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Notice of Appeal of Anna Patanska, *et al.* &c.
(Filed, April 13, 1928.)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. Notice of Appeal.

The complainants hereby appeal from so much of the final decree made in this court in the above-stated cause as declares that the bequests and legacies to the complainant, Anna Patanska, mentioned in the last will and testament of Nick Dugan, deceased, are null and void, to the Court of Errors and Appeals in the last resort in all causes.

Dated, April 9, 1928.

HERBERT CLARK GILSON,
Solocitor and of Counsel with Complainants.

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

HERBERT CLARK GILSON,
Of Counsel with Complainants.

Amended Notice of Appeal of Anna Patanska, *et al.* &c.

(Filed, April 28, 1928.)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. Amended Notice of Appeal.

The complainants hereby appeal from so much of the final decree made by the Chancellor on the advice of Vice Chancellor James F. Fielder, in this court in the above-stated cause as declares that the bequests and legacies to the complainant, Anna Patanska, mentioned in the last will and testament of Nick Dugan, deceased, are null and void, to the Court of Errors and Appeals in the last resort in all causes.

Dated, April 19, 1928.

HERBERT CLARK GILSON,
Solocitor and of Counsel with Complainants.

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

HERBERT CLARK GILSON,
Of Counsel with Complainants.

Petition of Appeal of Anna Patanska, *et al.* &c.

(Filed, April 13, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, executors, &c., Appellants, and PAZIA DUGAN KUZNIA, *et als.*, Respondents.	On Bill &c. Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Anna Patanska and Alexander Ulitsky, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 2nd day of April, 1928, wherein your petitioners were complainants, and Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko, Michael Druga, Vasil Druga, Anna Druga Levecky, Steve Druga, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City, and Greek Catholic Church of Habury, Hungary, were defendants, in this respect, to wit: that the said decree adjudges that the bequests and legacies to the said Anna Patanska in the last will and testament of the said Nick Dugan, deceased, are

null and void. And your petitioners 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 Anna Patanska was an unnecessary and superfluous witness to the execution of the said will, and the will could be proved without her testimony, and therefore the said bequests and legacies to her were not null and void under the statute.

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 court shall seem meet.

HERBERT CLARK GILSON,
Solocitor and of Counsel with Appellants.

Answer of Pazia Dugan Kuznia, *et al.* to Petition of Appeal of Anna Patanska, *et al.*

(Filed, April 18th, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, executors, &c., Appellants, and PAZIA DUGAN KUSNIA (true name Kusma), *et als.*, Respondents.	On Bill etc. Joint Answer of Pazia Dugan Kusma, Mary Dugan Kusma and Eva Dugan Chayka to petition of appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS OF NEW JERSEY OF THE LAST RESORT IN ALL CAUSES:

The answer of the defendants, Pazia Dugan Kusma, Mary Dugan Kusma and Eva Dugan Chayka, to the petition of appeal of Anna Patanska and Alexander Ulitsky, executors of the Estate of Nick Dugan, deceased, and Anna Patanska, individually, the appellants in the above stated cause, respectfully shows that:

The said defendants deny that the part of the decree of the Chancellor from which the said appellants appal, which adjudges that the bequests and legacies to the said Anna Patanska in the last will and testament of the said Nick Dugan, deceased, are null and void, is erroneous; and they do here protest that the same is in all things legal, equitable and just.

Answer of Pazia Dugan Kuznia, et al. to Petition of Appeal of Anna Patanska, et al.

Wherefore your petitioners pray that the said decree may as to the matter therein appealed from be affirmed and that the said appeal be dismissed with costs.

RICHARD DOHERTY,
Solicitor for and of counsel with defendants, Pazia Dugan Kusma, Mary Dugan Kusma and Eva Dugan Chayka.

Answer of Ruthenian Catholic Church &c. to Petition of Appeal of Anna Patanska, *et al.*

(Filed, April 18, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants. and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. Answer to Petition of Appeal.

The answer of Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City, one of the above named appellees to the petition of appeal of Anna Patanska and Alexander Ulitsky, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, the above named appellants; this Appellee not admitting the truth of any or all of the facts in said petition of appeal contained for answer thereto, nevertheless admits that an order was, on April 2, 1928 made and entered in the Court of Chancery of New Jersey in the above entitled cause wherein and whereby it was adjudged and decreed that the bequests and legacies to Anna Patanska in the Last Will and Testament of Nick Dugan deceased were null and void but as to the substance and form of said order, this appellee takes leave to refer thereto when the same shall be produced.

Answer of Ruthenian Catholic Church &c. to Petition of Appeal of Anna Patanska, et al.

This appellee is advised and believes that the said order of the Court of Chancery aforesaid is agreeable and prays that the same may be affirmed with costs to be taxed in favor of this appellee.

O'BRIEN & TARTALSKY,
Solocitors for Appellee.

MAURICE TARTALSKY,
Of Counsel.

Answer of Michael Druga, *et al.* to Petition of Appeal of Anna Patanska, *et al.*

(Filed, July 17, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, executors, &c., Appellants, and PAZIA DUGAN KUSNIA (true name Kusma), *et als.*, Respondents.	On Bill etc. Joint answer of Michael Druga and Vasil Druga to petition of appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS OF NEW JERSEY OF THE LAST RESORT IN ALL CAUSES:

The answer of the defendants, Michael Druga and Vasil Druga, to the petition of appeal of Anna Patanska and Alexander Utilsky, executors of the Estate of Nick Dugan, deceased, and Anna Patanska, individually, the appellants in the above stated cause. The said defendants answering the above petition respectfully say that:

They deny that that part of the decree is erroneous wherein the Chancellor adjudges that the bequests and legacies to the said Anna Patanska in the last will and testament of the said Nick Dugan, deceased, are null and void, and they do here protest that the same is in all things legal, equitable and just.

Answer of Michael Druga, et al. to Petition of Appeal of Anna Patanska, et al.

Wherefore your petitioners pray that the said decree may as to the matter therein appealed from be affirmed and that the said appeal be dismissed with costs.

JACQUES H. HECHT,
Solicitor for Michael Druga and Vasil Druga.

MAURICE S. MAURER,
Of Counsel.

Notice of Appeal of Pazia Dugan Kuzma, *et al.*
(Filed, May 10, 1928)

IN CHANCERY OF NEW JERSEY.

Between
ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, Deceased, *et al.*,
Complainants-Appellees,

and

PAZIA DUGAN KUSMA, MARY DUGAN MURYN, EVA DUGAN CHAYKA,
Defendants-Appellants,

GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, *et als.*,
Defendants-Appellees.

On Bill, etc. Notice of Appeal.

The defendants, Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, hereby appeal from so much of the final decree made in this court in the above stated cause as declares that by the true construction of the last will and testament of Nick Dugan, deceased, the bequests to Pazia Dugan Kusma, Mary Dugan Muryn, Eva Dugan Chayka, Ruthenian Greek Catholic Church of St. Peter and Paul of Jersey City and Greek Catholic Church of Habury, Hungary, are general legacies, and that they are chargeable against the real estate of which the said testator died seized, to the Court

Notice of Appeal of Pazia Dugan Kuzma, et al.

of Errors and Appeals in the last resort in all causes.

Dated, May 9th, 1928.

RICHARD DOHERTY,
Solicitor of and of counsel with appellants, Nick Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka.

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

RICHARD DOHERTY,
Of counsel with above appellants.

Petition of Appeal of Pazia Dugan Kusma, *et al.*

(Filed, May 10, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, Deceased, *et al.*, Complainants-Appellees, and PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA, Defendants-Appellants, GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, *et als.*, Defendants-Appellees.	On Bill, etc. Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 2nd day of April, 1928, wherein your petitioners were defendants, and Anna Patanska and Alexander Ulitsky, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, were complainants, and Michael Druga, Vasil Druga, Anna Druga Levecky, Steve

Druga, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City and the Greek Catholic Church of Habury, Hungary, were co-defendants, in this respect, to wit: that the said decree adjudges that the bequests to the said Pazia Dugan Kusma, Mary Dugan Muryn, Eva Dugan Chayka, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City and Greek Catholic Church of Habury, Hungary, are general legacies, and that they are chargeable against the real estate of which the said testator died seized. And your petitioners appeal from that part of the decree of the Chancellor which adjudges as aforesaid, upon the ground that the same is erroneous for the reason that the said will was exclusively a testament of personalty, wherein the bequests made, whether general or otherwise, were not, by the intention of the testator, nor in law or equity, properly chargeable upon the real estate of said Nick Dugan, deceased.

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 court shall seem meet.

RICHARD DOHERTY,
Solicitor of and of counsel with appellants, Nick Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka.

Answer of Anna Patanska, *et al.* to Petition of Appeal of Pazia Dugan Kuzma, *et al.*

(Filed, June 7, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, Deceased, *et al.*, Respondents, and PAZIA DUGAN KUZNIA, *et als.*, Appellants.	On Bill &c. Answer to Petition of Appeal.

The answer of the above named respondents, Anna Patanska and Alexander Ulitsky, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, to the petition of appeal of the above named appellants, Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayka.

These respondents, not acknowledging all or any of the matters in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a final decree was, on the 2nd day of April, last past, 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, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable

Answer of Anna Patanska, et al. to Petition of Appeal of Pazia Dugan Kuzma, et al.

to equity in respect to the matters contained in the said petition, and they pray that the same may be affirmed in the respect aforesaid with costs to be adjudged to these respondents.

HERBERT CLARK GILSON,
Solicitor of Anna Patanska,
et al., executors, &c., *et al.*,
respondents.

Answer of Michael Druga, *et al.* to Petition of Appeal of Pazia Dugan Kuzma, *et al.*

(Filed, July 16, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et el*, Executors of the Estate of Nick Dugan, Deceased, *et al*, Complainants-Appellees, and PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA, Defendants-Appellants. GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, *et als.*, Defendants-Appellees.	On Bill, etc. Answer of Michael and Vasil Druga to Petition of Appeal of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka.

The answer of Michael Druga and Vasil Druga, two of the above named appellees to the Petition of Appeal of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, the above named Defendants-Appellants.

These Appellees admit the making of the final decree as set forth in the petition of appeal and are advised and believe that the same is erroneous and contrary to law and equity in the particulars therein alleged, that is to say:

"That the said decree erroneously adjudges that the bequests to the said Pazia Dugan

Answer of Michael Druga, et al. to Petition of Appeal of Pazia Dugan Kuzma, et al.

Kusma, Mary Dugan Muryn, Eva Dugan Chayka, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City and Greek Catholic Church of Habury, Hungary, are general legacies, and that they are chargeable against the real estate of which the said testator died seized."

The Appellees consent, as to the matters and things so erroneously adjudged, that the said final decree be set aside and for nothing holden.

JACQUES H. HECHT,
Solicitor for Michael and Vasil Druga.

MAURICE S. MAURER,
Of Counsel.

Answer of Greek Catholic Church of Habury, to Petition of Appeal of Pazia Dugan Kusma, *et als.*

(Filed July 17, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*,
Complainants-Appellees,

and

PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA,
Defendants-Appellants,

GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, *et als.*,
Defendants-Appellees.

On Bill, etc.
Answer to Petition of Appeal.

The answer of Greek Catholic Church of Habury, Hungary, one of the above named appellees to the petition of appeal of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, the above named defendants-appellants.

This appellee not admitting the truth of any or all of the facts in said petition of appeal contained for answer thereto nevertheless admits that a decree was on April 2, 1928 made and entered in the Court of Chancery of New Jersey in the above entitled cause wherein and whereby it was ordered, adjudged and decreed that the bequest to the said Greek Catholic Church of Habury, Hungary was a general legacy and chargeable against the real estate of which

Answer of Greek Catholic Church of Habury, to Petition of Appeal of Pazia Dugan Kusma, et als.

said testator died seized. But as to the substance and form of said decree this appellee takes leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree of the Court of Chancery, aforesaid, is agreeable and prays that the same may be affirmed with costs to be taxed.

JAMES F. KELLY,
Solicitor for Appellee.

JAMES F. KELLY,
Of Counsel.

Answer of Ruthenian Greek Catholic Church to Petition of Appeal of Pazia Dugan Kusma, *et als.*

(Filed May 18, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*,
Complainants-Appellees,

and

PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA,
Defendants-Appellants,

GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, *et als.*,
Defendants-Appellees.

On Bill, etc. Answer to Petition of Appeal.

The answer of Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City, one of the above named Appellees to the Petition of Appeal of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, the above named defendants-appellants.

This appellee not admitting the truth of any or all of the facts in said petition of appeal contained for answer thereto nevertheless admits that a decree was on April 2, 1928 made and entered in the Court of Chancery of New Jersey in the above entitled cause wherein and whereby it was ordered, adjudged and decreed that the bequest to the said Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City was a general legacy and chargeable

against the real estate of which said testator died seized. But as to the substance and form of said decree this appellee takes leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree of the Court of Chancery, aforesaid, is agreeable and prays that the same may be affirmed with costs to be taxed in its favor.

O'BRIEN & TARTALSKY,
Solicitors for Appellee.

SAMUEL TARTALSKY,
Of Counsel.

Notice of Appeal of Michael Druga, *et al.*

(Filed, July 2, 1928)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, Executors of NICK DUGAN, Deceased. Complainants, and PAZIA DUGAN KUZNIA, *et al.*, Defendants.	On Bill, &c. Notice of Appeal.

The defendants Michael Druga and Vasil Druga hereby appeal from so much of the final decree made by the Chancellor on the advice of Vice Chancellor James F. Fielder in this Court in the above entitled cause as decrees:

1. That the bequests set forth in paragraph one of said decree are general legacies and that they are chargeable against the real estate of which testator died seized.

2. That paragraph three of said decree adjudges that the real estate of the said Nick Dugan descended to his heirs at law subject to the payment of the said legacies.

3. That paragraph six of said decree requires that the proceeds of the sale of the said real estate be devoted to the payment of said legacies mentioned in paragraph one thereof and that the resi-

Notice of Appeal of Michael Druga, et al.

due only of such proceeds should be paid to the heirs at law of said Nick Dugan.

JACQUES H. HECHT,
Solicitor of Michael Druga and Vasil Druga.

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

MAURICE S. MAUER,
Of Counsel with said defendants.

Petition of Appeal of Michael Druga, *et al.*

(Filed July 2, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants-Appellees, and MICHAEL DRUGA and VASIL DRUGA, Defendants-Appellants, PAZIA DUGAN KUZMA, *et als.*, Defendants-Appellees.	On Bill &c. Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Michael Druga and Vasil Druga, defendants, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 2nd day of April, 1928, wherein your petitioners were defendants, and Anna Patanska, *et al.*, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, were complainants, and Pazia Dugan Kuzma, Mary Dugan Muryn and Eva Dugan Chayko, Steve Druga, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City and the Greek Catholic Church of Habury, Hungary, were co-defendants, in this respect, to-wit:

1. That the said decree adjudges that the bequests to the said Pazia Dugan Kuzma, Mary Dugan

Muryn, Eva Dugan Chayko, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City and Greek Catholic Church of Habury, Hungary, are general legacies, and that the yare chargeable against the real estate of which said testator died are general legacies, and that they are chargeable seized.

2. That the said Nick Dugan died intestate as to his real estate and the same descended to his heirs at law, subject to the said legacies.

3. That the net proceeds from the sale of the said real estate should be applied first to the payment of the debts of the estate and to the commissions of the executors, next to the payment of the legacies and the residue to the heirs at law of the testator.

4. And your petitioners appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for the reason that the bequests mentioned in the first paragraph in the said decree were not general, but were specific legacies and that they are not chargeable against the real estate of which the said Nick Dugan died seized; that the real estate of the said Nick Dugan descended to his heirs at law not subject to the legacies mentioned in the first paragraph of said decree; and that no part of the net proceeds derived from the sale of said real estate should be applied to the payment of said legacies mentioned in the first paragraph of said decree.

JACQUES H. HECHT,
Solicitor for Michael Druga and
Vasil Druga, Defendants-Appellants.

MAURICE S. MAURER,
Of Counsel with said Defendants-Appellants.

Answer of Anna Patanska, *et al.* to Petition of Appeal of Michael Druga, *et al.*
(Filed July 6, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, executors, etc., Complainants-Respondents, and MICHAEL DRUGA and VASIL DRUGA, Defendants-Appellants.	On Petition of Appeal. Answer of Complainants-Respondents.

The answer of the above named respondents, Anna Patanska and Alexander Ulitsky, executors of the estate of Nick Dugan, deceased, and Anna Patanska, individually, to the petition of appeal of the above named appellants, Michael Druga and Vasil Druga.

These respondents, not acknowledging all or any of the matters which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a decree was on the 2nd day of April, 1928, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that those parts of the decree mentioned in said petition are agreeable to equity and they pray that the same may be affirmed in the respects aforesaid, with costs to be adjudged to these respondents.

HERBERT CLARK GILSON,
Solicitor and of counsel with
Anna Patanska, *et al.*, executors, etc. respondents.

Answer of Pazia Dugan Kusma, *et als.* to Petition of Appeal of Michael and Vasil Druga.

(Filed Jul y6, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants-Appellees, and PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA, GREEK CATHOLIC CHURCH OF HABURY, HUNGARY AND RUTHENIAN GREEK CATHOLIC CHURCH OF SAINTS PETER AND PAUL, Defendants-Appellees, MICHAEL DRUGA and VASIL DRUGA, Defendants-Appellants.	On Bill, etc. Answer of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka to Petition of Appeal of Michael Druga and Vasil Druga.

The answer of Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, three of the above named appellees, to the petition of appeal of Michael Druga and Vasil Druga, the above named defendants-appellants.

These appellees admit the making of the final decree as set forth in the petition of appeal and are advised and believe that the same is erroneous and contrary to law and equity in the particulars therein alleged, that is to say:

Answer of Pazia Dugan Kusma, et als, to Petition of Appeal of Michael and Vasil Druga.

1. That said decree erroneously adjudges that the bequests to the said Pazia Dugan Kusma, Mary Dugan Muryn, Eva Dugan Chayka, Greek Catholic Church of Habury, Hungary and Ruthenian Greek Catholic Church of Saints Peter and Paul are general legacies, and that they are chargeable against the real estate of which the said testator died seized;

2. That said decree erroneously adjudges that the said Nick Dugan died intestate as to his real estate and the same descended to his heirs at law subject to the said legacies.

3. That said decree erroneously adjudges that the net proceeds from the sale of the said real estate should be applied first to the payment of the debts of the estate and to the commissions of the executors, next to the payment of the legacies and the residue to the heirs at law of the testator.

The appellees consent, as to the several matters and things so erroneously adjudged, that the said final decree be set aside and for nothing holden.

RICHARD DOHERTY,
Solicitor of, and of counsel with, appellees, Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka.

Bill of Complaint.

(Filed, July 10, 1926)

IN CHANCERY OF NEW JERSEY.

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

The complainants, Anna Patanska and Alexander Ulitsky, executrix and executor of the last will and testament of Nick Dugan, deceased, sometimes known as Michael Dugan, of the city of Jersey City, in the County of Hudson and State of New Jersey, respectfully show:

1. That the said Nick Dugan departed this life on or about April 27, 1926, leaving him surviving, three sisters, Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko, his only next of kin and heirs at law.

2. That said decedent left a last will and testament bearing date August 8, 1925, wherein he appointed the complainants executrix and executor, respectively, which said last will and testament was, on May 13, 1926, duly admitted to probate by the Surrogate of Hudson County aforesaid, and letters testamentary were duly issued thereon to complainants who have taken upon themselves the burden of administration of said estate; a copy of which said will being hereto annexed and made part hereof.

3. At the time of making his will, the only property possessed by the said testator was money in several banks, and he bequeathed the sum of $3000 to the Greek Catholic Church of Habury, Hungary, and the sum of $3000 to the Rutheinar Greek Church of Saints Peter and Paul, of Jersey City, a corporation of the State of New Jersey, and the

sum of $2000 to each of his said three sisters, and the sum of $7300 to complainant, Anna Patanska.

4. On or about November 14, 1925, the said testator purchased the lands and premises with the apartment house thereon erected, hereinafter described, and took title thereto in his name as "Michael Dugan", using almost all of the said moneys in the banks therefor, to wit:

> All that certain plot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, described as follows:
>
> Beginning at a point in the westerly line of Randolph Avenue distant 56.29 feet southerly from the corner formed by the intersection of the westerly line of Randolph Avenue with the southerly line of McDougall Avenue, thence westerly and parallel with McDougall Avenue 105.74 feet; thence southerly and at right angles to the first course 31 feet; thence easterly and parallel with the first course 108.92 feet to the westerly line of Randolph Avenue; thence northerly and along the westerly line of Randolph Avenue 31.16 feet to the beginning.
>
> Being also known as 335 Randolph Avenue in said City and being also known as lot 15-C in City Block 1946 as laid down on the Official Assessment Map of Jersey City as amended in 1922.

5. The said testator died seized in fee simple of the said lands and premises without authorizing complainants to sell the same; and the said estate

is insufficient to pay the said legacies without selling the said lands and premises. Complainants believe, and therefore allege, that it was the intention of the said testator to have his estate distributed to the said legatees as soon as possible after his decease.

