codicil, which included the home to be provided as well as the provision for his widow.

II.

What law is applicable to the situation disclosed by the testamentary papers and the facts?

Mr. Moore, the testator, died in 1891, so the rule then applicable to distributions was that the widow should receive one-half of the undisposed of personal estate. This same provision had continued down from the Revision of New Jersey, 1877, and

is to be found at page 785 of that book. The testator died without children.

There was some argument in the Court of Chancery about the testator in the second codicil using the word abate to indicate a temporary decrease only. I find on looking at the dictionaries that the word "abate," when used in connection with legacies, means to grow less, or to be diminished. Nothing is said in the dictionaries about this word having in such connection an idea of only temporarily becoming less, but the idea seems to be to decrease, without any prospect of resuming their former size. I consider this important, as we may feel assured that the testator meant the legatees to whom he, conditionally, bequeathed the $50,000 trust fund on the decrease of his widow, to take it only as residuary legatees. This view is strengthened by observing the language of the testator in his second codicil, in which he directs his executors to be governed by the twentieth, or residuary, paragraph of his will, in the distribution of this fund, and not by his will as a whole.

In *Williams on Executors,* Vol. 2, *1213, the case of *Farmer* v. *Mills* is referred to, and seems to me to be applicable to the present situation. It shows that where a legacy has been abated, it will not necessarily be restored to the old amount upon the termination of a life estate. There is still the further reason why the abatement in this case was not temporary. The whole fund was to be used for a Home, if so determined, and, if not, a further dstribution of the whole fund was to occur, and this did away with the double distribution first contemplated.

The case of *Collins* v. *Bergen,* 42 N. J. Eq. (15 Stew.) 57, states the rule as to lapses in this way: "The rule is that where an aggregate fund is given to several persons nominatim, to be divided among

them in equal shares, if one of them dies before the testator, the share of such decedent will lapse" (page 59).

In the case of *Garthwaite's Executor* v. *Lewis,* 25 N. J. Eq. (10 C. E. Green) 351, at page 353, it is said, "These shares are shares of the residue itself, and though the rule is that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue itself, which fails."

The case of *Huston* v. *Read,* 32 N. J. Eq. (5 Stew.) 591, says, at page 599, "Mary P. Shiras died, in the testator's lifetime, without issue. The gifts to her, given by the second section of the will, consequently lapsed, and the testator died intestate of the property given to her * * *." "The provision in the second is, that the property be equally divided. That creates tenancy in common, and there was, therefore, no survivorship." "The surplus of the fund was given absolutely to the female legatees to whom annuities were given by the will, including Joanna and Mary P. Shiras. The share of the latter, however, lapsed, and the testator will be held to have died intestate as to it." This case is mentioned as it seems to touch on the question of "class," as well as lapses, and also to show that the deaths of the legatees in the testator's lifetime operated to bring about the testator's intestacy as to the shares of the residuary legatees dying in the lifetime of the testator, as well as if the legacies had been void. The Vice Chancellor suggests that void legacies stand on a different plane from lapsed legacies, and refers to a North Carolina case or two, to establish that principle, which never seems to have been recognized in New Jersey.

To the same effect is the case of *Hand* v. *Marcy,* 28 N. J. Eq. (1 Stew.) 59, in which case the court

says, at page 64, "It may be conjectured that if his attention had been directed to the subject he would have used language to prevent the lapse, and it is quite probable that he would have done so. The question, however, is not what he probably would have said, but what he did mean by the language he has used. The gift to Mrs. Stevens lapsed by her death in the testator's lifetime. The share of the residue given to her does not go to the surviving residuary legatees. The gift of the residue is to the legatees therein named, as tenants in common. It is to them by name, with direction that it be equally divided between them. The surviving residuary legatees are not entitled to the share given to Mrs. Stevens by right of survivorship." This case also deals with the right of the widow, to whom a legacy has been given in lieu of dower, and determines that the gift of dower does not interfere with her right to a share in the undisposed of personal property of the testator, as will be seen by reference to page 65, of the book last referred to.

It happens that in the cases mentioned, the residuary legacies have been to the parties in equal shares. In the present case, the gift to the residuary legatees is not in equal shares, but in particularly designated portions, which, it seems to me, makes the case even more strongly against the right of survivorship.

Ward v. *Dodd,* 41 N. J. Eq. (14 Stew.) 414, in the syllabus, says, "1. Where a specific share of the residue of an estate is given to a legatee, and it lapses by such legatee's death in the testator's lifetime, such share does not sink into the residue, but as to it the testator died intestate."

In the case of *Burnet* v. *Burnet,* 30 Eq. (3 Stew.) 595, at page 599, we find this language, "It is an established canon of construction, that unless a

contrary intention is manifested, all lapsed, void and illegal legacies fall into the residuum, and pass as part of it." "But this rule does not apply to a gift of the residue when a gift of the residue, or any part of it, fails, whether by lapse, illegality, or revocation; to the extent of the failure, the will is inoperative. At page 600 we find this, "It seems clear, on the authorities, that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of the residue; but, instead of resuming the nature of residue, devolves as indisposed of. Residue means all of which no effectual disposition is made by the will other than by the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails the will is inoperative." On the same page the opinion goes on to state, "And the same rule was applied in a case where a testator, by a codicil, revoked the gift of one share of the residue given by his will, and made no other disposition of it. As to that share it was held he died intestate." This last quotation is added to show that the fact of making a subsequent document, and in it making no disposition of a residuary share, where the legatee died in the lifetime of the testator, should certainly not have the effect of changing the provisions of the will as much as the revocation of the bequest by the testator himself. The testator would not be supposed to want to die intestate in the one case more than the other.

I find the following in the case of *Skellenger's Executors* v. *Skellenger's Executor*, 32 N. J. Eq. (5 Stew.) at page 661, "No doctrine of equity jurisprudence is more firmly established than that, where personal estate is given by will to a trustee, upon certain trusts, and the purposes of the trust do not exhaust the whole estate, or the trusts fail,

either in whole or in part, by lapse or otherwise, the trustee shall not take the surplus for his own benefit, unless such appears to have been the intention of the testator, but a trust results in favor of those who are entitled under the statute of distribution as the next of kin of the testator."

This quotation from the same case is in point also judging from the arguments of my opponents in Chancery in this same case (page 663), "It is also insisted, that the widow should not be permitted to take any part of this fund, because it is apparent upon the face of the will, that the testator intended that she should not. This intention, it is said, must be inferred from the fact that he gave her the use of the whole during her life, and he could not, therefor, have intended that she should take part absolutely. In other words, having given her a part by express words, it must necessarily be inferred that he did not intend that she should have any more. This argument, it will be observed, proceeds upon the assumption that the right of distribution is to be regulated by the intention of the testator. But this, I think, is a mistake. The intention of the testator is to govern only so far as he has declared it by his will. With regard to that part of his property which his will did not pass, it must be declared he had no will, and therefor the court cannot know his intention concerning it. The next of kin cannot take until intestacy is found, and then they take, not in pursuance of the testator's intention, but by force of law, regardless of what his intentions were. Upon this point, Chief Justice Shaw, in the case already cited says: "If it were thought important to inquire into the intent of the deceased, when he has made a will, but left property undisposed of, either in terms or by implication, as every man is presumed to know the law, it may reasonably be in

ferred as his intention that the residue should be disposed of according to law." "The rule upon this subject is settled. It has recently been adjudged by this court, that where a testator dies intestate as to part of his estate in consequence of the lapsing of a legacy, his widow is entitled to a distributive share of it, though she has accepted the provision made for her in lieu of dower, by the will." "The decree will direct the complainants to pay one moiety of the fund to the representative of the widow and the other to the next of kin."

The case of *Dildine* v. *Dildine,* 32 N. J. Eq. (5 Stew.), page 78, is a good authority in favor of my contentions as will be seen by reference to it, in several particulars. At page 80 this case says, "The rule is, that a gift by will to individuals described by name, though they may constitute a class, indicates the testator's intention to give to them only as individuals." I consider this to be the situation presented in the present case. In the case last referred to also two of the parties named were dead at the time the testator drew the will and he knew they were (page 80) or it made no difference if he did not. In this case the testator was considered to have died intestate as to half of his property. While the courts do not favor the construction of a will that produces a state of intestacy, yet where the principles of law require it they declare the testator intestate. The case in hand is one of the cases that seem to me to require that conclusion. The testator intended his great nephews to have about one-fifth of his property and named no one else to take their place.

Worcester Trust Co. v. *Turner,* 96 N. E. Rep., 132, (210 Mass. 115). In this case there were sixteen legatees named and three died. They were designated by the paragraph numbers of the bequest to them. This was considered to distinguish

them sufficiently. Three legacies lapsed for the benefit of the next of kin.

Aiken v. *Ripley,* 109 N. E. Rep. 359 (221 Mass. 444). Here the will was made with greatest care to prevent intestacy, but the court held that a share of the residue lapsed in favor of the heirs.

In re Coates, Pa. St. 2 Ashm. 12. Testator devised all of his estate to P and his six other children, their heirs and assigns, to be equally divided between them. There was one who died in testator's lifetime. Held that testator died intestate as to such share. This case was decided before the statute altered the general rule between 1870 and 1880, in Pennsylvania.

Dickinson v. *Ridgly,* 188 Ill. App. 252. Legacies to same person as general and residuary both lapsed on the death of the residuary. "The general rule is well settled in this State, that if a legacy lapses, and there is a general residuary clause sufficient to embrace it in its terms, it will sink into the residuum, and all lapsed legacies of personal property go into the residuary fund." (Refers to *Dorsey* v. *Dodson,* 203 Ill. 32, and other cases.) This is the general rule; however, there is an exception in cases where testator gives legacies to the same persons who are provided for under the residuary clause, in which event the lapsed legacy does not fall into the residuum, because it would in effect be construing that the intention of the testator was to bequeath to one who died a portion of the residue happening in consequence of his own death. At page 260 the court quotes from another case as follows: Upon the failure of a particular intent to give a legacy to some person, the courts give effect to the general intent manifested by the residuary clause, presuming that testator prefers the residuary legatee. But where a testator gives legacies to several per-

sons, and then provides for the disposition of the residue between the same persons, the rule and reason of it fail. * * * Where a testator gives specific legacies to several legatees, and gives the residue to them as tenants in common, if each one receives his share over and above the specific legacies, he received exactly what the testator intended to give him. Having given to each specific sums, and a specific share of the excess over the total of such sums, the proportion of those who live is not to be enlarged by a lapsed legacy. It is not to be inferred that the testator intended that a lapsed legacy to one should fall into the residue so that the survivors shall receive a different and increased proportion of testator's estate. This was decided in a case where the relationship was brother and sister between the residuary legatees. The court adds (page 261), The controlling principle announced in these cases is that the law will never hold that a testator intended to give to one who died a portion of the residue happening in consequence of his own death.

When this matter was before the court of Chancery, I considered it sufficient to refer to the cases stating what rule was applicable to the distribution of the residue, in case of the decease of any of the residuary legatees in the lifetime of the testator. I did not argue out the reasons that had brought about the rule, but, as the Vice Chancellor and the opposing attorneys have taken the stand that the rule indicated by the cases was not applicable to the present will, it may be well to consider what the testator's intentions were with regard to his estate. George D. G. Moore, as before mentioned, was Surrogate of Essex County, and a lawyer of this State, and it is fair to assume that he, in making his will, understood the law as well or better than the average testator. He made a per-

fectly clear scheme for the distribution of his property in his will, and first codicil, and desiring to change it by the second codicil, he stated precisely what should be done with substantially all of his property. He directed his executors not to take away anything from the trust fund provided for his sister, Harriet, in his will, and not to take away anything from the funds provided for the cemetery company, but to appropriate for the trust he proposed to make, the sum of $50,000 to be held by his executors on the trusts mentioned in the second codicil, without regard to what effect this new disposition of his property might have upon his former scheme of distribution, excepting in so far as he directed them to let the shrinkage operate equally aganist his general and specific legatees, so far as was necessary to establish the proposed trust fund. In doing this, he, in effect, directed that the sum of $50,000 or whatever smaller sum his estate might produce, should be appropriated for the purpose of his second codicil, which, as I understand it, was to form a trust fund to be used as directed by the second codicil. No doubt, for his own convenience, and to avoid the tedious redrafting of the greater part of his will, he kept that document still in existence for the purpose of informing his executors what he desired done with the trust fund of $50,000 upon the decease of his widow; otherwise, the will had become of little value, excepting in so far as the trust fund of his sister, Harriet, was concerned, which by the terms of the testator's will was to become a part of the testator's residuary estate, as planned by the will, and with which plan the testator did not interfere, except in so far as was necessary to carry out the trust imposed by his second codicil. This accounts for the fact that when it was discovered that there was no residue left for the gen-

eral and specific legatees, after deducting the two trust funds, it naturally followed that Harriet Moore's trust fund upon her decease had no residue with which to unite, but had to be used to make good, so far as possible, the other legacies provided for by the testator's second codicil, and in the will itself. It was accordingly ordered that that fund should be used to satisfy the specific legacies, and to make good the trust fund of $50,000 which was given precedence to the other bequests by the terms of the second codicil. In this manner the provisions of the will itself, when taken by itself, were executed, so far as they could be, without disregarding the provisions of the second codicil, which took precedence as containing the last wishes of the testator, and nothing further remained to be done by virtue of the will itself, as modified by the second codicil. After the distribution of the Harriet Moore trust fund, the executor's only duties remaining, under the will, were to see that the $50,000 trust fund was used for the purposes for which the testator designed it to be used, and those purposes were very simple and explicit. It was to be used to produce income during the life of his widow, and upon her decease it was to go as provided in the twentieth paragraph of the will. Inspection of the twentieth paragraph of the will shows that it related to what should be done with the residue of the testator's estate, only. This residue was left in trust to the executors to be used for a Home, or, in case no Home was established within five years from the testator's death, to the persons designated in his will and first codicil to receive money by testator's bequests, and shares of stock to be estimated at their market value, for the purpose of entitling the legatees thereof to share in the distribution of his residuary estate, if such distribution should occur.

