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Bill of Complaint.

In Chancery of New Jersey.

To the Honorable

EDWIN ROBERT WALKER,

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Chancellor of the State of New Jersey.

The complaint of Joseph G. Shannon, of the City of Jersey City, New Jersey, executor of the Last Will and Testament of Ellen J. B. Shea, deceased, shows:

1. That Ellen J. B. Shea, of Jersey City, New Jersey, died November 28th, 1916, leaving a last Will and Testament, which was made and executed November 11th, 1916, and which was duly admitted to probate by the Surrogate of Hudson County, December 8th, 1916, a true copy of which Last Will and Testament of Ellen J. B. Shea, Schedule A, to which for greater certainty complainant begs leave to refer. 20

2. Letters Testamentary thereon were issued to Complainant, December 11th, 1916, and he thereupon took upon himself the burden of administration of said estate.

3. That her estate consisted of real property located in New Jersey and New York and personal property. 30

4. By the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh paragraphs of said Will she made specific bequests of personal property and a specific devise of real estate located in New Jersey.

5. By the Twelfth paragraph of said will she gave pecuniary legacies to the persons and cor- 40

Bill of Complaint.

10 porations in said Twelfth paragraph mentioned and to the amounts therein specified and for the purposes therein specified to the amount of Forty Thousand Dollars, (\$40,000.00), and by the Thirteenth paragraph of said Will she provided that should her personal property be insufficient to enable the foregoing pecuniary legacies to be paid then she directed her executor to sell either all or so much of her land at Spuyten Duyvil, in the State of New York, as may be necessary, in such manner as in his judgment is deemed best to produce funds to supply the deficiency.

20 6. By the Fourteenth paragraph of said Will she gave, devised and bequeathed all the rest, residue and remainder of her estate, wheresoever situate and of whatsoever character unto her three nephews, Joseph Gilmore Shannon, John Hall Shannon and Robert Shannon, in equal shares to them and their heirs and assigns absolutely and forever.

7. That her personal estate, other than that specifically bequeathed, amounted to, approximately, Twenty-three Thousand Nine Hundred Eighty-four & 62/100 Dollars and is insufficient to pay the pecuniary legacies above mentioned and provided for in said paragraph Twelfth of her Will.

30 8. Pursuant to direction of and authority given to him in and by said Will, Complainant, upon failure of the personal property to satisfy the pecuniary legacies and in order to produce funds, to supply the deficiency, sold the Spuyten Duyvil real estate referred to in said Will and obtained therefor the sum of, Thirty-five Hundred Dollars, (\$3500.00), out of which he paid the expenses of the sale, so that the entire personal estate of the testatrix (other than personal property specifically bequeathed) together with the

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Bill of Complaint.

proceeds of the sale of the Spuyten Duyvil real estate amounts, approximately, to Twenty-one Thousand Seventy-nine Dollars and Ninety Cents, (\$21,079.90), and is insufficient to pay the pecuniary legacies in full.

9. That the estate of the testatrix, other than personal property above mentioned, the real estate specifically devised by her will and the Spuyten Duyvil real estate consists of real property located in the State of New Jersey of the value, approximately, of Twenty-four Thousand and Fifty Dollars, (\$24,050.00) and the equity of testatrix amounted approximately to Fifteen Thousand Five Hundred Fifty Dollars (\$15,550.).

10. Complainant says that the personal estate is sufficient to pay all debts of the testatrix but is not sufficient to pay the pecuniary legacies in full.

11. It is claimed and insisted by John Hall Shannon and Robert Shannon, two of the residuary legatees, that the real estate not specifically devised, other than the proceeds of the sale of the Spuyten Duyvil real estate, is not charged with the payment of the pecuniary legacies in said Will and that the personal estate and the proceeds of the Spuyten Duyvil real estate being insufficient to satisfy in full the pecuniary legacies such legacies abate proportionately and that the residuary devisees are entitled to have said real estate free from any claims of the pecuniary legacies; and on the contrary, it is claimed and insisted by the pecuniary legatees, or some of them, that the pecuniary legacies, upon failure of the personal estate and the Spuyten Duyvil real estate to satisfy such legacies in full, are a charge upon all of the real estate, other than that specifically devised, and that

Bill of Complaint.

they are entitled to have all or so much of said real estate as may be necessary, sold and applied to the payment of the pecuniary legacies.

10 12. Complainant further says that he has not exercised his power of sale as to any of such real estate except the Spuyten Duyvil real estate.

13. Doubt and difficulty has arisen in the mind of your complainant as to the true construction of the last Will and Testament of Ellen J. B. Shea, and more particularly of the clauses hereinabove referred to, as to whether said testatrix intended by the Fourteenth paragraph of her Will, upon her personal estate being insufficient to pay the pecuniary legacies, to limit such pecuniary legacies to the Spuyten Duyvil real estate to produce funds sufficient to supply the deficiency, 20 or whether she intended to charge the same upon all of the real estate which was devised by the Fourteenth or residuary clause of her Will; and until this question is determined complainant is unable to proceed with the administration of said estate with safety to himself and the legatees and devisees in said Will, and is compelled to seek the aid of a court of equity for a construction of said Will, and for a declaration of the rights of the persons interested.

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

1. That John Ryan; John Shannon; Little Sisters of the Poor of St. Francis Hospital, Jersey City; Passionate Sisters of Carrick, Pa.; St. Joseph's Hospital, Paterson, N. J.; Margaret McAneney; Home of the Blind, Jersey City, N. J.; Passionate Monastery, West Hoboken, N. J.; Little Sisters of the Poor, St. Michael's Hospital, Newark, N. J.; P. E. Smyth; Thomas Canty; 40 Sisters of Charity, St. Elizabeth's Convent, Con-

Bill of Complaint.

vent Station, New Jersey; Roberta Shannon; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Anne Milton; Ellen Gilmore; Margaret Padian; Holy Name Cemetery Association of Jersey City; Agnes O'Connor; All Soul's Hospital, Morristown, N. J.; M. Pauline Kelligar; Mary Agnes Sharkey; and M. Colomba O'Connor; John Hall Shannon and Robert Shannon, who are defendants in this suit may, without oath, an answer or answers under oath being waived, full, true and perfect answer make, to all and singular the premises. **10**

2. That complainant may receive the advice and direction of this Court in the premises; and that the doubts and difficulties herein suggested may be resolved, and that this honorable court may construe said Will, and declare the rights of the persons interested. **20**

3. That a decree may be made declaring whether or not in addition to the Spuyten Duyvil real estate the real estate otherwise disposed of by said Will and not specifically devised, on failure of the personal property and the Spuyten Duyvil real estate to pay and satisfy the pecuniary legacies, is chargeable with the payment and satisfaction of the said pecuniary legacies.

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as the Court may make in the premises. **30**

D. E. EDWARDS,
Solicitor for and of
Counsel with Complainant.

Schedule A.**The last Will and Testament of Ellen
J. B. Shea, of the City of Jersey City,
County of Hudson and State of New
Jersey.**

10 I, Ellen J. B. Shea, of the City of Jersey City,
Hudson County, New Jersey, being of sound and
disposing mind and memory, do hereby make, pub-
lish and declare this paper as and for my last
Will and Testament, in manner following (hereby
revoking all former Wills or codicils by me made)
namely:

FIRST: I direct my executor hereinafter named
to pay all my just debts and funeral expenses as
soon as practicable after my decease, and I author-
ize and empower my said Executor to sell any or
20 all of my real estate, save my home in Jersey City
on Fleet Street, where I reside, which is herein-
after disposed of, at public or private sale, and
upon such terms as in his judgment may be ad-
visable.

SECOND: I give and bequeath to my nephew
Joseph G. Shannon, my stock in the Mercantile
Trust Company, a corporation of New Jersey.

THIRD: I give and bequeath to Mrs. Minnie Le
Roy of Jersey City, my walnut bureau, which is
30 now in my bed-room, and the sum of One hundred
dollars.

FOURTH: To the Sisters of Charity of St.
Joseph's Convent, Baldwin Avenue, Jersey City,
I give my graphophone and records.

FIFTH: To John Shannon, son of Joseph G.
Shannon, I give and bequeath my Father's gold
watch.

SIXTH: To my second cousin Mary F. Ryan,
40 of Jersey City, I give devise and bequeath my

The Will of Ellen J. B. Shea.

house and lot known as No. 12 Fleet Street, Jersey City, where I now reside, and the contents thereof not herein otherwise disposed of.

SEVENTH: To the College of St. Elizabeth, Convent Station, New Jersey, I give and bequeath the picture of my daughter, Rita, the crayon of myself, and crayons of my Father and Mother; the oil painting called "The Horse Shoe Curve"; my parlor clock and candelabra; my hall bench-table, desk and music stand; my dining room furniture and buffet. 10

EIGHTH: To Sister Mary Agnes Sharkey of St. Elizabeth Convent, I give and bequeath my arm chair "comfort", as a souvenir of me.

NINTH: To Goie Shannon, wife of Joseph G. Shannon aforesaid, I give and bequeath my seal-skin coat, muff and hat; my leather bag with fixtures therein contained, and my diamond earrings. 20

TENTH: My sun-burst pin, containing about sixty-eight diamonds, I give and bequeath to Mrs. John Milton, of Jersey City.

ELEVENTH: My emerald and diamond ring I give and bequeath to my cousin Agnes O'Connor.

TWELFTH: I give and bequeath to my nephew Joseph G. Shannon, Five Thousand Dollars, to my second cousin John Ryan, Two Thousand dollars, to John Shannon, son of Joseph G. Shannon, for his education in the Catholic faith, Five Thousand dollars; to the Little Sisters of the Poor of St. Francis Hospital, Jersey City, One Thousand dollars; to the Passionate Sisters of Carrick Pa., Five Hundred dollars; to St Joseph's Hospital, Paterson, N. J. Five hundred dollars; to my faithful servant Margaret McAneney, Two Thousand Five hundred dollars; to the Home of the Blind, Jersey City, Five hundred dollars; to 30
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The Will of Ellen J. B. Shea.