6. Complainants have received an advantageous offer to purchase the said property, and they have entered into a contract for such sale subject to the approval of this court and a decree construing the said will and authorizing complainants to convey.

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

1. That Pazie Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko, Greek Catholic Church of Habury, Hungary, and Rutheinar Greek Church of Saints Peter and Paul of Jersey City, N. J., who are defendants in this suit, may answer this bill of complaint (but without oath), and each statement therein.

2. That the interests of the various parties may be determined by this Honorable Court, and that complainants may be instructed with regard to their duties in reference thereto.

3. That the said will may be construed and complainants may be authorized to sell the said land and premises.

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

HERBERT CLARK GILSON,
Solicitor and of counsel with complainants.

Schedule.

WILL OF NICK DUGAN, probated May 13th, 1926, in Surrogate of Hudson County.

I, Nick Dugan 50 years of age born at Habury ad Zemplin, Hungary, being sick–but of clear and sound mind do by this pronounce as my last will made voluntarily and without any force or influence as follows:

1) In case of my death I recommend my soul to mercy of God thanking Him for all His goods and blessings to me.

2) I command the administrators to provide to my body one *decent* christian funeral *on* a Catholic Cemetery, the expenses to be born by Mrs. Anna Patanska.

3) My cash money of which 10,000.00 is deposited at Provident Institution for Savings in Jersey City, N. J. and 3,000.00 and 1,600.00 in two Banks in Brooklyn, N. Y. and 2,500.00 at the Post Office at Jersey City all together = 17,100.00 or more is to be divided and applied as follows: 2,000.00 for my sister Pazie Dugan-Kuznia at Habury, Hungary, 2,000.00 for my sister Mary Dugan-Muryn at Habury, Hungary, and 2,000.00 for my sister Eva Dugan-Chayko at Mezo Laborcz, Hungary, 3,000.00 for the Greek Catholic Church at Habury, Hungary and 3,000.00 for *Rutheinar* Greek Catholic Church of Saints Peter and Paul Jersey City, N. J. and 5,100.00 for Anna Patanska in appreciation of her good care accorded to me in my sickness and otherwise. She has right to keep and retain for her 2,200.00 given by me to her already in cash and Liberty bonds to amount of 300.00 and all other

Schedule.

moneys valuable papers and my belongings which shall be left after my death.

Mrs. Anna Patanska and Rev. Alexander Ulitsky are to be appointed administrators and executors of this my will.

Given at Jersey City, on 8th day of August 1925 in presence of Mrs. Julia Narozniak, Mrs. Anna Patanska, Rev. Alexander Ulitsky and attested by a cross made by my own hand and signatures of

witnesses.
Julia Narozniak
Anna Patanska
Rev. Alex Ulitsky

his
Nick × Dugan
mark

Order of Amendment.
(Filed, April 4, 1927)

IN CHANCERY OF NEW JERSEY.

Between
ANNA PATANSKA, *et al.*, executrix of the last will and testament of NICK DUGAN, deceased,
Complainants,

and

PAZIA DUGAN KUZNIA, *et als.*,
Defendants.

On Bill &c.
Order of Amendment.

This matter being opened to the court by Herbert Clark Gilson, Esq., solicitor of complainants, and upon the consent of parties hereto;

It is on this 4th day of April, 1927, Ordered, that the bill of complainant herein be and it is hereby amended by adding as parties defendants hereto, Vasil Druga, Michael Druga, Steve Druga and Anna Levecky, children of a deceased sister of the said Nick Dugan, deceased.

Respectfully advised,

E. R. WALKER,
C.

JAMES F. FIELDER,
V. C.

Order of Amendment.

We consent to the entry of the within order.

RICHARD DOHERTY,
Solr. of Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan, defendants.

J. FRANCIS KELLY,
Solr. of Greek Catholic Church of Habury, Hungary, defendant.

O'BRIEN & TARTALSKY,
Solrs. of Rutheinar Greek Catholic Church of Sts. Peter & Paul of Jersey City, defendant.

JOHN MILTON,
Solr. of Vasil Druga, Michael Druga, Steve Druga and Anna Levecky.

Order of Amendment.
(Filed, August 17, 1927)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, executors &c., Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. Order of Amendment.

Upon the consents hereunder written and on motion of Herbert Clark Gilson, Esq., solicitor of complainants;

It is on this 17th day of August, 1927, ORDERED that the bill of complaint in the above entitled cause be and it is hereby amended by adding as a party complainant, Anna Patanska, individually.

E. R. WALKER,
C.

Order of Amendment.

We consent to the entry of the within order.

RICHARD DOHERTY,
Solr. of Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan, defendants.

JAMES F. KELLY,
Solr. of Greek Catholic Church of Habury, Hungary, defendant.

O'BRIEN & TARTALSKY,
Solrs. of Rutheinar Greek Catholic Church of Sts. Peter & Paul of Jersey City, defendant.

JOHN MILTON,
Solr. of Steve Druga and Anna Levicky, defendants.

Answer of Pazia Dugan Kuznia, *et als.*
(Filed, Oct. 6, 1926)

IN CHANCERY OF NEW JERSEY.

Between

ANNA PATANSKA and ALEXANDER ULITSKY, executors of the last will and testament of Nick Dugan, deceased,
Complainants,

and

PAZIA DUGAN KUZNIA, MARY DUGAN MURYN, EVA DUGAN CHAYKO, GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, and RUTHEINAR GREEK CHURCH OF SAINTS PETER AND PAUL OF JERSEY CITY, N. J.,
Defendants.

On Bill, Etc.
Joint Answers of Pazia Dugan Kuznia, Mary Dugan Muryn, and Eva Dugan Chayko.

The joint answers of Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko, respectfully show:

1. They admit paragraph 1 of the bill of complaint.

2. They deny so much of paragraph 2 of the complaint as alleges that the document therein referred to bearing date of August 8th, 1925 was the last will and testament of said Nicholas Dugan, deceased, and admit the remaining allegations of said paragraph.

3. They admit the allegation of paragraph 3 that the only property possessed by the testator on the

date of the said alleged will, was money in banks or otherwise deposited, and admit that the said alleged will purports to bequeath the several sums in the paragraphs mentioned.

4. They admit so much of paragraph 4 as alleges that on or about November 14th, said Nicholas Dugan purchased the lands and premises therein described and took title thereto in his name as Michael Dugan. They have no knowledge or information whereof to form a belief as to the truth that for said purchase he used all the money in the banks therefor.

5. They admit the allegations of paragraph 5 except that it was the intention of the testator to have his estate distributed to he said legatees as soon as possible after his decease, which allegation they deny.

6. They have no knowledge or information as to the truth of the allegations of paragraph 6 and therefore neither admit nor deny the same.

FIRST SEPARATE DEFENSE.

The said paper writing purporting to be the last will and testament of Nick Dugan was invalid by reason of the same not having been signed by the testator in the presence of the witnesses whose names appear thereon, and by reason of said witnesses not having signed in the presence of the testator and of each other, and by reason of the said testator not having declared and published the said document as and for his last last and testament.

SECOND SEPARATE DEFENSE.

The order of the Surrogate of the County of Hudson admitting the last will and testament to probate was on September 18th, 1926, duly appealed to the Orphans' Court of said county, which thereupon issued citations to the complainants and all parties interested in said estate to appear before said court October 15th, 1926 to answer said appeal, and that the proceedings on said appeal are still pending and undetermined in the said court.

THIRD SEPARATE DEFENSE.

The said legacies in the bill of complaint mentioned were demonstrative legacies and abated by reason of the termination of the funds out of which the same were to be paid.

FOURTH SEPARATE DEFENSE.

That said Nicholas Dugan as to the premises described in the bill of complaint, died intestate and the title to the same thereby descended to these defendants by operation of law.

RICHARD DOHERTY,
Solicitor for and of counsel with defendants, Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko.

Answer of Ruthenian &c. Church.

(Filed, Sept. 27, 1926.)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, executrix, etc., Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill, etc. Answer of Ruthenian Greek Catholic Church of Saints Peter and Paul.

The defendant, Ruthenian Greek Catholic Church of Saints Peter and Paul of Jersey City, a corporation of the State of New Jersey, in answer to the Bill of Complaint filed herein says:

1. It admits the allegations contained in Paragraph One.

2. It admits the allegations contained in Paragraph Two.

3. It admits that the testator bequeathed the sum of Three thousand dollars to this defendant together with the other sums to the other beneficiaries set forth in said Paragraph, but it has no knowledge as to the other allegations contained in said Paragraph.

4. It admits that on or about November 4, 1925, the testator purchased the lands and premises described in said Paragraph Four, but has no knowledge or information as to the other allegations contained in said Paragraph.

5. It admits that the testator died seized in fee simple of the lands and premises described in said Bill of Complaint, without authorizing complainants to sell the same and admits that it was the intention of the said testator to have his Estate distributed to the said legatees as soon as possible after his deceased, but it has no knowledge as to the other allegations contained in said Paragraph Five.

6. It has no knowledge concerning the allegations contained in Paragraph Six, but if proof shows this to be the fact, this defendant joins in the prayer of said Complainants.

This defendant joins in the prayers of the said Complainants.

O'BRIEN & TARTALSKY,
Solicitors for Ruthenian Greek Catholic
Church of Saints Peter and Paul.

Answer of Greek Catholic Church of Habury.

(Filed, Nov. 12, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

ANNA PATANSKA and ALEXANDER ULITSKY, Executors of the last will and testament of Nick Dugan, deceased,
Complainants,

and

PAZIA DUGAN KUZNIA, MARY DUGAN MURYN, EVA DUGAN CHAYKO, GREEK CATHOLIC CHURCH OF HABURY, HUNGARY and RUTHEINAR CATHOLIC CHURCH OF SAINTS PETER AND PAUL OF JERSEY CITY, N. J.,
Defendants.

On Bill, etc. Answer of Defendant Greek Catholic Church at Habury.

The defendant, Greek Catholic Church at Habury, Hungary, a duly organized religious association located at Habury, Czecho-Slovakia, for answer to the bill of complaint herein, says:

1. It admits all the allegations contained in the bill of complaint.

J. FRANCIS KELLY,
Solicitor of Defendant,
Greek Catholic Church at Habury.

Answer and Counterclaim of Steve Druga and Anna Levecky.

(Filed, May 16, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
ANNA PATANSKA, *et al.*, executrix, etc.,
Complainants,

and

PAZIA DUGAN KUZNIA, *et al.*,
Defendants.

On Bill, etc. Answer of Steve Druga & Anna Druga Levecky.

The answer of Steve Druga and Anna Druga Levecky to the bill of complaint of Anna Patanska and Alexander Ulitsky, executors of Nick Dugan (otherwise known as Michael Dugan):

1. They admit the allegations of the first paragraph of the complaint except that they say that the said Nick Dugan left him surviving in addition to the persons mentioned in the said first paragraph these defendants, Steve Druga, Anna Druga Levecky, Vasil Druga and Michael Druga, children of a deceased sister of testator.

2. They admit the allegations of the second paragraph of the complaint.

3. They admit the allegations of the third paragraph of the complaint and say that the said several sums of money in the said paragraph mentioned in the bequests thereof, by the will of the said Nick Dugan, were to be made out of moneys to his credit

in various banks in Jersey City and Brooklyn, New York.

4. They admit the allegations of the fourth paragraph.

5. They admit the allegations of the fifth paragraph except they say that it was not the intention of the said testator that the provisions of his said will should apply to real estate acquired by him after its execution of said will, and that as a consequence the said testator, as to the real estate described in the fourth paragraph of the complaint, died intestate.

6. These defendants have no knowledge with respect to the allegations of the sixth paragraph of the complaint.

7. These defendants join in the prayer of the complaint except that they aver that the complainants are without power to sell the real estate mentioned in the complaint and that this Court is without jurisdiction to confer such power.

COUNTERCLAIM.

These defendants by way of counterclaim to the bill of complaint of the said complainants say:

1. They repeat the allegations of the foregoing answer.

2. At the time of the making and execution by the said Nick Dugan of his last will and testament,

the said Nick Dugan was possessed only of cash in banks as recited in the said will.

3. Thereafter and on or about November 14th, 1925, the said testator purchased the lands and premises described in the said bill of complaint with the said moneys in banks and thereby destroyed the subject matter of the bequests in the third paragraph of the said will.

4. The said testator died seized in fee simple of the said lands and premises without devising the same in due form of law and as and in consequence thereof, as to said lands and premises the said testator died intestate.

5. These defendants are each entitled to the equal undivided one-sixteenth (1/16) portion of the said lands and premises in the right of their mother, who, if living, would have been entitled to the one undivided fourth (¼) part thereof.

6. The other persons interested in the said lands and premises are Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko, who are each entitled to the one undivided fourth (¼) part of said premises, and Vasil Druga and Michael Druga, brothers of these defendants who are each entitled to the one undivided sixteenth (1/16) part thereof.

7. The said Pazia Dugan Kuznia is married. Her husband's name is unknown to these defendants, and he is made a party to this counterclaim by the name "John".

The said Mary Dugan Muryn is married. Her husband's name is unknown to these defendants,

and he is made a party to this counterclaim by the name "Thomas".

The said Eva Dugan Chayko is married. Her husband's name is unknown to these defendants, and he is made a party to this counterclaim by the name "Joseph".

The said Vasil Druga is married. His wife's name being Anna.

The said Michael Druga is married. His wife's name being Anna.

This defendant Steve Druga is married. His wife's name being Julia.

This defendant Anna Druga Levecky is married. Her husband's name being Harry.

8. These defendants are desirous that a partition or division of the said tract of land and premises should be made among the parties seized of and entitled thereto, according to their respective rights, estates and interests therein, or in case that the said tract of land and premises cannot be divided among the owners thereof without great prejudice to their interests, then that the same may be sold and the proceeds divided among the parties entitled thereto, as aforesaid, according to their respective rights and interests.

These defendants therefore pray that the said complainants and the said Pazia Dugan Kuznia and John, her husband; the said Mary Dugan Muryn and Thomas, her husband; the said Eva Dugan Chayko and Joseph, her husband; the said Vasil Druga and Anna, his wife; the said Michael Druga and Anna, his wife; the said Steve Druga and Julia, his wife, and Anna Druga Levecky and Harry, her husband, may answer this counterclaim and each statement therein made.

That a fair partition and division of the above described premises may be made, according to the practice of this court, if the same be practicable and consistent with the rights of all the parties interested therein, among the persons entitled to shares of the said premises, according to their respective rights and interests therein; and that the liens, if any, on the undivided estate or interest of any of the parties hereto be decreed to be a charge only on the share assigned to such party, such share to be first charged with its just proportion of the costs of these proceedings, and with its just proportion of such sum as shall be found due these defendants for monies received by the said complainants while in possession of the said premises.

That in case actual partition shall be found to be impracticable or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then that the said tract of land and premises may be decreed by this court to be sold, including the inchoate rights of dower and of courtesy of the said Pazia Dugan Kuznia and John, her husband; the said Mary Dugan Muryn and Thomas, her husband; the said Eva Dugan Chayko and Joseph, her husband; the said Vasil Druga and Anna, his wife; the said Michael Druga and Anna, his wife; the said Steve Druga and Julia, his wife, and Anna Druga Levecky and Harry, her husband, and that after paying out of the proceeds the costs and charges of this suit, that the remainder be divided among the several parties interested therein according to their respective rights, shares and interests.

That an account may be taken of the sums of money received by the complainants while in the

possession of the said premises and that the said complainants be directed to bring into this court the monies remaining in their hands as the proceeds of the rents and profits of said premises, and that the said sum be decreed to be due and to be paid to the several parties entitled thereto in proportion to their respective interests.

That a writ of subpoena may issue, commanding said complainants and said defendants to answer this counterclaim and to abide by such decree as this Court may make in the premises.

JOHN MILTON,
Solicitor of and Counsel with Defendants,
Steve Druga and Anna Druga Levecky.

Answer and Counterclaim of Michael Druga, *et al.*

(Filed, Oct. 10, 1927)

61/280

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et als,* executrix of the last will and testament of NICK DUGAN, deceased, Complainants, and PAZIA DUGAN KUZNIA, *et als,* Defendants.	On Bill, &c. Answer to Bill of Complaint and Replication to Counterclaim of Michael Druga and Vasil Druga.

The answer of Michael Druga and Vasil Druga to the Bill of Complaint of Anna Patanska and Alexander Ulitsky, executors of Nick Dugan (otherwise known as Michael Dugan) :

1. They admit the allegations of the first paragraph of the complaint except that they say that the said Nick Dugan left him surviving in addition to the persons mentioned in the said first paragraph these defendants, Steve Druga, Anna Druga Levecky, Vasil Druga and Michael Druga, children of a deceased sister of testator.

2. They admit the allegations of the second paragraph of the complaint.

3. They admit the allegations of the third paragraph of the complaint and they say that the several sums of money in the said paragraph mentioned in the bequests thereof, by the will of the

said Nick Dugan, were to be made out of moneys to his credit in various banks in Jersey City and Brooklyn, New York.

4. They admit the allegations of paragraph four except that they have no knowledge or information whereof to form a belief as to the truth that for said purchase, Nick Dugan used all the money in the banks therefor.

5. They admit the allegations of the fifth paragraph except that they say that it was not the intention of the said testator that the provisions of his said will should apply to real estate acquired by him after the execution of said will, and that as a consequence the said testator, as to the real estate described in the fourth paragraph of the complaint, died intestate.

6. These defendants have no knowledge with respect to the allegations of the sixth paragraph of the complaint.

7. These defendants join in the prayer of the complaint except that they aver:

1. The bequests to Anna Patanska, one of the Complainants herein are void and such bequests form an estate to which the deceased, Nick Dugan, died intestate.

2. As to the premises described in the Bill of Complaint, the said Nick Dugan died intestate.

The replication of Michael Druga and Vasil Druga to the Counterclaim of the defendants, Steve Druga and Anna Druga Levecky:

1. They admit all the allegations of paragraph one (1), paragraph two (2), paragraph three (3), paragraph four (4), paragraph five (5) and paragraph six (6) of the Counterclaim.

2. They admit all the allegations in paragraph seven (7) of the Counter-claim and further allege that they do not know the Christian names of the husbands of Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko.

3. These defendants join in the prayers of the counter-claim of Steve Druga and Anna Druga Levecky that the said lands may be partitioned as therein prayed.

JACQUES H. HECHT,
Solicitor for Michael Druga and his wife Anna Druga and Vasil Druga and his wife, Anna Druga.

Replication and Answer to Counterclaim of Steve Druga, *et al.*

(Filed, Oct. 13, 1927)

IN CHANCERY OF NEW JERSEY.

Between ANNNA PATANSKA, *et al*, executors, etc., Complainants, and PAZIA DUGAN KUZNIA, *et als*, Defendants.	On Bill, &c. Replication and Answer to Counterclaim of Steve Druga and Anna Druga Levecky.

The replication of the complainants to the answer off Steve Druga and Anna Druga Lovecky, defendants.

The complainants join issue on the answer of the said defendants.

As to the counterclaim contained in said answer, complainants say:

FIRST.

Complainants reserve the right to move to strike out the said counterclaim at the final hearing of the cause, on the following grounds, viz.:

1. The said counterclaim does not set forth a cause for equitable relief in that the purchase of the lands and premises with the moneys in the banks at the time of the making of the last will and testament by the said Nick Dugan, deceased, did not destroy the bequests in said will.

2. The lands and premises mentioned in the counterclaim are not subject to a partition.

3. The said counterclaim joins improper and unnecessary parties, to wit: The husbands of Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Chayko and Anna Druga Levecky, and the wives of Vasil Druga, Michael Druga and Steve Druga.

SECOND.

The answer of the complainants to the said counterclaim.

1. They deny that the purchase of the said lands and premises by the said testator with the moneys in banks destroyed the subject matter of the bequests in the third paragraph of his said will, as alleged in the third paragraph of the counterclaim of said defendants.

2. They deny that the said testator died intestate as to the said lands and premises, as alleged in the fourth paragraph of the couunterclaim.

3. They deny the allegations contained in paragraphs five and six of the counterclaim

4. They deny that the husbands of the defendants, Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko and Anna Druga Levecky, and the wives of the defendants, Vasil Druga, Michael Druga and Steve Druga, have any interest or share in the said estate of Nick Dugan, deceased.

HERBET CLARK GILSON,
Solicitor of Complainants.

Replication to Answer of Pazia Dugan Kuznia, *et al.*

(Filed, Oct. 25, 1926)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA and ALEXANDER ULITSKY, executors, etc., Complainants, and PAZIA DUGAN KUZNIA, *et als,* Defendants.	On Bill, &c. Replication to Answers of Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko.

The replication of the complainants to the joint answers of Pazia Dugan Kuznia, Mary Dugan Mlryn and Eva Dugan Chayko, defendants.

The complainants join issuue on the joint answer of the said defendants.

HERBERT CLARK GILSON,
Solicitor of Complainants.

Replication to Answer of Ruthenian &c. Church.

(Filed, September 29, 1926)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.,* executrix, &c. Complainants, and PAZIA DUGAN KUZNIA, *et als,* Defendants.	On Bill, &c. Replication.