Whatever way we turn, we are confronted by the same situation. The general and specific legatees had become legatees of the testator's residuary estate, and each was to have a definite portion of that residue, when divided. First, they were made general legatees by the testator, but by the second codicil the same general legatees were made residuary legatees. As general and specific legatees, they were to have definite sums of money and property from the testator's estate, but by the second codicil, instead of being general and specific legatees, they became entitled to divide between them, in stated proportions, in the first instance, only what was left of the testator's estate after establishing trust funds of $10,000 and $50,000, for the purposes designated by the testator. This made them residuary legatees of what was undisposed of by the testator, for the purpose of trusts. These trust funds were to be used by the executors for the purposes designated by the testator in establishing the trusts, and again the persons who were general and specific legatees, in the first instance, became residuary legatees, entitled to whatever remained of the trust funds after the other purposes for which the testator had designed them had been carried out and completed, with the exception of the distribution to them as residuary legatees.

There was no residue left in the testator's estate other than the sum of $50,000 principal, that remained in the hands of the executor upon the decease of the testator's widow, because by the terms of the will, all the testator's estate should have been distributed to Harriet Moore, his sister, and to his general and specific legatees. It is true, I am dealing with facts as they occurred, and not with facts as contemplated by the testator at the time he drew the will with any degree of certainty; but at the same time, in providing as he did, the

testator directed just what should happen in case just such incidents as have occurred, should occur. He knew that the law of the State provided that in case any of the general and specific legatees expected to share in his residuary estate, should die before his own decease, their shares would go to his next of kin, under the established rule that a residuary legatee's share in the residue does not lapse for the benefit of the remaining residuary legatees, but is, by the decided cases, to be paid over to the next of kin and widow of the testator.

It is difficult to see, under such conditions, on what foundation a theory can be built that the testator meant to provide for a different disposition of his property than what was recognized as the established rule at the time his will was drawn. Because a man makes a will favorably to certain persons at one time and concludes to change it at another, so long as the directions in the second will or codicil are clear, we should assume that the testator means what he says. I am simply arguing that we should take the testator's words as he gives them to us. My opponents consider this a technical construction.

The rights of the representatives of the widow of the testator may be considered from four standpoints. While I believe the first of these is the true interpretation of the will, yet, as my opponents insist that I am mistaken in this, and the Court of Chancery has sustained their view, for the protection of my clients I mention what appear to me to be the logical results following each aspect of the case:

1. The representatives of Mrs. Moore will be entitled to about $6000, if the court decides that the great nephews of the testator, who died in his lifetime, would now, if living, be entitled to their

shares of the estate of the testator, as residuary legatees.

2. The representatives of Mrs. Moore will be entitled to about $6000, if the court decides that the rule referred to in Schouler on Wills, and accepted as the law in Illinois and Massachusetts, which provides that where the general legatee is also a residuary legatee, the rule that the general legacy lapses for the benefit of all the residuary legatees, is not applicable, but that the whole share of the legatee, both general and residuary, lapses, and that the testator dies intestate as to such lapsed legacies.

3. The representatives of Mrs. Moore will be entitled to receive the sum of about $2,000, if the court decides that the great nephews of the testator, having died in the lifetime of the testator, their general legacies (if any) lapsed into the residuary estate of the testator, because, as residuary legatees as well as general legatees, they would have been entitled to receive a share of the testator's residuary estate, and their shares as residuary legatees, by the established rules in New Jersey, because of the absence of words of survivorship, would have gone to the next of kin of the testator, and to his widow's representatives.

4. If the court holds that the gifts of the residuary estate were gifts to a class, notwithstanding the fact that to each legatee a definite and distinct portion of the estate was bequeathed, the representatives of the estate of the widow will be entitled to receive nothing from the testator's estate.

With these various results before us, the necessity of a decision on the points involved will be quite apparent.

In Jarman on Wills, page *232, we find this language: "A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews,' but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, and who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."

The rule that where a share of the residue itself lapses it does not go to increase the shares of the remaining residuary legatees, is referred to as common knowledge in all the following books, and is stated in Jarman on Wills at page *719, as follows: "When a disposition of an aliquot part of the residue itself fails from any cause, that part will not go in augmentation of the remaining parts as a residue of the residue, but will devolve as undisposed of." See also Hawkins on Wills page *42. Schouler on Wills, 5th Ed. §519, where this language is used. "Moreover, as by residue we mean that which is only disposed of effectively in the residuary clause, any part of the residue which itself fails, does not prima facie swell the remaining part of the residue, but goes as estate undisposed of."

One of the fundamental ideas with regard to a class is that of survivorship as joint tenants. Where, as in this will, all the shares bequeathed as residue are distinct fractions of the whole estate, there is no foundation on which this principle can operate, for the two ideas cannot exist together. Instead of each having a share in the whole each has a

share in a separate and distinct fraction, as is the case with tenants in common.

In this case the testator does not intend them to take as joint tenants for in the words of the gift to them he states that each is to have a share fixed by the amount of the preceding general or specific bequest, using the following language (page 9 printed case line 19): "I direct them to divide and distribute the said residue pro rata among the legatees above named, and in proportion to their respective moneyed legacies," etc.

I notice that the cases referred to by the Vice Chancellor, *Lea* v. *Brown,* 56 N. C., p. 141, and *Allison* v. *Allison,* 56 N. C., p. 230, are in Jones Eq. Reports, Vol. 3, and that the page of the last mentioned case is 236 and not 230. I speak of this as I had some difficulty in finding the cases referred to, and wish to save the members of this court trouble if they take sufficient interest in the decisions to examine them. The case of *Lea v. Brown* (ubi supra) is interesting in a way, but though it is referred to in *Allison v. Allison* as establishing the principle that a lapsed legacy of part of the residue goes to the remaining residuary legatees and not to the next of kin, it may be observed that the case *Lea* v. *Brown* did not deal with effect of a residuary clause, at all, as the court expressly decided that there was no general residuary provision in the will under consideration. Admitting, however, for the sake of argument, that the Court of North Carolina did expressly decide that a lapsed legacy of part of the residue, in the will before it, did lapse for the benefit of the remaining residuary legatees, it does not follow that in New Jersey, where the matter had been decided differently in the lifetime of the present testator, that the North Carolina decisions should be applied to testator's language, in the selection of which he was no doubt

guided by New Jersey decisions, to bring about a result he never contemplated.

III.

Consideration of Vice-Chancellor's conclusions.

As one of the essentials in reaching a proper conclusion is to start from correct premises, and as sometimes the smallest mistakes in facts lead us to serious errors, in our conclusions, I proceed to show in what particulars the Vice Chancellor appears to have been mistaken about his facts, even though, in some instances, they may seem trivial. This court can easily determine whether they are of importance.

1. The two relatives whose legacies lapsed on account of their deaths in testator's lifetime, were both his great nephews, as will be seen by reference to the fourth and eleventh paragraphs of will. To one he left $10,000 and to the other he left $250. The Vice Chancellor said the one to whom testator left the larger sum was a nephew, while the one to whom he left the smaller sum was a great nephew. The distinction hinted at by the Vice Chancellor is that testator showed preference because of closer blood relationship.

2. Testator's bequest to his sister was a trust fund established for her benefit, of which not only the income was given to her, but such part of the principal as might be required in addition thereto, as will be seen by reference to the third paragraph of the will, and not the income, only, as the Vice Chancellor appears to have thought. This might

lead to the conclusion that he was more solicitous for his residuary legatees than for his sister.

3. The Vice Chancellor in stating the questions in the case and in his conclusions fails to remark that the claims of the representatives of the widow were two fold; the first, that testator died intestate as to bequests to his great nephews of sums aggregating $10,250 and shares in the residue, and the second, that if said legacies lapsed into the residue, he died intestate as to part of the residue; as will be seen by reference to the fifth and sixth paragraphs of the answer of the representatives of Mary S. Moore, the widow (page 32 printed case).

The Vice Chancellor states that the insistment was made that as to the legacies last mentioned, the testator died intestate, "and that they are to be distributed under the statute, and that, as this was the condition existing at the death of the testator, his widow, then, or her representatives, now, are entitled to one-half the amount of these lapsed legacies." No such claim was made, either in the answer of the representatives of Mary S. Moore, nor in my brief in the Court of Chancery, nor in my oral argument there, or elsewhere. The idea probably was taken by the Vice Chancellor from one of the briefs of the opposing counsel. I understood perfectly that the widow had no ground on which to claim an interest in the lapsed legacies during her lifetime, for she was enjoying a life interest in property which, upon her decease would be distributed as the testator's will and the law of the State directed. The importance of this mistake is shown later on, in his conclusions, when the Vice Chancellor follows this incorrect premise by stating that the widow did not make her claim for the seventeen years during which she was enjoy-

ing her life interest in the property, thus conceding that she had no interest therein, and that her representatives, following in her right, claimed it, for the first time, on this application for distribution. It has been shown that the estate of the testator was not sufficient to provide satisfactorily for the trust funds of $10,000 and $50,000, and that the widow's fund was not all composed of satisfactory securities prior to the death of Harriet Moore. The claim of the representatives of the widow as now presented to the court, shows that they are entitled to a portion of the $50,000 trust fund, the income of which Mary S. Moore enjoyed in her lifetime. It would have been impossible for Mrs. Moore herself to have presented a claim for any definite portion of the testator's estate during her lifetime, because of the lapse of these legacies, unless the testator had died seized and possessed of sufficient property to pay during the widow's lifetime all the general legacies provided for in his will in addition to the two large trust funds and leave a surplus for division, which is obviously not the condition of affairs that existed upon the testator's decease when it was found that there were not funds sufficient for both trusts. Besides all this, no one knew whether Mr. Allen, the executor, would use this same money for a home, as he was entitled to under the will and codicil.

I do not assume that this statement of fact will be contested, but, if it is, it seems to me that the burden is on the other side to show that if Mrs. Moore had made a claim on the testator's death, in addition to her life estate in the sum of $50,000, she could have had the same chance of securing some benefit from her application as her representatives do, now that her trust fund has been released for distribution in accordance with the provisions of paragraph twentieth of testator's will, and since

Mr. Allen has determined not to found or assist in establishing the home contemplated by testator.

One of the most serious errors into which the Vice Chancellor has fallen, is, possibly, where he intimates that the testator did not, in the will under consideration, give the residue to persons definitely designated and then later states: "In this case the deceased nephews of the testator are not specifically named as residuary legatees, nor is any other person so named." He appears to have overlooked the fact and maxim, "That is certain which may be made certain." The testator specifically names the persons by reference to his will as effectively as if that document were again repeated in the residuary clause.

The Vice Chancellor follows this by saying: "To entitle the representatives of Mrs. Moore to prevail under the rule of construction they invoke, they must show that testator's nephews were both general and residuary legatees, that the bequests to them of a share of the residue were to them in an individual, and not in a collective capacity, that the testator has not made an effectual disposition of their shares of his estate, and that as to such shares, he died intestate." This shows how vital a mistake of fact he made in concluding that the residuary legatees were not definitely designated. He intimates that the contention of the representatives would prevail if the facts were not as he erroneously supposed them to be.

Let us take this matter up in detail to see in what particulars the requirements of the Vice Chancellor's specification have not been complied with. He says: "To entitle the representatives of Mrs. Moore to prevail, under the rule of construction they invoke, they must show that:

(1) "Testator's nephews were both general and residuary legatees." To show this refer to the

4th, 11th and 20th paragraphs of will and second codicil.

(2) "The bequests to them of a share of the residue was to them in an individual, and not in a collective capacity." Note in this respect that all the legatees are named individually, and that to each a distinct fraction of the estate is bequeathed.

(3) "Testator has not made an effectual disposition of their shares of his estate." Proof of this lies in the fact that there are no words of survivorship in the 20th, or residuary clause, and the trust fund of $50,000 is to go as provided therein, and to be divided in proportionate sums among the several legatees mentioned.

(4) "As to such shares he died intestate." Having definitely designated his greatnephews and indicated the shares of his estate he desired each to take, he died without making any other disposition of those shares, in case of their deaths in his lifetime. Under such conditions the cases in the State of New Jersey hold that such legacies lapse, and that as to them the testator dies intestate.

The next error the Vice Chancellor seems to have fallen into, is to adopt the argument of counsel, itself founded on mistakes. The suggestion that the testator was a competent lawyer, should have been followed by assuming that he was familiar with the cases in the State, providing that lapsed legacies of the residue itself went to the next of kin and not to the remaining residuary legatees, as shown by the cases herein cited. A similar provision for the widow made in lieu of dower, has already received the consideration of the court and it has been decided that it does not affect the rule in question, as appears from said cases.

The Vice Chancellor makes a particular point of the presumption that the testator did not desire to die intestate. Accepting this as a fact, nevertheless he did not say to whom the undisposed of residue of his estate should go, in case of the death of one or more of his residuary legatees, and it is at least as reasonable to assume that he desired it to go to the persons who the law says should take it, as to those it declared should not take, as shown by the cases decided in this State.