- the Passionate Monastery, West Hoboken, New Jersey, an offering for one thousand masses for the deceased members of the Shannon family, the same to be said as soon as possible after my death, One thousand dollars; To the Little Sisters of the Poor, St. Michael's Hospital, Newark, N. J. 10 Five Hundred dollars; to Monsignor P. E. Smyth of St. Joseph's Church, Jersey City, Five Hundred dollars; to Father Thomas Canty, of St. Joseph's Church, Jersey City, One thousand dollars, to the Sisters of Charity, St. Elizabeth's Convent, Convent Station, New Jersey, Ten Thousand Dollars, the interest whereon is to be used to defray, so far as possible, the expenses of the incumbents of two scholarships, one to be known as the "Ellen J. B. Shea Memorial Scholarship", open 20 to any student at St. Elizabeth's, who during the life of Sister Mary Agnes Sharkey shall be chosen and designated by her, and after her death shall be designated by the President of the College of St. Elizabeth. The Second—known as the "Rita Scholarship", in loving memory of my daughter Rita Bosdevez Burke which shall be opened by competitive examination, to such students at St. Elizabeth's as are girl graduates of St. Joseph's Parochial School, at Jersey City, New Jersey, the 30 successful competitor to enjoy, so far as possible, the full course at St. Elizabeth's Academy, Convent Station, New Jersey; to Roberta Shannon, daughter of John H. Shannon of Jersey City, the sum of Five Thousand Dollars; to the Trappist Fathers of Kentucky, as an offering for masses for the deceased members of the Michael Shannon family, One Thousand Dollars; to the Catholic Church Extension Society of Chicago, for the erection of two chapels in memory of my parents, 40 Michael and Margaret Shannon, and to be called St. Michael and St. Margaret Chapels, One Thou-

The Will of Ellen J. B. Shea.

sand Dollars; to Anne Milton, daughter of John Milton, of Jersey City, to be used for her education, Five Thousand dollars, to my cousin Ellen Gilmore, of Jersey City, One Thousand Dollars; to my cousin Margaret Padian, of Jersey City One Thousand Dollars; to the Holy Name Cemetery Association of Jersey City, the income from which is to be applied to the perpetual care of the Michael Shannon Plot, One Thousand Dollars; to my cousin Agnes O'Connor, of Newark, New Jersey, One Thousand Dollars; to all Soul's Hospital, Morristown, New Jersey, Five Hundred Dollars; to Sister M. Pauline Kolligar, of Convent Station, New Jersey, Five Hundred Dollars; Sister Mary Agnes Sharkey, of Convent Station, Five Hundred Dollars; to my cousin Sister M. Colomba O'Connor of St. Mary's Orphan Asylum, South Orange, New Jersey, Five Hundred Dollars. 10 20

THIRTEENTH: Should my personal estate be insufficient to enable the foregoing pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvil, in the State of New York, as may be necessary, in such a manner as in his judgment is deemed best, to produce funds to supply the deficiency.

FOURTEENTH: All the rest, residue and remainder of my estate, wheresoever situate, and of whatsoever character, I give, devise and bequeath unto my three nephews, Joseph Gilmore Shannon, John Hall Shannon and Robert Shannon, in equal shares, to them, their heirs and assigns absolutely and forever. 30

I nominate, constitute and appoint my nephew Joseph G. Shannon, of Jersey City, Executor of this, my last Will and Testament, and direct that he be empowered to perform the duties thereof 40

The Will of Ellen J. B. Shea.

without the giving of any bond, either in this state or elsewhere,

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eleventh day of November in the year of Our Lord, One Thousand nine hundred and sixteen.

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ELLEN J. B. SHEA (L. S.)

Signed, sealed, published and declared by the said Ellen J. B. Shea, as and for her Last Will and Testament, in the presence of us, who, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

The letter "n" erased on the first line of the second page and the word "devise" inserted on the second line of the same page before execution.

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Robert H. McCarter 765 Broad St., Newark, N. J.

Bernhard J. Firmer 81 Isabella Ave., Newark, N. J.

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Answer of Passionate Sisters of Carrick.

(Filed July 16, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, Executor of
the Last Will and Testament of
Ellen J. B. Shea, Deceased,*Complainant,**and*JOHN RYAN, *et als.,**Defendants.*

On Bill, &c.

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The answer of Passionate Sisters of Carrick, Pennsylvania, to the bill of complaint of Joseph G. Shannon, executor of the last will and testament of Ellen J. B. Shea, deceased;

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This defendant answering said bill of complaint says:

1. It admits the allegations of the first, second and third paragraphs of said bill of complaint.

2. It admits the allegations of the fourth paragraph of said bill of complaint but says that said decedent had other real estate situated in the State of New Jersey, which was not specifically devised.

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3. It admits the allegations of the fifth paragraph of said bill of complaint but says that the amount of bequests mentioned in the twelfth paragraph of said will is \$48,000.

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Answer of Passionate Sisters of Carrick.

4. It admits the allegations of the sixth paragraph of said bill of complaint.

5. It has no knowledge, information or belief as to the allegations of the seventh, eighth, ninth and tenth paragraphs of said bill of complaint.

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6. It denies that the real estate not specifically devised, as stated in the eleventh paragraph of said bill of complaint, is not charged with the payment of the pecuniary legacies in said will, but on the contrary insists that under the terms and provisions of said last will and testament said pecuniary legacies are entitled to be paid in full and before the residuary legatees receive or take anything under said will.

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7. It has no knowledge, information or belief as to the allegations of the twelfth paragraph of said bill of complaint.

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8. It is not advised as to what doubt and difficulty has arisen in the mind of the complainant as to the true construction of the said last will and testament of the said decedent and of the clauses referred to in said bill of complaint but it insists that the true intent and meaning of the said testatrix as expressed in her said will is to charge the pecuniary legacies referred to in said bill of complaint upon all of her real estate except that specifically devised, and that under the true intent and meaning of said last will and testament none of said residuary legatees or devisees are entitled to receive any moneys until said pecuniary legacies are paid in full.

And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

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TREACY & MILTON,
Solicitors.

**Answer of "Home of the Blind, Jersey
City, N. J." or Institute for the
Blind, Sisters of St. Jo-
seph of Peace.**

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, Executor of
the Last Will and Testament of
Ellen J. B. Shea, deceased,

Complainant,

and

JOHN RYAN, *et als.*,

Defendants.

On Bill, &c.

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The answer of "Home of the Blind, Jersey City,
N. J." or Institute for the Blind, Sisters of St.
Joseph of Peace:

1st: It admits the allegations of the first, sec-
ond and third paragraphs of said bill of com-
plaint.

2nd: It admits the allegations of the fourth
paragraph of said bill of complaint but says that
said decedent had other real estate situated in
the State of New Jersey which was not specific-
ally devised.

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3rd: It admits the allegations of the fifth par-
agraph of said bill of complaint, but says that
the amount of the bequest mentioned in the
twelfth paragraph of said will is Forty-eight

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Answer of Home of the Blind.

Thousand Dollars and not Forty Thousand Dollars.

4th: It admits the allegations of the sixth paragraph of said bill of complaint.

10 5th: It has no knowledge, information or belief as to the allegations of the seventh, eighth, ninth and tenth paragraphs of said bill of complaint.

20 6th: It denies that the real estate not specifically devised as alleged in paragraph eleven of said bill of complaint is not charged with the payment of the pecuniary legacies in said will, but on the contrary insists that under the terms and provisions of said last will and testament of decedent, said pecuniary legacies are entitled to be paid in full before the residuary legatees receive or take anything under said will.

7th: It has no knowledge, information or belief as to the allegations of paragraph twelve of said bill of complaint.

30 8th: It has no knowledge as to what doubts and difficulties as arisen in the mind of complainant as to the true constructions of said last will and testament of said decedent, and of the clauses referred to in said bill of complaint. This defendant, however, insists that the true intent and meaning of the said testatrix as expressed in her said last will and testament is to charge the pecuniary legacies referred to in said bill of complaint upon all of her real estate except as specifically devised, and that under the true intent and meaning of said last will and testament none of said residuary legatees or devisees are entitled to receive any money until said pecuniary legacies are paid in full.

40 AND this defendant humbly prays to be hence

dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

HAMILL & CAIN,
Solicitors of "Home of the
Blind, Jersey City, N. J."
or Institute for the Blind,
Sisters of St. Joseph of
Peace.

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**Answer of John Hall Shannon and
Robert Shannon.**

(Filed June 12, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, Executor,
etc., of Ellen J. B. Shea, dec'd,

Complainant,

and

JOHN RYAN, *et als.,*

Defendants.

On Bill, &c.

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Defendants, John Hall Shannon and Robert Shannon, answering the bill of complaint herein say:

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1. They admit paragraphs one (1), two (2), three (3), four (4), five (5) and six (6) of said bill.

2. They have no knowledge or information as to the matters set forth in paragraph seven (7) of said bill, but say that they are informed by the complainant that the personal estate of said decedent is insufficient to pay the pecuniary legacies

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Answer of John H. and R. Shannon.

mentioned in paragraph twelve (12) of the will of said decedent.

10 3. They admit that the property at Spuyten Duyvil, referred to in the will of decedent, was sold by complainant for the sum of Thirty-five hundred Dollars (\$3,500) as set forth in paragraph eight (8). They deny, however, that the entire personal estate of the testatrix (other than the personal property specifically bequeathed) together with the proceeds of sale of the Spuyten Duyvil real estate amounts approximately to Twenty-one thousand seventy-nine dollars and ninety cents (\$21,079.90) and allege that the same amounts to more than that sum, as shown by the said bill of complaint.