The replication of the complainants to the answer of Ruthenian Greek Catholic Church of Saints Peter and Paul, defendant.

The complainants join issue on the answer of the said defendant.

Solicitor of Complainants.

Replication to Answer of Greek Catholic Church of Habury.

(Filed, Nov. 12, 1926)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, executrix, &c. Complainants, and PAZIA DUGAN KUZNIA, *et als*, Defendants.	On Bill, &c. Replication.

The replication of the complainants to the answer of Greek Catholic Church at Habury, defendant.

The complainants join issue on the answer of the said defendant.

HERBERT CLARK GILSON,
Solicitor of Complainants.

Replication of Pazia Dugan Kuznia, *et al.*

(Filed, Oct. 25, 1926)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA and ALEXANDER ULITSKY, Executors of the last will and testament of Nick Dugan, Complainants, and PAZIA DUGAN KUSMA (sued as Pazia Dugan Kuznia), STASKO KUSMA, her husband, MARY DUGAN MURYN, EVA DUGAN CHAYKO, GREEK CATHOLIC CHURCH OF HABURY, HUNGARY, RUTHENIAN CATHOLIC CHURCH OF SAINTS PETER AND PAUL OF JERSEY CITY, N. J., STEVE DRUGA and ANNA DRUGA LEVECKY, VASAL DRUGA and MICHAEL DRUGA, Defendants.	On Bill, Etc. Replication of Pazia Dugan Kusma, Stasko Kusma, her husband, Mary Dugan Muryn and Eva Dugan Chayko.

The joint replications of Pazia Dugan Kusma, Stasko Kusma, her husband, Mary Dugan Muryn and Eva Dugan Chayko to the counterclaim of the defendants, Steve Druga and Anna Druga Levecky:

1. They admit the allegations of paragraph 1 of the counterclaim.

2. They admit the allegations of paragraph 2 of the counterclaim.

Replication of Pazia Dugan Kuznia, et al.

3. They admit the allegations of paragraph 3 of the counterclaim.

4. They admit the allegations of paragraph 4 of the counterclaim.

5. They admit the allegations of paragraph 5 of the counterclaim.

6. They admit the allegations of paragraph 6 of the counterclaim, and the defendant, Stasko Kusma alleges that he is entitled to a right of courtesy initiate in and to the one undivided one-fourth part of said premises vested in his wife, the above named Pazia Dugan Kusma.

7. They admit the said Pazia Dugan Kusma is married, and that her husband is the defendant, Stasko Kusma.

They deny the said Mary Dugan Muryn is married, and allege that she is a widow.

They deny that the said Eva Dugan Chayko is married, and allege that she is a widow.

They have no knowledge or information whereof to form a belief as to whether the said Vasal Druga, Michael Druga, Steve Druga and Anna Druga Levecky, or any of them, are married.

8. These defendants join in the prayer of paragraph 8 that the said lands may be partitioned as therein prayed.

9. The true name of the defendant, Pazia Dugan Kuznia, is Pazia Dugan Kusma, and the true name of the defendant, Stasko Kuznia, is Stasko Kusma,

Replication of Pazia Dugan Kuznia, et al.

and they each pray that the process, pleadings and proceedings of the cause be amended accordingly.

Dated, May 23rd, 1927.

RICHARD DOHERTY,
Solicitor for and of counsel with Defendants, Pazia Dugan Kusma, Stasko Kuusma, her husband, Mary Dugan Muryn and Eva Dugan Chayko.

Replication to Answer of Michael Druga, *et al.*

(Filed, Oct. 12, 1927)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al,* executors, &c. Complainants, and PAZIA DUGAN KUZNIA, *et als,* Defendants.	On Bill, &c. Replication to Answer of Defendants Michael Druga and Vasil Druga.

Replication to the answer of Michael Druga and Vasil Druga, to the bill of complaint in the above stated cause:

The complainants join issue on the answer of the defendants, Michael Druga and Vasil Druga.

HERBERT CLARK GILSON,
Solicitor of Complainants.

Case.

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.,* Complainants, and PAZIA DUGAN KUZNIA, *et al.,* Defendants.	On Bill, &c.

TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY taken on final hearing in above stated cause, January 9, 1928, at Chancery Chambers, Jersey City, before His Honor James F. Fielder, Vice Chancellor.

APPEARANCES:

HERBERT CLARK GILSON, Esq., for complainants.

RICHARD DOHERTY, Esq., for defendants, Pazia Dugan Kuznia, *et als.*

J. FRANCIS KELLY, Esq., for defendant, Greek Catholic Church of Habury, Hungary.

SAMUEL TARTALSKY, Esq. (O'Brien and Tartalsky), for defendant, Ruthenian Greek Catholic Church of Sts. Peter and Paul of Jersey City.

JOHN J. MULVANEY, Esq. (John Milton), for defendants Anna Levecky and Steve Druga.

JACQUES H. HECHT, Esq., for defendants, Michael Druga and Vasil Druga.

COMPLAINANTS' CASE.

Mr. Gilson: I offer in evidence stipulation of facts signed by the solicitors of all the parties.

The assets of this estate as shown by the inventory are as follows:

Cash in Williamsburg Savings Bank,	$ 1,761.75
55 shares common stock of Standard Oil Company of New Jersey,	2,414.00
Trunk, clothes,	7.00
Watch and chain,	15.00
Total personal property,	$ 4,197.75

The debts of the estate, as shown by the inheritance tax report, are as follows:

Funeral expenses,	$ 1,321.50
Priest,	100.00
Organist,	75.00
Singers, Choir,	100.00
Seeley, Florist,	40.00
Lafayette, Florist,	6.00
Administration expenses (estimated),	150.00
Counsel fees (estimated),	1,000.00
Executors,	580.00
Total,	$ 3,372.50

ALEXANDER ULITSKY, sworn as a witness on the part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 217 Fifth Street, Jersey City.

Q. You are a Minister of the Gospel? A. Yes.

Q. How long have you lived in Jersey City? A. Twenty years.

Q. What is your church; what is the denomination of your church? A. Greek Catholic Church.

Q. Did you know Nick Dugan in his lifetime? A. Yes.

Q. You were one of the witnesses to his will? A. Yes.

Q. Who drew the will? A. I drew the will.

Q. Will you please tell the Court how you happened to draw the will and where it was drawn?

Mr. Mulvaney: We object to that. The will has been proven and admitted to probate by the Orphans Court of Hudson County. The circumstances under which it was made are utterly immaterial.

Mr. Gilson: One of the issues raised by Vasil Druga and Michael Druga in their answer is that it was not the intention of the testator that the provisions of the will should apply to real estate. In order to get at what the intention of the testator was, the circumstances surrounding the execution of the will are not only relevant but proper and material.

The Court: Do you mean what he said to this witness?

Mr. Gilson: Partly what he said.

The Court: Evidence is admissible in order to explain the contents of a will where there is ambiguity; but where the will, on its face, is capable of interpretation, using the words of the will, testimony is inadmissible to show that the testator meant something else other than what he said in his will. Testimony may be admitted to show the surrounding circumstances.

Mr. Gilson: The question is simply how he came to draw the will.

The Court: I will allow the witness to answer, subject to motion to strike out his answer.

Q. (Question repeated.) Will you please tell the Court how you happened to draw the will and where it was drawn?

The Court: First, where was it drawn? A. The will was drawn in the hospital.

Q. What hospital? A. Jersey City Hospital.

Q. Who asked you to draw it? A. When I came to the hospital Mr. Nick Dugan asked me to draw the will for him.

Mr. Doherty: I move to strike out the answer.

The Court: I will reserve decision on all of this.

Q. How long had you known Nick Dugan? A. Over fifteen years.

Q. And so you drew the will, and who were present? A. There was Mrs. Julia Narozniak.

Q. Who else? A. Anna Patanska.

Q. All three of you signed the will in his presence as witnesses? A. We all three signed it.

Q. Do you remember the order in which you three signed the will? A. Yes.

Q. How? A. I asked to sign first Mrs. Narozniak; then signed Mrs. Anna Patanska, and then I signed.

Q. All of you signed, of course, after Nick Dugan signed? A. Nick was first.

Q. Do you know what country Nick Dugan came from? A. He came from Hungary.

Q. About how old was he? A. Over sixty years.

Q. Do you know how long he had been in this country? A. Over twenty years or longer. He was over here a long while.

Q. Do you know what condition of health he had been in before he went to the hospital? A. He was sick for a long time.

Q. What do you mean by "a long time"—years or months or weeks? A. Years sickly, but working.

Q. Do you know how long he had been in the hospital when you drew the will? A. About one month.

Q. Then he came out of the hospital? A. After I drew the will he came out from the hospital—after—maybe one month later.

Q. You and Anna Patanska, as executors of the estate, have entered into a contract to sell this eight family apartment house for $25,000? A. Yes.

Q. What have you to say as to whether that is the largest price available for the property?

Mr. Mulvaney: That is objected to because the witness is not shown to possess the necessary qualifications to enable him to testify as to value.

Mr. Gilson: Question withdrawn.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Mr. Dugan was very sick when you drew the will, was he not? A. He was very sick.

Q. He expected to die, didn't he? A. Not right away, but he expected to die soon.

Q. You say that you signed after Anna Patanska? A. Yes.

Q. Did you sign your name under hers? A. No.

Q. Didn't you sign your name under the mark of Nick Dugan? A. Yes.

Q. But not over where Anna Patanska signed? A. Not over.

Q. Did you sign your name to it later on? A. The same moment.

Q. Anna Patanska is the same person who got a legacy? A. Yes.

Q. Of $2,000, I think. A. $5,000.

Q. In that will? A. Yes.

Q. Was Mrs. Narozniak a relative of Anna Patanska? A. No.

Q. Was she any relative of Nick Dugan? A. No.

Q. Anna Patanska was Nick's housekeeper, was she not? He boarded with her? A. He boarded with her.

Q. Anna Naronzniak went there when? Did she arrive later on? A. She came with me.

Q. Did you know, before you got to the hospital, that Nick Dugan wanted you to draw a will? A. Yes.

Q. When did you find that out, that he wanted you to draw a will? A. When I came to the hospital.

Q. You didn't know it before that? A. I did.

Q. From whom? A. Mrs. Patanska. She said to me Nick Dugan wants to see me; he wants me to sign a will for him because he hates to see lawyers around him.

Q. You are a Minister of the Gospel, you say? A. Yes.

Q. Are you sure? A. Sure.

Q. Have you not been—

Mr. Gilson: I object.

The Court: Objection sustained.

Q. So, you went there at the request of Anna Patanska, and was it you or Mrs. Patanska who asked Mrs. Narozniak to come? A. Mrs. Patanska asked Mrs. Narozniak to come.

Q. Do you know whether Nick Dugan could sign his name? A. Yes.

Q. He did not sign his name on the will, did he? A. He did with a cross mark.

By the Court:

Q. Do you know whether or not he was able to write his signature? A. He was illiterate. Maybe he knew to write his signature.

Q. If you don't know, say so. A. I don't know.

Anna Patanska, sworn as a witness on the part of the complainants, testifies as follows:

Direct Examination by Mr. Gilson:

Q. Where do you live? A. 335 Randolph Avenue, Jersey City.

Q. That is the house that Nick Dugan bought before he died? A. He bought before he died.

Q. With whom do you live? A. With my man and boy.

Q. Your husband and your son? A. My husband and son.

Q. How old is your son? A. Fourteen years.

Q. Did you know Nick Dugan? A. I know him.

Q. How long had you known him? A. Twenty-two years.

Q. Did he board with you at the time of his death? A. He boarded eight months and then eight months he lived with me,—oh,—eighteen months.

Q. What country did he come from? A. From Austria. Now it is Czeko-Slovakia.

Q. How long had he been in this country, do you know? A. Nearly forty years, he told me.

Q. Had he ever been back to the old country? A. Never. He stayed here always.

Q. Do you know whether any of his sisters had ever been over to this country? A. No.

Q. You don't know, or they had not been? Do you know whether he had ever seen any of his sisters since he came to this country? A. No; never go in the old country. Stay always here.

Q. You don't understand me. Do you know whether he saw any of his sisters after he came to this country forty years ago? A. No, sir; he never see his sisters.

Q. During the eighteen months that he lived with you, what was the condition of his health? A. When he came in my house?

Q. Yes. A. Well, he came in my house, he ask me if I take him because he felt bad.

BY THE COURT:

Q. When he first came to live with you, was he sick? A. Well, sick.

Q. When he came to live with you? A. Yes; he always keep a plaster on his chest.

BY MR. GILSON:

Q. Was he working when he came to live with you? A. He work—not very sick.

BY THE COURT:

Q. Where was he working? A. Down in the Standard Oil Company.

Q. What was his job? A. I don't know.

Q. You don't know what work he did? A. No.

Q. Where was it—in Bayonne? A. No; Jersey City.

Q. Whereabouts in Jersey City? A. I don't know. Standard Oil Company.

Q. You don't know? A. No.

BY MR. GILSON:

Q. You don't know what kind of work he did? A. When he was sick?

Q. No; in the Standard Oil Company. You don't know what kind of work he did? A. I don't know. He say he make holes for the iron—

Q. Drilling holes? A. Yes—the fire—

Q. Then he went to the hospital, did he, after he went to live with you? Did he go to the hospital? A. When he started sick he went to the hospital.

Q. When did he go to the hospital? A. About the last—I think—I don't know what month.

Q. Do you remember the day he made his will? A. I don't remember.

Q. You know Father Ulitsky and Mrs. Narozniak were there when he made his will in the hospital. You remember that? A. Yes; I remember about that because I went—

Q. How long before that did he go to the hospital—one week or one month or six months? A. About two months.

Q. And you asked Father Ulitsky to go up to the hospital and make his will? Did you ask Father Ulitsky to go up to the hospital to make his will? A. Yes.

Q. Who asked Mrs. Narozniak to go to the hospital that day? A. I ask her because he told me: "Call her in."

Q. Nick Dugan told you to ask Mrs. Narozniak to go to the hospital that day? A. Nick Dugan told me to call that lady. "I want Julia Narozniak and I want Father Ulitsky and I want to make a will."

Q. Do you remember which one signed the will first? Who signed the will first? A. Julia Narozniak.

Q. And second? A. Me.

Q. And then Father Ulitsky? A. Yes.

Q. How long after that did Nick Dugan come out of the hospital? A. One month later he came home.

Q. Then did he ever go to work after he came home from the hospital? A. No.

Q. Why not? A. He is unable to work; he is very sick.

Q. There was some Standard Oil Company stock that he had. Do you know whether he bought that stock before he went to the hospital or after he came out of the hospital? A. After he came home from the hospital.

Q. Have you got that stock with you? A. I got it here.

Q. Do you know whether or not he paid for that stock after he came out of the hospital or paid for it out of his wages before he went to the hospital? A. His wages?

Q. Do you know how he paid for it? A. I don't know.

The Court: What is the date of the certificate?

Mr. Gilson: February 24, 1926.

Q. Do you know whether he drew out any money from the banks or paid any money for this stock after he came out of the hospital—do you know whether he did? A. No. Before he paid for that stock when working.

Q. How do you know? A. He told me.

Mr. Doherty: I move to strike the previous answer out.

The Court: Motion granted. Strike it out.

Q. Do you know whether or not Nick Dugan ever referred to his sisters?

Mr. Doherty: I object to that as irrelevant.

Mr. Gilson: I think it may develop on the question of what his attitude was or what his intention might have been at the time.

The Court: I sustain the objection to the form of the question, but if Mr. Gilson will ask the witness whether Nick Dugan ever told her that he had written to his relatives or ever told her that they had written to him, I will allow such a question.

Q. Had Nick Dugan ever told you whether he had written to his sisters?

Mr. Doherty: Objected to.

The Court: Objection sustained.

Q. Did Nick Dugan ever tell you that he had written to his sisters?

Mr. Doherty: Objected to.

The Court: Objection overruled.

A. (No answer.)

BY THE COURT:

Q. Did he ever tell you that he had written to his sisters? A. No.

Q. Did he ever tell you that he had not written to them? A. I don't understand it.

Q. Did Nick Dugan ever tell you that he had written to his sisters? A. Well, I think he told me he write a couple of times—one sister he write the letter. After the letter come back. It never came back to my house.

Q. Do you mean the letter itself came back? Did he tell you that he had written a letter to his sister and that the letter came back to him? A. No.

BY MR. GILSON:

Q. Did he tell that his sisters or any of them ever wrote a letter to him when he was in this country?

Mr. Doherty: Objected to.
The Court: Objection overruled.

A. I never see his sister write a letter to him.

Q. Did he tell you that his sister had written him a letter? A. I don't understand.

(At this point Alexander Ulitsky is sworn as interpreter, and the examination of the witness continues through the interpreter.)

Q. Did Nick Dugan ever tell you that he had written to his sisters? A. Yes; he told me.

Q. Did he ever tell you that his sisters had written to him? A. He got two letters from them.

Q. When was the last time he got a letter from them? A. I don't know—not when he was with me.

Q. Did Nick Dugan ever tell you that he had seen the children of the sister who was dead? A. No; never.

Q. Did he tell you or didn't he tell you? A. He didn't say never one word about his sister.

CROSS EXAMINATION BY MR. MULVANEY:

Q. You say Nick Dugan was in this country forty years? A. About thirty-eight or thirty-nine years.

Q. How long had you known him while he was in this country? A. Twenty-two years I know him.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You knew where his sisters lived, didn't you? A. In the old country?

Q. Yes. A. I know one well and two I don't know. He never told me of another one.

Q. Didn't you write to all of them? A. Yes; I did, because they wrote to me first.

Q. Is that (showing witness) your letter? A. Yes.

Q. To whom did you send that letter? A. To Eva.

Q. His sister Eva? A. They wrote to me first.

Q. You wrote that letter to Eva, did you? A. Yes.

Q. (showing witness) Did you write that letter? A. Yes.

Q. To whom did you write that letter? A. To Eva, too.

Q. In that letter to Eva did you say in your language— What is your language—Hungarian? A. Slavish.

Q. Did you say there in Slavish: "If it were not for me, you would not receive anything and everything would go to the city. Why not trust me in this? I will have a great deal of trouble until I finish this for you, my dear Eva"? A. (No answer.)

Mr. Doherty: I ask to have this letter and the translation marked for identification.

(Letter and translation marked D-1 for identification.)

Q. (Showing witness) You wrote this letter to Eva, too? A. Yes.

Mr. Doherty: I ask to have this second letter and the translation marked for identification.

(Letter and translation marked D-2 for identification.)

Q. (Showing witness) Did you write this letter to Eva? A. One I did.

Q. Is that in your handwriting? A. Yes; it is my handwriting.

Q. Did you write it to Eva? A. I wrote only one letter to Eva.

Q. To whom did you write this letter? A. I don't know the other sister.

Q. Did you write this to the other sister? A. I wrote the letter to both sisters at once.

Q. Did you write this letter to one of the sisters? A. I don't know to which sister.

Q. But you wrote it to one? A. Yes.

Mr. Doherty: I ask to have the letter just shown the witness marked for identification.

(Letter is marked D-3 for identification.)

Mr. Doherty: I withdraw the question concerning the passage in the letter.

BY MR. GILSON:

Q. Did I understand you to say that you had received some letter or letters from these sisters? A. Yes. I have all of them—four or five letters—here.

(Witness produces letters.)

Mr. Gilson: I offer these letters in evidence.

Mr. Mulvaney: I think that should be subject to our objection.

Mr. Gilson: I will ask to have them marked for identification for the present.

(Letters produced by witness are marked C-1 for identification, C-2 for identification, C-3 for identification, C-4 for identification and C-5 for identification.

BY THE COURT:

Q. When did you receive these letters from the sisters—after Nick Dugan had died? A. Yes, after Nick died.

BY MR. GILSON:

Q. And before you wrote these letters to the sisters? A. Never; no; she got the letters first.

BY THE COURT:

Q. You got the sisters' letters before you wrote to them? A. I wrote first.

Q. You wrote first and then the sisters wrote you afterwards; is that it? A. I wrote first and they answered me.

Q. Where did you get the address from? A. I know because I came from the same city as Eva.

JOHN PATANSKA, sworn as a witness on the part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. You are the husband of Anna Patanska, the preceding witness? A. Yes; I am the husband.

Q. You live with her? A. Yes.

Q. Where? A. 335 Randolph avenue, Jersey City.

Q. You have a son about fourteen years of age? A. Thirteen.

Q. He lives with you? A. Yes.

Q. Nick Dugan boarded with you, did he? A. Yes.

Q. How long did he board with you? A. About eighteen months.

Q. During that time was he in good health or bad health? A. He had bad health.

Q. When he came out of the hospital did he ever go back to work again? A. Never.

No cross examination.

JULIA ZARSKY, sworn as a witness on the part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 619 Elm street, Rochelle Park.