The testator wanted each of his legatees to have a distinct part of his estate, and no more. He could readily have provided for their receiving additional sums by putting a survivorship clause in his will, or he could have directed that any share of the residue that lapsed should go as in case of intestacy. He was familiar with the principle of lapses for he provides against one in his will. (Printed case, page 4, line 36). The law itself as interpreted by the cases herein cited, presumably known to him, informed him that in case he desired such shares to go to the next of kin, in such a contingency, he had used proper language to bring about that result. Why should our sympathies be excited toward persons who are to be congratulated on their good fortune that the testator left them any part of his estate, as he did by leaving them the residue, conditionally.

Speaking of significant circumstances pointing to the testator's intentions, we have as many one way as the other. For instance, if such questions are to be asked, why was it that he provided specifically by his first codicil, written after the death of one of his other legatees, that certain other persons not named in his will should take her share? The answer to this would naturally be that he did not want it to go as he knew it would, in case he made no such provision. He had not shown by

his will how he wanted this share to go in case of the death of this general legatee. It appears that he did not want it to go as the law directs in case of intestacy. When he did not want it to go that way he provided otherwise. If he did not want his next of kin to have his greatnephews' shares, as he knew the law said they should, under a will like his, would he not, if he had known of their deaths, have made some new disposition of their shares in his second codicil, as he did with reference to the other legacy in his first codicil?

ALFRED F. STEVENS,
Of Counsel with Appellants.

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Petition.

(Filed July 20, 1914.)

In Chancery of New Jersey.

Between

FRANK B. ALLEN, Executor etc., of George D. G. Moore, deceased,

Complainant,

and

HARRIET E. MOORE *et al.*,

Defendants.

On Bill, &c.
On Petition for further directions, etc.

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

Your petitioner, Frank B. Allen, Executor of the last will and testament of George D. G. Moore, deceased, complainant in the above cause, respectfully shows and presents that the said George D. G. Moore died in the City of Newark, in the County of Essex, in the State of New Jersey, on or about the 13th day of October, in the year of Our Lord, one thousand eight hundred and ninety-one, which was the place of his last domicile, leaving a last will and testament bearing date the 16th day of June in the year of Our Lord one thousand eight hundred and eighty-nine, duly made and executed in due form

of law to pass real and personal estate in New Jersey, and two codicils thereto, each executed in like manner, the first thereof dated the 24th day of January in the year of Our Lord one thousand eight hundred and ninety-one and the second dated the fifth day of October in the last mentioned year, which said will and codicils were after his said death duly admitted to probate by the Surrogate of said County of Essex on the 26th day of October in the year last aforesaid, and were duly proved and letters testamentary thereon were duly issued to your petitioner, one of the Executors of said will, the other Executor, James C. McDonald, Esq., having renounced the execution of the said will.

And your petitioner shows unto your Honor that the said last will and testament and the codicils thereto are in the language following, to wit;

In the Name of God, Amen.

I, George D. G. Moore of the City of Newark, in the County of Essex and the State of New Jersey being of sound and disposing mind, memory and understanding, do make, publish and declare this as and for my last will and testament, hereby revoking all former and other wills by me at any time heretofore made.

First. I order and direct that all my just debts and funeral expenses, including the proper inscription of my monument and the putting in complete order and ornamenting in a tasteful manner my burial plot in the Rosedale Cemetery at Orange, shall be paid as soon as may be.

Second. I order and direct that there shall be paid immediately after my death to "The proprietors of Rosedale Cemetery" the sum of Four Hundred Dollars for the perpetual care of my burial lot in the said cemetery, the interest to be used and applied to caring for and ornamenting said lot by keeping flowers planted and growing thereon, as I have done, as nearly as the said interest will allow.

Third. I give to my executors hereinafter named the sum of ten thousand dollars in trust, to invest the same (and for this purpose they can select from the securities that I leave the said amount) and keep the same safely invested and pay the net annual interest thereof to my sister Harriet E. Moore during her natural life, the same to be paid in quarterly payments on the first days of January, April, July and October as nearly as the collection of the same will allow; the first payment to be due and payable on the first quarter day following my decease, and if for any reason the income should not be sufficient for her

comfortable support, I authorize my executors to apply so much of the principal of said sum as in their judgment may be needful for that purpose.

Fourth. I give and bequeath to my nephew George DeGraw Moore, son of my Nephew E. Conway Moore of Prairie duSac, Wisconsin, ten thousand dollars and if he should be under the age of twenty-one years when the same is payable, I direct the said sum to be paid to his father E. Conway Moore for him and a receipt from his father shall be a sufficient discharge to my executors.

Fifth. Whereas I hold a mortgage executed and given to me by my niece Sarah M. Walsh and her husband Zachariah Walsh for twelve hundred dollars and whereas the Howard Savings Institution also hold a mortgage given by the same parties for twenty two hundred and fifty dollars both being on the same property, to wit, her house in Sixth Street in Newark, I direct my said executors to pay off said mortgage to said Howard Savings Institution and take an assignment of the same and hold both mortgages for the use and benefit of the two youngest children of my said niece, viz. Robert Walsh and Adeline H. Walsh, but no interest is to be paid on said mortgages by said Sarah M. Walsh and Zachariah Walsh during their lives or the life of the survivor, but upon the death of both, the same shall become the property of the said Robert and Adeline H. Walsh in equal shares or the survivor of them. I also give to my said niece Sarah Walsh the further sum of One Thousand Dollars.

Sixth. I give to my executors in trust the sum of two thousand dollars to invest the same and keep the same safely and securely invested and

pay the net interest thereof to the mother of my nephew George Moore Reuck, son of my nephew J. Monroe Reuck for his support and education during his minority, and when he arrives at the age of twenty one years, if he shall live to reach that age then to pay him, the said George Moore Reuck the said two thousand dollars. But I expressly direct that the said principal sum shall not be deemed or considered vested in him till he reaches the age of twenty one years. And in the event of his death before attaining that age, then to his sisters, if of the age of eighteen years, to them on their own receipts notwithstanding their minority. If any of them should be under the age of eighteen, that share may be paid to the mother on her receipt. I also give to the said sisters, daughters of the said J. Monroe Reuck, the further sum of six hundred dollars to be paid, as above directed as to the two thousand dollars (in case of the death of the said brother before arriving at age).

Seventh. I give and bequeath to my niece Albertha Reuck, daughter of my nephew J. Whitfield Reuck, deceased, One Thousand Dollars, and the same may be paid to her when she attains the age of eighteen years or marries, on her own receipt notwithstanding her minority, and until she reaches that age the interest shall be paid to her mother for her maintenance. I give to the other children of my nephew J. Whitfield Reuck One Thousand Dollars to be divided equally among them, to such as may have attained the age of eighteen years, to be paid to them on their own individual receipts and to those that have not attained that age, their share to be paid to their mother Phoebe Reuck and her receipt shall be a sufficient voucher to my executors for the same.

Eighth. I give and bequeath to my niece Harriet Elizabeth Gould wife of Henry D. Gould, Two thousand Dollars.

Ninth. I give and bequeath to my niece Emma E. Moore, one thousand dollars, and to the children of my nephew Edwin J. Moore deceased, one thousand dollars, to be equally divided among them and to my niece Harriet Mathilda Downs, one thousand dollars.

Tenth. I give to my following named nephews and nieces, Harriet Augusta Harrison wife of William H. Harrison, Joseph Moore of Prairie du Sac, Wisconsin, Emma Reford, wife of J. Banks Reford, Joseph Parcells, Harriet Amelia Bacheler, wife of John C. Bacheler, Carrie Cobb, wife of William A. Cobb, E. Conway Moore of Prairie du Sac, Wisconsin, and to his sister Fanny Moore, the sum of five hundred dollars to each.

Eleventh. To my following named nephews and nieces, George Thereon Moore, George Moore, son of my nephew Joseph Moore of Prairie du Sac, Wisconsin, Olivia Smith, wife of Isaac Smith of Iowa, Carrie Fletcher, wife of Charles Fletcher of Iowa, and Alfred Moore, son of my nephew, Aaron Nelson Moore, deceased, two hundred and fifty dollars to each.

Twelfth. I give to my kind friend Mrs. Frances D. Stanwood, wife of Dr. Robert G. Stanwood, ten shares of my Essex County National Bank Stock.

Thirteenth. I give to the Protestant Foster Home Society of Newark five hundred dollars as a legacy from my dear wife who was one of its managers.

Fourteenth. I give to "The Board of Foreign Missions of the Presbyterian Church in the United States of America" and to "The Board of Home

Missions of the Presbyterian Church in the United States of America," incorporated April 19, 1872, by act of the legislature of the State of New York, twenty-five hundred dollars to each.

Fifteenth. I give to "The Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America, incorporated May 5, 1871, by the legislature of the State of New York, and to the "Presbyterian Board of Relief for Disabled Ministers and the widows and Orphans of Deceased Ministers one thousand dollars to each.

Sixteenth. I give to the German Theological School located at Bloomfield, New Jersey, five hundred dollars.

Seventeenth. I give to the children of my nephew Francis D. Moore deceased, one hundred dollars each.

Eighteenth. I give to my friends James C. McDonald and Joseph D. Gallagher, whom I hereafter appoint my executors, as a kind remembrance, one thousand dollars each.

Nineteenth. My furniture, books, clothing and articles of personal use, I dispose of as follows:

Item. I give my gold watch, key and buckle, my diamond ring formerly my dear wife's and the Crayon Portraits of my wife and myself to my nephew George D. G. Moore son of my nephew E. Conway Moore.

Item. I give the silver spoons and forks by the direction of my wife and as her legacy to my niece Harriet Elizabeth Gould.

Item. I give my mahogany Chiffonier and my Intaglio Sleeve Buttons to my nephew Alfred Moore son of my nephew Alfred Nelson Moore, deceased.

Item. The watch and chain of my dear wife's now in possession of my sister, Harriet, and to be used and retained by her as long as she lives, at her death is to be given as directed by my said wife, and as from her to my niece Grace Moore, daughter of my nephew Edwin J. Moore deceased.

Item. I give to my friend Joseph D. Gallagher my silver tobacco box, my library table, whatever law books I may have and my Benton's Abridgment of the Debates of Congress.

Item. I give all the remainder of my household furniture, books, ornaments, pictures and articles of my house, clothing and contents of the bureau and Chiffonier to my niece Sarah M. Walsh (she will know what to do with them) also the diamond brooch of my dear wife's in the shape of a cross, including the principal stone which has been taken out and is now in a scarf pin. The silver pie knife is a gift to her from my wife, and as my niece will be at some expense in carrying out some wishes of mine in reference to the above articles, that she alone will know of, I direct my executors to pay her any such expense and her receipt for the same shall be a sufficient voucher.

Twentieth. All the rest and residue of my estate including the interest and accumulations thereon and the ten thousand dollars (after the death of my sister Harriet the interest of which is given to her during her life) I give, devise and bequeath to my executors hereinafter named in trust for the following uses and purposes, to wit, to apply and pay over the same to and for the purpose of a home for respectable aged people of both sexes and where husband and wife can be taken care of together and not separated in their old age, to be under Presbyterian or undenominative Protestant management and control of the City of Newark, of which the Presbyterian

denomination shall have at least an equal representation and control with any other, and no one other denomination shall have a controlling power in the management of said home. Provided there shall be such a home founded and established within five years from my death, for such distinctive purpose by a name distinctly signifying such purpose (and into which the word "Melrose" shall be incorporated, that being the second name of my dear deceased wife) according to the judgment and to the satisfaction of my executors, their judgment and opinion to be conclusive. And if no such home be founded and established within the said five years whereby and to which the said residue can be paid over by my executors, then I direct them to divide and distribute the said residue pro rata among the legatees above named, and in proportion to their respective moneyed legacies, and for this purpose the bank stock to Mrs. Stanwood shall be reckoned at its market value and the morgtage mentioned in the fifth clause of my will shall be considered as a legacy to my niece Sarah M. Walsh and the legacy to the Rosedale Cemetery mentioned in the second clause of my will shall not be increased more than one hundred dollars.

Twenty-first. If I should die away from home, I direct that my body be recovered if possible, at any expense and placed beside my wife, the grave vault to be increased so that we shall lie more in front of the monument. If it should be impossible to recover my body, then I direct the grave to be opened and the box which I have had made containing our likenesses placed in the grave as directed on the wrapper of the box and at my burial the box to be placed in the vault as directed on said wrapper. The vault prepared for

me by the side of my wife shall never under any circumstances be used for any other person.

Twenty-second. I order and direct my executors to sell and convey all the real estate of which I shall die seized for the purpose of paying the above legacies and distributing the residue the whole estate real and personal, for all the purposes of distribution to be taken and considered as personal property.

Twenty-third. I give and bequeath to my niece Mrs. Sarah M. Walsh and my friend Mrs. Frances D. Stanwood, the further sum of two hundred and fifty dollars each, with the request that they will exercise during their lives and perhaps their children after them a kind of supervision of my burial lot, see that the Cemetery Company keep it in order and perhaps sometimes place flowers on my grave.

Lastly. I name, constitute and appoint my friends James C. McDonald and Joseph D. Gallagher, Counsellors at Law as and to be the executors of this my last will and testament, and I direct that they shall not be required to pay the above legacies faster than my estate can be settled and converted into cash without sacrifice neither shall my real estate be sacrificed by a speedy sale, but until it is sold, let it be rented and the rents go into and form a part of my estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this seventeenth day of June in the year eighteen hundred and eighty-nine."