20 4. They admit that the estate of the testatrix, other than personal property, the real estate specifically devised by her and the Spuyten Duyvil real estate consists of real property located in the State of New Jersey; they have no knowledge as to the approximate value thereof or of the equity of the testatrix therein and, therefore, deny the same and leave complainant to make proof thereof.

30 5. They admit that the personal estate is sufficient to pay all the debts of the testatrix but whether the same is sufficient to pay the pecuniary legacies in full or not, they have no knowledge and, therefore, leave complainant to make proof thereof.

40 6. They admit that it is claimed and insisted by them that the real estate not specifically devised other than the proceeds of the sale of the Spuyten Duyvil real estate is not charged with the payment of the pecuniary legacies in said will, and that if the personal estate and the proceeds of the Spuyten Duyvil real estate are in-

Answer of John H. and R. Shannon.

sufficient to satisfy in full the pecuniary legacies, such legacies abate proportionately, and that the residuary devisees are entitled to have said real estate free from any claim of the pecuniary legacies.

7. They admit paragraph twelve (12).

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8. They admit that doubt and difficulty has arisen as to the construction of the last will and testament of the said Ellen J. B. Shea, and of the clauses hereinabove referred to and insist that the true intendment of said testatrix by the thirteenth (13th) paragraph of her will was that, should the personal estate be insufficient to pay the pecuniary legacies, to limit such pecuniary legacies to the Spuyten Duyvil real estate to produce funds sufficient to supply the deficiency, and that there was no intention on her part to charge the same upon all of the real estate which was devised by the fourteenth (14th) or residuary clause of her will.

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EDWARDS & SMITH,
Solicitors of defendants,
John Hall Shannon and
Robert Shannon.

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Answer of Roberta Shannon.

(Filed June 12, 1919.)

IN CHANCERY OF NEW JERSEY.

Between 10 JOSEPH G. SHANNON, Executor, etc., of Ellen J. B. Shea, dec'd, <i>Complainant,</i> <i>and</i> JOHN RYAN, <i>et als.</i>, <i>Defendants.</i>	}	On Bill, &c.
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20 The answer of Roberta Shannon by Lucie B. D. Shannon, her guardian ad litem, duly appointed by the Court of Chancery, one of the defendants in the above entitled matter, shows:

1. She admits paragraphs one (1), two (2), three (3), four (4), five (5) and six (6) of said bill.

30 2. She has no knowledge or information as to the matters set forth in paragraph seven (7) of said bill, but says that she is informed by the complainant that the personal estate of said decedent is insufficient to pay the pecuniary legacies mentioned in paragraph twelve (12) of the will of said decedent.

40 3. She admits that the property at Spuyten Duyvil, referred to in the will of decedent, was sold by complainant for the sum of Thirty-five hundred dollars (\$3,500) as set forth in paragraph eight (8). She denies, however, that the entire personal estate of the testatrix (other than the personal property specifically bequeathed) together with the proceeds of sale of the Spuyten Duyvil real estate amounts approximately to

Answer of Roberta Shannon.

Twenty-one thousand seventy-nine dollars and ninety cents (\$21,079.90) and alleges that the same amounts to more than that sum, as shown by the said bill of complaint.

4. She admits that the estate of the testatrix, other than personal property, the real estate specifically devised by her and the Spuyten Duyvil real estate consists of real property located in the State of New Jersey; she has no knowledge as to the approximate value thereof or of the equity of the testatrix therein and, therefore, denies the balance of paragraph nine (9) and leaves complainant to make proof thereof. 10

5. She admits that the personal estate is sufficient to pay all the debts of the testatrix, but whether the same is sufficient to pay the pecuniary legacies in full or not, she has no knowledge and, therefore, leaves complainant to make proof thereof. 20

6. She admits the allegations of paragraph eleven (11) and alleges that she claims as therein set forth.

7. She admits paragraph twelve (12).

8. She admits that doubt and difficulty has arisen as to the construction of the last will and testament of the said Ellen J. B. Shea, and of the clauses hereinabove referred to, and insists that the true intendment of said testatrix by the thirteenth (13th) paragraph of her will was that the pecuniary legacies, upon failure of the personal estate and the Spuyten Duyvil real estate to satisfy such legacies in full, should be charged upon all of the real estate other than that specifically devised, and that the legatees are entitled to have all or so much of said real estate as may be necessary sold and applied to the payment of the pecuniary legacies. 30 40

MARK TOWNSEND, JR.,
Solicitor of Defendant, Roberta Shannon.

Answer of Ann Milton.

(July 9, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

10 JOSEPH G. SHANNON, Executor of
the Last Will and Testament of
Ellen J. B. Shea, deceased,

*Complainant,**and*JOHN RYAN, *et als.,**Defendants.*

On Bill, &c.

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The answer of Ann Milton, an infant under the age of twenty-one years, by John Milton, her guardian, to the bill of complaint of Joseph G. Shannon, executor of the last will and testament of Ellen J. B. Shea, deceased, complainant:

This defendant answering said bill of complaint says:

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1. That she is a stranger to all and singular the matters and things in the said bill of complaint contained other than that this defendant is informed that the said Ellen J. B. Shea died leaving the last will and testament referred to in said bill of complaint and that this defendant is a legatee under said will.

This defendant being an infant of tender years submits herself to the judgment of this Honorable Court and prays that her interest may be protected and saved to her.

TREACY & MILTON,
Solicitors of Defendant.

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**Answer of Little Sisters of the Poor
and others.**

(Filed July 1, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, Executor of
the Last Will and Testament of
Ellen J. B. Shea, deceased,

Complainant,

and

JOHN RYAN, *et als.*,

Defendants.

On Bill, &c.

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The answer of Little Sisters of the Poor of St. Francis Hospital, Jersey City; St. Joseph's Hospital, Paterson, N. J.; Margaret McAneney; Passionate Monastery, West Hoboken, N. J.; Sisters of Charity, St. Elizabeth's Convent, Convent Station, New Jersey; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Ellen Gilmore; Margaret Padian; Holy Name Cemetery Association of Jersey City; M. Pauline Kelligar; Mary Agnes Sharkey, M. Colomba O'Connor, to the bill of complaint of Joseph G. Shannon, executor of the last will and testament of Ellen J. B. Shea, deceased;

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These defendants answering said bill of complaint say:

1. They admit the allegations of the first, second and third paragraph of said bill of complaint.

2. They admit the allegations of the fourth paragraph of said bill of complaint but say that

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Answer of Little Sisters of the Poor.

said decedent had other real estate situated in the State of New Jersey, which was not specifically devised.

10 3. They admit the allegations of the fifth paragraph of said bill of complaint but say that the amount of bequests mentioned in the twelfth paragraph of said will is \$48,000.

4. They admit the allegations of the sixth paragraph of said bill of complaint.

5. They have no knowledge, information or belief as to the allegations of the seventh, eighth, ninth and tenth paragraphs of said bill of complaint.

20 6. They deny that the real estate not specifically devised, as stated in the eleventh paragraph of said bill of complaint, is not charged with the payment of the pecuniary legacies in said will, but on the contrary insist that under the terms and provisions of said last will and testament said pecuniary legacies are entitled to be paid in full and before the residuary legatees receive or take anything under said will.

7. They have no knowledge, information or belief as to the allegations of the twelfth paragraph of said bill of complaint.

30 8. They are not advised as to what doubt and difficulty has arisen in the mind of the complainant as to the true construction of the said Last Will and Testament of the said decedent and of the clauses referred to in said bill of complaint, but they insist that the true intent and meaning of the said testatrix as expressed in her said will is to charge the pecuniary legacies referred to in said bill of complaint upon all of her real estate except that specifically devised, and that under
40 the true intent and meaning of said last will and testament none of said residuary legatees or de-

visees are entitled to receive any moneys until said pecuniary legacies are paid in full.

And these defendants humbly pray to be henced dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Opinion.

IN CHANCERY OF NEW JERSEY.

10

Between

JOSEPH G. SHANNON, Executor of
Ellen J. B. Shea, deceased,

Complainant,

and

JOHN RYAN, *et als.*,

Defendants.

On Bill, &c.

20

Submitted May 20, 1919; decided June 27, 1919.
DAVID F. EDWARDS and THEO. RUNYON, ESQS., for
Complainants;
EDWARDS & SMITH, for John Ryan, Defendant;
TREACY & MILTON, for general legatees.
GRIFFIN, V. C.:

In this case, were it not for the Thirteenth Paragraph of the will, the legacies would be clearly charged on the land. *Corwine vs. Corwine*, 24 N. J. Eq., 979; *Johnson vs. Poulson*, 32 N. J. Eq., 390. 30

In *Johnson vs. Poulson*, *supra*, after stating that the personal property is the primary fund for the payment of legacies, Judge Dodd says:

"The real estate is not charged with the payment of legacies unless the testator intended it should be, and that intention must

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Opinion.

10 be either expressly declared or satisfactorily inferred from the language and dispositions of the will. This rule was held, in *Corwine vs. Corwine*, to be met and its requirements satisfied by giving to the word 'residue' its natural and proper force and effect. It signifies what is left of a number or quantity after something has been abstracted. * * *

The rule itself, being a judicial interpretation of words used with reference to the other conditions of the will, subservient, as rules of construction in all cases are, to the cardinal and predominant one which seeks the purpose of the testator from all parts and provisions of the instrument considered together."

20 It is, therefore, apparent, from this ruling, in the absence of anything to the contrary, that the mere giving of general legacies and then passing real and personal property in a residuary clause makes the legacies a charge.

The Thirteenth Paragraph of the will is as follows:

30 "Thirteenth: Should my personal estate be insufficient to enable the foregoing pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvil, in the State of New York, as may be necessary, in such manner as in his judgment is deemed best, to produce funds to supply the deficiency."