Q. You live there with your husband? A. Yes.

Q. How long have you been married to Mr. Zarsky? A. Three years it is going to be in May.

Q. What was your name before you were married? A. Narozniak.

Q. You are another witness to this will of Nick Dugan? A. Yes.

Q. How long had you known Nick Dugan? A. Ten years.

Q. Do you know where he lived during the last year and a half or so of his life? A. Yes.

Q. Where? A. He lived with Mrs. Patanska on Van Horn street and then they moved to Randolph avenue.

Q. How long have you known Mrs. Patanska? A. I know her it is twelve years now.

Q. Do you know how long Nick Dugan was in the hospital? A. Since the time he was fifty-five years.

Q. How long ago was that? A. When he took sick.

Q. How did you happen to go to the hospital when the will was made? A. Mrs. Patanska came over to my house and she said that "Mr. Dugan is very sick and he asked me I should call Father Ulitsky because he wants to make a will and he don't want nobody else but you and Father Ulitsky."

Q. Are you related in any way to Mrs. Patanska? A. No; no relation at all.

Q. Were you related to Nick Dugan in any way? A. No.

Q. Do you remember which one of you three witnessed the will first? A. Nick Dugan, he signed first; he made a cross; then I signed; then Mrs. Patanska, and then Father Ulitsky.

Q. Did Nick Dugan ever tell you that he had written to his sisters? A. He says: "Yes; I have sisters on the other side—

BY THE COURT:

Q. The question was: Did he ever tell you that he had written to them? A. Yes; a long time ago.

BY MR. GILSON:

Q. Did he say how long ago? A. No.

Q. Did Nick Dugan ever tell you that he had received a letter from his sisters or that he had never received a letter from his sisters? A. He says yes, he received.

Q. Did he ever tell you when he received the last letter? A. He said they asked for money; they were poor.

Q. How long ago did he tell you that? A. About two years ago.

BY THE COURT:

Q. Two years before he died? A. Yes.

BY MR. GILSON:

Q. Did Nick Dugan ever tell you who took care of him in his sickness? A. Yes; he said Mrs. Patanska.

Q. What did he say about that? A. Why, he says somebody else, even his own mother, would not take such good care of him as Mrs. Patanska did.

Mr. Doherty: I object to this as irrelevant.

Mr. Gilson: It goes to the intention.

The Court: I will let it stand, but nothing further on that line.

CROSS EXAMINATION BY MR. TARTALSKY:

Q. You say that Mr. Dugan lived in Van Horn street with Mr. and Mrs. Patanska before he went to the hospital; is that right? A. Yes.

Q. After he left the hospital he bought this property on Randolph avenue; is that right? A. Well, he bought the property before he took sick. He just paid a deposit. Then when he came out of the hospital he paid the rest.

Q. Then did he move to the Randolph avenue house? A. Yes.

Q. And did Mrs. Patanska move with him to the Randolph avenue property? A. Yes.

Q. And is that the house from which he was buried? A. Yes.

BY MR. DOHERTY:

Q. What do you know about the buying of the house; were you with him when he bought it? A. I was because we were neighbors.

Q. Were you there when he signed the contract to buy the house? A. No; I was there when he said: "Tomorrow I am going to sign the contract."

Q. That is what he said, that he was going to sign it the next day? A. Yes.

Mr. Doherty: I move to strike out where she undertakes to say when he bought the house. I move to strike out the testimony that he paid a deposit on this house before he took sick, on the ground that it is incompetent.

The Court: I will grant the motion but not to strike out the whole of the testimony.

Mr. Tartalsky: I have no objection to that part being stricken out.

ANNA LYSIAK, sworn as a witness on the part of the complainants, testified through the interpreter heretofore sworn, as follows:

BY MR. GILSON:

Q. Where do you live? A. Van Horn street.

Q. What number? A. 316.

Q. Did you know Nick Dugan in his life time? A. Yes; I did.

Q. How long have you known him? A. Fifteen years .

Q. Did he board with you? A. He lived six years.

Q. In Jersey City? A. Yes; on Van Horn street.

Q. He never was married, was he? A. No.

Q. And from your house did he go to live with Mrs. Patanska? A. Yes.

Q. When he left your house what was his condition of health? A. I don't know. He worked.

Q. Do you know whether he had bandages around his chest and arms? A. Sometimes he applied some bandages.

Q. Did you ever see him after he went to board with Mrs. Patanska? A. Yes.

Q. Did he ever say anything to you about the way Mrs. Patanska treated him?

Mr. Doherty: Objected to.

The Court: Objection sustained.

Q. Did Nick Dugan ever tell you that he had written letters to his sisters?

Mr. Doherty: Objected to as leading.

The Court: Objection overruled.

Mr. Doherty: I object to it as irrelevant.

The Court: Also overruled.

A. Yes; he did write all letters.

Q. Did he ever get any letters from his sisters, did he say? A. Yes; he did receive some letters.

Q. How many sisters did he have? A. Three sisters.

No cross examination.

WILHELMINA DE MONTE, sworn as a witness on the part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 66 Romaine avenue, Jersey City.

Q. Do you know Mrs. Patanska? A. Yes, sir.

Q. Did you know Nick Dugan? A. Yes, sir.

Q. How long had you known Nick Dugan before he died? A. I know Mr. Dugan about eight months while I live down there.

Q. Do you remember a conversation with Nick Dugan just before he died? A. Yes, sir.

Q. What did Nick Dugan say, if anything, about Mrs. Patanska?

Mr. Mulvaney: Objected to.

The Court: Objection sustained.

Mr. Gilson: We want to show that Mrs. Patanska took good care of him.

The Court: Objection still sustained.

Q. Did Nick Dugan tell you that he had received any letters from his sisters, during that conversation? A. Well, he would never tell me nothing about his sisters. All he would say, "Mrs. Patanska is so good to me, like a mother. I am—"

Mr. Mulvaney: I object to that and move to strike it out.

Q. Did Nick Dugan ever tell you that he had written letters to his sisters? A. No; he never told me that.

No cross examination.

LUDWIG GLUSZKOWSKI, sworn as a witness on the part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 1920 Boulevard, Jersey City.

Q. What is your business? A. Real estate.

Q. How long have you been in the real estate business? A. Four years.

Q. Are you familiar with the value of real estate in the neighborhood of 334 Randolph Avenue, Jersey City? A. Yes.

Q. Have you bought and sold property around that section? A. Yes.

Q. And do you know this house known as 334 Randolph Avenue? A. Yes, sir.

Q. What is the value of it? A. Well, I sold that for $25,000. I think that is a pretty good price.

BY THE COURT:

Q. You sold that, did you say? A. I sold that.

Q. For the executors? A. Yes.

BY MR. GILSON:

Q. You were the agent for them and got a purchaser for the property? A. Yes, sir.

Q. Did you know Nick Dugan in his life time? A. Yes, sir.

Q. Did you have a conversation with him a few days before he died? A. Yes, sir.

Q. In that conversation did he say anything to you about his sisters? A. No; never; nothing about his sisters.

Q. Did he say anything to you about Mrs. Patanska during that conversation—Yes or No? A. No.

Q. Did he say anything to you about who took care of him during his illness? A. Yes.

Q. Whom? A. Anything what he told me, Mrs. Patanska, "If not for Mr. Patanska, Mrs. Patanska, I would not live today,—very bad condition."

BY THE COURT:

Q. Who said this? A. Nick Dugan.

Q. Whom was he speaking of? A. Mrs. Patanska —Mr. Patanska.

L. Gluszkowski. Called by Complainants. Cross.

BY MR. GILSON:

Q. Do I understand you to say that he said: "If it had not been for Mr. and Mrs. Patanska, I would not be living today"? A. Yes.

Q. Then he spoke about both of them? A. Mr. and Mrs. Patanska.

Q. Did he say anything to you at that time about having been down to see Judge Lowy about making a new will? A. No.

Mr. Mulvaney: Objected to as immaterial.
The Court: "No" is the answer.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Was $25,000 a good price at the time when it was sold? A. Very good price.

Q. That was in June of 1926, was it not? A. Yes. I had an offer, Mr. Dugan, the man himself, for $25,000. He said $26,000; if we can sell for $25,000, to let it go, to sell. The time he lived he gave me that property to sell.

Q. Do you know what the present value of that property is? A. Yes.

Q. What is it? A. Well, I believe that the house we can get—

BY THE COURT:

Q. Is the property worth any more than $25,000 today? A. No, sir.

BY MR. DOHERTY:

Q. It is income property; there are tenants there? A. Yes.

Q. What is the size of it? A. An eight-family house, 31 by 100.

Anna Patanska. Recalled. Direct.
Anna Patanska. Recalled. Cross.

ANNA PATANSKA, one of the complainants, already sworn as a witness on the part of the complainants, recalled and further examined as follows:

DIRECT EXAMINATION BY MR. GILSON:

Q. How many families in this house, 334 Randolph Avenue? A. Eight families.

Q. What are the rents a month? A. I collect the rent.

Q. How much have you been able to get for the first floor? A. Thirty dollars.

Q. For each apartment? A. Each apartment.

Q. That is sixty dollars for the first floor—where do you live? A. First floor.

Q. How much do you pay? A. Ten dollars.

Q. You also act as janitress of the house? A. Yes.

Q. How much do you get for the other apartment on the first floor? A. Thirty dollars.

Q. How much do you get for the two apartments on the second floor? A. Thirty-five dollars.

Q. Thirty-five dollars each? A. Thirty-five dollars each.

Q. Seventy dollars for the two? A. Yes.

Q. How much do you get for the third floor—the two apartments on the third floor? A. One side thirty-two dollars; the other side thirty-five dollars.

Q. How much did you get for the top floor? A. Thirty dollars and thirty-two dollars.

CROSS EXAMINATION BY MR. TARTALSKY:

Q. Before you lived on Randolph Avenue you lived on Van Horn Street? A. Yes.

Anna Patanska. Recalled. Cross.

Q. Did Mr. Dugan live with you in the Van Horn Street apartment? A. Yes; he lived with me.

Q. And then when he came out of the hospital he bought the Randolph Avenue house. Did you go to Randolph Avenue? A. Yes.

Q. Did he live in the same apartment with you? A. Yes; the same.

Mr. Gilson: I offer in evidence contract for the purchase of 334 Randolph Avenue, dated July 1, 1925; title to close July 24, 1925.

(Marked Exhibit C-6.)

The Court: What is the purchase price?

Mr. Gilson: $24,800; $500 deposit.

The Court: Have you any further testimony, Mr. Gilson?

Mr. Gilson: With the exception of reserving the right to take the testimony of Justice of the Peace Lowy, the complainants rest.

The Court: Is there any testimony on the part of the defendants?

Mr. Mulvaney: We have none.

Mr. Doherty: None.

Mr. Tartalsky: We have none.

Mr. Kelly: We have none.

The Court: What do you wish to prove by Mr. Lowy?

Mr. Gilson: I offer to prove by Justice of the Peace Lowy that Nick Dugan called on him the day before he died and told him that he wanted to draw a new will and that he wanted to leave everything he had in the world to Mrs. Patanska because she had saved his life and nursed him through a very serious illness and he had not heard from his sisters in so many years that he decided to change his will and not leave them anything.

Mr. Mulvaney: That, of course, is objected to as incompetent as well as immaterial and irrelevant under the status of the case as it appears now. That is an attempt to establish a will by parol.

The Court: No; that is not what he seeks to establish. That is not the inference Mr. Gilson wishes to have drawn from that testimony. The inference he wishes drawn from such testimony is that Mr. Dugan had a friendly feeling for Anna Patanska.

Mr. Gilson: It is more than that. Two of these defendants claim that he did not intend the real estate to be affected by the legacies. I think that the testimony shows that he not only wanted Mrs. Patanska to take that much property, whether it was in real estate or personal property or in money, but that he wanted her to have it all.

Mr. Mulvaney: We make the further point that a statement of that kind made by a testator who has bequeathed personal property is not sufficient to charge his real estate with the payment of those legacies in cash, and such statements are inadmissible for that purpose.

The Court: We have it on the record now that counsel are willing to admit that if Judge Lowy were present he would testify as Mr. Gilson has stated, but they object to such testimony being admitted, on the ground that it is incompetent and irrelevant.

I will take that admission as to what Judge Lowy would testify, subject to this objection and determine that along with the main question in the case.

I understand that the case is closed and it is now a matter of argument or submission on brief.

Mr. Gilson: I want to make a motion to strike out the question asked by Judge Doherty as to whether a letter contained a certain statement.

The Court: Judge Doherty withdrew that question.

Mr. Doherty: There was no answer and the question was withdrawn.

The Court: What are you going to do about the letters marked for identification?

Mr. Doherty: I don't offer them.

The Court: You don't offer yours, Mr. Gilson?

Mr. Gilson: No, sir.

STIPULATION OF FACTS.

Exhibit C-1.
(Filed, January 9, 1928)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, executors of the Estate of Nick Dugan, deceased, *et al.*, Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. Stipulation of Facts.

It is hereby stipuated and agreed by and between the parties in the above entitled cause, that the following are facts which may be used on final hearing of said cause, reserving the right to supplement the facts by any testimony or evidence which may be material and relevant, to wit:

1. Nick Dugan died on April 27th, 1926, leaving a last will and testament dated August 25th, 1925, a true copy of which is annexed hereto marked "Exhibit A".

2. The next of kin and heirs at law of the testator are as follows:

Pazia Dugan Kuznia or Kusma, a sister (whose husband is Stasko Kuznia or Kusma), residing in Czecho Slavakia.

Mary Dugan Muryn, a sister and widow, residing in Czecho Slavakia.

Exhibit C-1.

Eva Dugan Chayko, a sister and widow, residing in Czecho Slavakia.

Anna Dugan Levecky, daughter of a deceased sister (whose husband is Harry Levecky) residing in the State of Pennsylvania.

Steve Druga, son of a deceased sister (whose wife is Julia Druga), residing in the State of Pennsylvania.

Michael Druga, son of the said deceased sister (whose wife is Anna Druga) residing in South America.

Vasil Druga, son of the said deceased sister (whose wife is Anna Druga) residing in Czecho Slavakia.

The testator had not seen any of the above named next of kin for a great many years, and he never saw the children of his deceased sister.

3. The said will was admitted to probate by the Surrogate of Hudson County on May 13th, 1926, and letters testamentary were issued to the complainants, Anna Patanska and Alexander Ulitsky.

4. At the time of the making of the will (August 25th, 1925) the only property possesed by the testator was money in several banks and Liberty Bonds.

5. On November 14th, 1925, the testator purchased an eight-family apartment house known as No. 335 Randolph Avenue, Jersey City. He withdrew $16,000. from his bank accounts which he paid as part of the consideration for the property, and assumed a mortgage for $9000. He took title to the property in the name of "Michael Dugan". Shortly thereafter the testator withdrew the further sum of

Exhibit C-1.

$4000 from his bank accounts and used it to pay off part of the said mortgage, thereby reducing it to $5000.

6. Between the time of the making of his will and the time of his death, the testator was not employed and he did not receive or acquire any property, real or personal, other than as above stated.

7. The estate of the testator is insufficient to pay the legacies without selling the real estate.

8. On June 19th, 1926, the executors of the estate received an offer of $25,000. for the said apartment house and they entered into a contract to sell the same for that amount, subject to the approval of this court.

9. Appeals from the probate of the said will were taken by the defendants, Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko, Anna Druga Levecky and Steve Druga, which were heard and dismissed by the Orphans' Court of Hudson County on March 17th, 1927.

Dated, December 22nd, 1927.

HERBERT PARK GILSON
Solicitor of Complainants.

RICHARD DOHERTY
Solicitor of Pazia Dugan, Kuznia and Mary Dugan Muryn, and Eva Dugan Chayko, defendants.

Exhibit C-1.

JOHN MILTON
Solicitor of Anna Druga, Levecky and Steve Druga, defendants.

JACQUES H. HECHT
Solicitor of Michael Druga and Vasil Druga, defendants.

O'BRIEN & TARTALSKY
Solicitors of Greek Catholic Church of Sts. Peter and Paul of Jersey City, defendant.

JAMES F. KELLY
Solicitor of Ruthenian Greek Catholic Church of Habury, defendant.

CONTRACT FOR PURCHASE OF PROPERTY.

Exhibit C-6.

Between LOUIS NEMETY and PAUL SABADOS and MICHAEL DUGAN	Dated, July 1, 1925. Consideration $24,800 Deposit, $500 Title to close July 24, 1925.

Contract for the purchase of the lands with apartment house No. 334 Randolph Avenue, Jersey City, described in the bill of complaint. Subject to first mortgage of $9000. Second mortgage $1000 to be part of purchase price.

Conclusions.
(Filed, March 14, 1928.)

IN CHANCERY OF NEW JERSEY

Between
ANNA PATANSKA, *et al.*, executors, &c.,
Complainants,
and
PAZIA DUGAN KUZNIA, *et als.*,
Defendants.

61—280
On Bill, &c.
CONCLUSIONS

1. In determining whether legacies are specific or are general or demonstrative, consideration must be given to the whole will; to the circumstances under which it was prepared and executed: to the situation in which the testator was as regards his property: to the relation and disposition he bore toward his legacies and to his presumed intention to dispose of his whole estate for the benefit of his beneficiaries, for the intention of the testator on the subject of specific legacies, is the principal object to be ascertained.

2. A clear intention must appear to make a legacy specific. Courts are disposed to consider a legacy general or demonstrative if the will admits of such construction.

3. One who attests the execution of a will can take no beneficial interest under the will and it is immaterial that the attesting witnesses exceed the number required by statute.

The issues raised by the pleadings call for the construction of the will of Nick Dugan, who died a

resident of Jersey City and for instructions to the complainants, executors, as to their duties.

The testator entered into a contract dated July 1, 1925, for the purchase of an apartment house for $24,000, paying a deposit of $500. and agreeing to take title July 24, 1925. When the time for closing title arrived, he was in a hospital, seriously ill and while there he called in his priest, who is of foreign birth and at his request the priest prepared the following will, which Dugan executed and which later was duly admitted to probate.

I, Nick Dugan 50 years of age born at Habury ad Zemplin, Hungary, being sick but of clear and sound mind do by this pronounce as my last will made voluntarily without any force or influence as follows:

1) In case of my death I recommend my soul to mercy of God thanking him for all His goods and blessings to me.

2) I command the administrators to provide to my body one *decent* christian funeral *on* a Catholic Cemetery, the expenses to be born by Mrs. Anna Patansko.

3) My cash money of which 10,000.00 is deposited at Provident Institution for Savings in Jersey City, N. J., and 3,000.00 and 1,000.00 in two banks in Brooklyn, N. Y. and 2,500.00 at the Post Office at Jersey City all together = 17,000.00 or more is to be divided and applied as follows: 2,000.00 for my sister Pazia Dugan-Kuznia at Habury, Hungary, 2,000.00 for my sister Mary Dugan-Muryn, at Habury, Hungary and 2,000.00 for my sister Eva Dugan-Chayko, at Mazo Laborez, Hungary, 3,000.00

for the Greek Catholic Church at Habury, Hungary, and 4,000.00 for *Rutheiner* Greek Catholic Church of Saints Peter and Paul, Jersey City, N. J. and 5,100.00 for Anna Patanska in appreciation of her good care accorded me in my sickness and otherwise. She has right to keep and retain for her 2,200.00 given by me to her already in cash and Liberty bonds to amount of 300.00. and all other moneys valuable papers and my belongings which shall be left after my death.

"Mrs. Anna Patanska and Rev. Alexander Ulitsky are to be administrators and executors of this my will. "Given at Jersey City, on 8th day of August, 1925, in presence of Mrs. Julia Narozniak, Mrs. Anna Patansko, Rev. Alexander Ulitsky, and attested by a cross made by my own hand and signatures of witnesses.

his
NICK X DUGAN"
Rev. Alex Ulitsky mark

When the will was executed, the testator's estate consisted exclusively of money in savings banks, a postal savings account and a small amount in Liberty bonds. About a month after executing his will he had recovered sufficiently to leave the hospital and about two months thereafter he completed his contract for the purchase of the apartment house by paying approximately $16,000. in cash, which he withdrew from his savings accounts and taking title subject to a $9,000 mortgage. His deed for the property bears date November 14, 1925. Subsequently he withdrew $4,000 more from his savings accounts, which he applied in reduction of the $9,000 mortgage. He did not return to work after leaving the

hospital and he died April 27, 1926. At his death he owned the apartment house subject to a balance of $5,000 due on mortgage and personal property inventoried at $4,197.75, of which but $1761.75 was money in bank. He owed no debts, but it is estimated that his funeral and expenses connected therewith, administration expenses and counsel fees will total $3,272.50. There being insufficient money in his bank account to pay the legacies mentioned in the third clause of his will, the main question is whether or not those legacies were adeemed by the withdrawal of his money from his savings accounts and investing the same in the purchase of the apartment house.

Mr. Herbert Clark Gilson for complainants

Mr. Richard Doherty for defendant Pazia Dugan-Kuznia, *et al.*

Mr. Jacques H. Hecht and Mr. John Milton for defendants Michael Druga, *et al.*

Messrs. O'Brien & Tartalsky for defendant Ruthenian Church

Mr. J. Francis Kelley for defendant Greek Catholic Church.

FIELDER, V. C.

The determination of the main question presented depends upon the nature of the lagacies bequeathed by the third clause of the will—whether they were intended to be specific legacies, confined to the tes-

tator's savings accounts, or general or demonstrative legacies of definite sums of money which, at the time of the execution of the will, happened to be in banks.