"A codicil to the will of me, George D. G. Moore, which will bears date the seventeenth day of June, eighteen hundred and eighty-nine."

First. I increase the bequest in the second clause of my will mentioned to the "Proprietors of Rosedale Cemetery" one hundred dollars, making the amount to them five hundred dollars.

Second. Whereas my niece Harriet E. Gould mentioned in the eight clause of my will has since died, the legacy of Two thousand dollars given in said clause, I give to her three sons, to be divided equally among them, and the silver spoons and forks mentioned in the nineteenth clause of my said will I also give to them to be divided among them.

The diamond brooch mentioned in the nineteenth clause of my will no longer remains. The principal diamond of it I now wear in a stud and give the same to Miss Grace Whitehead of Washington, D. C., a niece of my dear wife, a ring containing two small diamonds from said brooch, I give to Miss Fannie Whitehead, another niece of my said wife's daughter of her brother Philip residing in Illinois.

As to the residue of my estate given to my executors, in trust by the Twentieth clause of my will, I authorize and empower them to unite with some existing home or institution but in such a way as to secure the purpose for which said residue is given and the incorporation of the word "Melrose" in remembrance of my dear wife into the name of the institution that shall receive the said residue.

Third. I give to my friends S. Fannie Carter of Newark, Teacher, and Miss Mary Strieby, daughter of the Rev. Dr. Strieby, also teacher,

of Newark ten shares each of my Essex County National Bank Stock, and in case of a further distribution of the residue of my estate among the legatees, said stock to be reckoned at its market value.

I request my executors to retain my gold mining stock for at least three years after my death unless they see some very good reason for sooner disposing of the same, and as much longer as they deem it wise so to do.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this twenty fourth day of January in the year eighteen hundred and ninety one.

"A further codicil to the will of me, George D. G. Moore, which bears date June 17, 1889."

First. As to the residue of my estate given to my executors in trust by the twentieth clause of my will—in place of that I give to my executors in trust the sum of fifty thousand dollars, the interest thereon, to be paid to Mary S. Fitch (with whom I am shortly to be joined in marriage) during her life in semi-annual payments, the first to begin at six months after my death and at her decease, said sum of fifty thousand dollars to go as provided in said twentieth clause subject to the same conditions as in said clause mentioned, and also to the modifications of the same contained in the prior codicil dated January 24, 1891, said bequest to be in lieu of dower in my estate. And in case said residue shall not amount to the said sum of fifty thousand dollars, then I direct that the other legacies (except that to my sister and that to the Cemetery Company) shall abate in proportion so that at all events the sum of $50,000 shall be available for said purpose.

I lastly nominate and appoint James C. McDonald and Frank B. Allen executors of my said will and codicils, naming said Frank B. Allen as executor, because he is familiar with my business affairs in the place of Joseph D. Gallagher, whose appointment I hereby revoke.

Witness my hand and seal this fifth day of October, A. D. 1891.

And your petitioner further shows that after making of the last codicil said testator married said Mary S. Fitch therein named.

And your petitioner further presents and states that on the 21st day of January, 1892, he filed his bill in said cause asking the advice and aid

and direction of this Honorable Court in the construction of said will and that all and every the legatees and parties in interest under said will, and the next of kin and heirs at law of said testator, were made party defendants therein and that they were all and each of them were duly subpœnaed to appear therein and that a decree *pro confesso* was made and filed against all the said defendants except the Protestant Foster Home Society of Newark, The Board of Foreign Missions of the Presbyterian Church in the United States of America, The Board of Home Missions of the Presbyterian Church in the United States of America, incorporated April 19, 1872, by act of the Legislature of the State of New York; The Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America, incorporated May 5th, 1871 by the Legislature of the State of New York, The Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers, Frances D. Stanwood and Mary S. Moore, who entered appearance and filed answer therein, and the then infants George Moore Reuck, Bessie Reuck, Albertha Reuck, Ada Reuck, Edith Reuck, Addie M. Moore and William Gould, for whom appearance was entered by the Clerk of this Court as Guardian *ad litem.*

And your petitioner further shows that in the bill filed therein he asked the advice and aid and direction of this Honorable Court as to his duty in several important respects in regard to the validity of some of the provisions of said will and also as to the rights of certain legatees named in said will under the same.

And your petitioner further shows that in said bill filed herein he asked the advice, aid and direction of this Honorable Court, among other things, as follows:

"That in the twentieth section of the said will the testator gives all the rest and residue of his estate to his executors in trust for the following purposes (using the testator's language) "to apply and pay over the same to and for the purpose of a home for respectable aged people of both sexes, and where husband and wife could be taken care of together and not separated in their old age: to be under Presbyterian or undenominative Protestant Management and control of the City of Newark of which the Presbyterian denomination shall have at least an equal representation and control with any other and no other one denomination, shall have a controlling power in the management of said home. Provided there shall be such a home founded and established within 5 years from the time of the said testator's death, for such distinctive purpose and by a name distinctly signifying such purpose (and into which the word "Melrose" shall be incorporated, that being the second name of the testator's deceased wife) according to the judgment and the satisfaction of his executors, their judgment and opinion to be conclusive;' and if no such home be founded or established within the said 5 years whereby and to which the said residue can be paid over by his executors, then he directs his executors to divide and distribute the residue among the legatees therein above named, and in proportion to their respective 'money legacies'; and for this purpose the bank stock bequeathed to Mrs. Stanwood shall be reckoned at its market value and the mortgages mentioned in the fifth clause of the will shall be considered as a legacy to his niece, Sarah M. Walsh, and he directs that the legacy to the Rosedale Cemetery in the second clause of his will shall not be increased more than one hundred dollars."

That by the first codicil the testator says that as to the residue of his estate given to his executors in trust by the twentieth clause of his will, he authorize and empowers them to unite with some existing home or institution but in such a way as to secure the purpose for which said residue is given, and the incorporation of the word Melrose in remembrance of his wife into the name of the home or institution that shall receive said residue.

And in and by the second codicil he provides that as to the residue of his estate given to his executors in trust by the twentieth clause of said will, in place of it he gives to his executors the sum of fifty thousand dollars, the interest thereon to be paid to Mary S. Fitch during her life, etc., the said $50,000 to go as provided in the said 20th clause subject to the same conditions as in that clause mentioned and also to the modifications of the same contained in the first codicil and he directs that in case said residue shall not amount to the said fifty thousand dollars the other legacies except that to his sister and that to the Cemetery Company shall abate in proportion, so that at all events the sum of fifty thousand dollars shall be available for said purpose. And in said bill this petitioner further sets forth in this connection that he was advised by counsel that doubts existed as to whether said trust by said will and codicil created was a valid trust, that is to say, as to whether the use, object and purpose of said trust was a lawful one, whether the same was a charity seeing that the trust was not expressed to be for the benefit of the poor and helpless or infirm persons needing the assistance of others or the public for their comfortable support, and whether if the same be a charitable use, the description thereof and directions as to the same are so vague, indefinite and imperfect, that the trust is incapable of fulfilment and therefore invalid and void; and also as to what disposi-

tion was to be made of said $50,000 in case said trust shall be declared invalid and whether the same was on the death of the testator's widow to go to those to whom the 20th section of the will, the residue is to go in case no such home as contemplated by the testator shall be founded and established within the 5 years in that clause mentioned and limited, whether the testator is in such case, to be held to have died intestate as to the said fifty thousand dollars, and if so, to whom is that fund on the death of said testator's widow to go? And your petitioner further shows that on the tenth day of December, A. D. 1892, on motion of Theodore Runyon, then counsel of your petitioner, and in his presence, and in the presence of John W. Taylor, solicitor for and of counsel with the defendants, the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers, and of Frederick G. Burnham, solicitor for and counsel of with the defendants The Board of Foreign Missions of the Presbyterian Church in the United States of America, The Board of Home Missions of the Presbyterian Church in the United States of America and the Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America and John R. Hardin, Solicitor and of Counsel with Frances D. Stanwood, and of Sherred Depue, Solicitor for and of Counsel with the Protestant Foster Home Society of Newark, the bill having been taken as confessed against all other adult defendants, due notice of the hearing of this cause at that time having been given to the guardian Ad Litem of the infant defendants, by his Honor, Alexander T. McGill, Chancellor of the State of New Jersey, it was, among other things ordered, adjudged and

decreed: That if it be necessary to raise the fifty thousand dollars mentioned in the last codicil to said will that the other legacies abate according to directions of said testator in said codicil in that behalf, that the other legacies (except that to his sister and that to the Cemetery Company) shall abate in proportion, so that at all events the sum of fifty thousand dollars be available for the gift to his intended wife, that all the specific legacies given by the testator in and by said will and codicils thereto abate proportionately with the pecuniary legacies and that to, that end the legatees to whom the same are given, on receipt of the thing or things given by their respective legacies contribute and pay by way of abatement to the executors in money their respective due proportions of the amount of abatement required in order to make the fifty thousand dollars available according to the direction of the last codicil to, said will, and that in ascertaining the portion of such abatement or contribution of or in respect to said specific legacies, the value of said legacies at the time of the death of the testator to be taken as the basis of such contribution, and if any legatee of any specific legacy shall refuse or fail to contribute after notice of the amount to be contributed and demanded thereof, the executor may and shall, giving at least ten days notice to the legatee, sell the article or articles specifically bequeathed for the best price he can obtain therefor and after applying so much of the proceeds of sale to the contribution aforesaid as may be the due proportion and share of the legatee, pay over the rest, if any, of said proceeds to the legatee; except in case of the direction to put the mortgages held by the Howard Savings Institution and the gift of the mortgage held by the testator on the Walsh property, in reference to which direction was in said decree there-

after provided. And it was further ordered, adjudged and decreed that after such contribution should have been made, that the petitioner was authorized and directed to apply to this Court for direction as to what should be done in reference to the gifts touching the mortgage aforesaid on the property of Sarah M. Walsh and that such application could be made by order setting the cause to be heard on that subject on such notice as the Court might direct. And it was further ordered, adjudged and decreed "that inasmuch as the gift of the residue of the estate or the disposition of the principal of the gift of the fifty thousand dollars fund to be set apart for the widow of said testator cannot go into effect until the death of the said widow and in the meanwhile the said gift may be rendered void under the terms and provisions of the will in that behalf, no decision of the question raised or to the validity of said gift be made at this time but that that quesion be and is hereby reserved with leave to bring it and the question of the devolution of the residue (or said fifty thousand dollars) in case the gift for the 'home' be declared invalid, before the Court for decision in this cause by order setting down the cause to be heard on that subject on such notice as the Court may direct on the death of the said widow, unless the gift shall have become void under the terms of the will rendering decision unnecessary, and that the said executors should be at liberty to come before this Court and apply on the foot of the decree on such notice as the Court may by order direct for further instructions and directions as to any of the matters therein disposed of and decred upon."

And your petitioner further shows that he has applied for aid, direction and instruction at other times on matters pertaining to his duties as executor under the said will and has received in-

structions and directions from this Honorable Court therein, and that this Court instructed this petitioner that the direction to buy said mortgage held by the Howard Savings Institution is a pecuniary legacy and that the gift of the Walsh mortgage held by the testator was a specific legacy. And that the interest on this last mentioned Walsh mortgage as well as the principal of the same is a specific legacy and as such is entitled to share in the disposition of the fund.

That the several petitions for further direction and the decrees entered therein are now on file in this cause in this Honorable Court and your petitioner respectfully refers to the same if it should be necessary to do so.

That on November 7th, 1913, the final accounting of this petitioner as executor and trustee under the said last will was passed upon and duly allowed by decree of the Essex County Orphans Court, that in and by said decree it is shown that the sum of $34,972.68 remained in the hands of your petitioner, that since the making of said decree on said accounting your petioner has paid general legacies bequeathed under said last will (which legacies were at the time of said accounting unpaid as stated in said accounting) amounting to $13,000. That there now remains in the hands of your petitioner as the rest and residue of the said estate the sum of $21,972.68.

That the rest and residue of said estate has not been applied or paid over to a home for respectable aged people of both sexes nor has any such home been founded or established within the periiod of five years from the date of the death of the said testator (or within the period of five years from the date of the death of the testator's widow) as described in said twentieth clause of said last will and testament and the codicils thereto, no such

home as described in said will and codicils existing as the time and that in the opinion and judgment of your petitioner it is not advisable to establish such a home (said will and codicil expressly leaving the establishment of such a home to the judgment and satisfaction of your petitioner).

That all the debts and expenses and specific and general legacies have been paid and all the directions in said last will and testament and codicils (excepting the establishment of a home for respectable aged people of both sexes as above stated) complied with, excepting the following, to wit:

The provisions of subdivision "Fourth" of said will have not been complied with for the reason that the said George DeGraw Moore (the legatee therein named) died on or about the 18th day of April, A. D. 1891, and before the death of the said testator, and your petitoner respectfully asks if the said ten thousand dollars is and becomes a part of the rest and residue of the said estate of said testator, or if the said testator is to be held and regarded as having died intestate so far as the said legacy of $10,000 is considered.

That the provisions of subdivision "Eleventh" of said will bequeathing $250 to George Moore (son of Joseph Moore, a nephew of the said testator) have not been complied with for the reason that the said George Moore died on or about April 5th, A. D. 1891, and your petitioner respectfully asks if the said $250 is and becomes a part of the said rest and residue of the said estate of said testator or if the said testator is to be held and regarded as having died intestate so far as the said legacy of $250 is concerned; your petitioner therefore prays the advice and direction of this Honorable Court in these two matters.