40 If the Spuyten Duyvil property was in New Jersey, this clause would weaken the view that the property in the residuary clause was charged. The Spuyten Duyvil property is not devised, it passes by the residuary clause, subject to the whole or part of it being taken and used for the payment of the legacies. Counsel for the general legatees, however, say that, under the decisions of the Court of Appeals of the State of New York (which, by stipulation, the parties agree may be

Opinion.

considered without formal proof), the rule of construction is different from ours; that there the rule is that the mere giving of general legacies followed by a residuary clause passing real and personal property, in the absence of a contrary intention, is not sufficient to charge the residue with the payment of legacies, *Brill vs. Wright*, 112 N. Y., 129; 19 N. E., 628; and the latter case of *Carley vs. Harper*, 219 N. Y., 295, 114 N. E., 351; and as there is a presumption that the testatrix knew the law, it will be presumed that the will was drawn in compliance therewith. *Walker vs. Walker*, 283 Ill. 11; 118 N. E., 1014; and, therefore, in order that the Spuyten Duyvil property might be placed on a parity with the residue in New Jersey, she also designated this residuary property for sale to pay the legacies. There is some force in this argument. It is a circumstance tending to disclose her motive. 10 20

The case, however, may be decided without determining this question.

The residuary legatees, however, citing *Johnson vs. Poulson*, *supra*, contend that, under the doctrine *expressione unius est exclusio alterius*, a mere direction to resort to the Spuyten Duyvil property to pay the deficiency, without further expression in the event of the proceeds of the Spuyten Duyvil property being insufficient, is a circumstance unfavorable to the charge, and must, under such circumstances, operate as an expression of her intent that the remaining deficiency should not be paid out of the residue, but should abate ratably. 30

In this situation of affairs the Court must sense up the will in its entirety and give effect to the intention of the testatrix, with the aid of extrinsic evidence as to the condition of the estate and the objects of her bounty. 40

Opinion.

It is quite plain that the testatrix intended that the legacies in the Twelfth Paragraph should be paid. After giving a number of specific legacies and a devise of the house and lot where she resided, in the Twelfth Paragraph she gave legacies aggregating \$48,000. To Joseph G. Shannon, who
10 is her nephew and executor, she gave specific legacies; to the son of Joseph she gave her father's gold watch; and to the wife of Joseph she also gave specific legacies; and she devised her residence to her cousin Mary F. Ryan. By this Twelfth Paragraph, in which passes all of the general legacies, she gives to Joseph \$5,000; she gives for the education of Joseph's son, \$5,000; she gives to the Sisters of Charity of St. Elizabeth, where she was educated, \$10,000 to found two scholarships,
20 one of which was to be known as "The Rita Scholarship," as she puts it "in loving memory of my daughter, Rita Bosdevez Burke;" she also gives to Roberta Shannon, a daughter of John Hall Shannon (one of her residuary legatees) \$5,000; and to her faithful servant, Margaret McAneny, she gives \$2,500. She also gives \$1,000 to erect two chapels in memory of her parents, and \$1,000 for the perpetual care of the family cemetery plot.

30 Apparently, her nearest kin were related as nephews and cousins.

Thus it appears that in this Paragraph Twelve she was bountiful to Joseph Shannon, one residuary devisee and legatee, and his family; and John Hall Shannon, while receiving nothing, his daughter was given \$5,000; and the last residuary legatee, her nephew Robert Shannon, is nowhere mentioned in the will, excepting in the residuary clause.

40 The will was drawn on November 11, 1916, and testatrix died November 28th of the same

Opinion.

year, without any change happening in her estate between the two dates. Her personal estate was inventoried at \$30,827.37; the debts amounted to \$1,000; leaving a net personal estate of approximately \$29,827.37. The Spuyten Duyvil property was sold for about \$3,500. The value of the New Jersey real estate, excluding that specifically devised, is approximately \$14,750.00; leaving the total value of real and personal property, excluding the specific devises and bequests, about \$48,000. The legacies amount to \$48,000.00. 10

It must be assumed that the testatrix knew what property she was possessed of at the time she made her will, and would hardly give legacies amounting to \$48,000.00 with but \$30,000.00 of personalty and the Spuyten Duyvil property of the value of \$3,500.00, to pay the same, with knowledge that she had some debts, and that there would be the expense of settling up her estate. 20

But it is argued that she conceived the Spuyten Duyvil property to be of great value. The property did have a speculative value, and she had endeavored to sell it. It consisted of land under water, unattached to the upland; and it is conceivable that, if taken for the purpose testified to, it might bring sufficient to make of the deficiency of personalty. But there is no evidence as to what the value of this property was, even for the use for which it was adapted and was likely to be taken. 30

The question, therefore, presents itself, did the testatrix mean that this residue, consisting of real estate alone, should, in all events, pass to the residuary legatees? She knew what this real estate consisted of; and I am rather inclined to the view that, if she meant in any event to give the same to these three legatees, she would have 40

Opinion.

done so by specific devises, and then have put in a general residuary clause; and when it is considered that she made large provision for Joseph and his family, and the same for Roberta, daughter of John, it would seem that she did not intend that their legacies should be cut down to enable Joseph and John to take in the residuary clause at the expense of such general legacies.

Another feature to be considered is, did she intend that her will as to the Rita Scholarship in memory of her daughter, the memorial chapels for her parents, and the care of the family plot should fail for the benefit of the residuary legatees?

The whole spirit and tenor of this will, prior to the Thirteenth Clause, seem to indicate clearly that the testatrix gave to everyone whom she regarded as an object of her bounty, and for every purpose that she desired to have fulfilled.

The specific bequests are ten in number. The general legacies number twenty-five. They run to relatives of the blood, a servant, and other persons strangers to the blood, and for various purposes. It seems almost inconceivable that, in this wide distribution of her bounty, she should not mention her nephews John and Robert personally yet intended that they should take in the residuary clause to the detriment of the general legatees. The whole will itself breathes an intimation that she intended that these legacies should be paid in full, even to the extent of taking the whole residue for the purpose. *Carter vs. Gray*, 58 N. J. Eq., 411.

There is another feature of the will which tends to negative the inference arising from the Thirteenth Paragraph and leads strongly in the direction that she meant to have these legacies paid out of the residue, if necessary: By the First

Opinion.

Clause of her will she directs her executor to pay all her just debts and funeral expenses, and then proceeds, "I authorize and empower my said executor to sell any and all of my real estate, save my home in Jersey City on Fleet Street where I reside, which is hereinafter disposed of, at public or private sale, and upon such terms as, in his judgment may be advisable." This power of sale, according to the tenor of the will, could only apply to the residue, and this residue consisted of the Spuyten Duyvil property (or the balance of the proceeds of the sale thereof after paying the legacies) as well as the other real estate, under-
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A thought which occurs is why did the testatrix give a power of sale, if she intended to limit the payment of legacies, after exhausting the personalty, to the Spuyten Duyvil property? The power of sale in the First Paragraph could only affect what passed by the residuary clause. All of the residuary legatees were of full age. It was not for the purpose of paying her debts; she had ample for that. And unless this power of sale were given to enable the executor to sell this residue, if necessary, to pay the legacies, then it was meaningless. *Ely vs. Magie*, 219 N. Y., 112; 113 N. E., 800.
20

Taking the will in its entirety, my conclusion is that the general legacies in the Twelfth Paragraph are a charge upon the property contained in the residuary clause.
30

There was offered in evidence a letter of the scrivener who drew the will, with the same force and effect as if he had been called and testified. It was objected to, however, on the ground that evidence of what the testatrix told him to do, and what he omitted to tell her, was inadmissible. This letter was sent to me after the case was
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closed. The objection of counsel for the general legatees is sustained. *Farnum vs. Penna. Co. For Ins., &c.*, 87 N. J. Eq., 108 (114); *af'd. idem*, 652.

A decree will be advised charging the general legacies in the Twelfth Paragraph upon the property mentioned in the residuary clause.

Final Decree.

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IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, executor,
etc.,

Complainant,

and

20

JOHN RYAN, *et als.*,

Defendants.

On Bill, &c.

30

This cause being opened to the Court by Treacy & Milton, solicitors for Little Sisters of the Poor of St. Francis of Jersey City; St. Joseph's Hospital, Paterson; Margaret McAneny; Passionists Monastery, West Hoboken; Sisters of Charity, St. Elizabeth; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Ellen Gilmore; Margaret Padian; Holy Name Cemetery Association of Jersey City; M. Pauline Kelliger; Mary Agnes Sharkey; M. Colomba O'Connor; John Milton, guardian ad litem for Ann Milton, and Passionist Sisters of Carrick, Pa. and notice that this application having been given to David F. Edwards, solicitor for complainant, Edwards and Smith, solicitors for John Hall Shannon and Robert Shannon, and guardian of Roberta Shannon, Mark Townsend guardian ad litem of John

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Final Decree.

Shannon and Hamill and Cain solicitors for defendant, Home for the Blind, and it appearing that this cause came on to be heard at the Chancery Chambers in Jersey City in the presence of the above stated solicitors and the complainant's bill having been heretofore taken as confessed against the other defendants therein named, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the pleadings, proofs and arguments, and the Court being of the opinion that the general legacies contained in the twelfth paragraph of the last will and testament of complainant's testatrix, Ellen B. Shea dated November 11th, 1916 and admitted to probate December 8th, 1916 by the Surrogate of Hudson County are charged upon the property devised or bequeathed under and by residuary clause of the said last will and testament, and must be paid out of the proceeds of the said residuary estate to the extent of any deficiency arising through the inability of the personal estate or other property applicable to the payment of the legacies to pay the same. 10 20

It is on this 7th day of July, 1919, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED and the said Chancellor by the virtue, power and authority of this Court does hereby ORDER, ADJUDGE and DECREE that the testatrix Ellen J. B. Shea by her said last will and testament charged the legacies given under the twelfth clause or paragraph of her said last will and testament upon all of the property bequeathed or devised under and by the residuary paragraph or clause of her said last will and testament to the extent of any deficiency arising through the inability of the personal estate or other funds or property applicable thereto to pay the same. 30 40

Final Decree.