In determining the question, consideration must be given to the whole will: to the circumstances under which was prepared and executed: to the situation in which the testator then was as regards his property: to the relation and disposition he bore towards his legatees and to his presumed intention to make disposition of his whole estate for the benefit of the beneficiaries named by him, for the intention of a testator upon the subject of specific legacies is the principal object to be ascertained (Norris v. Thomson, 16 N. J. Equity, 542; Prendergast v. Walsh, 58 N. J. Equity, 149). Whether the gift of a sum of money invested in a particular way is specific or not, depends upon the question whether the testator meant his legatee to have the sum, however invested, or whether the actual investment is an important part of the gift (Langstroth vs. Golding, 41 N. J. Equity, 49), and a clear intention must appear to make a legacy specific. Courts are disposed to consider a legacy general or demonstrative if the will admits of such construction (Johnson v. Conover, 54 N. J. Equity, 333; Blair v. Scribner, 67 N. J. Equity, 583; Allen v. Allen, 76 N. J. Equity, 245; Mecum v. Stoughton, 81 N. J. Equity, 319; In re U. S. Fidelity &c. Co., 90 N. J. Equity, 254).

The will was written by a person somewhat handicapped in the use of English and unversed in the preparation of such an instrument. It was executed while the testator was in a hospital and probably in contemplation of death. The time fixed for the performance of his contract to purchase real estate had

elapsed and there is no evidence that he had sought or obtained an extension. He probably contemplated that because of the serious nature of his malady he must forfeit his contract and die leaving an estate consisting practically wholly of money in bank. His thoughts turned to the natural objects of his bounty, who were his three sisters (next of kin) his churches and Mrs. Patanska, the last being a person in whose family he had been a boarder many years and who had nursed and cared for him in his illness. Another sister had died leaving children whom the testator had never seen, hence he did not mention them in his will. He manifestly intended to distribute the entire estate he then possessed among his beneficiaries. No indication appears that he intended they should receive the sums bequeathed to them, only in case his property remained unchanged in character to his death. Not only is that thought not mentioned in the will, but on the contrary it deals with personal property only and makes no disposition of real estate.

If he was not expecting to take title to the real estate but was expecting to die leaving his money in bank, then his will would effectuate his purpose. If he did not expect to withdraw his money from bank and use it to pay for the real estate, he disclosed no intention that in such event his bequests should adeem and the real estate go elsewhere and he died intestate as to his real estate. After his discharge from the hospital he did not dispose of the subject of his bequests, in the sense that he consumed it; he merely removed it from the place where it was when he executed his will, to another place where it was when he died. I have reached the conclusion that it was the testator's intention that his legatees were

to receive the sums of money specified, in all events; that by referring to his savings deposits he merely intended to indicate such funds as the primary source from which his bequests could be paid and that he did not intend that such portion of his estate as should be found on deposit in banks at his death should be the only source for the payment of legacies. I think that the clear intention of the testator as expressed in his will, when read in the light of the circumstances under which it was executed, is as if he had said: "My estate, now consisting wholly of money in bank, shall be divided and applied as follows: $2000 to my sister Pazia Dugan Kuznia, and so on and that it should be so construed that bequests therein made are general legacies. In reaching this conclusion I am guided by the decisions I have cited above.

The testator's personal estate is insufficient to pay his legacies and since I have concluded that it was his intention to give his legatees, generally, the respective sums stated in the will, I further conclude that the legacies are chargeable against the real estate of which the testator died seized. The provision in the will that Mrs. Patanska "has right to keep and retain * * * all other moneys, valuable papers and my belongings which shall be left after my death," even if a sufficient residuary devise to include real estate, shows an intention to give her only what remained of his estate after payment made of the specific sums given to his beneficiaries, but these words, in their ordinary meaning, refer to personal property only and, in fact, the testator dealt solely with personal property when he executed his will. Therefore and also because I am compelled to hold that Mrs. Patanska can take nothing under the will and that this and other provisions for her are void, for a reason hereinafter stated, the testator died intestate as to his real estate and the same descended to his heirs at law, subject to the legacies. No express power of sale is conferred on the executors, but I shall hold that they have an implied power to sell for the purpose of raising money with which to pay legacies. In their bill (filed more than a year and a half ago) they allege and their proofs on the hearing show, that they have an offer of $25,000 for the property, which they claim is a fair price and their bill prays that they be empowered to make sale for such sum. Except as the parties contend that the legacies are specific and are payable out of money in bank only, no one objected to an executors' sale at the figure named and I shall therefore approve said sale unless the executors find that a better price can now be obtained. The executors are advised that the net proceeds of sale should be applied first to the payment of their commissions, next to the payment of legacies (except to Mrs. Patanska) and the residue paid to the testator's heirs at law. The counterclaim for partition filed by he defendants, Steve Rruga, *et al.,* as heirs at law, will be dismissed.

Mrs. Patanska can take nothing under the will because she is a witness to the execution thereof. The statute (Comp. Stat. 5862, Sec. 4) provides: "That if any person * * * shall attest the execution of any will * * * to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate * * * shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting

the execution of such will * * * be utterly null and void." This provision does not affect her appointment as an executor (Lippincott *v.* Wikoff, 54 N. J. Equity, 107) but it does make void the bequests or legacies therein given her (Case v. Hasse, 83 N. J. Equity, 170). Her counsel argues, that the statute does not apply because being one of three witnesses, she was a superfluous witness, and the will could be proved without her testimony, but the statute applies by its terms to *any* person who shall attest the execution of a will and makes void any legacy, estate or interest given to *such* person.

Final Decree.

(Filed, April 2, 1928)

IN CHANCERY OF NEW JERSEY.

Between ANNA PATANSKA, *et al.*, executors, &c., Complainants, and PAZIA DUGAN KUZNIA, *et als.*, Defendants.	On Bill &c. FINAL DECREE.

This cause coming on to be heard in the presence of Herbert Clark Gilson, Esq., of counsel with the complainants; and Richard Doherty, Esq., of counsel with the defendants, Pazia Dugan Kuznia, Mary Dugan Muryn and Eva Dugan Chayko; and Jacques H. Hecht, Esq., of counsel with the defendants, Michael Druga and Vasil Druga; and John Milton, Esq., of counsel with Anna Druga Levecky and Steve Druga; and Messrs. O'Brien & Tartalsky, of counsel with Rutheinar Greek Catholic Church of Saints Peter and Paul of Jersey City, and J. Francis Kelly, Esq., of counsel with Greek Catholic Church of Habury, Hungary; and the bill of complaint as amended, answers, counterclaim, replications, stipulation of facts, and proofs, have been read and considered, and the arguments of the respective counsel having been considered, and the court being of the opinion that the complainants are entitled to have the last will and testament of Nick Dugan, deceased, construed by this court and the rights of the several parties making claims thereunder ascertained, and that the complainants, as exe-

cutors of the said last will and testament, are entitled to have their powers, rights and duties ascertained and defined, and are entitled to the directions of the court in the administration of the said estate; and it appearing to the court that the bequests in the last will and testament of Nick Dugan, deceased, are general legacies, and that the testator's personal property is insufficient to pay his legacies and therefore they are chargeable against the real estate of which the testator died seized, and that the said Nick Dugan died intestate as to his real estate and the same descended to his heirs, at law, subject to the legacies, and that the said executors have implied power to sell the real estate for the purpose of raising money with which to pay the legacies; and it further appearing that the said executors have received an offer of twenty five thousand dollars ($25,000) for the real estate of which the testator died seized and that a sale for said sum should be approved; and it further appearing that the complainant, Anna Patanska, individually, attested the said will as a witness to the execution thereof, and, therefore, the bequests and legacies to her are null and void;

It is on this 2nd day of April, A. D., 1928, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, that the said Chancellor by virtue of the power and authority of this court, does hereby ORDER, ADJUDGE and DECREE, as follows:

1. That by the true construction of the last will and testament of Nick Dugan, deceased, the bequests to Pazia Dugan Kuznia, Mary Dugan Muryn, Eva Dugan Chayko, Rutheinar Greek Catholic Church

of Saints Peter and Paul of Jersey City and Greek Catholic Church of Habury, Hungary, are general legacies, and that they are chargeable against the real estate of which the said testator died seized.

2. That the bequests and legacies to Anna Patanska are null and void.

3. That the said Nick Dugan died intestate as to his real estate and the same descended to his heirs at law subject to the said legacies.

4. That the said executors have implied power to sell the real estate of which the testator died seized.

5. That the said executors be and they are hereby authorized to sell the real estate belonging to said estate at public or private sale for the best sum that can be obtained therefor and to execute and deliver a good and sufficient conveyance to the purchaser.

6. That the net proceeds from the sale of the said real estate should be applied first to the payment of the debts of the estate and to the commissions of the executors, next to the payment of the legacies, and the residue to the heirs at law of the testator.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the counterclaims for partition of the real estate of which the said Nick Dugan died seized, filed by the defendants, Steve Druga, Anna Druga Levecky, Michael Druga and Vasil Druga, be and they are hereby dismissed.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that there be allowed out of the funds of the said estate to Herbert Clark Gilson, Esq., solicitor

of the complainants as executors, a counsel fee of nine hundred dollars, together with his taxed costs herein; and to Richard Doherty, Esq., solicitor of the defendants above mentioned, a counsel fee of five hundred dollars, together with his taxed costs herein; and to Jacques H. Hecht, Esq., solicitor of the defendants above mentioned, a counsel fee of four hundred dollars, together with his taxed costs herein; and to John Milton, Esq., solicitor of the defendants above mentioned, a counsel fee of four hundred dollars, together with his taxed costs herein; and to Messrs. O'Brien & Tartalsky, solicitors of the defendant above mentioned, a counsel fee of three hundred dollars, together with their taxed costs herein; and to J. Francis Kelly, Esq., solicitor of the defendant above mentioned, a counsel fee of two hundred dollars, together with his taxed costs herein; and the executors be and they are hereby directed to pay said allowances out of the funds and assets of said estate.

E. R. WALKER,
C.

RESPECTFULLY ADVISED.

James F. Fielder,
V. C.

A true copy:
THOMAS BARBER,
Clerk.

New Jersey Court of Errors and Appeals

Between
ANNA PATANSKA and ALEXANDER ULITSKY, executors of the Estate of Nick Dugan, deceased, and ANNA PATANSKA, individually, Complainants-Appellants,

and

PAZIA DUGAN KUZNIA, *et al.*, Defendants-Respondents.

On Appeal of Complainants from Chancery.

BRIEF OF APPELLANTS.

Statement.

The only question on the appeal of the complainants is, whether or not a bequest to a third or superfluous attesting witness to a will is void under our statute.

The bill of complaint was filed by Anna Patanska and Rev. Alexander Ulitsky, executrix and executor of the last will and testament of Nick Dugan, deceased, for a construction of the will, etc. The bill was amended by adding Anna Patanska, individually, as a party complainant, and the children of a deceased sister of testator as party defendants (pp. 32, 35, 37). Two of the children of the deceased sister alleged in their answer that the bequest to Anna Patanska, was void because she was an attesting witness to the will. (*See answers of Michael and Vasil Druga,* p. 52.) Vice Chancellor Fielder, to whom the cause was referred, held that the said bequest was void for the reason stated (p. 103).

The will was drawn by Rev. Alexander Ulitsky and it was executed in the Jersey City Hospital on August 25th, 1925 (pp. 65-66). The testator died on April 27th, 1926.

He was a bachelor and a native of Hungary. He had been in this country about 40 years. At the time of his death and for about one and one-half years prior thereto, the testator boarded with the family of the complainant, Anna Patanska, in Jersey City. The testator was virtually an invalid during the latter part of his life, and the said Anna Patanska, nursed and cared for him. He was in the Jersey City Hospital when the will was executed on August 25th, 1925. He asked the complainant, Anna Patanska, to call his spiritual adviser, Rev. Alexander Ulitsky, and requested him to draw the will. The testator recovered and left the hospital several weeks later (pp. 65, 70, 72, 80).

The next of kin and heirs at law of the testator are as follows:

Pazia Dugan Kuznia or Kusma, a sister, whose husband is Stasko Kuznia or Kusma, residing in Czecho-Slavakia.

Mary Dugan Muryn, sister and widow, residing in Czecho-Slavakia.

Eva Dugan Chayko, a sister and widow, residing in Czecho-Slavakia.

Anna Druga Levecky, daughter of a deceased sister, whose husband is Harry Levecky, residing in Pennsylvania.

Steve Druga, a son of said deceased sister, whose wife is Julia Druga, residing in Pennsylvania.

Michael Druga, son of said deceased sister, whose wife is Anna Druga, residing in South America.

Vasil Druga, son of said deceased sister, whose wife is Anna Druga, residing in Czecho-Slavakia (*Stipulation of Facts*, p. 91).

The testator had not seen any of his sisters for 40 years, and he had never seen the children of his deceased sister (*Test.*, p. 70; *Stipulation of Facts*, p. 92).

There were three witnesses to the will, including the complainant, Anna Patanska, one of the beneficiaries. It provides among other things, as follows:

> "(3) My cash money of which 10,000.00 is deposited at Provident Institution for Savings in Jersey City, N. J., and 3,000.00 and 1,600.00 in two banks in Brooklyn, N. Y., and 2,500.00 at the Post Office at Jersey City, all together 17,100.00 or more is to be divided and applied as follows: 2,000.00 for my sister Pazia Dugan-Kuznia at Habury, Hungary, 2,000.00 for my sister Mary Dugan-Muryn, at Habury, Hungary, and 2,000.00 for my sister, Eva Dugan-Chayko at Mezo Laborecz, Hungary, 3,000.00 for the Greek Catholic Church at Habury, Hungary, and 3,000.00 for *Rutheinar* Greek Catholic Church of Saints Peter and Paul, Jersey City, N. J., and 5,100.00 for Anna Patanska in appreciation of her good care accorded to me in my sickness and otherwise. She has right to keep and retain for her 2,200.00 given by me to her already in cash and Liberty bonds to the amount of 300.00 and all other moneys valuable papers and my belongings which shall be left after my death."

And it contains the following residuary clause:

> "She (Anna Patanska) has right to keep and retain for her $2200 given by me to her already in cash and Liberty bonds to amount of $300. and all other moneys valuable papers and my belongings which shall be left after my death" (p. 33).

The will was probated in the Hudson County Surrogate's office on May 13th, 1926, and letters testamentary were issued to Mrs. Patanska and

Rev. Ulitsky, the executors named therein. Appeals from the probate of the will were taken by the three sisters of the testator, and by two children of the deceased sister. The appeals were dismissed after a hearing by the Orphans' Court of Hudson County (p. 93).

The estate consisted of the following property at the time of the testator's death, viz:

Equity in apartment house	$20,000.00
Cash in Williamsburg Savings Bank	1,761.75
55 shares common stock, Standard Oil Co. of N. J.	2,414.00
Trunk and clothes	7.00
Watch and chain	15.00
	$24,197.75
The debts including funeral expenses amounted to	3,372.50
Leaving a net estate of	$20,825.25

(*Test,* p. 64; *Stipulation of Facts,* p. 93.)

ARGUMENT.

The bequests to Mrs. Patanska are not void.

Anna Patanska was a superfluous witness to the will. The will could have been proved without her testimony. Our statute requires that there shall be *two* witnesses (*4 Comp. Stat.,* p. 5867, sec. 24); and it also provides:

> "That if any person hath attested the execution of any will or codicil, after the first day of March, in the year of our Lord one thousand seven hundred and fifty-three, or shall attest the execution of any will or codicil hereafter to be made, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements and hereditaments, for the payment of any debts, hath been or shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him or her, be *utterly null and void, and such person shall be admitted as a witness* to the execution of such will or codicil, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil."

4 Comp. Stat., 5862, sec. 4.

The reason for the statute was to remove the possibility of the interest of a beneficiary affecting his testimony in proving the will. The early English statute required "credible" witnesses, and in ocnstruing the statute it was held that a beneficiary was not a credible witness and therefore a will so attested was invalid. In order to prevent the entire will being invalidated the statute was enacted declaring such a witness competent, but a devise to him void. (40 Cyc, 1060; *1 Jarm. on Wills* (6 ed.) *71; *Schouler on Wills* (2 ed.) sec. 357.)

And in view of the incompetency at common law of a witness who had any "interest" in the subject matter of a suit, it was originally held that the statute applied where the husband of a legatee was a witness to the will, or where there was a bequest to a corporation and a stockholder was a witness, or where a creditor was a witness to the will. (*1 Jarm, on Wills* (6 ed.)*70; *Schouler on Wills* (2 ed.) secs 354-356; 40 Cyc, 1062.)

In most of the states the statutes expressly provide that if a will can be proved without the testimony of the witness who is a beneficiary, the devise or bequest shall not be void.

> "The American decisions, however, have very generally held that *if a will can be proved inde-*

pendently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to *such witness is valid,* and it makes *no difference whether such witness testified or not."*

40 Cyc, 1061, and note 30 citing cases. (my italics)

"The statutes in this country vary somewhat touching this subject. In a large group of states, attesting witnesses are made incapable of taking any beneficial interest under the will (unless, besides, the will is attested by the required number of duly qualified witnesses.)"

1 Jarman on Wills (6 ed.)*p. 69, note 1;

And see

Schouler on Wills (2 ed.), sec. 357, and note.

But that provision in the statutes of other states is merely an express limitation which would be logically *implied* from the reason of the statute; otherwise the statute would apply to any number of unnecessary witnesses to a will beyond the statutory number. It is not stretching the imagination to conceive a case where there are four or five witnesses to a will. It would be absurd to assume that the legislature intended to make legacies to all of them void when only two are necessary witnesses. A construction of a statute which would result in an absurdity is never placed upon a statue (36 Cyc, 1107).

Therefore, the logical interpretation of the statute in the light of its reason and purpose, is that if there are two competent witnesses any other witness is superfluous and a legacy to such a witness is not void.

While the precise question has never arisen in this state (so far as an exhaustive examination of the cases has disclosed) Vice Chancellor Emery as-

sumed that a superfluous witness did not come within the statute. That suit was for specific performance, and one of the contentions was that the will under which the complainant claimed title, was void because one of the witnesses to the will was incompetent on account of his "interest" under the will. The alleged "interest" was the appointment of the husband of a devisee as executor. The court said:

"The defendant contends that Frank P. Lippincott was an incompetent witness to the execution of the will, and that *there not being two competent* witnesses, the instrument was invalid as conveying any title to real estate of the testatrix. * * * Upon the question whether the appointment as executor comes within the terms of the section which relates to a beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, I think it does not."

Lippincott v. *Wikoff,* 54 N. J. Eq. 107 at pp. 109, 110.

The principle is the same whether the "interest" be that of a husband of a beneficiary or the beneficiary herself, so far as the reason for the statute is concerned. The statute was aimed at the temptation to an interested and necessary witness to a will. The instant case is stronger than the *Lippincott* case, for if the "interest" of a husband of a devisee was not contemplated by the statute, then the "interest" of an unnecessary and superfluous witness to a will was not contemplated.

It is fundamental that in construing a statute the reason and intention of the legislature are to be ascertained and given effect. And it is equally well settled that the spirit of the statute will prevail over its letter.

It is also a rule that whatever is necessarily or plainly implied in a statute is as much a part of it

as that which is expressed, and to construe a statute to admit implied exceptions.

Under those rules it has been held that a beneficiary in a will who becomes a witness to a codicil does not forfeit his legacy even under the statutes which do not contain the express provision that if the will can be proved without the beneficiary, the legacy is not void. (*1 Jarmon on Wills,* (6 ed.)*72, and note 1; 40 Cyc, 1062.)

The legislature never intended to make void a legacy to any other than the two witnesses required by the statute. Therefore it is logical and not unusual to imply that object.

> "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, and defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object by suppressing the mischief and securing the benefits intended." 36 Cyc, 1110.

The reason for the statute does not obtain in the instant case. Mrs. Patanska was not one of the witnesses required by the statute, and the will could be proved without her testimony. Therefore the legacies to her are not void, and the decree in that respect should be reversed.

Respectfully submitted,

HERBERT CLARK GILSON,
Solicitor and of counsel with
Complainants-Appellants.

New Jersey Court of Errors and Appeals

Between
ANNA PATANSKA and ALEXANDER ULITSKY, executors of the estate of Nick Dugan, deceased, and ANNA PATANSKA, individually,
Complainants-Respondents,

and

MICHAEL DRUGA, VASIL DRUGA, STEVE DRUGA and ANNA DRUGA LEVECKY,
Defendants-Appellants.

On Bill, &c.
On Cross
Appeals from
Chancery.

BRIEF OF COMPLAINANTS-RESPONDENTS.

Appeals and cross appeals were taken by the complainants and some of the defendants. The appeal of complainants is No. 22 on the present October calendar, and is argued in a separate brief because when it was prepared the complainants did not know whether or not the defendants intended to prosecute their cross appeals (Nos. 45 and 91 on the calendar).

Statement.