That the provisions of section twenty-three of the said will bequeathing the sum of $250 to Mrs.

Sarah M. Walsh and the sum of $250 to Mrs Francis D. Stanwood have not been complied with for the reason that he is advised by his counsel and he is himself of the opinion that there are grave doubts of the validity of these two bequests and your petitioner therefor respectfully asks the aid and direction of this Honorable Court as to whether he should pay said two last mentioned legacies.

That your petitioner has paid the legacy of $400 bequeathed to the Proprietors of the Rosedale Cemetery under section two of the said will and also the legacy of one hundred dollars bequeathed under the first codicil to the said will and that your petitioner is advised by his counsel and he is himself of the opinion that there are grave doubts whether said The Proprietors of the Rosedale Cemetery should share in the final distribution of the rest and residue of the said estate and he therefore respectfully asks the aid and direction of this Honorable Court as to whether said The Proprietors of the Rosedale Cemetery are to be held and regarded as one of the legatees mentioned in the twentieth section of said will to and among whom it is thereby directed the residue is to be "divided and distributed pro rata in proportion to their respective moneyed legacies, etc.", or whether they are to be excluded from participation in such division and distribution.

That Harriet E. Moore (sister of the testator) died on or about January 6th, 1894.

That Mary S. Moore (the widow of the testator) died on or about July 11, 1908, leaving a last will and testament as your petitioner is informed and verily believes which was proved on July 25, 1908 at Halifax in the Province of Nova Scotia, in the Dominion of Canada, wherein she bequeathed her entire estate to her five sisters, M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, Edith G.

Fitch and Laleah McGee and appointed the first three mentioned her executrices.

That the said Sarah M. Walsh died on or about October 10, 1909, leaving her surviving Robert E. Walsh and Adeline H. Walsh her only children and sole heirs-at-law and that said Robert E. Walsh is the sole executor of her last will and testament which was duly probated by the Essex County Surrogate.

That Katherine Reuck Sparks died at a date unknown to your petitioner leaving her surviving Frederick Sparks (a minor) her only son and sole heir-at-law.

That Jennie E. Selover (a daughter of J. Whitfield Reuck) died at a date unknown to your petitioner leaving her surviving her husband, Louis Selover and Louis Whitfield Selover (a minor) her son and sole heir-at-law.

That Harriet Augusta Harrison died on or about June 18, A. D. 1912, leaving her surviving her husband William H. Harrison and Gertrude L. Teed, Sarah Bush and Belle E. Captain her children and sole heirs at law and that letters of administration on the estate of said Harriet Augusta Harrison have been granted by the Surrogate of Essex County to said William H. Harrison.

That Emma Reford died on or about August 17, 1909, leaving her surviving her husband J. Banks Reford and that she left a last will and testament which was duly probated in the Essex County Orphans Court and that said J. Banks Reford is the Executor of her estate and that in her said last will she bequeathed and devised all her estate to her husband.

That Joseph Parcells died at a date unknown to your petitioner leaving him surviving his widow Nancy Moore Parcells now deceased and Frederick N. Parcells his only son and sole heir at law.

That Carrie Cobb died on or about January 18, 1912 (a widow) leaving her surviving Grace P. Cobb, H. Mabel Cobb Williams and Wilbur A. Cobb her children and sole heirs at law and that she left a last will and testament which was duly probated by the Essex County Surrogate and that Grace P. Cobb is the Executrix of her estate.

That George Thereon Moore died on or about February 17, 1895 (unmarried) leaving him surviving his sister Harriet M. Downs and Emma Reford and a father Joseph A. Moore his sole heirs and that he left a last will and testament which was duly probated by the Essex County Surrogate and that J. Banks Reford is the Executor of his estate.

That Anne Olivia Smith (a widow) died at a date unknown to your petitioner leaving her surviving Daisy C. Herbrecht and Hattie P. VonBerg, her only children and heirs at law.

That Carrie Fletcher died (a widow) at a date unknown to your petitioner leaving her surviving Jessie Fletcher Redding her only child and sole heir at law.

That Alfred E. Moore died at a date unknown to your petitioner leaving him surviving Jessie Moore, his widow and Alfred E. Moore and Kenneth Moore his children and sole heirs at law (both of whom are minors).

That Mary Strieby died on or about March 26, 1896 (unmarried) and that letters of administration on her estate have been granted by the Surrogate of Essex County to Julius M. Foote, who has taken upon himself the burden of the administration of her estate and claims to be entitled to receive her share in the said residue.

That said James C. McDonald by writing under his hand and seal bearing date September 11, 1913, did assign all his right, title and interest as one of

the residuary legatees under said will to Benjamin J. Fleuchas who now claims to be entitled to the share of said James C. McDonald in said residue by virtue of said assignment.

And your petitioner further shows that the following persons are the next of kin and the heirs at law of said testator: Frank W. Moore, Lillian M. Mickins, Jennie B. Mackain, Addie M. Morrison (which said Frank, Jennie, Lillian and Addie are the children of Frank D. Moore dec'd who was the oldest son of Daniel Moore, dec'd an uncle of the said testator.

Grace A. Moore, Walter E. Moore (said Grace and Walter are the children of Edwin J. Moore dec'd another son of said Daniel Moore dec'd). Robert E. Walsh, Adeline H. Walsh (said Robert and Adeline are children of Sarah M. Walsh dec'd who was a daughter of said Daniel Moore dec'd). William H. Harrison, Gertrude L. Teed, Sarah Bush, Belle E. Captain (said William Harrison is the husband of and said Gertrude, Sarah and Belle children of Harriet Augusta Harrison dec'd who was a daughter of said Daniel Moore dec'd). Emma E. Moore (who was a daughter of said Daniel Moore dec'd). Harriet Amelia Bacheler, Grace P. Cobb, H. Mabel Cobb Williams and Wilbur A. Cobb, children of Carrie Cobb, dec'd (said Harriet and Carrie were children of said Daniel Moore dec'd). Alfred E. Moore and Kenneth Moore (said Alfred and Kenneth are sons of Alfred Moore dec'd who was the son of Stephen Moore dec'd, an uncle of said testator).

Frederick N. Parcells (who is a son of Nancy Moore Parcells, dec'd, aunt of said testator) Elias Conway Moore, Daisy O. Herbrecht Hattie P. Von-Berg (said Daisy and Hattie are daughters of Anne Olivia Smith dec'd).

Jessie Fletcher Redding (daughter of Carrie Fletcher, dec'd), Fannie J. Moore (which said Elias Ann, Carrie and Fanny are children of Martin S. Moore, an uncle of said testator).

Horace P. Gould, Walter H. Gould, William Moore Gould (children of Hattie Gould, dec'd who was a child of Sarach Maria Reuck, dec'd, an aunt of said testator).

George Moore Reuck, Hattie Reuck Schmidt, Bessie A. Stanaback, Frederick Sparks (son of Catherine Sparks dec'd) (said George, Hattie, Bessie and Catherine being children of J. Moore Reuck, dec'd, who was a child of said Sarah Maria Reuck, dec'd, an aunt of said testator). Jessie M. Reuck Connery, Louis Selover (son of Jennie Selover, dec'd), Nellie T. Reuck, Alberta Reuck, Ada Reuck, Edith Reuck (said Jessie, Jennie, Nellie, Albertha, Ada, and Edith, are children of J. Whitfield Reuck, dec'd, who was a child of said Sarah Maria Reuck, dec'd).

Harriet M. Downs, Emma Reford, Joseph Moore (children of Archibald Moore, dec'd, an uncle of said testator and also sister and brothers of George Thereon Moore, dec'd, who was also a son of said Archibald Moore, dec'd).

M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, Edith G. Fitch and Laleah McGee (sisters and heirs at law of Mary S. Moore, dec'd who was the widow of said testator).

And your petitioner further shows; that after the said decree by the Essex County Orphans Court on his final accounting as Executor and Trustee under said will he petitioned said Essex County Orphans Court for an order or decree to distribute and pay the rest and residue of said estate in accordance with the directions of the said will and for the aid and direction of the said Orphans Court in the matter and things aforementioned and set forth. That a rule to show cause why such decree should

not be made and such directions given was granted your petitioner and served upon all the parties in interest. That said Orphans Court refused to grant unto your petitioner the relief prayed by him on the ground that said Orphans Court did not have jurisdiction in the premises.

And your petitioner further shows that he is desirous of distributing the said rest and residue of the said estate among the legatees mentioned in the said will and codicils thereto and that he is in doubt as to whom to pay the same and in what proportion and your petitioner therefore prays the advice and direction of this Honorable Court in that matter.

And your petitioner further shows unto your Honor, that he is without remedy in the premises at the Common Law and can only have relief in this Honorable Court wherein matters of this nature are properly cognizable and that he is entitled to relief. That your petitioner is advised by his counsel that in view of the fact that many of the defendants named in the original bill filed as aforementioned in this cause in the Honorable Court have since died and that the representatives of such deceased defendants should have the opportunity to appear at the hearing of this petition.

To the end thereof that the said proprietors of the Rosedale Cemetery, Robert E. Walsh, Adeline H. Walsh, Robert E. Walsh, Executor of the last will and testament of Sarah M. Walsh, dec'd, George Moore Reuck, Hattie Reuck Schmidt, Bessie A. Stanaback, Frederick Sparks, Albertha Reuck, Jessie M. Reuck Connery, Ada M. Reuck, Nellie T. Reuck, Edith Reuck, Louis Selover, Louis Whitfield Selover, William Moore Gould, Horace P. Gould, Walter H. Gould, Emma E. Moore, Walter E. Moore, Grace A. Moore, Harriet Mathilda Downs, William H. Harrison, Administrator of the estate of Harriet Augusta Harrison, dec'd, Gertrude L.

Teed, Sarah Bush, Belle E. Captain, Joseph Moore, J. Banks Reford, Executor of the last will and testament of Emma Reford, dec'd, J. Banks Reford, Frederick N. Parcells, Harriet Amelia Bacheller, Grace P. Cobb, Executrix of the last will and testament of Carrie Cobb, dec'd, Grace P. Cobb, H. Mabel Williams Cobb, Wilbur A. Cobb, Elias Conway Moore, Fanny J. Moore, J. Banks Reford, Executor of the last will and testament of George Thereon Moore, dec'd. Daisy O. Herbrecht, Hattie P. Von Berg, Jessie Fletcher Redding, Jessie Moore, Alfred E. Moore, Kenneth Moore, Frances D. Stanwood, Protestant Foster Home Society of Newark, The Board of Foreign Missions of the Presbyterian Church in the United States of America, The Board of Home Missions of the Presbyterian Church in the United States of America, incorporated April 19, 1872, by act of the Legislature of the State of New York, The Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States, incorporated, March 27, 1871, by the Legislature of the State of New York, The Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers, The German Theological School of Newark, New Jersey, Frank W. Moore, Addie M. Morrison, Jennie Moore Mackain, Lillian M. Mickins, Benjamin J. Fleuchaus, Joseph D. Gallagher, S. Fannie Carter, Julius M. Foote, Administrator of the estate of Mary Strieby, dec'd. M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, Edith G. Fitch, Leleah McGhee and M. Amelia Fitch, Adelaide P. Fitch and Margaret R. Fitch, Executrices of the last will and testament of Mary Moore, dec'd who are hereby made defendants in this suit and each and every of them may (without oath which is waived) full true and perfect answer make to all and singular

the premises as fully and particularly as if the same were herein again repeated and they and each of them thereto particularly interrogated and that your Honor will advise, aid and direct your petitioner in the premises and will construe said will in respect to all and singular the matters aforesaid, and that your petitioner may have such other or such further aid, advice, direction and assistance from this Honorable Court in reference to the construction of said will and distribution of the estate of said testator as may be reasonably necessary to aid him to discharge his duties as Executor of said will and that he may have such other or further relief in the premises as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your petitioner the States writ of subpœna issuing out of and under seal of this Honorable Court to be directed to all and singular the said defendants, therein and thereby commanding them and each and every one of them to be and appear (such of them as are natural persons personally and such of them as are corporations according to law and the practice of this Court) before your Honor in this Honorable Court, on a certain day and under a certain penalty therein to be expressed, then and there to, answer all and singular the premises and to stand to abide by and perform such order, decree and direction therein as your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your petitioner as in duty bound, will ever pray, etc.

BENJAMIN J. FLEUCHAUS,
Solicitor of Petitioner.

Answer of Defendants, Executrices and Legatees of Mary S. Moore, Widow of said George D. G. Moore.

(Filed Sept. 9, 1914.)

IN CHANCERY OF NEW JERSEY.

Between FRANK B. ALLEN, Executor, etc., of George D. G. Moore, deceased, Complainant, and HARRIET E. MOORE, *et al.*, Defendants.	On Bill, etc.

The answer of M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, legatees and Executrices of Mary S. Moore, deceased, and of Edith G. Fitch and Laleah McGee, legatees of said Mary S. Moore.

These defendants, for answer to the petitioner's petition, or unto so much thereof as they are advised it is material for them to make answer unto, answering say:

1. These defendants are not familiar with the matters of fact set forth in the bill of complaint, other than the making and probating of the wills of George D. G. Moore and of Mary S. Moore, his widow, as set forth in the said petition; and as to these wills and codicils, they say that they are substantially as set forth in the petition, and they admit that they are the only Executrices and legatees of and under the will of the said Mary S. Moore, and further say that they are also her next of kin.