It is further ORDERED, ADJUDGED and DECREED that the complainant Joseph G. Shannon as executor of the said last will and testament be, and he hereby is authorized and directed in the administration of his office as such to so distribute the assets of said estate.

10

It is further ORDERED, ADJUDGED and DECREED that there be allowed to Treacy & Milton, solicitors for certain legatees the sum of \$1,000 as and of counsel fee together with their costs to be taxed; to Mark Townsend, solicitor for Guardian Ad Litem of Roberta Shannon, the sum of One Hundred Dollars, and taxed costs; to Edwards and Smith, solicitors for Certain Legatees, the sum of Seven Hundred and Fifty Dollars, and taxed costs; to David F. Edwards, and Theodore Rurode, solicitors of counsel for complainant, the sum of Five Hundred Dollars each and taxed costs; that such payments be made by said executor out of the funds of said estate.

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Respectfully advised,

JOHN GRIFFIN,
V. C.

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Minutes of Final Hearing.
IN CHANCERY OF NEW JERSEY.

Between

JOSEPH G. SHANNON, Executor of
 Ellen J. B. Shea, deceased,

Complainant,

and

JOHN RYAN, *et als.*,

Defendants.

} On Bill, &c.

10

A P P E A R A N C E S :

D. F. EDWARDS and THEO. RURODE, ESQS., for
 Complainants;

EDWARDS & SMITH (Mr. Dawson), for Defendant,
 Ryan;

JOHN MILTON, ESQ., for Little Sisters of the Poor

of St. Francis Hospital, Jersey City; St. Joseph's Hospital, Paterson, N. J.; Margaret McAneney; Passionate Monastery, West Hoboken, N. J.; Sisters of Charity, St. Elizabeth's Convent, Convent Station, N. J.; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Ellen Gilmore; Margaret Padian; Holy Name Cemetery Association of Jersey City; M. Pauline O'Connor; Mary Agnes Sharkey; M. Colomba O'Connor; Anna Milton; Passionate Sisters of Carrick, Pa.

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Before HON. JOHN GRIFFIN, Vice-Chancellor.

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Joseph G. Shannon—Direct Examination.

Chancery Chambers, Jersey City, N. J.

November 11th, 1918.

JOSEPH G. SHANNON, sworn.

DIRECT EXAMINATION BY MR. RURODE:

10 Q. You are the executor of the will of Ellen J. B. Shea? A. I am.

Q. What is your business, Mr. Shannon? A. Banking.

Q. What relation are you to Ellen J. B. Shea? A. A nephew.

Q. What other blood relatives did she leave surviving? A. My two brothers—I don't know what you mean.

Q. They are the nearest, are they—the next of kin—the two brothers and yourself, her nephews? 20 A. Yes.

Q. How old was Mrs. Shea at her death? A. I imagine she was about 63, or 62; I don't know.

Q. Mr. Shannon, is there sufficient personal property in this estate to pay the pecuniary legacies under the will? A. No.

Q. As executor, did you sell the Spuyten Duyvil real estate, under the terms of the will? A. Yes.

Q. And what did that real estate realize on the 30 sale? A. Why, it sold for, I think, thirty-five hundred dollars; but the net proceeds, after taxes were paid and cost of selling—

Q. (Interrupting) Was less than thirty-five hundred dollars? A. Yes.

Q. So, with the proceeds of the Spuyten Duyvil real estate, was there sufficient, with the personal property, to pay the pecuniary legacies in full? A. No.

Q. Where did Mrs. Shea live? A. No. 12 Fleet 40 Street, at the time of her death.

Q. Jersey City? A. Yes.

Joseph G. Shannon—Direct Examination.

Q. Do you know how she acquired the Spuyten Duyvil property or real estate? A. Under the will of her sister, Mrs. T. A. S. Sheridan.

Q. How large a tract of land was the Spuyten Duyvil real estate? A. About 185 feet along the railroad, and about 650 feet out into the River.

Q. And where was it located? A. On the Hudson River. You have a map there. 10

Q. (Showing the witness a map.) A. Approximately 1442 feet south of West Two Hundred and thirty-sixth Street.

Q. And did you ever see this land yourself? A. No.

Q. Did you ever talk with Mrs. Shea, the testatrix, about this land? A. Yes, she spoke of this land.

Q. Did she tell you what kind of land it was? A. Yes. I know all about it, from what she told me. 20

Q. What kind of land did she say it was? A. Well; Mrs. Sheridan originally owned that land, including land on which the New York Central and Hudson River tracks ran; Mrs. Sheridan had sold the upland to the New York Central and Hudson River Railroad, and had kept the land under water, because Mrs. Sheridan was in the towing business.

Q. Then this land that Mrs. Shea got was mostly all land under water? A. She got all land under water. 30

Q. Did Mrs. Shea ever say anything to you about the value of this land, in her estimation, or in her judgment? Yes or no? A. Yes.

Q. Well; what did she say about that? A. She believed that it was very valuable, and that the New York Central would have to buy it.

Q. Did she ever tell you how valuable she thought it was? A. No. 40

Joseph G. Shannon—Direct Examination.

Q. Did she ever mention figures? A. No; she wanted me to see what I could get the New York Central people to pay for it; but I told her that I never mixed family affairs up with business, and I did not care to take it up with the New York Central man.

10 Q. Did you have more than one talk with her about the value of this land? A. Oh; she spoke of it several times—in fact, she more or less had it on her mind.

Q. Did she ever say anything to you about her will when she was discussing the value of this land—about her last will and testament? A. No.

Q. Was Mrs. Shea friendly with her three nephews mentioned in the residuary clause? A.
20 Yes particularly with me. In fact, she spoke about the last clause of her will, which would divide some of it up.

Q. What did she say about that?

MR. MILTON: Objected to.

THE VICE CHANCELLOR: How is that material—how is it admissible, rather?

MR. RURODE: Well; we cannot tell unless we hear it. It would be material.

Q. You say she spoke about the “last clause of her will”; do you mean the residuary clause? A.
30 Yes.

Q. When did she speak to you about that residuary clause?

MR. MILTON: Objected to.

THE VICE CHANCELLOR: Well; I will permit that question to be asked.

A. Why; the night before the last will was
40 drawn.

Q. Well; what did she say about that?

Joseph G. Shannon—Direct Examination.

MR. MILTON: Objected to.

THE VICE CHANCELLOR: How is that admissible?

MR. RURODE: I cannot tell until after he answers it; then your Honor can strike it out, if it is not; it may be, or it may not. We are trying to get some light on her idea of the value of this real estate, and what she intended to do about her residuary clause. 10

THE VICE CHANCELLOR: Well, suppose you do—what ambiguity is there on the face of the will?

MR. RURODE: Well; if your Honor does not think there is any ambiguity on the face of the will, I am content. Remember, I am representing the Executor, don't you know; we are here asking a construction, and I thought this testimony was material. 20

THE VICE CHANCELLOR: I will allow the testimony to go in; I will strike it out if it is not material.

MR. MILTON: I do not think it is even competent.

THE VICE CHANCELLOR: Well; it is not competent. Testimony of that character can go only, as I understand it, to explain a latent ambiguity. Now, this ambiguity, if it exists at all, is patent. The question is what did the testatrix mean to do by her will? Now, she has said it. If she has failed to make a full explanation on the face of her will, so that it is ambiguous, but patently ambiguous, the will must either fall in that clause, or it receives a construction; but you cannot explain what the testatrix said at the time she made her will. You may go ahead, though; I will let you offer the testimony. I do not see that it is material. 30 40

Joseph G. Shannon—Direct Examination.

(Last question repeated.)

A. Why, she spoke about having the will with a codicil, and she wanted to have a new will made; she said that she had left my boy some money, naming five thousand dollars, and she spoke about
 10 my niece, Roberta Shannon; and I said that I thought that as she was leaving money to I think it is Anne Milton, and to my son, that it would only be fair to my niece not to have her left out; that I did not want my son to be getting any advantage.

Q. A little louder, Mr. Shannon. A. I did not want my boy to have any advantage.

Q. Well; was there anything said about the residuary clause? A. Yes; she asked me to see
 20 Mr. McCarter the following morning, and ask him to come in so that she could have her will re-written; and she said to tell Mr. McCarter that she wanted me to have half the residuary, and the other half to be divided equally between my two brothers.

Q. Was there anything said at that time about how much she expected you would get under the will—you and the other residuary legatees? A. Yes; she told me that she had left me five thousand dollars in the will, and she would give me a
 30 half interest in the residuary; but she wanted me to go and see Mr. McCarter in Newark the following morning and ask him to come in and see her so she would write her will. I went to see Mr. McCarter, and he went there.

Q. What I mean is this; was there anything said at that time about how much would pass by the residuary clause of the will?

MR. MILTON: Objected to.

40 THE VICE CHANCELLOR: I will permit it; I am quite clear it is not admissible, but I will let it come in.

Joseph G. Shannon—Cross Examination.

A. No.

MR. RURODE: He says "No", so no harm is done.

Q. Did Mrs. Shea ever indicate, in dollars and cents, what she thought the value of the Spuyten Duyvil real estate was? 10

MR. MILTON: He said "No". He was asked that, and he said "No."