The bill was filed for the construction of the will of Nick Dugan, deceased. It was drawn by the spiritual adviser of the testator while he was in the Jersey City Hospital, on August 25th, 1925. At that time the property of the testator consisted of money in banks, Liberty bonds, and stock of the

Standard Oil Co. He made bequests of certain sums of money to his three sisters and to two churches, and to the complainant, Anna Patanska (see Will, p. 33). Prior to going to the hospital the testator entered into a contract to purchase an apartment house (Ex. C-6; p. 95). He recovered and left the hospital, and in the following November (1925), he withdrew part of the money from the banks and carried out the contract to purchase the apartment house.

The testator was a bachelor about 58 or 60 years of age, and a native of Hungary. He had been in this country about 40 years. At the time of his death and for about one and one-half years prior thereto, the testator boarded with the family of the complainant, Anna Patanska, in Jersey City. The testator was virtually an invalid during the latter part of his life, and the said Anna Patanska nursed and cared for him (pp. 65, 70, 72, 80).

The next of kin and heirs at law of the testator are as follows:

Pazia Dugan Kuznia or Kusma, a sister, whose husband is Stasko Kuznia or Kusma, residing in Czecho-Slovakia.

Mary Dugan Muryn, a sister and widow, residing in Czecho-Slovakia.

Eva Dugan Chayko, a sister and widow, residing in Czecho-Slovakia.

Anna Druga Levecky, daughter of a deceased sister, whose husband is Harry Levecky, residing in Pennsylvania.

Steve Druga, a son of said deceased, sister, whose wife is Julia Druga, residing in Pennsylvania.

Michael Druga, son of said deceased sister, whose wife is Anna Druga, residing in South America.

Vasil Druga, son of said deceased sister, whose wife is Anna Druga, residing in Czecho-Slovakia (pp. 91, 92).

The will was probated in the Hudson County Surrogate's office on May 13, 1926, and letters testamentary were issued to Mrs. Patanska and Rev. Ulitsky, the executors named therein. Appeals from the probate of the will were taken by the three sisters of the testator, and by two children of the deceased sister. The appeals were dismissed after a hearing by the Orphans' Court of Hudson County (p. 93).

The estate consisted of the following property at the time of the testator's death viz.:

Equity in apartment house	$20,000.00
Cash in Williamsburg Savings Bank.	1,761.75
55 shares Common stock, Standard Oil Co. of N. J.	2,414.00
Trunk and clothes	7.00
Watch and chain	15.00
	$24,197.75
The debts including funeral expenses amounted to	3,372.50
Leaving a net estate of	$20,825.25

On June 19th, 1926, the executors received an offer of $25,000 for the said apartment house, and they entered into a contract to sell the same for that amount, subject to the approval of the court (p. 93). The offer is a fair and reasonable value of the property (p. 85).

POINT I.

The bequests were not specific legacies.

In determining whether or not a legacy is general, demonstrative or specific, as in every question in the construction of wills, the main guide is the intention of the testator, and it is proper to consider

the surrounding circumstances. (*Langstroth* v. *Golding,* 41 N. J. Eq. 49; *Savings Investment & Trust Co.,* 93 Ib. 311; 40 Cyc. 1871).

The will in question was not an unnatural one. It was inartistically drawn, but it is clear that the intention and design of the testator was to give his three sisters and the churches the respective amounts mentioned in the will, and the residue to Mrs. Patanska. The testator had never seen the appellants, his nephews and niece; and he had not seen his sisters since he left his native country, (40 years before making his will). Mrs. Patanska and her husband had taken care of the testator in his illness.

The testator must have known when he made his will that unless he died before consummating the contract to purchase the apartment house he would not have sufficient money in the banks to pay the legacies to his sisters and the churches. The designation of the banks in which the monies were deposited, was to apprise the executors of the location of the monies.

In *Turner* v. *Gibb,* 48 N. J. Eq. 526, which was quite similar to the instant case, there were pecuniary bequests and after the will was made the testatrix purchased real estate and there was not sufficient personal property to pay the bequests, it was held;

> "In consequence of subsequent purchases of real estate, these legacies amounting to $2020 to her own blood relatives, her grandchildren, have no means of payment in full unless resort is had in part to the real estate covered by the residuary clause. I am of opinion, not only that from the other words and provisions of the will are not inconsistent with the existence of an intention on the part of the testatrix, as is assumed by the rule relied on, but that the circumstances, proper to be considered, strengthen the presumption the law raises from

> the provisions of the will, in connection with the residuary clause, that it was the intention of the testatrix that the legacies to the grandchildren should be paid out of the real estate devised by the said clause, in case there was a deficiency of personal property to fully meet their payment."

In *Parker* v. *Moore,* 25 N. J. Eq. 228, it was held

> "A bequest of money generally, without designating it from the testator's other moneys, or mentioning out of what fund it is to be paid, "was a general legacy; and a "designation of such bequest in the residuary clause as a 'specific' legacy, will not change its character as general, where the term is evidently used by the testator with reference to the fact that it was a legacy of a specified sum of money."

In *Mathis* v. *Mathis,* 18 N. J. L. 59, where the testator bequeathed $500. to each of his children to be kept in gold and silver to be given to them at lawful age or marriage, and directed that the money could not be lent or used, the court held that they

> "were not specific legacies, unless the sums bequeathed are in specie separated and put in parcels, and each parcel identified and described, and given to the legatee."

And in *Langstroth* v. *Golding,* 41 N. J. Eq. 49, the court said:

> "Whether the gift of a certain sum of money 'invested' in a particular way is specific or not, depends upon the question whether the testator meant the legatee to have the sum, however invested, or whether the actual investment is the important part of the description."

No ademption took place. The use of the moneys in the banks to consummate the contract for the purchase of the apartment house, did not destroy

the bequests nor indicate a change of intention by the testator of dividing his estate as provided in his will. There was an equitable conversion and the real estate is deemed personal property for the purpose of paying the legacies, and there was therefore an implied power of sale.

> In re *Cooper,* 95 N. J. Eq. 210, at page 212;
> *Pennsylvania Co.* v. *Riley,* 89 Ib. 252;
> *Saving Investment & Trust Co.* v. *Cronch,* 93 Ib. 311, aff. 118, Atl. 927;
> *Prendergast* v. *Walsh,* 58 Ib. 149;
> *Johnson* v. *Conover, supra,* 40 Cyc. 2021;
> 13 Corpus Juris, 860 and 862.

The cases cited by defendant were either where there were bequests of stocks and bonds and other easily identified property, or where the bequests were of money and the testators had set apart and designated particular funds from which the legacies were to be paid, or where the bequests were of cash in bank and the intention was to dispose of whatever balance remained in the bank.

Even if the legacies lapsed the testator did not die intestate as to the real estate. It is well settled that lapsed legacies fall into the residuary estate.

> "A residuary legatee, as a general rule, is entitled to all legacies not effectually disposed of by the will, but to be thus entitled, he must be the general legatee of the testator's whole residuary estate."
>
> *Roy* v. *Monroe,* 47 N. J. Eq. 356.

And see:

> *Burnet* v. *Burnet,* 30 N. J. Eq. 395.

The residuary clause provides as follows:

> "She (Anna Patanska) has right to keep and retain for her $2200 given by me to her already

> in cash and Liberty bonds to amount of $300. and *all other moneys valuable papers and my belongings which shall be left after my death.*"

No particular form is necessary for a residuary clause.

> "'Residue' meaning that which remains, *no particular mode of expression is necessary to constitute a residuary clause.* * * * All that is necessary is an adequate designation of what has not been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial. * * * It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary."
>
> *40 Cyc,* 1563, 1564.

And see:

> *7 Corpus Juris,* 1040;
> *Tzeses* v. *Tenez Const. Co.,* 95 N. J. Eq. 145.

The words "all other moneys * * * and my belongings which shall be left after my death", show clearly that the intention of the testator was to leave the residue of his estate to Mrs. Patanska. The word "belongings" implies ownership and it is broad enough to include real estate as well as personal property. (*7 Corpus Juris,* 1039, 1040, citing *Blauvelt* v. *Fechtman,* 48 N. J. L. 430.)

The circumstances also show that the intention was to make Mrs. Patanska the residuary legatee. Ordinarily the natural objects of a person's bounty are his relatives, but there are often cases where that condition is changed. In the instant case the testator had not seen his sisters in 40 years, and he had never seen his niece and nephews. He lived

with Mr. and Mrs. Patanska, and the latter had taken care of him in his illness; as he expressed it to one witness "if it had not been for Mr. and Mrs. Patanska, I would not be here now." Two witnesses testified to that effect (pp. 81, 85, 86). And the feeling of the testator became so strong that he decided to change his will by leaving everything to Mrs. Patanska, but he died the day after making the arrangement for the change (pp. 88, 89). That evidence shows testator's feeling of gratitude to Mrs. Patanska. Such testimony is competent. It is a well recognized *rule* that testimony of declarations by a testator showing fraud, or undue influence is admissible. (*State* v. *Ready,* 78 N. J. L. 599; *3 Wigmore on Ev.* (2 ed.), sec. 1738.) Therefore it would be admissible to show the opposite condition; in other words to show the kindly feelings towards a beneficiary. As stated in *Wigmore on Evidence,* testimony:

> "That certain persons have been or are the objects of his affection or dislike, and relevant to show a mental condition and intention" (Sec. 1734).

And that rule applies to post-testamentary declarations. (*3 Wigmore on Ev.* (2 ed.), sec. 1738.) Chief Justice Gummere, speaking for the Court of Errors and Appeals, points out that the confusion of courts on this question in some cases is caused by the distinction between the use of such testimony for the purpose of defeating or destroying the will, and the use of it to show the condition of the testator's mind with reference to the objects of his bounty. (*State* v. *Ready, supra,* and cases there cited; and see *Van Houten* v. *Post,* 33 N. J. L. 344.)

POINT II.

The bequests to Anna Patanska were not void. That point is argued in the separate brief of complainants submitted herewith.

CONCLUSION.

The part of the decree which adjudges that the legacies were general and that the executors have implied power to sell the real estate for the purpose of raising money with which to pay the legacies, should be affirmed. The other part of the decree which holds that the legacies to Anna Patanska are void, should be reversed.

HERBERT CLARK GILSON,
Solicitor of Complainants-Respondents.

New Jersey Court of Errors and Appeals

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, Deceased, *et al.*, Complainant-Appellants, and PAZIA DUGAN KUSMA, *et als.*, Defendants-Respondents.	On Bill, &c. ON APPEAL FROM CHANCERY.

BRIEF OF DEFENDANTS-APPELLEES, RUTHENIAN GREEK CATHOLIC CHURCH OF SAINTS PETER AND PAUL OF JERSEY CITY AND GREEK CATHOLIC CHURCH OF HABURY, HUNGARY.

Statement.

This is a joint brief on behalf of the two churches, legatees, under the testator's will. There are three appeals pending before the Court as cases No. 22, 45 and 91, October Term, 1928. The churches are the only defendants who have not appealed from the decree of the Chancellor. An appeal was taken by Anna Patanska and Alexander Ulitsky, Executors of Nick Dugan, deceased, and Anna Patanska, individually, complainants-appellants, represented by Herbert Clark Gilson, Esq. A cross-appeal was taken by Pazia Dugan Kusma, Mary Dugan Muryn and Eva Dugan Chayka, legatees mentioned in the will, represented by Richard Doherty, Esq., and another cross-appeal was taken by Michael Druga,

Vasil Druga, Steve Druga and Anna Druga Levecky, the nex to kin of the deceased who were not legatees under the will and who are represented by John Milton, Esq., and Jacques H. Hecht, Esq.

We are not concerned with the appeal of Anna Patanska, the complainant-appellant, who contends that her legacy under the will was not invalidated because she was a superfluous witness to the will. The churches cannot be affected by the claim of this appellant. This brief is in reply to the briefs filed by the cross-appellants.

Facts.

The opinion of Vice Chancellor Fielder (Case, pp. 96-104) reported in 6 Adv. 654; 141 Atl. 88 states the facts accurately. The Vice Chancellor determined that the legacies to the churches were general legacies; that the testator died intestate as to his real estate and that the same descended to his heirs at law, subject to the legacies.

Argument.

The cross-appellants, Michael Druga, *et al.* urge that the legacies were specific while the cross-appellants Pazia Dugan Kusma, *et al.* urge that the legacies were demonstrative. All cross-appellants urge that the legacies were not a charge upon the real estate. We respectfully urge that the decree be affirmed and will argue the matter under two headings. First, the legacies were not specific, and second, the legacies were a charge upon the real estate.

The Law.

Though the decedent was not at the time of the making of his will seized of the lands in question,

nevertheless, after acquired property passes under the will perforce of Section 26 of the Wills, Act (4 Comp. Stat. 5870).

It is an elementary principle of law and equity that the intention of the testator shall be gathered from the whole will. "His intentions are all important, and the court must do everything in its power to discover them and see that they are carried out, if it be possible."

Johnson v. *Bowen,* 85 Eq. 76;
Supp v. *Second Nat'l Bank,* 98 Eq. 242.

A will is ambulatory and operates from the time of testator's death. The intention of the testator is not to be determined by hard and fast rules. In construing the will, the predominant idea of testator's mind is heeded and a clear gift should not be cut down except by express words or clear implication.

Supp v. *Second Nat'l Bank, supra.*
Johnson v. *Haldane,* 95 Eq. 404.

It is one of the soundest rules of construction that the law abhors intestacy and it is the duty of the court to sustain a will if there is any way in which it can do so reasonably. No testator shall be presumed to die intestate and the law prefers a construction which will prevent rather than one which will permit total or partial intestacy.

In re Smith, 95 Eq. 631;
Kanouse v. *Central R. R. Co.,* 97 L. 185;
Bruce v. *Bruce,* 90 Eq. 573.

The will in question was not drawn by a lawyer, it was drawn by a priest of foreign extraction who manifestly wrote in the best language at his command the wishes of the testator. *It is apparent*

that he desired that his three sisters, the two churches and Mrs. Patanska share and divide his property and estate. They were the objects of his bounty and no one else. It was not his intention that his nephew and nieces who reside in Pennsylvania, South America and Czecho Slovakia should share in the estate to any extent and it should be in that light that this will should be construed.

The Vice Chancellor in his opinion said (Case, pp. 100-101):

> "The will was written by a person somewhat handicapped in the use of English and unversed in the preparation of such an instrument. It was executed while the testator was in a hospital and probably in contemplation of death. *The time fixed for his performance of his contract to purchase real estate had elapsed and there is no evidence that he had sought or obtained an extension. He probably contemplated that because of the serious nature of his malady he must forfeit his contract and die leaving an estate consisting practically wholly of money in bank. His thoughts turned to the natural objects of his bounty, who were his three sisters* (next of kin) *his churches and Mrs. Patanska,* the last being a person in whose family he had been a boarder many years and who had nursed and cared for him in his illness. Another sister had died leaving children who the testator had never seen, hence he did not mention them in his will. *He manifestly intended to distribute the entire estate he then possessed among his beneficiaries."*

POINT ONE.

The legacies were not specific.

An academic rule of construction is that the character of the legacy depends wholly upon the language of the will. The court below said:

> "In determining the question, consideration must be given to the whole will: to the circumstances under which was prepared and executed: to the situation in which the testator then was as regards his property: to the relation and disposition he bore towards his legatees and to his presumed intention to make disposition of his whole estate for the benefit of the beneficiaries named by him, for the intention of a testator upon the subject of specific legacies is the principal object to be ascertained (Norris v. Thomson. 16 N. J. Equity, 542; Prendergast v. Walsh, 58 N. J. Equity, 149). Whether the gift of a sum of money invested in a particular way is specific or not, depends upon the question whether the testator meant his legatee to have the sum, however invested, or whether the actual investment is an important part of the gift (Langstroth vs. Golding, 41 N. J. Equity, 49), and a clear intention must appear to make a legacy specific. Courts are disposed to consider a legacy general or demonstrative if the will admits of such construction (Johnson v. Conover, 54 N. J. Equity, 333; Blair v. Scribner, 67 N. J. Equity, 583; Allen v. Allen, 76 N. J. Equity, 245; Mecum v. Stoughton, 81 N. J. Equity, 319; In re U. S. Fidelity &c. Co., 90 N. J. Equity, 254). (Case, p. 100.)"

Vice Chancellor Emery in Blair v. Scribner, 65 Equity 498 at page 519 said:

> *"This inclination of the courts arises from the presumption that the testator intended a real benefit to the legatees, and in order to car-*

ry this intention into effect and to protect legacies from the operation of the fixed and inflexible rule of ademption, which applies to specific legacies the application of which rule the testator had apparently not foreseen or provided, courts are disposed to consider the legacies, general or demonstrative, if the language of the will admits of such construction."

Though the latter case was reversed by the Court of Errors and Appeals as to the facts in the case, yet the opinion of Vice Chancellor Emery continues to be cited with approval and the same rule is stated by Chancellor Walker in *Allen* v. *Allen,* 76 Eq. 245 at page 250.

So in 28 R. C. L., p. 293, Sec. 267, the rule is stated:

> *"Courts are averse to construing legacies to be specific,* and will not unless it be clear that the testator so intended. This is because a general legatee has greater protection against the risk of ademption. If compatible with the language employed, they are disposed to interpret gifts as general legacies; but if the language is clear and unequivocal, and plainly evidences an intent of the testator to create a specific legacy, such effect must be given to that language. *In case of doubt as between a demonstrative or a specific legacy the courts incline towards the construction which classifies the legacy as demonstrative* and a clear intention must appear in order to make a legacy specific rather than demonstrative."

If a particular kind of article or stock or property which can be individuated or is identified and it is intended by the testator that that alone shall pass, then the legacy is specific and is adeemed if that bequest is disposed of or destroyed by the testator in his lifetime.

> 3 Pomeroy Eq. Jur. Sec. 1130, *et seq.*;
> *In re Cooper,* 2 N. J. Misc. 22.

In construing the legacies to be general the Vice Chancellor reasoned thus (Case, pp. 101-102):

> *"No indication appears that he intended they should receive the sums bequeathed to them, only in case his property remained unchanged in character to his death. Not only is that thought not mentioned in the will, but on the contrary it deals with personal property only and makes no disposition of real estate.*
>
> *"If he was not expecting to take title to the real estate but was expecting to die leaving his money in bank, then his will would effectuate his purpose. If he did not expect to withdraw his money from bank and use it to pay for the real estate, he disclosed no intention that in such event his bequests should adeem and the real estate go elsewhere and he died intestate as to his real estate. After his discharge from the hospital he did not dispose of the subject of his bequests, in the sense that he consumed it, he merely removed it from the place where it was when he executed his will, to another place where it was when he died. I have reached the conclusion that it was the testator's intention that his legatees were to receive the sums of money specified, in all events; that by referring to his savings deposits he merely intended to indicate such funds as the primary source from which his bequests could be paid and that he did not intend that such portion of his estate as should be found on deposit in banks at his death should be the only source for the payment of legacies. I think that the clear intention of the testator as expressed in his will,* when read in the light of the circumstances under which it was executed, is as if he had said: 'My estate, now consisting wholly of money in bank shall be divided and applied as follows: $2000. to my sister Pazia Dugan Kusnia, and so on and that it should be so construed that bequests therein made are general legacies. In reaching this conclusion I am guided by the decisions I have cited above.' "

A demonstrative legacy partakes of the nature of both specific and general legacies and combines the advantages of each. *Demonstrative legacies are bequests of money not in themselves specific, but made primarily out of a particular designated fund.* If the fund or part of it remains at the death of the testator, satisfaction is first made from that fund and the deficiency made up out of the residue exactly like general legacies.

3 Pomeroy Eq. Jur. Sec. 1133.

General legacies are gifts of amounts or things, not out of any fund but are paid generally from the estate.

3 Pomeroy Eq. Jur. Sec. 1132.

The rule is stated in 40 Cyc. 1875 "A bequest of a sum of money without designating the fund out of which it is to be paid is regarded as a general legacy," and at page 1874 it is gathered that, *when a testator names a* particular fund out of which the legacy is to be paid *it is to be considered as demonstrative.*

In 28 R. C. L. 292 Sec. 266 the rule is: "A bequest of all the testator's money remaining in bank except a specified sum, which is bequeathed to another, is likewise a demonstrative legacy."

The phraseology used in the will "My cash money of which 10,000.00 is deposited at Provident Institution for Savings in Jersey City, N. J. and 3,000.00 and 1,600.00 in two Banks in Brooklyn, N. Y. and 2,500.00 at the Post Office at Jersey City all together = 17,100.00 or more is to be divided and applied as follows: "We contend that *this expression when and as used by the priest in the writing of the will was merely an enumeration or detailing of what the testator's estate consisted of and descriptive of the places where the moneys were to be*

found." It is reasonable to suppose that if he intended that a specified amount of money was to go to all or any of the beneficies he could have used phraseology similar to this "I give the 3,000. on deposit in the Brooklyn Bank to Ruthenian Greek Catholic Church." The contention that the testator intended that these gifts be specific is negatived by the expression that his money "all together = 17,100.00 or more is to be divided and applied as follows." *His intention was that the entire of his estate which aggregated about 17,100.00 should be shared and divided among the persons named.* It is true that some of the cases hold that the use of the word "my" is often operative in identifying an article but then it should be considered as to who used the expression. Again we urge that this will was not drawn by one learned in the law or familiar with legal phraseology. This is not the situation of one who says he gives a particular article such as "my horse," "my diamond ring," etc. The fact that he used the words "my cash money" (then declaring the amounts in the respective banks) "all together =17,100.00 or more" indicates clearly that he did not intend that one beneficiary should receive a certain portion in a certain bank and another beneficiary another portion in another bank, but manifests that *he merely designated that all of his estate aggregated a certain amount.* We respectfully urge, therefore, that the legacies are not specific.