2. These defendants say that the said George DeGraw Moore, deceased, bequeathed the sum of ten thousand dollars, together with a share of the residue of his estate, to his nephew, George D. G. Moore, and that the latter died intestate, on or about the eighteenth day of April, eighteen hundred and ninety-one, prior to the death of his said uncle, and without leaving any descendants, so far as these defendants know, and that George Moore, the son of Joseph Moore, to whom the sum of two hundred and fifty dollars was bequeathed by the said testator, died on or about April fifth, eighteen hundred and ninety one, prior to the testator.

3. These defendants admit that Mary S. Moore died on or about July eleventh, nineteen hundred and eight, after the decease of the testator, and that the will of the said Mary S. Moore was probated as in the said petition stated, and that she bequeathed her entire estate, as in the said petition stated.

4. These defendants further answering say, that the total amount of the legacies set forth in the will of said George D. G. Moore, is sixty thousand three hundred and ninety-seven dollars and fifty cents, including, in the said sum, the bequests to Harriet E. Moore, the testator's sister, George D. G. Moore's lapsed legacy, George Moore's lapsed legacy, the bequest to the cemetery, and the bequests of two hundred and fifty dollars each to Mrs. Sarah M. Walsh and Mrs. D. Stanwood, and not including therein, the trust fund of fifty thousand dollars, provided for in the second codicil to the testator's will; and that Frank B. Allen, Executor of George D. G. Moore, has already distributed the sum of thirty-nine thousand one hundred and forty-seven dollars and fifty cents, and has in his hands for distribution, the sum of twenty-one thousand

nine hundred and seventy-two dollars and sixty-eight cents or thereabouts, yet to be distributed, as is shown by the account filed in the Surrogate's office of Essex County, in the matter of the said estate of George D. G. Moore.

5. These defendants say that they are entitled to receive from the Executor of the will of the said George D. G. Moore, the share of his widow, Mary S. Moore, in the estate of which the said George D. G. Moore died intestate, and that he died intestate as to the sum of ten thousand dollars bequeathed by him to George D. G. Moore, together with a pro rata share in the residue of his estate, and that he died intestate as to the sum of two hundred and fifty dollars bequeathed by him to George Moore, son of Joseph Moore, together with a pro rata share of the residue of his estate; and that these defendants, as the representatives of the said Mary S. Moore are entitled to one-half part of the said estate of which he died intestate.

6. These defendants further say, that if the Court shall determine that the said sum of ten thousand dollars and two hundred and fifty dollars, bequeathed as aforesaid to the said George D. G. Moore and George Moore lapsed into the residue of the estate of the testator George D. G. Moore, of which he died testate, they are entitled to one-half of that part of the residue of which he died intestate through the death of the said two residuary legatees in his lifetime.

7. These defendants are not concerned in ascertaining to whom, or in what amounts, the remaining half of the estate, of which George D. G. Moore died intestate, may be distributed by the order of this Court, their own share of such estate being

readily determined, without reference to what may be done with the other half.

ALFRED F. STEVENS,
Solicitor for and of Counsel,
with the above named Defendants.

Order Re Reference.

(Filed Feb. 5, 1916.)

IN CHANCERY OF NEW JERSEY.

Between FRANK B. ALLEN, Ex'r, etc., Complainant, and HARRIET E. MOORE *et al.*, Defendants.	On Petition of the Executor for further direction, &c.

This cause being opened to the Court by Benjamin J. Fleuchaus of counsel with the complainant and it appearing that an interlocutory decree and order of reference to John R. Emery, Esquire, then one of the Vice Chancellors of this Court, was made by the Chancellor on December 8th, 1914, and it further appearing that said cause was set down for hearing on July 27th, 1915, before the Vice Chancellor, John R. Emery and it further appearing that said cause was argued by counsel before said Vice Chancellor on said last mentioned date but that no report was made or decree advised by said Vice Chancellor thereon and that said Vice Chancellor has since departed this life; it is thereupon on this 4th day of February, nineteen hundred and sixteen, for cause shown, ordered that;

that portion of the said order made in this cause on December 8th, 1914, referring this matter to John R. Emery, Esquire, then one of the Vice Chancellors of this Court, be vacated and that this matter be referred to Hon. John E. Foster one of the Vice Chancellors of this Court to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
C.

Stipulation.

(Filed May 21, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK B. ALLEN, Executor, etc., of George D. G. Moore, deceased,
Complainant,

and

HARRIET E. MOORE *et al.*,
Defendants.

On Petition of the Executor for further direction, etc.

The following state of facts is agreed upon by and between counsel for the complainant and the answering defendants:

(1) That the testator, George D. G. Moore, died October 13th, 1891, leaving a last will and testament and two codicils thereto as set forth at length in the petition filed in this cause, and that said will and codicils were probated by the Surrogate

of Essex County and letters testamentary issued to Frank B. Allen, the Executor and Trustee.

(2) That the said Executor filed his bill in this Court January 21st, 1892, asking the advice and direction of this Court in the construction of said will, and that a decree was entered on December 10th, 1892, by the Chancellor of this State; that the Executor applied at various times for further instructions and that orders were entered thereon as set forth in said petition in this cause. That said bill, and decree and the petitions for further instructions and the orders of this Court thereon are now of record in this Court and are made a part of this stipulation and referred to if it should be necessary so to do.

(3) That the mortgage referred to in the next to the last paragraph of the decree entered in this cause bearing date January 6th, 1897, as the Walsh mortgage is that mortgage which was made by Zachariah Walsh and Sarah M. Walsh, his wife, to George D. G. Moore, bearing date November 1st, 1888, acknowledged November 6th, 1888, registered November 7th, 1888, in Book Q9 of Mortgages for Essex County, page 177, being given to secure the payment of bond conditioned for the payment of $1,200 in one year with interest at 5% per annum payable semi-annually, covering premises on North Sixth Street in the City of Newark; that Zachariah Walsh died before his wife, Sarah M. Walsh, and that Sarah M. Walsh died October 10th, 1909, that the amount of interest payable on said mortgage from October 14th, 1891, the death of George D. G. Moore, to October 10th, 1909, the death of Sarah M. Walsh, covering a period of eighteen years, figured at 5% on $1,200 is $1,079.33.

(4) That on November 7th, 1913, the final accounting of said Executor and Trustee was passed

upon and allowed by decree of the Essex County Orphans' Court. That in and by said accounting it appears that the Executor had in his hands on that date $34,972.68, and that since the Executor has paid out to parties to whom general legacies were bequeathed in the said will and codicils, sums amounting to $13,000 as appears by a schedule annexed to said account, leaving now in his hands the sum of $21,972.68, as yet undistributed.

(5) That the Orphans' Court, on application to it to determine what disposition should be made of the residue then in the hands of the Executor, decided that it did not have jurisdiction in the premises, although all the parties interested in the estate were properly brought into the Orphans' Court in proceedings to determine their respective shares; and no appeal has been taken from such decision.

(6) That the rest and residue of said estate has not been applied or paid over to a home for respectable aged people of both sexes nor has any such home been founded or established within the period of five years from the date of the death of the testator (or within the period of five years from the date of the death of the testator's widow) as described in the 20th clause of said will and codicils thereto; no such home as described in said will and codicils existing at the time and that in the opinion and judgment of the Executor it is not advisable to establish such a home (said will and codicils expressly leaving the establishment of such a home to the judgment of the Executor).

(7) That Mary S. Moore (the widow of the testator) died July 11th, 1908, and her representatives have been made parites to this proceeding.

(8) That all the debts and expenses and sums

mentioned in said will and codicils as specific and general legacies, have been paid by the Executor to the legatees mentioned in said will and codicils, and all the directions in said will and codicils have been complied with, excepting the establishment of a home for respectable aged people of both sexes, as above stated, and also excepting the following, to wit:

(a) The provisions of paragraph 20th, of said will and of the first and second codicils so far as they relate to the disposition of the funds now in the Executor's hands for distribution.

(b) The provisions of sub-division "4th" of said will bequeathing to George De Graw Moore (a nephew of the testator) the sum of $10,000. That the said George De Graw Moore died on April 18th, 1891 (before the testator's death), without leaving any issue.

(c) The provisions of sub-division "11th" of said will bequeathing $250 to George Moore (son of Joseph Moore, a nephew of the testator). That said George Moore died April 5th, 1891 (before testator's death) without leaving any issue.

(d) The provisions of section "23" of said will bequeathing $250 to Mrs. Sarah M. Walsh and a like sum to Mrs. Frances D. Stanwood.

(9) The matters upon which the said, instruction and direction of this court is prayed for are:

(a) Is this sum of $10,250 which was bequeathed to said George De Graw Moore, under subdivision "fourth" of said will, and to George Moore, under subdivision "eleventh" of said will and the balance now in the hands of the Executor, or any part of it, to be considered to have lapsed into the rest and residue of the estate of the testator and if so what

part and to whom should it be distributed or should the testator be considered to have died intestate so far as these two legacies and balance are concerned, and if so to whom should said sums be distributed?

(b) Are the bequests, under section 23 of said will, of $250 each to Sarah M. Walsh and Frances D. Stanwood "With the request that they will exercise during their lives and perhaps their children after them a kind of supervision of my burial plot, see that the Cemetery Company keep it in order and perhaps sometimes place flowers on my grave," valid bequests?

(c) Should the Proprietors of the Rosedale Cemetery further participate in the residue of the estate as one of the legatees mentioned in the 20th clause of the will they having already received $500.00.

PITNEY, HARDIN & SKINNER,
Solicitors for Frances D. Stanwood.
ALFRED F. STEVENS,
Solicitor of Estate of Mary S. Moore, deceased.
LEHLBACH & VAN DUYNE,
Solicitors for Adeline M. Walsh, Robert E. Walsh and Robert E. Walsh, Executor for Estate of Sarah M. Walsh.
McCARTER & ENGLISH,
Solicitors for Board of Home Missions and Board of Foreign Missions.
CORTLANDT & WAYNE PARKER,
Solicitors for Presbyterian Board of Relief.

Fred. G. Stickel, Jr.,
For George Moore Reuck,
Mattie Reuck Schmidt and
Bessie A. Stanaback.
Chas. B. Clancy,
Protestant Foster Home
Society.
Benjamin J. Fleuchaus
and
Samuel E. Ayers,
Solicitors for Petitioner.

Conclusions.

(Filed June 27, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK B. ALLEN, Executor, &c., of GEORGE D. MOORE, deceased, Complainant,

and

HARRIET E. MOORE *et al.*, Defendants.

On Petition for Construction of Will.
Heard on Bill, Petition, Answers, and Stipulation of Counsel as to Facts.
Submitted.

APPEARANCES:

BENJAMIN J. FLEUCHAUS, for Petitioner.
JOHN R. HARDIN, of PITNEY, HARDIN & SKINNER, for Defendant Francis D. Stanwood.
ALFRED F. STEVENS, for Defendant Estate of Mary S. Moore, deceased.
LEHLBACH & VAN DUYNE, for Defendants Adeline H. Walsh and Robert E. Walsh, individually, &c.

McCarter & English, for Defendants Board of Home Missions of the Presbyterian Church in the United States of America, and Board of Foreign Missions of the Presbyterian Church in the United States of America.

Cortlandt & R. Wayne Parker, for Defendant Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of deceased Ministers.

Fred G. Stickel, Jr., for Defendant George Moore Reuck, Hattie Reuch Schmidt and Bessie A. Stanaback.

Charles B. Clancy, for Defendant Protestant Foster Home Society.

Frederick G. Burnham, for Defendant Board of Church Erection.

CONCLUSIONS.

Foster, V. C.:

The petition in this case is filed by the Executor of George D. G. Moore who died October 13th, 1891, leaving a last will and testament dated June 17th, 1889, and two codicils thereto dated respectively January 24th, 1891, and October 5th, 1891, which were duly admitted to probate in Essex County. Testator left a widow but no issue.

The will, after directing the payment of debts and funeral expenses, gives a large number of general and specific legacies to relatives and friends of the testator, among them a bequest of $10,000 is given by the fourth clause of the will to George DeGraw Moore, a nephew of the testator, and a bequest of $250 is given by the 11th clause of the will to George Moore, a great nephew of the testator, George DeGraw Moore and George Moore both died in April, 1891, about five months before the death of the testator.

By the 20th clause of his will, testator gave all the rest and residue of his estate, including the interest and accumulations thereon and also $10,000 of which his sister was to have the income for life, to his Executors in trust for the purpose of establishing a home for respectable aged people of both sexes, if in the judgment of his Executors it was deemed advisable to do so, and if this home was not established within five years from the death of the testator, then he directed his Executors "to divide and distribute the said residue pro rata among the legatees above named, and in proportion to their respective moneyed legacies."

By the 22nd clause of the will he directs that for all the purpose of distribution the whole estate, real and personal, is to be taken and considered as personal property.

By the first codicil some minor changes are made regarding some of the bequests and he authorized his Executors in carrying out the trust mentioned in the 20th clause of the will to unite with some existing home or institution.

By the second codicil executed on October 5th, 1891, a few days before testator's marriage and death he directed:

"First. As to the residue of my estate given to my Executors in trust by the twentieth clause of my will—In place of that—I give to my Executors in trust the sum of fifty thousand dollars, the interest thereon to be paid to Mary S. Fitch (with whom I am shortly to be joined in marriage) during her life in semi-annual payments, the first to begin at six months after my death, and at her decease, said sum of fifty thousand dollars to go as provided in said twentieth clause subject to the same conditions as in said clause mentioned, and also to the modifications of the same contained in the prior codicil

dated January 24th, 1891, said bequest to be in lieu of dower in my estate. And in case said residue shall not amount to the sum of fifty thousand dollars then I direct that the other legacies (except that to my sister and that to the Cemetery Company) shall abate in proportion so that at all events the sum of fifty thousand dollars shall be available for said purpose."