Q. Did you say "No" to that, before? A. Yes, I said "No".

CROSS EXAMINATION BY MR. MILTON:

Q. Mr. Shannon, the Spuyten Duyvil real estate was acquired by Mrs. Sheridan, the sister of Mrs. Shea, in her lifetime—that is true, is it not? A. Yes. 20

Q. And it was acquired by her in payment of a debt which she could not otherwise collect—that is true, is it not? A. I don't know about that.

Q. Don't you know it was acquired in payment of a debt which was due Mrs. Sheridan as part of her towing business? A. Now that you speak of it, I remember that there was some such thing.

Q. And you also know that the upland was sold to the New York Central, some years prior to her death, by Mrs. Sheridan? A. Yes. 30

Q. And that after the land under water remained, Mrs. Sheridan did not dispose of it, or sell it, during her lifetime? A. No.

Q. You know, do you not, that there was no access to the Spuyten Duyvil land which Mrs. Shea got from Mrs. Sheridan except by water; don't you? A. Yes.

Q. And that Mrs. Shea was so unfamiliar with the location of this land that she had to have a 40

Joseph G. Shannon—Cross Examination.

map and survey of it made—that is true; is it not? A. Yes.

Q. Did she ever tell you that Mr. Milton had endeavored to procure a price on the land from several brokers in New York City and could not? A. No; she said you were looking after it, and that she had asked you to have a map made.

Q. Did she tell you that Mr. Milton had endeavored to sell it for her? A. I don't remember that she did.

Q. You don't remember that? A. Can I say this, outside?

Q. Yes. A. You know, on account of my brother-in-law being in the New York Central, I never talked to her about that.

Q. You preferred not to discuss the sale of this land to the New York Central because your brother-in-law was one of the Vice Presidents of that Company? A. And she wanted me to go to him and get a good price for it.

Q. Now; you have spoken of the nephews of Mrs. Shea being friendly with her—is it not a fact that you were her favorite nephew? A. Yes.

Q. You, for some little time before her death, had assisted her in the management of such business affairs as she had? A. Yes.

Q. And helped her to make out checks, and deposit interest, and all her little business affairs you had helped her with? A. Yes.

Q. Now, while, of course, I do not want to make any strictures upon your brothers, it is also a fact that for some years before her death neither John Hall Shannon nor Robert Shannon had been to see their aunt, Mrs. Shea—that is a fact, is it not? A. Well; I guess they did not see her so very often.

Q. And it was not until a short time before her death that they did come to see her? A. I do not recall how often they went there, John; you know

Joseph G. Shannon—Cross Examination.

as much about that as I do.

Q. Well; this much is true, Mr. Shannon—that you were a more frequent visitor to Mrs. Shea than either Bert or Hall Shannon, weren't you?

A. Oh, yes.

Q. And your aunt did not see so much of them until just before her death—that is so, is it not? A. She did not see as much of them at all as she did of me. 10

Q. Would you want to go so far as to say that they had not seen her for a long period of time until just prior to her death? A. No; I am not in a position to say just when they came.

Q. This will that you are Executor of was drawn by Robert McCarter of the City of Newark, wasn't it? A. Yes.

Q. I call your attention, Mr. Shannon, to the twelfth clause of the will, and first I will ask you where was Mrs. Shea educated? She was graduated from St. Elizabeth's Convent at Madison, New Jersey, wasn't she? A. I think she did go there, John. 20

Q. And she was a devoted Roman Catholic up to the time of her death? A. Yes.

Q. She had manifested in her lifetime her religious feelings in the way of charitable gifts to priests and to nuns? A. Yes; she gave them money, John. 30

Q. She was very friendly with the nuns who managed the St. Elizabeth Convent, at Convent Station, at Madison? A. Well; there was times when she was not; but, generally speaking, yes.

Q. Now; I call your attention to the bequest of \$5,000, in the twelfth clause, to Joseph G. Shannon—that is to you, Mr. Shannon, is it not? A. Yes, sir.

Q. And I do not want to violate your modesty, but you were her particularly favorite nephew weren't you? A. Yes. 40

Joseph G. Shannon—Cross Examination.

Q. Now; the bequest to John Shannon, so of Joseph G., for his education in the Catholic faith, \$5,000—that is your son? A. Yes; she explained that to me.

10 Q. And your aunt was desirous of having your boy brought up in the Catholic faith? A. Well; I will have to explain that, John, or Mr. Milton; that is, she explained to me that she had put this in here for the reason that when my father died I did not get anything—or, I mean, when my mother died, I did not get anything under the will; the only thing I had was earning power; and that if I should die while my boy was small it was almost certain that one brother-in-law in New York, on the New York Central, or the other one, would take care of my boy and pay for his
20 education; and as none of my wife's family, or her brothers-in-law, go to the Catholic Church, Mrs. Shea said she did not want them to be in a position to say that as long as they were paying for his education that they could send him to some college——

Q. (Interrupting.) She wanted that boy, in the event of her death, to be educated in the Catholic faith? A. Yes; she wanted him educated so he could grow up as he pleased and not be under obligation to stay in some college that might be
30 picked out by people——

Q. (Interrupting.) By people who were of the Protestant faith? A. Yes.

Q. The bequest to Margaret McAneney of \$2,500—she was a servant who had been with your aunt for a great many years? A. Yes.

Q. The bequest of \$10,000 to St. Elizabeth's Convent for scholarships, one of which was to be known as the "Ellen J. B. Shea Memorial Scholarship"—that was named for Mrs. Shea herself—
40 that is true? A. Yes.

Joseph G. Shannon—Cross Examination.

Q. And the other was named for Rita Bostivez Burk, who was Mrs. Shea's daughter? A. Yes.

Q. This child, or girl, was the only child Mrs. Shea ever had—is that not so? A. Yes.

Q. And this girl died in young-womanhood as the result of having a child—that is true? A. Yes. 10

Q. That was a great grief in Mrs. Shea's life, was it not? A. Yes.

Q. She had always cherished a great affection for this girl? A. Yes.

Q. She had manifested that in the later years of her life, had she not, by frequently alluding to it? A. Yes.

Q. And, at the time of her death she was very fond of this girl? A. Yes.

Q. St. Joseph's Parochial School is attached to St. Joseph's Roman Catholic Church in Jersey City, is it not? A. Yes. 20

Q. And Mrs. Shea lived in St. Joseph's Roman Catholic Church Parish? A. Yes.

Q. And that is the Church which she attended in her lifetime? A. Yes.

Q. As a general rule. Sometimes she went to the Monastery in West Hoboken, did she not? A. Yes.

Q. She was on very friendly terms with Father Sabastian of the Monastery? A. Yes. 30

Q. I think, at one time, as a young girl, she had gone to St. Joseph's Parochial School, before going to the Convent? A. That I don't know. As a child, though, she lived in St. Joseph's Parish.

Q. What was Mrs. Shea's father's name? A. Michael Shannon.

Q. And the bequest of \$1,000 to the Trappist Fathers as an offering for Masses for the members of the Michael Shannon family was for the benefit, in a religious sense, of the members of her 40

Joseph G. Shannon—Cross Examination.

own family, including herself and her father and mother? A. Yes.

Q. That is who she meant by the "Michael Shannon family"? A. Yes.

10 Q. The bequest to the Catholic Church Extension Society for the erection of two chapels in memory of her parents, Michael and Margaret Shannon—Michael and Margaret Shannon were her parents? A. Yes.

Q. And the bequest to the Catholic Church Extension Society for the erection of the chapels was to perpetuate and honor the names of her father and mother? A. Yes.

20 Q. Likewise, the bequest to the Holy Name Cemetery Association of \$1,000 for the perpetual care of the Michael Shannon plot—in that plot were buried her father and mother? A. Yes.

Q. And other members of her family? A. Yes; all but my father.

Q. In your discussions with Mrs. Shea as to the value of the Spuyten Duyvil real estate, she indicated that she was desirous of selling the property, didn't she? A. Yes.

30 Q. In fact, she had asked you to take it up with the New York Central officials, or the person that you knew there, with a view to having the New York Central Railroad buy it? A. Yes; they were buying land at that time for this new extension, or tentative extension.

Q. For the West Side Extension? A. For the West Side Extension.

Q. That, however, was much further south in New York City? A. Why; at that time they were buying much further south in New York City, but this property was shown on that map.

40 Q. Didn't she believe that this land had a speculative value, contingent upon the opening of the Barge Canal in New York, and the possible de-

Joseph G. Shannon—Cross Examination.

mand for sites for the docking and wharfing of large barges and canal boats? A. Yes; she spoke of it as being available for that purpose.

Q. And the contingency which would require the use of such property for that purpose was postponed for some years to come? A. For that purpose—canal purposes? 10

Q. Yes. A. Yes, but it did look as though the New York Central was forced to buy.

Q. Rather; didn't it look as if the New York Central was the logical buyer, because of the fact that the land under water abutted upon the upland sold to the New York Central? A. Yes; but I knew from the other side, of course, I knew from the New York Central side, that they had to buy land with this new development which they are taking there, or which it was proposed to put there, and which was stopped by the war. 20

Q. When Mrs. Shea asked you to intercede with your brother-in-law in the New York Central, and induce him to use his efforts to purchase this land, and you said you would rather not mix family affairs with business affairs, did she say anything about employing anyone else to go to the New York Central to endeavor to sell the land to them? A. No; she talked all the rest of it with you. 30

Q. Have you the inventory of the estate, Mr. Shannon? A. Mr. Edwards ought to have that.

(Mr. Edwards produced the inventory at Mr. Milton's request.)

MR. MILTON: You have no objection to my offering a copy of this?

MR. EDWARDS: Oh, no; that has been filed with the Surrogate.

Joseph G. Shannon—Re-Direct Examination.

RE-DIRECT EXAMINATION BY MR. RUOFF:

Q. Mr. Shannon, was Mrs. Shea aware of this proposed New York Central extension, and the prices they were paying for land—did she ever speak to you about that? A. Why; no, only in
 10 a general way, that they were paying big prices down around One hundred and thirtieth Street at that time.