In *Pennsylvania Co.* v. *Reilly,* 89 Eq. 252, the testatrix directed that out of the proceeds of the sale of her house $1,000.00 be set apart for her grandchild. The testatrix had disposed of her house in her lifetime. Vice Chancellor Leaming held that the bequest was demonstrative, saying: *"The circumstance that the testatrix at her death did not own the property out of which she directed the bequest to be paid is not alone operative to wholly defeat the bequest. A demonstrative legacy, so cir-*

cumstanced assumes the status of a general legacy and should be paid from the personal assets of a testator, and if properly charged from the testator's real estate."

In *Tichenor* v. *Tichenor,* 41 Eq. 39, testator gave his wife an annuity of $200.00 "payable from his personal estate." His personal estate was inadequate to produce the income. When he made the will he had two bonds and mortgages and in his lifetime these were foreclosed and the property bought in by him. Chancellor Runyon held that the annuity was a demonstrative legacy and was chargeable against the real and personal estate.

In *Aitken* v. *Sharp,* 93 Eq. 336, the testatrix made a gift of Ten Middlesex Water Company Bonds. She never owned such bonds. She did own bonds of another company. The gift was held to be general and not specific.

In re U. S. F. & G. Company, 90 Eq. 254, this court held that a bequest of "One-half of the balance of moneys, bonds and investments that I may die possessed of" to be a general legacy.

And so there are many cases in this state which hold that a bequest of a specified number of stocks and bonds constitutes a general legacy. Such as

Blaim v. *Scribner, supra;*
Savings etc. Co. v. *Crouch,* 93 Eq. p. 311;
Mecum v. *Stoughton,* 81 Eq. 319.

In *Prendergast* v. *Walsh,* 58 Eq. 149, testatrix gave to her three sisters or the survivor of them "Whatever of my money on deposit" in four banks in New York City (naming them) *"which may be on hand and not otherwise disposed of."* The testatrix withdrew the moneys from those banks and deposited the money with some addition in a Hoboken bank and the Vice Chancellor held that the removal from the banks designated in the will did

not constitute an ademption or disposition of the bequests in spite of the fact that he held that the legacy was specific. In the course of the opinion the Vice Chancellor said "The place of deposit was merely used as descriptive of the thing bequeathed. It was used to identify the particular money given, and it is entirely settled that where the place is merely descriptive the romoval of the thing to another place is immaterial." The Vice Chancellor apparently called the gift in that case specific in order to carry out the obvious intention of the testator that her sister should be the recipient of the money rather than the grandchildren who claimed that the legacy was adeemed by the removal of the moneys from the banks in which they were deposited and mentioned in the will. We most respectfully submit that though the phraseology "specific legacy" was used by the Vice Chancellor, the bequest in question was treated as demonstrative because under the strict rules of specific legacies an ademption might operate, whereas under the classification of demonstrative legacies, the effect would have been the same with additional advantages. Then, too, in the cited case the will referred to the money "which may be on hand and not otherwise disposed of", whereas in the case at bar no such expression is used or inferable. Obviously, the Vice Chancellor in that case enforced the clear intention of the testatrix in directing that the money be paid to the sister.

POINT TWO.

The legacies were a charge upon the real estate.

At the time of the making of the will, testator had the moneys in the banks and subsequently he withdrew a considerable portion and acquired real estate. This conversion of personalty into realty created charges upon the land.

In 40 Cyc. 2019 the rule is thus stated:

> "Where the testator makes an absolute disposition of all his personal estate, thereby leaving nothing for the payment of legacies, this is considered a material fact tending to show an intention to charge the legacy on the real estate undisposed of or passing under a residuary clause, as a different rule would attribute to the testator a purpose to make a gift in appearance and not in realty."

And on pages 2021-2022 this rule is found:

> *"Where, at the time of making the will, the testator owned sufficient personal property to satisfy the legacies, but afterwards converted into realty the personal estate from which the legacies would have been primarily payable, and made no change in the will, this has been held a circumstance to be considered as showing his intention to charge the payment of the legacies upon the real estate."*

Cited under this section is the case of *Turner* v. *Gibb,* 48 Eq. 526. In that case the testatrix made pecuniary legacies of $2,020.00. After the execution of the will she acquired four tracts of land, probably with the money. This property was not specifically devised. The legacy could not be paid from the personalty. At page 531, Vice Chancellor Green said:

> "It is, for reasons before stated, to be assumed that the testatrix, at the time the will was made, owned property sufficient, in quantity and kind, to meet the provisions of her will. If she afterwards converted the personal estate, from which the legacies would be primarily payable, into real estate, and made no change in her will, *it is a fair inference that she intended the real estate, which she owned at her death, and which represented pro tanto the personal estate she owned at the date of the will to respond for any deficiency of personal estate to meet her gifts."* It was so decreed.

In the instant case we have a very strong presumption that the testator intended that the legacies be charged upon the real estate for the reason that it appeared from the evidence that a contract for the purchase of property was entered into one month prior to the making of the will and that title to the property was acquired about two months after the making of the will. The testator moved from the place where he resided into the house which he purchased with Mrs. Patanska, one of the beneficiaries named in the will, and resided there until the time of his death. It can certainly be inferred that the testator when he made the will knew that if he took title there would not be sufficient moneys with which to pay the legacies in cash and it can also be reasonably presumed that he intended that his wishes be carried out and that his sisters, the churches and Mrs. Patanska should share in his estate and that the legacies be paid rather than to assume that the will and the provisions thereof be a mere idle gesture.

The court below in its opinion at Case, pages 102-103, said:

> "The testator's personal estate is insufficient to pay his legacies and since I have concluded that it was his intention to give his legatees,

generally, the respective sums stated in the will, I further conclude that the legacies are chargeable against the real estate of which the testator died seized. The provision in the will that Mrs. Patanska 'has right to keep and retain * * * all other moneys, valuable papers and my belongings which shall be left after my death,' even if a sufficient residuary devise to include real estate, shows an intention to give her only what remained of his estate after payment made of the specific sums given to his beneficiaries, but these words, in their ordinary meaning, refer to personal property only and, in fact, the testator dealt solely with personal property when he executed his will. Therefore and also because I am compelled to hold that Mrs. Patanska can take nothing under the will and that this and other provisions for her are void for a reason hereinafter stated, the testator died intestate as to his real estate and the same descended to his heirs at law, subject to the legacies."

In addition to the foregoing reasons that the conversion of the money into real estate created a charge upon the land, the rule in this state is well settled that if the personal estate is inadequate to satisfy legacies and the will contains a general residuary clause wherein real and personal property are given together that then the legacies are a charge upon realty. We urge that the testator created a residuary clause for he said that Anna Patanska shall "keep and retain"—"all other moneys, valuable papers and my belongings which shall be left after my death." It is entirely settled that no particular mode of expression, nor are special words necessary to constitute a residuary clause. All that is necessary is an adequate designation of that which has not been otherwise disposed of. If at all ambiguous, the words shall be given a broad rather than a narrow meaning.

40 Cyc. pages 1563-1564.

The word "belonging" has been held to mean and include realty of the testator.

7 Corpus Juris, page 1040 et seq., and notes thereunder.

In *Goetter* v. *Berth,* 99 Eq. 625 testator had no real estate when he made his will which provided that his widow should have and hold "all that I may be rightfully possessed of at the time of my decease." This was held sufficient to pass real estate although the words "give" and "bequeath" were used.

In *Tzeses* v. *Tenez Construction Co.,* 95 Eq. 145 the will read:—"I wish my niece to be put into possession of all I have in clothing, money, jewelry, in fact all I have." And this was considered sufficient to pass real estate in fee simple.

The case of *Johnson* v. *Bowen,* 85 Eq. 76 held that it is to be assumed that a testator intended to dispose of all his property and that the words "all moneys and income" were not limited merely to a disposition of personal property but included real estate as well.

In *Mt. Holly etc. Co.* v. *Deacon,* 79 Eq. 120 the word "moneys" was held to mean the equivalent of property and included all property of whatever nature belonging to deceased at her death.

It is clear, therefore, that the testator created a residuary clause wherein and whereby he bequeathed and devised both real and personal property and it is admitted that the personal estate is insufficient to pay the legacies in full. The cases are that under such a situation a charge upon the land is imposed for the payment of the legacies.

In *re Baylis,* 95 Eq. 120 it is said that since *Corwine* v. *Corwine,* 24 Eq. 579 the rule is established that in the absence of an express charge or anything else to the contrary in a will, a testator generally intends the legacies given by his will to be a charge

on his real, as well as on his personal estate when the residuary real and personal property are given together.

So, too, Chancellor Walker in *In re Smith,* 94 Eq. 1 held "That a legacy is chargeable upon lands devised by the same will where the personal estate has been exhausted."

To the same effect is *Paterson etc.* vs. *Blauvelt,* 72 Eq. 725.

Should this court uphold the court below in its determination that Anna Patanska, the legatee witness to the will, is disqualified from accepting any benefit under the will, the rights of these appellees are not disturbed for the effect would be that instead of Anna Patanska taking as residuary legatee there would be substituted in her place and stead as residuary legatees the next of kin, cross-appellants. In other words, a determination that Anna Patanska is disqualified does not bring about a revocation of the residuary clause but merely a disqualification of the person named in the residuary clause. The next of kin can be in no better position that Mrs. Patanska herself and hence their rights would be subject to payment of the legatees designated by testator.

For the reasons urged we respectfully submit that the decree of the court below insofar as the churches are concerned be affirmed.

Respectfully submitted,

O'BRIEN & TARTALSKY,
Solicitors for Ruthenian Greek Catholic Church etc.

JAMES F. KELLY,
Solicitor for Greek Catholic Church of Habury, Hungary.

SAMUEL TARTALSKY,
Of Counsel.

New Jersey Court of Errors and Appeals

Between ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *Complainants-Appellees,* and PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA, *Defendants-Appellants.*	On Appeal. October Term #45.
Between PAZIA DUGAN KUSMA, MARY DUGAN MURYN and EVA DUGAN CHAYKA, *Complainants-Appellees,* and ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *Defendants-Appellants.*	On Cross Appeal. October Term #22.

BRIEF AND ANSWERING BRIEF OF PAZIA DUGAN KUSMA, MARY DUGAN MURYN AND EVA DUGAN CHAYKA.

This brief is submitted in support of the cross appeal of the above named, listed as #45, October 1928 term, and as an answering brief on the appeal of Anna Patanska, listed as #22, October 1928 term.

A cross appeal was also taken by 2 other defendants, Michael Druga and Vasil Druga (#91—

October 1928 term) identical with the cross appeal of above named defendants to which the latter filed an answer assenting to the reversal which it prayed.

Facts.

The facts were the subject of a stipulation (Exhibit C, p. 90) which was supplemented by testimony relating to the circumstances attending the drawing of the will while the testator was sick and in contemplation of death (p. 67, line 35), and the extent of his estate at the time of his death (p. 64). From this testimony the Vice-Chancellor made findings of facts (pp. 97, 98 and 99) and concluded (1) that the legacies were general (p. 102, line 18), (2) that deceased died intestate as to his real estate and the same descended to his heirs, (3) that the realty was subject to the legacies (p. 103, line 5) and (4) that the complainant, Mrs. Patanska, a legatee under the will, forfeits such legacy by reason of having acted as attesting witness (p. 103, line 30).

The Vice-Chancellor further found as a fact that at the time of making the will the testator probably contemplated the abandonment of a contract previously made for the purchase of real estate (p. 101, line 5), and that he intended to deal solely with personal property when he executed his will (p. 102, line 35).

ARGUMENT.

1. The legacies were demonstrative and not general.

2. The legacies abated to the extent that the designated fund was insufficient to satisfy them, and no recourse, unless specially intended, could be had to the realty for the deficit.

3. The decree erroneously made the legacies a charge on the real estate merely because of an insufficiency of personal assets.

4. Anna Patanska forfeited the legacy by reason of attesting the will by force of the plain language of the statute.

POINT I.

The legacies were demonstrative and not general.

The language of the will is perfectly apt to disclose the intention of the testator, and for the purpose of providing a demonstrative legacy better expression could not be used by even one skilled in the law. The bounty was to proceed from "my cash money" * * * is "to be divided and applied as follows." Precise information is given as to where the cash money was to be found, and what banks were the custodians of the fund. Further on in the testament Anna Patanska was given the "right to keep and retain all other monies, valuable papers and belongings which shall be left after my death." Mrs. Patanska was the custodian of the latter articles, and this direction, asserted to be a residuary clause, was merely an exoneration from liability to account for assets.

> The holding in *Pendergast* v. *Walsh*, 58 N. J. Eq. 149 that a disposition of bank deposits by will constitutes a specific legacy, even in case where the money was withdrawn and placed in a new depository, seems to be at variance with many decisions which have declared that a bequest of bank deposits constitutes a demonstrative and not a specific legacy.
>
> *Tenille* v. *Phelps*, 49 Ga. 541;
> *Kennedy* v. *Sinnot*, 179 U. S. 606;
> *Bowen* v. *Dorrance*, 12 R. I. 269;
> *Gardner* v. *McNeal* (Md.), 82 Atl. 988.

Amer. & Eng. Ency. of Law, 2nd Ed., Vol. 28, p. 72 dealing with the matter of a bequest out of a designated fund constituting a general legacy states: "The criterion in all cases is that it must appear distinctly by the will that the testator intended the legatee to have the legacy at all events. While this principle is perfectly well settled, it is obvious that minds may differ as to what constitutes evidence of such intention on the part of the testator, and such diversity of opinion actually does exist."

If there is an independent gift of money accompanied by a direction to pay it out of certain specific monies the legacy is demonstrative.

Roberts v. *Pocock,* 4 Ves. Jr. 150;
Acton v. *Acton,* 1 Mariv. 178.

It is contended that nothing appears in the will respecting the testator's intention except his concern that the money which he had in bank and the belongings which he had in the custody of Mrs. Patanska should find definite ownership in the event of his expected dissolution, and that it discloses no thought whatever of future contingencies, nor, indeed, any loving regard for his kindred. He was unmarried and his direction that his living sisters, his boarding mistress, an American church and one in Ruthenia should participate in his savings is not evincive of any fervid desire whatever that these should be the object of bounty. The will projected nothing more than a handy program of having the money disposed of when it would be taken out of the bank.

His own phraseology upholds the contention that there was to be a division of the funds if such division had to come, and evidences no such bountiful solicitude as would vindicate the view that the legatees were to be benefited at all events. On this branch of the case the Vice-Chancellor erred

in finding that the legacies were general because "no indication appears that he intended that they should receive the sums bequeathed to them only in case his property remained unchanged in character to his death. Not only is that thought mentioned in the will, but on the contrary it deals with personal property only and makes no disposition of real estate." The plain fact is that the intention which the Vice-Chancellor said was not indicated was very clearly stated. The bequests were not given generally, but his money in bank was to be divided and applied. The Vice-Chancellor decided the case by construing the will to read "my estate, now consisting wholly of money in bank, shall be divided and applied as follows." The actual expression was "my cash money" * * * "to be divided and applied as follows." The Vice-Chancellor overlooked that the money in bank did not, according to the terms of the will, constitute the entire estate "consisting wholly of money in the bank." The will itself proclaimed that he had further assets consisting of the debt of Mrs. Patanska, Liberty Bonds and other money, valuable papers and belongings.

The Vice-Chancellor's conclusion that it was the testator's intention that his legatees were to receive the sum of monies specified in all events is negatived by the circumstances surrounding the will: It was not made until he believed himself to be *in extremis;* Anna Patanska, a stranger, was given $7,500.00 and his belongings (see Stipulation of Facts); his sisters of whom he never spoke, to whom he never wrote and whom he had not seen in 22 years (pp. 74 and 75) were given shares of $2,000.00 and $3,000.00. A church in Hungary where he lived 39 years before (p. 75) was given $3,000.00 (the same amount as his most favored sister), while $4,000.00 was given to a church in Jersey City (see Stipulation of Facts). These cir-

cumstances are in nowise eloquent of a purpose to benefit the legatees at all events. Such intention should clearly appear to overcome the plain language of the bequest which deals with the division of particularly specified funds.

POINT II.

The legacies abated to the extent that the designated fund was insufficient to satisfy them, and no recourse, unless specifically intended, could be had to the realty for the deficit.

> A demonstrative legacy is not adeemed if the particular fund be called in or fail, but in that event the legacy is payable out of the general assets, that is to say, out of the personalty or, if properly charged, out of the realty of the testator's estate.
>
> *Johnson* v. *Conover,* 54 N. J. Eq. 333.

In the above case the claim that the deficit resulting from the failure of a demonstrative legacy was chargeable against the realty was rejected because the circumstances did not sanction the application of the rule in *Greville* v. *Brown,* 7 H. L. C. 689, which required, first, an intention to so charge or the implication of such intention from the making of general legacies and, second, by the blending of real and personal property in one mass in a residuary clause.

POINT III.

The decree erroneously made the legacies a charge on the real estate merely because of an insufficiency of personal assets.

The principle pervading the authorities on the subject of charging legacies upon the realty is that of intention alone. Our earliest pronouncement on the subject is that personal estate is the primary fund out of which legacies are payable. The real estate is not charged with the payment of legacies unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred from the language and disposition of the will.

Leigh v. *Savage,* 14 N. J. Eq. 124.

The many subsequent rulings dealing with the subject all faithfully adhere to the principal that intention, and intention alone, be the same express, implied or inferred, is the criterion in such case. The doctrine of *Greville* v. *Brown,* 7 H. L. C. 689, was adopted in *Corwine* v. *Corwine,* 24 N. J. Eq. 579, and in a multitude of cases which followed. The rule is merely one in aid of the interpretation of intention, and lays down that such intention may be implied where legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, but the implication even then is merely of an intention to charge on the residuary realty as well as on the personal estate. The rule has no application in the present matter, because there is here no residuary clause, and if there was it could not have contained any disposition of realty of which the testator had none.

> The holding in the present case was a clear disregard of the established rule that mere insufficiency of personalty raises no presumption of intention to charge legacies on realty.
>
> *Johnson* v. *Paulson,* 32 N. J. Eq. 390.

> No implication of such an intention can arise when the general or particular terms of the will are inconsistent therewith.
>
> *Paterson Hospital* v. *Blauvelt,* 72 N. J. Eq. 520;
>
> *Stevens* v. *Flower,* 46 N. J. Eq. 340.

The intention to charge must be gathered from the will where the same is not latently ambiguous.

Shannon v. *Ryan,* 91 N. J. Eq. 491;
Tyndale v. *McLaughlin,* 84 N. J. Eq. 652.

It is contended that the will in the present case being made by a man who had personalty only, and which by its terms professed to deal with personalty only, cannot have attached to it any intention with respect to realty or charges thereupon. The Vice-Chancellor found that the testator intended to dispose only of his personal assets on the brink of impending death, and an intention, in such circumstances, to charge legacies upon real estate which he did not own and never expected to own is inconceivable. The decree in the present matter was arrived at by a reference to the conduct of the testator after his recovery which was entirely unallowable. Testamentary intention must be gathered from the will itself, and the circumstances of the estate of the testator and of his beneficiaries at that time.

It has been held that a will of personalty exclusively does not, even under our statute, operate to affect after-acquired real estate.

Gardner's Exrs. v. *Gardner,* 37 N. J. Eq. 487, aff. 39 N. J. Eq. 357.

With equal force the present will intended to deal with personalty, and cannot be regarded as importing any intention to charge legacies upon unacquired real estate. The cases which deal with such a presumed intention are all found to deal with real estate owned at the time with the possible exception of *Turner* v. *Gibbs,* 48 N. J. Eq. 526.

In that case the testatrix owned several pieces of property at the time of the making of the will and acquired other parcels before

her death. The conclusion that the legacies provided were chargeable upon the realty resulted from the circumstances of there having been an adequate residuary clause disposing of realty and personalty in one mass, and that there were in addition many other circumstances indicative of an intention that the legatees should take at all events. Those circumstances are expatiated in the opinion at pages 530 and 531 and are as follows: (1) that the beneficiaries whose legacies would be abated were not strangers but grandchildren of the testatrix' blood and that the legacies are the only provisions made for them; (2) that the residuary clause was sufficient to carry the real estate acquired after the making of the will; (3) that such after-acquired property would go to the residuary devisee not by specific devise but by force of the statute; (4) that the grandchildren would not receive their legacies in full and (5) that the testatrix had charged her debts and funeral expenses upon the real estate.