The estate proving insufficient to pay all debts, legacies and expenses, and to create a trust fund of $50,000 for the benefit of the widow, proceedings were had in this cause whereby directions were given that the legacies should abate in proportion for the purpose of creating this fund. *Moore* v. *Moore,* 5 Dick., p. 554.

Mrs. Mary S. Moore, the widow of the testator, died July 11th, 1908.

The executor in the exercise of his judgment deemed it advisable not to establish the home for aged people.

On November 7th, 1913, the final account of the Executor and Trustee was duly allowed by the decree of the Essex County Orphan's Court, and the Executor now has in hand, after the payment of all debts, expenses and legacies, $21,972.68, to distribute according, as he assumes, to the provisions of the 20th clause of the will pro rata among the moneyed legatees mentioned in the will.

By the stipulation of counsel three questions designated therein as "A," "B," and "C," were submitted for determination; and on the argument before me by the consent of all parties the following entry was made upon the record.

"The questions referred to in "B" and "C" in the stipulation were disposed of by V. C. Emery orally at the time of the argument before him last summer, and under his oral decision at

that time counsel are all agreed that Mrs. Stanwood, under Section 23, is entitled to $250 and Mrs. Sarah Walsh is entitled to like amount, and that the proprietors of the Rosedale Cemetery are not entitled to have any further payments made to them beyond what has already been paid, that both the Stanwood and Walsh legacies are money bequests under the will."

This leaves for determination the questions raised by the paragraph designated as "A" in the stipulation, and which reads as follows:

"(A) Is this sum of $10,250, which was bequeathed to George De Graw Moore, under subdivision 'fourth' of said will, and to George Moore under subdivision 'eleventh' of said will and the balance now in the hands of the Executor, or any part of it to be considered to have lapsed into the rest and residue of the estate of the testator and if so what part and to whom should it be distributed or should the testator be considered to have died intestate so far as these two legacies are concerned, and if so to whom should the said sum be distributed?"

These questions arise because of the contention made by the representatives of Mrs. Mary S. Moore, the widow of the testator, to the effect, that these two legacies to testator's nephews, who predeceased him, amounting to $10,250 lapsed by reason of the death of the nephews in the life time of the testator; and that these lapsed legacies did not become part of the residuary estate because the nephew were both general and residuary legaties. That they became residuary legatees by reason of the fact that money had been bequeathed to them respectively under the 4th and 11th clauses of the will; and that the second codicil, and the 20th clause of the will,

directed the distribution of the residue among the moneyed legatees named in the will.

The insistment is made that as to these lapsed legacies testator died intestate, and that they are to be distributed under the statute, and that as this was the condition existing at the death of the testator, his widow then, or her representatives now, are entitled to one-half the amount of these lapsed legacies.

Support is sought for this contention in the rule stated in *Collins* v. *Bergen,* 42 Eq., p. 57, that "when an aggregate fund is given to several persons *nominatim,* to be divided among them in equal shares, if one of them dies before the testator the share of such decedent will lapse"; and at page 60 of this case the statement is made that "the shares of Harriet Kemble and Rachel Collins who died in testator's lifetime, lapsed and being shares of the residue they did not pass to the other legatees as part of the residue (Hawk, Wills, 42), consequently the testator must be held to have died intestate as to them."

There is a clear distinction to be noted between the situation presented by the facts in this case, and that present in Collins v. Bergen, *supra,* and in the cases cited to support the text in Schouler on Wills, 3rd Ed., Sec. 519, in which this rule is discussed.

These are cases in which the testator either gave the residue of his estate to certain persons named, or definitely designated, to be divided among them in stated proportions; or cases in which the general legacies lapsed because of their illegality, and not because of the death of the legatee in the lifetime of the testator. In the first class of cases the devises or bequests were held to have been made to individuals and not to a class, and that in the absence from the will of any provision

for survivorship or substitution, such devises or legatees took as tenants in common and not as joint tenants.

In *Security Trust Co.* v. *Lovett,* 78 Eq., at p. 451, Vice-Chancellor Leaming states that the rule applicable to bequests of this kind is that, "Where a gift is to several persons by name, a presumption arises, in the absence of contrary intent apparent on the face of the will, that the persons named are to take in their individual, and not their collective capacity, even though the persons as named constitute a class. In such case the bequest lapses as to any one of the persons named who may be dead at the time of the death of the testator. * * * The presumption referred to, however, is but a rule of construction to be used in the ascertainment of the intention of testator; the presumption is not conclusive. If it sufficiently appears from the will that it was the intention of testator to make a bequest to a class, as distinguished from the individuals who may compose the class at the time the will was made, the death of one or more of the persons before testator will not cause a lapse of any part of the fund, but the survivors of the class will take the whole; such an intention may be manifest even when the persons comprising the class are named."

In other cases in which this rule has been followed, it has been limited in its operation to legacies that have lapsed by reason of their invalidity, and it has not been extended to cases where the legacy lapsed by reason of the death of the legatee before the testator, the reason for this limitation being that the will speaks at the death of the testator, when he may be supposed to know of the death of the legatee, and for that reason he is presumed to have intended to in-

clude the subject of the lapsed legacy in the residuary clause, but that the same reasoning is not sound in regard to legacies declared void, for in such cases, testator at his death has thought he had made an effectual disposition of the subject to one and cannot be presumed to intend to give it to another.

Lea v. *Brown,* 56 N. C., p. 141.
Allison v. *Allison,* 56 N. C., p. 230.

In this case the deceased nephews of the testator are not specifically named as residuary legatees, nor is any other person so named. By the second codicil, the fund of $50,000 which testator terms the residue of his estate, is to be distributed in accordance with the provisions of the 20th clause of the will, and these provisions direct that the residue be divided and distributed pro rata among the legatees named in the will in proportion to their respective moneyed legacies.

To entitle the representative of Mrs. Moore to prevail under the rule of construction they invoke, they must show that testator's nephews were both general and residuary legatees, that the bequests to them of a share of the residue was to them in an individual and not in a collective capacity, and that testator has not made an effectual disposition of their shares of his estate, and that as to such shares he died intestate.

In ascertaining testator's intention regarding the distribution of this residue of his estate, it should be borne in mind that he was a competent lawyer, that he had a very extended experience in the construction of wills as Surrogate of Essex County for a number of years, that the second codicil, by which he designated this fund as the residue of his estate, was executed some months after his nephews had died, that by this codicil

he changed the entire disposition of his estate and indicated that the principal objects he sought to accomplish by his will and codicils were; to provide for his sister and his widow; and for the care of his burial plot, and to this end he directed that all bequests given by his will should abate, if necessary, to carry out these purposes, and he further directed that the provision made for his widow should be in lieu of dower.

He evidently had no intentions of dying intestate, as pointed out by Vice Chancellor Van Fleet in *Moore* v. *Moore, supra.* He not only attempted to dispose of everything he owned but actually made provisions by the will and codicils disposing of about $108,000 while his estate amounted to but about $60,000.

To hold that testator intended that these lapsed legacies of his nephews should not fall into the residue of his estate, but should go to his widow and next of kin, together with the deceased nephews' share of the residue, if they were entitled to any, would require the most technical construction of the will and codicils; and would do violence to the manifest purposes of the testator, and would be in conflict with the construction which the widow herself placed upon the testamentary papers.

For seventeen years from testator's death in 1891 to her death in 1908, Mrs. Moore enjoyed the income from the fund of $50,000 which had been created for her by the abatement of all the legacies; and by the inclusion therein of the amount of the two legacies in question. During all that period she never asserted that these legacies had lapsed and that as to them, testator had died intestate and that she as a widow was entitled, under the statute, to one-half of their amount, it was left for her personal representa-

tives to make that claim; and to support it they must take the position that while testator thought the income of $50,000 to which he expressly limited her interest in his estate, sufficient for his widow, for whose care the second codicil shows him to have been especially solicitous, yet that on the death of his widow he intended to die intestate as to nearly one-fifth of his estate; and that her personal representatives, none of whom are mentioned or referred to in the will or codicils, should have this portion of his estate in preference to his relatives and friends whom he sought to make the objects of his bounty by the provisions of his will.

I think it apparent from the will and codicils that testator did not intend to die intestate as to any part of his estate, and that he succeeded in avoiding any intestacy by the provisions made for the distribution of his estate, including the residue, which he directed to be distributed among those to whom he gave money bequests in his will, as a class, and not as individuals, in proportion to their respective moneyed legacies; and that he had a class instead of individuals in mind, in the distribution of the residue, is further apparent by his inclusion therein of Mrs. Stanwood and Mrs. Walsh as moneyed legatees, who otherwise might not have been so regarded, and by the limitation of the amount to be paid to the Cemetery Company as a residuary legatee to $100, although he had made a moneyed bequest of $400 to the Cemetery Company by his will.

Another significant circumstance indicating testator's intent, is the fact that the second codicil was made months after the decease of the testator's nephews, when it is not unreasonable to suppose that he knew of their death, and he evi-

dently thought the provisions he had made in this codicil, and in the twentieth clause of the will referred to therein, were sufficient to dispose of the residue of his estate as he desired, without further direction, and serves to indicate that testator's original intention was to dispose of the residue to a class and not to particular individuals, and that he was satisfied that he had done so.

From my consideration of this case I think the correct and controlling rule to be applied is that stated in Tindall's Executors v. Tindall, 24 Eq., 512:

> "That the residuary legatee is entitled as well to a residue caused by a lapsed legacy or an invalid or illegal disposition as to what remains after payment of debts and legacies.
>
> "The only exception to the rule is that where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention as gathered from the whole will must not be defeated. Or the rule embracing the exception, as stated in some of the books, is that the residuary legatee must be a legatee of the residue generally, and not partially so only."

This rule rests on the presumption that a testator by incorporating in his will a general residuary clause, evidences his intention not to die intestate as to any of his personal property, and it is presumed he took the particular legacy from the residuary legatee only for the benefit of the particular legatee. Giving effect to these presumptions or inferences as to the intention of the testator, which are of course *prima facie* merely, the

cases in our State hold that if a legacy of personal property lapses, or proves ineffectual the subject matter thereof will inure to the benefit of the general residuary legatee, if there is one, and not to the testator's next of kin, or heirs at law. *Sanford* v. *Blake,* 45 Eq., 248; *Barnet* v. *Barnet,* 40 Eq., 380; *Huston* v. *Read,* 32 Eq., 591; *Garthwaite* v. *Lewis,* 25 Eq., 351; *Macknet* v. *Macknet,* 24 Eq., 277; *Shreve* v. *Shreve,* 17 Eq., 487.

My conclusion is that the legacies to testator's nephews lapsed, and became part of the residue; that testator did not die intestate as to any part of his estate, and that the fund now in the hands of the Executor, which constitutes the only residue of the estate, is to be divided and distributed as directed by the testator in the twentieth clause of his will, among the moneyed legatees, and not among the testator's next of kin.

Decree.

(Filed July 18, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK B. ALLEN, Executor etc., of George D. G. Moore, deceased,

Complainant,

and

HARRIET E. MOORE *et al.*,

Defendants.

On Petition of the Executor for further directions, &c.

The complainant in the above cause having filed the further petition in this matter and having applied for further instruction and direction as to the meaning and construction of certain parts of the will of George D. G. Moore, deceased, in this matter and as to the disposition of the residue of the estate of said testator, and the matter coming on to be heard before the Court in the presence of Benjamin J. Fleuchaus and Samuel E. Ayers, solicitors for and of counsel with the complainant; John R. Hardin, of Pitney, Hardin and Skinner, solicitors for and of counsel with the defendant Francis D. Stanwood; Alfred F. Stevens, solicitor for and of counsel with the defendant estate of and heirs at law of Mary S. Moore, deceased; Lehlbach and Van Duyne, solicitors for and of counsel with the defendants Adeline H. Walsh and Robert E. Walsh and the estate of Sarah M. Walsh, deceased; McCarter and English, solicitors for and of counsel with the defendants Board of Home

Missions of the Presbyterian Church in the United States of America and Board of Foreign Missions of the Presbyterian Church in the United States of America; Cortlandt and R. Wayne Parker, solicitors for and of counsel with the defendant Presbyterian Board of Relief for Disabled Ministers and the widows and Orphans of Deceased Ministers; Fred G. Stickel, Jr., solicitor for and of counsel with the defendants George Moore Reuck, Hattie Reuck Schmidt and Bessie A. Stanaback; Charles B. Clancy, solicitor for and of counsel with the defendant Protestant Foster Home Society; Frederick G. Burnham, solicitor for and of counsel with the defendant Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America, the petition having been taken as confessed as against all other adult defendants and due notice of the hearing of this matter at this time having been given to the Guardian *ad litem* of the infant defendants and on reading the bill, petition, answers and stipulation of counsel as to the facts and the arguments of the several counsel aforesaid and after duly considering of the matters then and thereby submitted to the adjudication, determination and decree of this Court, and it appearing by the fifth section of the testator's will that the Executors should hold a mortgage for twelve hundred dollars on property on Sixth Street, Newark, given to the testator by his niece Sarah M. Walsh and her husband, Zachariah Walsh, for the use and benefit of the two youngest children of his said niece, viz., Robert Walsh and Adeline H. Walsh, but no interest was to be paid on the mortgage by the said Sarah M. Walsh or Zachariah Walsh during their lives or the life of the survivor and that Zachariah Walsh died before his wife and that Sarah M. Walsh died October 10th, 1909,

and that the amount of interest payable on said mortgage from October 14th, 1891, the death of the testator, to October 10th, 1909, the death of Sarah M. Walsh covering a period of eighteen years, figure at five per cent. on twelve hundred dollars is one thousand seventy-nine dollars and thirty-three cents. And it further appearing that in and by a decree made by this Court in this matter on January 6th, 1897, it was decreed among other things "that the interest on the Walsh Morgage is a specific legacy as well as the principal of said mortgage heretofore decreed by this Court to be a specific legacy and as such said interest is entitled to the share in the disposition of the fund."