Q. And she knew that the proposed extension would pass this property of hers? A. Yes; she knew that.

Q. She spoke to you about that, did she? A. Yes.

Q. Was that the time that she tried to induce you to go to the New York Central and see if you could sell? A. No; not at that time; she
 20 spoke of it at different times, about "You ought to do that little thing".

Q. Was the New York Central actually changing its right-of-way, or the location of its right-of-way? A. Why; their improvement is in connection with the Riverside Park Extension, and widening out their tracks south of Spuyten Duyvil.

Q. And that ran up all the way beyond this property, did it? A. Yes; it touches this property.

Q. And did she ever mention to you how much
 30 they were paying for land? A. No.

MR. MILTON: He said she did not know.

BY MR. DAWSON:

Q. Did you know how much the New York Central was paying for land around the River front?

MR. MILTON: Objected to, as irrelevant, incompetent, and immaterial, what this witness knows.

THE VICE CHANCELLOR: Suppose he did
 40

Joseph G. Shannon—Re-Direct Examination.

know—what Mrs. Shea knew would be relevant. This is not the will of Mr. Shannon, it is the will of Mrs. Shea. Now; you say that she regarded this property as being very valuable; I assume, knowing the extent of her personal estate, that she realized or thought there would be sufficient realized from it to make up any deficiency in assets; but that knowledge would have to be her knowledge, not Mr. Shannon's knowledge. I will let you ask the question, though. I do not think there is any testimony so far that I need to consider, but you may go ahead. 10

MR. DAWSON: My idea in asking the question was that the witness said Mrs. Shea thought the property was valuable; now, your Honor don't know, and I don't know what the value of the property is there, and if he knew the price they were paying there it might enlighten us all. 20

THE VICE CHANCELLOR: Well, if the witness knows, he may state.

A. I cannot remember, at that time, the price that was spoken of, but I learned at that time in connection with the Gordon property at One hundred and thirtieth Street, Gordon lives in Avon, and he at that time, I think, had been selling some land at the foot of One hundred and thirtieth Street, and spoke about the price, but whatever it was I have forgotten. 30

By MR. MILTON:

Q. This development of the New York Central, that you have referred to, was really projected and contemplated, but was never effectuated? A. No; it is only tentative, as I understand.

Q. And it requires the assent of the Board of Estimate of the City of New York before it can be put through? A. Yes; I understand so. 40

John Hall Shannon—Direct Examination.

Q. And the Board of Estimate refuses to give its assent, and did some years ago refuse to give its assent? A. Why, the New York Journal, I think, stopped this thing.

10

JOHN HALL SHANNON, sworn.

DIRECT EXAMINATION BY MR. DAWSON:

Q. Mr. Shannon, you are one of the nephews of Ellen J. B. Shea, mentioned in the residuary clause of her will? A. Yes.

Q. Did you know the testatrix in her lifetime? A. Yes.

20

Q. Did you ever visit her? A. Yes.

Q. How often? A. Oh, maybe five, six or seven times a year, at a rough guess; sometimes I would go there once a month, and sometimes there would be three or four months in between.

Q. Do you remember about the time she made her will? A. Yes.

Q. Do you recall having seen her, or conversed with her, a short time prior thereto? A. Yes.

Q. How long prior to that was your last conversation with her? A. Why, my last conversation with her, I should say, was in the neighborhood of fifteen or twenty minutes—maybe an hour—before she made her will.

30

Q. Well; did she, at that time, say anything to you about the value of the Spuyten Duyvil property? A. No; probably a week or so before that.

Q. And what did she say to you at that time? A. Why; she had asked me to go up and go over the property, which I did; and she had mentioned it several times before, in a general way, but

40

she said "That will leave you boys so you won't

John Hall Shannon—Direct Examination.

have to worry about anything.”

Q. What is your business? A. Contractor.

Q. How old are you? A. Thirty-nine.

Q. And did you go and look at this property?

A. Yes.

Q. Did she say anything to you about a prospective purchaser of the property? A. A prospective purchaser? 10

Q. Yes. A. Why; she said that the railroad would have to have it; she had said that it would bring a good price, so there would be enough so we would not have to worry about it. That is about as definite as that proposition was.

CROSS EXAMINATION BY MR. MILTON:

Q. You are the father of the child Roberta Shannon, who receives a gift, under the Twelfth Clause of this will, of \$5,000? A. Yes. 20

Q. Now; Mrs. Shea died in November, 1916? A. Yes.

Q. In the year 1915, how many times had you been to visit Mrs. Shea at her house? A. I should say six or seven times—eight times—something like that.

Q. In the year 1916? A. About the same.

Q. You are not able to recall when those visits were made? A. No. 30

MR. MILTON: Ordinarily, I would not testify, being counsel; but the first witness has disclosed the fact that Mrs. Shea had some conversations with me, and, in order that no false impression may be made on your Honor's mind as to the nature of those conversations, I feel, under the circumstances, that I ought to swear as to what they were. 40

John Milton—Direct Examination.

JOHN MILTON, sworn:

(The Witness): Mrs. Ellen J. B. Shea retained me as her attorney shortly after the contest over the will of her sister, Theresa A. S. Sheridan, had been finished. Mrs. Shea had filed an appeal from
 10 the probate of that will, and I had represented one of the executrices of that will. A year or so after Mrs. Sheridan died another sister, named Watt, died, and Mrs. Shea desired to contest the will of Mrs. Watt—Mary J. Watt—and she retained me for that purpose.

BY THE VICE CHANCELLOR:

Q. Was that appeal before me? A. No, sir; I think it came up before you, that is, the Watt case came up before you.

20 Q. Yes; Shannon vs. Watt was before me. A. Yes; on the rights of the husband of Mrs. Watt in the real estate. Mrs. Shea, under the will of her sister, Theresa A. S. Sheridan, had received some land in New York City, which was referred to as "land at Spuyten Duyvil". It was not until at least two years after Mrs. Sheridan's death that she asked me to do anything about it. She did not know where it was; she did not know whether the taxes had been paid or not, and asked
 30 me to investigate it. I ascertained that there were some arrears of taxes, and so reported to her. I ascertained that the land had been given to Mrs. Sheridan, the sister of Mrs. Shea, in payment of a debt which had been contracted by someone that Mrs. Sheridan had done some towing for. The upland had been sold by Mrs. Sheridan some years before to the New York Central Railroad Company, and there was no access to the land which remained, and which went to Mrs. Shea,
 40 from the land side; the only access was from the

John Milton—Cross Examination.

River—the land in question being all under water. In order to locate definitely its whereabouts, I recommended to Mrs. Shea that we have a sketch or survey made which I did; I gave that to her, and recommended that we try and dispose of it. I negotiated with several brokers in New York City, particularly with Duross, Reardon & Company but none of them were able to procure a purchaser; the land had no present value; its value was largely speculative, contingent upon the development of the river along general commercial lines. It was my own conception that the land might become valuable if there should be an influx of trade and a development of the river as a harbor from the construction of the Barge Canal, and a demand for dockage and wharfage sites for barges and large canal boats. Mrs. Shea discussed the matter with me several times prior to her death, and had no idea as to the value of the property at all.

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20

CROSS EXAMINATION BY MR. DAWSON:

Q. Mr. Milton, can you fix the time that you made your efforts to sell this property? A. Yes; I think it was about the summer of 1916.

BY THE VICE CHANCELLOR:

Q. Was that before or after the date of the will? A. Why; it was a month or two before it.

30

BY MR. DAWSON:

Q. And did you know of the contemplated improvements of the Central Railroad? A. Did I?

Q. Oh, yes; it was a matter of common knowledge, and, as Mr. Shannon has said, newspaper comment—the New York American—was vigorously opposing any such program, that involved what the Journal was pleased to call “the destruction of

40

John Milton—Cross Examination.

Riverside Drive—New York's Playground."

Q. And it was taken up quite extensively in the newspapers? A. Oh, yes.

10 Q. And did Mrs. Shea, to your knowledge, have any copies of those newspaper clippings, outside of the maps of the property? A. She had the copy of the map which I procured for her; whether she had any copies of the newspapers, or not, I don't know.

Q. What led you to believe that the property might be valuable at some time? A. Why, it was pure speculation on my part, Mr. Dawson, and on the general theory——

20 THE VICE CHANCELLOR: Well; do you think it requires any evidence to convince the Court that property of that character has speculative value?

MR. DAWSON: No; I think it did have speculative value; the question is, what did the testatrix think of it—what was in her mind as to the value of it? I think that is the gist of all of this testimony.

THE VICE CHANCELLOR: Yes; well, you haven't got much light on that; she did not seem to know anything about it.

30 (The witness, resuming.) ——on the general theory that water front property in New York Harbor some day ought to be worth money; but just when that time was going to arrive Divine Providence, of course, is the only one that can tell you.

BY THE VICE CHANCELLOR:

Q. Well; doesn't it depend largely on someone needing the property? A. Precisely.

40 Q. And until someone needs the property, it is a white elephant? A. It is; I can give you countless illustrations of that right in Jersey City.

John Milton—Cross Examination.

BY MR. DAWSON:

Q. Mrs. Shea was imbued with the same idea, was she not—that this was going to be immensely valuable? A. No; I do not think so, Mr. Dawson; I think she realized that some day she ought to get a good price for it, but I do not think she regarded it as being immensely valuable.

10

BY THE VICE CHANCELLOR:

Q. Was there any particular change in the value of the personal property from the date of her will to the date of her death?

MR. RURODE: I do not think so.

MR. MILTON: The will is dated November, 1916, and she died the same month.

THE VICE CHANCELLOR: Oh; I see.

MR. EDWARDS: There was apparently no change. We have a copy of the inventory here, but that inventory includes some specific bequests that were not pecuniary.