In the present case no such collocation of circumstances appear, and the Vice-Chancellor in his conclusion that the legacies were charged on the real estate adverts to nothing except a purpose on the part of the testator to bestow legacies which would fail because of lack of personalty.

While in the event of abatement the stranger legatees would sacrifice part of their bounty, the kindred would not be jeopardized because of their inheritance of the realty.

POINT IV.

Anna Patanska forfeited the legacy by reason of attesting the will by force of the plain language of the statute.

The statute (C. S. 5862, Sec. 4) evinces a clear purpose to dispel all doubts as to the competency of a legatee to act as attesting witness, and plainly

says that such legatee shall be admitted as a witness notwithstanding such legacy. In order not to do violence to the requirement of earlier statutes that witnesses shall be creditable, it prescribed that if any person hath attested the execution to whom a legacy hath been given such legacy so far as concerns such person attesting the execution shall be *utterly* null and void. Language so positive does not admit of any construction that the witness referred to in the statute should be a superfluous witness. Many states have enacted legislation exempting from the operation of a similar statutory rule the witness whose testimony is not necessary, but in New Jersey such legislation has not yet appeared and the effect of the statute is peremptory.

These appellants, answering the appeal of Anna Patanska, refer to the argument contained in the brief of Michael and Vasil Druga which contentions they adopt.

It is respectfully submitted that the decree below should be sustained so far as it determines that the deceased died intestate as to the lands and that they descended to his heirs at law; that it should be sustained as to the holding that the attesting witness forfeited her legacy, and that it should be reversed as to its refusal to hold that the legacies abated upon the insufficiency of the personalty and as to the judgment that the legacies were a charge upon the realty.

RICHARD DOHERTY,
Attorney of and of Counsel with
Defendants-Appellants.

New Jersey Court of Errors and Appeals

Between:
ANNA PATANSKA, *et al.*, Executors of the Estate of Nick Dugan, deceased, *et al.*,
Complainants-Appellees,

and

MICHAEL DRUGA, VASIL DRUGA, STEVE DRUGA and ANNA DRUGA LEVECKY,
Defendants-Appellees.

ON BILL, ETC.

BRIEF OF THE DEFENDANTS, MICHAEL DRUGA, VASIL DRUGA, STEVE DRUGA AND ANNA DRUGA LEVECKY.

Statement.

These are cross appeals from a decree of the Chancellor, advised by Vice Chancellor Fielder.

The Facts.

Nick Dugan died a resident of Jersey City on April 27, 1926, leaving a last will and testament probated in the Orphan's Court in the County of Hudson, May 13, 1926, copied at page 33, of the state of the case.

The will was dated August 8, 1925, and was executed in the Jersey City Hospital (page 66) when the testator was under apprehension of a fatal illness.

The witnesses of the will were Julia Narozniak, Anna Patanska and Reverend Alex Ulitsky. Anna Patanska was one of the principal beneficiaries of the will and one of the witnesses to the probate thereof.

At the time of the execution of the will, property of testator consisted of cash balances in a number of banks designated in the will.

Testator recovered from his illness and between the time of the making of the will and his death, withdrew these cash balances on and about November 14, 1925, and purchased real estate therewith. This purchase was made pursuant to a contract dated July 1, 1925 (page 97) whereby title was to pass July 24, 1925. The deed, however, was not given until November 14, 1925, and thereafter testator withdrew other moneys from the bank which he used to reduce the principal of the mortgage (page 98). Two points are involved in these appeals. First, whether by the conversion of the cash into realty after the making of the will the bequests adeemed. Secondly, whether the gifts to Anna Patanska are null and void, she having been a witness to the will. The learned Vice Chancellor, held that the legacies were general, were a charge upon the land and that the bequests to Anna Patanska were void.

Discussion.

The defendants, Michael Druga and Vasil Druga, and Anna Druga Levecky and Steve Druga contend that:

1. The several sums of money bequeathed in said will are specific and are adeemed or abate *pro rata* in the event of the cash mentioned in the will being insufficient to pay all in full.

2. As to the premises described in the Bill of Complaint the said Nick Dugan, deceased, died intestate, and that they descend to the heirs and next of kin mentioned in the counterclaims (at pages 47, 48).

3. The net proceeds realized from the sale of the real estate should be distributed amongst the heirs-at-law and next of kin mentioned in the counterclaims (at pages 47, 48).

POINT I.

The learned Vice-Chancellor in his opinion filed in this cause said: "I think that the clear intention of the testator as expressed in his will * * * be so construed that the bequests therein made are general legacies."

The several sums of money bequeathed in said will are specific. Specific legacies are defined in 28 R. C. L. 289, Section 263, as follows:

> "A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which can be satisfied only by the delivery and receipt of the particular thing given. A specific legacy may be looked upon as one which the testator has separated from the general mass of his property for the benefit of a particular legatee. In ascertaining whether a legacy is specific recourse should be had to the intention of the testator, and this intention should be gathered from the language used in creating it, in the light of the circumstances of the testator and the property which he is disposing of in his will. No special words are required to make a bequest specific though such words as 'my',

'owned by me', 'standing in my name', or 'in my possession' are indicative of the specific character of the legacy. * * * A gift of a particular horse, money in a particular receptacle, or a particular obligation to pay money are all instances of specific bequests. And a bequest of 'all horses, mules, cows, hogs, wagons, farming implements, household and kitchen furniture, on said plantation,' is a specific legacy. The fact that a legacy is associated with other gifts which are clearly specific weighs in favor of holding it to be specific also. *A specific legacy may consist of money if it is designated with sufficient certainty,* and when real or personal property is devised or given to be sold, and the proceeds are to be paid to a certain named person or persons, the legacy is specific. Even a bequest of a certain amount, with power to select all or any part of it in notes belonging to the testator, becomes, upon the exercise upon the power of selection, specific. But it has been held that a bequest of 'my household goods, cash on hand, or in bank, life insurance and all other personal property of every description', is a specific legacy so far as the household goods, cash and insurance are concerned, and a general legacy so far as any other property passing by it is concerned."

In *Kearns* v. *Kearns,* 77 N. J. E. 453, Vice-Chancellor Leaming held that "the bequest of 'my household goods, cash on hand or in bank, life insurance and all other personal property of every description' is a specific legacy so far as household goods, cash and insurance are concerned."

It is to be noted that in this case particular stress is laid on the possessive pronoun "my". So it is in paragraph 2 of the will, wherein the testator says "my cash money of which, etc.", and then enumerates how much money he has and where it is located.

The Vice-Chancellor goes on to say further "If the thing bequeathed is, by the terms of the will, individuated so that it is distinguished from all others of the same kind, it is a specific legacy."

As to the money in the banks, in the matter of *Prendergast* v. *Walsh,* 58 N. J. E. 149, which was a case similar to this one, there was a bequest of money on deposit in four named New York Banks. Before the death of the testatrix, she removed the balance from the New York Banks to a bank in Hoboken. Vice-Chancellor Reed held that "the gift was specific. It was a gift of the money in the several banks at the time the will was made, which should not be otherwise subsequently disposed of by the testatrix. It was, therefore, a bequest of a specific thing."

In *Blair* v. *Scribner,* 65 N. J. E. 498, there was a bequest of a specified number of shares of stock in a designated corporation. At the time the will was made testator owned sufficient shares to fulfill the legacies, but at the time of his death the number had been decreased. Vice-Chancellor Emery held that the bequest was specific and that it failed because of the want of designated shares to satisfy it. And the principles of construction used by Vice-Chancellor Emery in this case have been upheld by Chancellor Walker in *Allen* v. *Allen,* 76 N. J. E. 245 at 250, despite the reversal of *Blair* v. *Scribner* in 67 N. J. E. 583 at 588.

The several sums of money bequeathed in said will as specific legacies have adeemed by the withdrawal of the moneys from the bank. 28 R. C. L. 345, Section 341:

> "The distinctive characteristics of a specific legacy is its liability to ademtion. If the identical thing bequeathed is not in existence, or has been disposed of so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone.

The rule is universal that in order to make a specific legacy effective the property bequeathed must be in existence and owned by the testator at the time of his death, and in non existence of property at the time of the death of the testator which has been specifically bequeathed by will is the familiar and almost typical form of ademption. This may result from a variety of causes, such as a gift during the lifetime of the testator, of the particular article which was the subject matter of the legacy, its consumption, loss, death, or sale, and in each of such instances the courts have held that the legacy is adeemed. Where the testator substantially alters the form of the subject matter of his bequest as by making wool into cloth, or a piece of cloth into a garment, the legacy is adeemed, because the subject matter cannot be restored to its former state. A bequest of corporate stock is adeemed by its sale by the testator and the investment of the proceeds in other stocks, and the newly purchased stock cannot be substituted for the former to answer the bequest. And it has been held that a specific legacy of stock in a corporation is adeemed where, after the execution of the will, the testator exchanges the stock for stock in a corporation which has succeeded to the rights, duties, and property of the first corporation, or where the charter of the corporation expires during the lifetime of the testator and he receives dividends in liquidation of the stock. So a specific bequest of the proceeds of specified life insurance policies has been held to be adeemed by the collection of testator of the surrender value of the policy, and the deposit of the proceeds in the bank, investing them in other securities, or mingling them with other moneys of the testator. . . . In the case of a specific legacy, whenever the article in question is not forthcoming, the will is usually construed as meaning that the testator did not intend any other article for the legatee, and therefore, he cannot have anything. Accord-

ing to some decisions, however, slight or immaterial changes in the form of the property bequeathed will not work an ademption. Sometimes this doctrine of ademption is expressed by saying that the alienation of bequeathed property by the testator in his lifetime operates as a revocation *pro tanto* of his will."

In the matter of the estate of Henrietta Cooper, deceased, Chief Justice Gummere, writing the opinion for an undivided Court, held, in 95 N. J. E. 210, 30 A. L. R. 673 at 674, that:

> "In the case of Morse *v.* Converse, ... N. H. ...., 113 Atl. 214, a decision of the supreme court of New Hampshire, Parsons, Ch. J., in discussing the doctrine of ademption, thus defines its scope: A legacy which is specific is adeemed when the particular thing is wholly lost or destroyed; or is disposed of by the testator during his life; or is so altered by him in its form as to indicate a change of testamentary purpose on his part, an intentional partial revocation of his will."

POINT II.

The learned Vice-Chancellor has concluded in his opinion filed in this cause that "I further conclude that the legacies are changeable against the real estate of which the testator died seized. No express power of sale is conferred on the executors, but I shall hold that they have an implied power to sell for the purpose of raising money with which to pay legacies."

If for the sake of argument we are to assume that the legacies bequeathed in the will are general or demonstrative, this Court would not have the power to order the sale of the real property of the testator, 28 R. C. L. 305, Section 286:

> "Ordinarily the personal estate is not only the primary fund, but *prima facie*, the exclusive fund from which pecuniary legacies are to be paid, and real estate is not chargeable with the payment of legacies, unless the intention of the testator so to charge it is expressly declared or may be fairly deduced from the language of the will. * * * The insufficiency of the personal property is not considered a sufficient ground to impute to the testator a desire to charge legacies on the real estate. * * *"

In the matter of *Leigh* v. *Savidge,* 14 N. J. E. 124, there was a bill filed to recover legacies bequeathed by the will of John Savidge, deceased. The personal estate of the testator after the payments of debts was insufficient to pay the legacies and the bill prayed that the legacies may be declared a charge upon the real estate and that enough of the real estate be sold to pay the legacies. Chancellor Green in a very capable opinion held at page 129, that:

> "Personal estate is the primary fund out of which legacies are payable. The real estate is not charged with the payment of legacies, unless the testator intended it should be and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and dispositions of the will."

This principle of law is followed out by Chancellor Runyon in the matter of *Taylor* v. *Tolen,* 38 N. J. E. 91, at page 97.

In the matter of *Weber* v. *Bardon,* 111 Atl. 649, Vice-Chancellor Fielder upholds "a long line of decisions of our courts not necessary to cite here," and then goes on to quote from *Leigh* v. *Savidge.*

Whether the bequests are held to be specific or demonstrative is immaterial. In *Johnson* v. *Conover,* 54 N. J. E. 333, Vice-Chancellor Reed held

that a bequest of $8,000.00 invested in stocks was demonstrative in that it bequeathed a sum of money to be primarily raised out of certain specific property. In that case at the time of the death there was not sufficient stocks to satisfy the legacies and it was held recourse could not be had to the real estate embraced in a residuary devise in order to satisfy the legacies.

Wills, 40 Cyc. 2011, Charge of Legacies on Real Estate. (1) In general:

> "In the absence of a statute to the contrary, unless legacies are charged upon the real estate by the will, either in express terms or by clear implication, the personal estate is not only the primary fund, but it is the only fund for their payment, and if the personalty is insufficient, the legatees have no fund from which payment can be enforced."

Wills, 40 Cyc. 2013, Question of Intention. How Intention Must Appear:

> "Whether legacies are charged on the real estate of the testator depends primarily upon the terms and phraseology of the particular will under consideration; and the chief criterion for the determination of the question whether there is such a charge is, as in all other cases where the construction of wills is involved, the intention of the testator. The intention to charge legacies on real estate must clearly appear or be clearly deducible from the language and dispositions of the will. It is not necessary that the charge shall be made in express terms or that any particular language shall be used. It may appear either expressly or by implication from the language and disposition of the will, and the intention to charge is to be given effect whenever it is discoverable from *anything in the instrument.*"

Wills, 40 Cyc. 2017, Circumstances Tending to Show Intention. (A) Extrinsic Circumstances in General:

> "As we have seen the intention to charge legacies on real estate must appear from the language and dispositions of the will. It cannot be inferred solely from or shown solely by evidence of circumstances altogether extrinsic to the will; nor is such evidence admissible on the question of intent where there is no ambiguity in the will."

At the final hearing the learned Vice-Chancellor over objection on behalf of these appellants permitted testimony and circumstances extrinsic to the will and its execution (page 89) but failed to advert to it in his conclusions.

Wills, 40 Cyc. 2018, Real Estate Undisposed Of:

> "In the absence of statutory provision to the contrary, the rule that legacies, to constitute a charge on land, must be so charged by the will applies, not only to land specifically devised and land passing under a residuary clause; but also to real estate which is undisposed of by the will and passes to the heirs at law by descent; the mere fact of a failure to dispose of real estate not being sufficient to show an intention to charge it with the payment of legacies where the personalty is insufficient."

40 Cyc. 2021 Condition of Estate. (1) At Time of Execution of Will.

> "If at the time the will was executed the testator had sufficient personal property to pay debts and legacies, this fact is ground for inference against an intention to charge the legacies on land."

All of the testimony presented to the Court on the final hearing, with respect to declarations by

the testator in his life time are not only immaterial and irrelevant but incompetent to establish a will other than the one which was probated. It needs no citation of authorities to demonstrate that declarations made by the testator with regard to the construction of his will are incompetent as evidence unless it is clearly ambiguous. The utmost that declarations of testator tend to prove is that he had a high regard for Mrs. Patanska—nothing more. The expression of Judge Lowey of his intention to make a new will does not establish such new will nor authorize the Court to change the terms and character of the will before it.

It is to be noted that the will before the Court, was executed while testator was ill, that he purchased the property three months after the will was executed and that he held the property for a further period of six months preceding his death.

In concluding this point, it can be said here that there is nothing in the will to indicate an intention of the testator to satisfy these legacies out of the real property. On the contrary if the allegations made in the bill filed in this cause are true, that is if the testator withdrew almost all of the moneys he had in the bank, there is a revocation of his will *pro tanto*. And if it is proven that he withdrew another $4,000.00 to further reduce a mortgage which was on the premises in question, then he withdrew more money than he bequeathed and worked an entire revocation of his will so that in reality, the testator died intestate.

No intention can be found in the will wherein the testator blends his real and personal property so as to charge the real estate with the payments of the legacies.

Tyndale v. *McLaughlin,* 84 N. J. E. 652, Backes, V. C., at 657:

"The testator's intention must be gathered from within the four corners of the will. What he has laid down there, either expressly or by implication, the court construes, and the leaning will always be toward a construction to prevent intestacy. *But the will must furnish the basis for the construction. If the testator through ignorance or inadvertence, fails to dispose of all his estate, it is not within the power of the court to supply the omissions. The power of the court is to construe, not to make, wills.*" (Italics ours.)

In *Smith* v. *Pond,* 90 N. J. E. 445, V. C. Backes at page 450:

"The intention of the testatrix must be found in the will. It cannot be established *aliunde.*"

Savings Investment & Trust Co. v. *Crouch,* 93 N. J. E. 311 at page 313:

"Evidence *aliunde* is admissible in aid of the intention expressed in the will but not to supply the intention. In other words, the intention cannot be sought in the circumstances surrounding the testator at the making of the will, if it is not somewhere seen in the will itself, that is, the will must attach to it the surrounding circumstances to clarify the testator's wish as indicated by his testament. The disposition of one's earthly belongings, after death, is a privilege of the statute and the manner must be found within the four corners of the testament."

POINT III.

The bequests to Anna Patanska are null and void in that she attested the will as a witness.

4 Compiled Statutes 5862 Section 4. "That if any person hath attested the execution of any will or codicil, after the first day of March, in the year of our Lord one thousand seven hundred and fifty three, or shall attest the execution of any will or codicil hereafter to be made, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments, for the payment of any debt or debts, hath been or shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerned such person attesting the execution of such will or codicil or any person claiming under him or her, be utterly null and void, and such person shall be admitted as a witness to the execution of such will or codicil, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil."

In the case of *Case* v. *Hasse,* in 83 N. J. E. 170 at 177, Vice-Chancellor Howell held that "All the bequests to Jennie F. Romer are void. She was one of the witnesses to the will and is barred by our statute."

There was no residuary clause in the will unless the legacies to Anna Patanska under the wording of the will can be called the residuary clause and therefore as to the legacies which Anna Patanska was to receive, the testator died intestate, and it is immaterial that there were three witnesses to the will. The statute distinctly says "that if *any* person hath attested, etc."

While it is true that in most of the United States, statutes expressly provide that if a will can be proved without the testimony of the witness who is a beneficiary, the devise or bequest shall not be void, it is not at all applicable to the case at bar. In this State there is no statute governing bequests or devises to superfluous witnesses, except Section 4 of the Wills Act, which distinctly applies to any witness without any exceptions or reservations whatsoever.

As to Section 4 of the Wills Act, 4 C. S. 5862, this is a matter for the legislature to remedy and not the Courts.

In the case of *Lippincott* v. *Wikoff*, 54 N. J. E. 107, cited by the appellant, the question involved was not one of *superfluous* witnesses, but one of *competent* witnesses. In this matter it made very little difference if the will were set aside, for then the wife of the witness whose competency was being questioned, would have received as much if the testator died intestate. By the will she received half of the real and personal property of her late father. There were only two children and heirs at law of the testator and undoubtedly the Court had this in mind when finding the conclusions. At the common law, and in the absence of express statute, a husband was an incompetent witness to the execution of a will wherein his wife is a devisee, for the reason that at common law, the wife can do no act which may prejudice the husband without his consent. However, in recent years, the various Married Women's Acts have taken away and removed all of the disabilities that existed at common law, so that today a married woman enjoys all of the privileges of a *femme sole.*

Interest as Disqualification. 28 R. C. L. 134 Section 88.

> "It would seem to be the well settled common law rule that interest will disqualify one as a subscribing witness to a will, and it is sometimes expressly prescribed by statute that a will must be signed by a certain number of 'disinterested' witnesses, or witnesses not beneficially interested under the will. Generally speaking, however, an interest which will render one incompetent as a witness to a will must be a pecuniary or proprietary interest—a relation such as that of debtor or creditor, heir or legatee, by which he will gain or lose something by the result of the proceedings—as distinguished from an interest of feeling, sympathy, or bias. It must be certain and not merely possible or contingent; not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof. If a person is interested as legatee or devisee under the will, or is to derive a pecuniary benefit or advantage from any part of it, he is disqualified to act as an attesting witness. By virtue of statute in a number of states, however, the witness is competent, but all beneficial devises, legacies, and gifts given to him in the will are void, unless the will is proved by a sufficient number of other competent witnesses. Other statutes of this nature deprive the witness of taking any property of the decedent other than what he would have taken by the law of descent. A Statute making void a devise or bequest to a witness to a will which cannot be proved without his testimony has been held to apply only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate. Some courts place a person interested, at the time of attestation, as an officer or otherwise, in a religious or charitable institution to be benefited by the will, on the same plane as a legatee or devisee under the will, or a per-

son deriving a direct pecuniary benefit or advantage under a provision thereof. The weight of authority is, however, apparently to the contrary, and it has been held that a provision in a will giving property to a local lodge of a fraternal order is not void because the will was witnessed by members of such lodge. So the inhabitants of an incorporated society, to whom property is devised for the support of a school, have been declared competent witnesses to attest the will. Where, as is the case in some states, a will must be subscribed by witnesses not beneficially interested under such will, a son of the testator receiving much less under the will than his interest as heir-at-law is a competent witness to prove the will."

CONCLUSION.

The decree of the Court of Chancery should be reversed in so far as it holds the legacies a charge upon the land and affirmed in so far as it holds the gifts to Anna Patanska to be void.

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