That under the second section of said will the testator bequeaths the sum of $400 to the Proprietors of Rosedale Cemetery Company and which amount was by a codicil to said will increased to $500.

That by the fourth section of said will the testator bequeathed to a nephew, George De Graw Moore, $10,000 and that said George De Graw Moore died without issue on April 18th, 1891, before the testator's death.

That by the eleventh section of said will the testator bequeathed to a grand nephew, George Moore, $250, and that said George Moore died without issue on April 5th, 1891, before the testator's death.

And it further appearing that by the twenty-third section of said will testator bequeathed to Sarah M. Walsh and Frances D. Stanwood the sum of $250 each, with the request that they will exercise during their lives and perhaps their children after them a kind of supervision of his burial lot, see that the Cemetery Company keep it in order and perhaps sometimes place flowers on his grave.

That by the twentieth section of the testator's will he gave all the residue of his estate including the interest and accumulation thereon, and after his sister's death the $10,000 mentioned in the third section, to his Executors in trust to apply and pay over the same to and for the purpose of a home for respectable aged people of both sexes and where husband and wife can be taken care of together and not separated in their old age, to be under Presbyterian or undenominational protestant management and control of the City of Newark, of which the Presbyterian denomination shall have at least an equal representation and controlling power in the management of such home, provided that there shall be such a home founded and established within five years from his death for such distinctive purpose and by a name distinctly signifying such purpose (and into which the word Melrose shall be incorporated that being the second name of the first wife) according to the judgment and to the satisfaction of his Executors; their judgment and opinion to be conclusive and that if no such home be founded and established within the said five years whereby and to which the said residue can be paid over by his Executors, he then directed them to divide and distribute said residue pro rata among the legatees therein above named and in proportion to their respective moneyed legacies and that for that purpose the bank stock given to Mrs. Frances D. Stanwood should be reckoned at its market value and the mortgages mentioned in the fifth section should be considered as a legacy to his said niece Sarah M. Walsh and that the legacy to the Rosedale Cemetery in the second clause should be increased not more than one hundred dollars.

That by the first codicil the testator authorizes his Executors in carrying out the trust mentioned

in the twentieth clause of the will to unite with some existing house or institution; that by the second codicil the testator directs that as to the residue of his estate given to his Executors in trust by the twentieth clause of his will be given in place of that to his Executors in trust the sum of $50,000 the interest thereon to be paid to Mary S. Fitch (with whom testator was to be joined in marriage shortly) during her life in semi-annual payments, the first to begin six months after testator's death and at her decease said sum of $50,000 to go as provided in said twentieth clause subject to the same conditions as in said clause mentioned and also to the modifications of the same contained in the prior codicil, said bequest to be in lieu of dower in the testator's estate, and in case said residue should not amount to the sum of $50,000 then he directed that the other legacies (except that to his sister and that to the Cemetery Company) should abate in proportion so that at all events the sum of $50,000 should be available for said purpose.

That Harriet E. Moore, the sister of testator is deceased.

That Mary S. Moore (the widow of the testator) died July 11th, 1908, and her representatives are parties defendant in this matter.

And it further appearing that the Executor has paid and discharged all debts of the testator and all sums mentioned in said will and codicils as specific and general legacies to the legatees mentioned in said will and codicils excepting the gift of $10,000 to George De Graw Moore under section four of said will, the gift of $250 to George Moore under section eleven of said will and the gift of $250 each to Sarah M. Walsh and Frances D. Stanwood under section twenty-three of said will; and that the directions of said testator's will

and codicils have been carried out by the Executor in all other respects.

That the rest and residue of said testator's estate amounting to $21,972.68 at the last accounting with the Essex County Orphans' Court has not been applied or paid over to a home for respectable aged people of both sexes nor has any such home been founded or established within the period of five years from the date of the death of the testator or of his widow no such home as described in said will and codicils existing at the time and in the opinion and judgment of the Executor it not appearing advisable to establish such a home.

And it also appearing that the complainant as Executor of the last will and testament of George D. G. Moore, deceased, seeks the construction of said will and also the aid, advice and direction of this Court in his final disposition of the residue of the estate of said testator under said will and the codicils thereto (which are all set forth in said petition) and it appearing that the complainant is entitled to the relief which he seeks.

It is on this eighteenth day of July, nineteen hundred and sixteen, on motion of said counsel of the complainant by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and said Chancellor, by virtue of the power of this Court, does hereby order, adjudge and decree, that:

The gifts in said will under the twenty-third section thereof to Sarah M. Walsh and Frances D. Stanwood of the sum of $250 each are lawful and the complainant is hereby directed to pay the same with interest at 4% for six years, and that both gifts are money bequests under the will.

And it is further ordered, adjudged and decreed that the Proprietors of the Rosedale Ceme-

tery are not entitled to have any further participation in the distribution of the estate of said testator;

And it is further ordered, adjudged and decreed that the bequests to testator's nephews George De Graw Moore of ten thousand dollars under the fourth section of said will and of two hundred and fifty dollars to George Moore under the eleventh section of said will both lapsed and became part of the residue of the estate of said testator and that the testator did not die intestate as to any part of his estate.

And it is further ordered, adjudged and decreed that the fund now in the complainant's hands as Executor of said testator together with such interest as he may have received thereon constitutes the residue of the estate of said testator and the complainant is directed to divide and distribute the same as directed by the twentieth clause of his will (set forth on page 3 above) among the moneyed legatees and not among the testator's next of kin and that for this purpose the interest on the Walsh mortgage of $1,200 mentioned in the fourth section of the will, which interest amounts to the sum of $1,079.33 shall be considered as a moneyed legacy.

And it is further ordered that the complainant's taxed costs and a solicitor and counsel fee of one thousand dollars be paid the counsel of the complainant out of the money belonging to the estate now in the hands of the executor; that to the counsel of the defendant Frances D. Stanwood a counsel fee of two hundred and fifty dollars and her taxed costs be paid; to the counsel of the estate of Mary S. Moore, deceased, a counsel fee of two hundred and fifty dollars and its taxed costs be paid; to the counsel of Adeline H. Walsh and Robert E. Walsh a counsel fee of two hun-

dred and fifty dollars and their taxed costs be paid; to the counsel of the Board of Home Missions and Board of Foreign Missions of the Presbyterian Church in the United States of America a counsel fee of two hundred dollars and their taxed costs be paid; to the counsel of the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers a counsel fee of fifty dollars and their taxed costs be paid; to the counsel of George Moore Reuck, Hattie Reuck Schmidt and Bessie A. Stanaback a counsel fee of and their taxed costs be paid; to the counsel of Protestant Foster Home Society a counsel fee of fifty dollars and their taxed costs be paid; to the counsel of the Board of Church Erection Fund of the Presbyterian Church in the United States of America a counsel fee of and their taxed costs be paid; such payments to be made by the Executor out of the funds of the estate.

EDWIN R. WALKER,
C.

Respectfully advised.

JOHN E. FOSTER,
V. C.

Notice of Appeal.

(Filed Aug. 2, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK B. ALLEN, Executor, etc., of George D. G. Moore, deceased,

Complainant,

and

HARRIET E. MOORE, *et al.*,

Defendants.

On Petition, etc.

The defendants, M. Amelia Fitch, Adelaide P. Fitch and Margaret R. Fitch, legatees and executrices of Mary S. Moore, deceased, and Edith G. Fitch and Laleah McGhee, legatees of said Mary S. Moore, hereby appeal from so much of the decree or order, dated July 18th, 1916, made in this court in the above cause, as declares as follows:

"And it is further ordered, adjudged and decreed that the bequests to testator's nephews George De Graw Moore of ten thousand dollars under the fourth section of said will and of two hundred and fifty dollars to George Moore under the eleventh section of said will both lapsed and became part of the residue of the estate of said testator and that the testator did not die intestate as to any part of his estate.

"And it is further ordered, adjudged and decreed that the fund now in the complainant's hands as Executor of said testator together with such interest as he may have received thereon

constitutes the residue of the estate of said testator and the complainant is directed to divide and distribute the same as directed by the twentieth clause of his will (set forth on page 3 above) among the moneyed legatees and not among the testator's next of kin and that for this purpose the interest on the Walsh mortgage of $1,200 mentioned in the fourth section of the will, which interest amounts to the sum of $1,079.33 shall be considered as a moneyed legacy;" to the Court of Errors and Appeals in the last resort in all causes.

Dated July 29, 1916.

ALFRED F. STEVENS,
Solicitor for and of Counsel with said Defendants, M. Amelia Fitch, Adelaide P. Fitch, Margaret R. Fitch, Edith G. Fitch and Laleah McGhee, Executrices and legatees of Mary S. Moore, as aforesaid.

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

ALFRED F. STEVENS,
Of Counsel with last mentioned Defendants.

Petition of Appeal.

(Filed Aug. 3, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FRANK B. ALLEN, Executor &c., of George D. G. Moore, deceased,
Complainant-Respondent,

and

HARRIET E. MOORE *et al.*,
Defendants,

M. AMELIA FITCH *et al.*,
Appellants.

} On Bill, &c.,

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

The petition of M. Amelia Fitch, Adelaide P. Fitch and Margaret R. Fitch, legatees and Executrices of Mary S. Moore, deceased, and Edith G. Fitch and Laleah Mc Ghee, legatees of said Mary S. Moore, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date July eighteenth, 1916, wherein Frank B. Allen, Executor, &c., of George D. G. Moore, deceased, was complainant, and Harriet E. Moore, *et al.*, were defendants, in this respect, to wit, that the said decree, among other things, "ordered, adjudged and decreed that the bequests to testator's nephews George De Graw Moore of ten thousand

dollars under the fourth section of said will and of two hundred and fifty dollars to George Moore under the eleventh section of said will both lapsed and became part of the residue of the estate of said testator and that the testator did not die intestate as to any part of his estate.

"And it is further ordered, adjudged and decreed that the fund now in the complainant's hands as Executor of said testator together with such interest as he may have received thereon constitutes the residue of the estate of said testator and the complainant is directed to divide and distribute the same as directed by the twentieth clause of his will (set forth on page 3 above) among the moneyed legatees and not among the testator's next of kin and that for this purpose the interest on the Walsh mortgage of $1200 mentioned in the fourth section of the will, which interest amounts to the sum of $1079.33 shall be considered as a moneyed legacy."

Your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have adjudged, among other things, (1) that upon the decease of Mary S. Moore the fund of $50,000, the income from which was to be paid to her in her lifetime, according to the provisions of the second codicil to the testator's will, became part of the residuary estate of the said George D. G. Moore, and should have been divided among the parties entitled thereto under paragraph twentieth of the testator's will, excepting that the two legacies of ten thousand dollars and two hundred and fifty dollars bequeathed to his two nephews having lapsed by reason of their death in his lifetime, the testator should have been adjudged to have died intestate as to the said two last mentioned

legacies, as they formed a part of the residuary estate, and were bequeathed to the said legatees as a part thereof; or (2) that because of the decease of the said two great-nephews of the testator, George D. G. Moore, in the lifetime of the testator, their legacies lapsed and became part of the testator's residuary estate, and as no provision was made in said will for the survivors of the residuary legatees to take the shares of deceased residuary legatees, and the character of the legacies to the residuary legatees demonstrated that the testator intended each of the residuary legatees (not as a class but as individuals) to have a definite portion of the residue, and no more, the testator died intestate as to the shares of the residue alloted to the said two residuary legatees who died in his lifetime, and these appellants insist that the same persons who would have been entitled to a share of the testator's estate in case he had died wholly intestate should be and are entitled to the shares of the residue that the said legatees, great-nephews of testator, would have been entitled to had they survived the testator, and that these appellants, as the representatives of his widow, Mary S. Moore, are entitled to one-half part of whatever fraction of the residue of his estate the said testator, George D. G. Moore, failed to dispose of effectively by the provisions of his will.

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

ALFRED F. STEVENS,
Solicitor for and of Counsel with Appellants.

Answer to Petition of Appeal.

(Filed August 10, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FRANK B. ALLEN, Executor etc., of George D. G. Moore, deceased,
Complainant-Respondent,

and

HARRIET E. MOORE *et al.*,
Defendants,

M. AMELIA FITCH, *et al.*,
Appellants.

On Appeal from Chancery.

The answer of the above named respondent to the petition of appeal of M. Amelia Fitch, Adelaide F. Fitch, and Margaret R. Fitch, legatees and Executrices of Mary S. Moore, deceased, and Edith G. Fitch and Laleah McGhee, legatees of said Mary S. Moore, appellants.

This respondent, not acknowledging all or any of the matters which in said petition of appeal are contained, to be true, for answer nevertheless says and admits that an order was on the eighteenth day of July, 1916, 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 is produced.

And this respondent is advised and believes that the said order is agreeable to equity, and prays that the same may be affirmed with costs to be adjudged to this respondent.

BENJAMIN J. FLEUCHAUS,
Solicitor of Respondent.
SAMUEL E. AYERS,
Of Counsel with Respondent.

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