20

MR. RURODE: I think the amounts are correctly charged in the bill, and there is no question but what there is a deficiency of assets.

MR. MILTON: There is no question of that. I offer the inventory; it shows a gross inventory of \$30,827.37.

30

THE VICE CHANCELLOR: And the bequests amount to how much?

MR. DAWSON: They amount to about \$40,000.

MR. RURODE: And some of these specific bequests of jewelry, etc., which were inventoried, there is a deficiency of. The real estate will have to be sold; there won't be enough even with the Spuyten Duyvil real estate; and the effect of a construction that the residuary real estate is chargeable with

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Colloquy.

the payment of the pecuniary legacies will be, I think, to wipe out entirely the residuary legatees.

Both sides close.

10

Chancery Chambers,
Jersey City, May 10, 1919.

Case re-opened for further proofs.

20

MR. MILTON: Mr. Edwards is the moving party. He has some testimony in respect to the value of the real estate. He went to his office, as he came away without the tax bill. Perhaps we might discuss, while waiting for him, the question of the McCarter testimony which Mr. Dawson wanted to offer.

30

MR. DAWSON: Now; in reference to that, your Honor will recall, when we were in court the last time, that the statement was made that a letter from Mr. McCarter would be agreeable to all concerned as evidence, subject simply to the question of its admissibility. Now; I have a letter here, a copy of which I gave to Mr. Milton. I will read the letter. Shall we start in now?

THE VICE CHANCELLOR: Yes; go ahead.

MR. DAWSON: (Reading):

"April 23, 1919.

"R. H. McC.

Personal.

"Messrs. Edwards & Smith,

"1 Exchange Place,

"Jersey City, N. J.

"Gentlemen:

40

"I represented Ellen J. B. Shay, and obtained from her dictation the data from which her will, bearing date November 1, 1916, was

Colloquy.

drawn. I also witnessed her execution of the will. She directed that the Spuyten Duyvil property be charged with the payment of the pecuniary legacies if there were a deficiency in the personalty.

"I did not mention to the testator any difference between the laws of New York and New Jersey, relative to the chargeability of real estate with the payment of legacies. 10

"Yours very truly,
"Robert H. McCarter."

MR. MILTON: In the first place, the will is dated November 11th. Is he talking about some other will? He said in the letter "dated November 1st."

MR. DAWSON: Well, Mr. McCarter is here, in the other room.

MR. MILTON: Well; I will assume that it is the will in question which he refers to. 20

(Mr. Dawson offers the letter just read in evidence.)

MR. MILTON: I have no objection to the form of the proof, and am willing to consent that Mr. McCarter will testify as he has written in this letter; but I do object to the competency of the offer of the testimony, and its materiality.

(The Court reserves the ruling on the offer at this time.) 30

After argument by counsel.

MR. MILTON: It is stipulated by and between the counsel of the respective parties that the personal estate of the testatrix is, gross, \$30,827.37; the debts are \$1,000; the net personal estate is the difference, or \$29,827.37; the Spuyten Duyvil real estate sold for approximately \$3,500; and the value of the New Jersey real estate is, gross, \$23,250, subject to a mortgage of \$8,500; or, net, \$14,750. 40

Case closed, and argued by counsel.

(Filed August 15, 1919.)

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

10 JOSEPH G. SHANNON, Executor of
the Last Will and Testament of
Ellen J. B. Shea, deceased,

Complainant,

and

JOHN RYAN, *et als.*,

Defendants.

On Bill, &c.

20 John Hall Shannon and Robert Shannon defendants in the above entitled cause, hereby appeal from the final decree entered in the above cause on July 7, 1919, construing the will of Ellen J. B. Shea deceased, and from every part thereof with the exception of that portion of the decree which awards counsel fees.

Dated, July 29, 1919.

EDWARDS & SMITH,
Solicitors of Appellants.

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

RAYMOND DAWSON,
Of Counsel with Appellants.

To:

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Notice of Appeal.

DAVID F. EDWARDS,

Solicitor for Robert G. Shannon, Executor,
&c.

MARK TOWNSEND,

Solicitor for Guardian of Robert A. Shannon.

HAMIL & CANE,

Solicitors for Defendant,

Home for the Blind, Jersey City, New Jersey.

10

TREACY & MILTON,

Solicitors of Defendants,

Little Sisters of the Poor of St. Francis Hospital, Jersey City; St. Joseph's Hospital, Paterson, N. J.; Margaret McAneney; Passionate Monastery, West Hoboken, N. J.; Sisters of Charity, St. Elizabeth's Convent, Convent Station, New Jersey; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Ellen Gilmore; Margaret Padian; Holy Name Cemetery Association of Jersey City; M. Pauline Kelliger; Mary Agnes Sharkey; M. Colomba O'Connor; Anne Milton and Passionate Sisters of Carrick, Pa.

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Petition of Appeal.

(Filed August 22, 1919.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

	Between	}	
10	JOSEPH G. SHANNON, Executor, &c.,		
	<i>Complainant-Respondent,</i>		
	<i>and</i>		
	JOHN G. RYAN, <i>et als.</i> ,		
	<i>Defendant-Appellants.</i>		On Bill, &c.

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

20 The petition of John Hall Shannon and Robert Shannon, the defendants in the above stated case respectfully shows that your petitioners find themselves aggrieved by final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 7th day of July, 1919, wherein the said John Hall Shannon, Robert Shannon and John Ryan; John Shannon; Little Sisters of the Poor of St. Francis Hospital, Jersey City; Passionate Sisters of Carrick, Pa.; St. Joseph's Hospital, Paterson, N. J.; Margaret McAneney; Home of the Blind, Jersey City, N. J.; Passionate Monastery, West Hoboken, N. J.; Little Sisters of the Poor, St. Michael's Hospital, Newark, N. J.; P. E. Smyth; Thomas Cauty; Sisters of Charity, St. Eliabeth's Convent, Convent Station, New Jersey; Roberta Shannon; Trappist Fathers of Kentucky; Catholic Church Extension Society of Chicago; Anne Milton; Ellen Gilmore; Margar-

Petition of Appeal.

et Padian; Holy Name Cemetery Association of Jersey City; Agnes O'Connor; All Soul's Hospital, Morristown, N. J.; M. Pauline Kelliger; Mary Agnes Sharkey; and M. Colomba O'Connor, were defendants and Joseph G. Shannon, Executor of the last will and testament of Ellen J. B. Shay, deceased, was complainant, in this respect, to wit: that the said decree adjudges that the said Ellen J. B. Shay by her last will and testament charged the legacies given under the twelfth clause or paragraph of her said last will and testament upon all the property bequeathed or devised under the residuary clause or paragraph of her said last will and testament to the extent arising through the inability of the personal estate or other funds or property applicable thereto to pay the same.

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And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous, for that the Court of Chancery should have by this decree adjudged the property bequeathed or devised under said residuary clause or paragraph of said will, not chargeable with the deficiency arising from the insufficiency of the personal estate or other funds applicable to the payment of the legacies mentioned in paragraph or clause twelve of said last will and testament.

30

Your petitioners therefore pray that the said decree of the said Chancellor may be and 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 may seem meet.

EDWARDS & SMITH,
Solicitors for and of Coun-
sel with Appellants.

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Answer to Petition of Appeal.

(Filed October 16, 1919.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

10 JOSEPH G. SHANNON, Executor,
&c.,*Complainant-Respondent,**vs*JOHN RYAN, *et als.*,*Defendants-Appellants.*On Appeal
from Chan-
cery.

20 The answer of Little Sisters of the Poor of St. Francis Hospital, Jersey City. St. Joseph's Hospital of Paterson, New Jersey, Margaret McAneny, Passionate Monastery, West Hoboken, N. J., Sisters of Charity, St. Elizabeth's Convent, Convent Station, New Jersey, Trappist Fathers of Kentucky, Catholic Church Extension Society of Chicago, Ill., Ellen Gilmore, Margaret Padian, Holy Name Cemetery Association of Jersey City, M. Pauline Kelliger, Mary Agnes Sharkey, M. Colomba O'Connor, John Milton, guardian ad litem of Ann Milton, Passionate Sisters of Car-

30 rick, Pennsylvania, respondents, to the Petition of Appeal of John Hall Shannon and Robert Shannon, Appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer there-
to nevertheless say and admit that a decree was
on the 7th day of July last past, made and en-
tered in the Court of Chancery in the cause for
that purpose mentioned in the said petition as

40 is therein stated; but as to the substance and form

Answer to Petition of Appeal.

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 to equity and pray that the same may be affirmed with costs to be adjudged to these respondents.

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Of Counsel:

TREACY & MILTON,
Solicitors for Respondents.

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Answer to Petition of Appeal

that the respondent has to refer to the
when the same shall be produced.

And when respondent has referred to the
that the same is referred to the
that the same may be referred to the
to be referred to the respondent.

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Of Counsel:

TRACY & MURPHY
Solicitors at New York

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New Jersey Court of Errors and Appeals

Between

JOSEPH G. SHANNON, Executor
of Ellen J. B. Shea, deceased
Complainant Respondent

and

JOHN RYAN, et al.,
Defendant Appellants.

On Appeal
from Chancery

**Memorandum for Respondents in Support
of Construction to Charge Deficit on New
Jersey Real Estate.**

FACTS

Ellen J. B. Shea died a resident of Jersey City, November 28th, 1916. She left a will which was admitted to probate by the Surrogate of Hudson County, December 8th, 1916. Letters testamentary were issued to Joseph G. Shannon, complainant herein.

By her will testatrix made certain specific gifts and devises as follows:

Paragraph of Will:

(2) To complainant all stock in the Mercantile Trust Company.

(3) To Minnie Le Roy, walnut bureau and \$100.00.

(4) To the Sisters of Charity, graphophone and records.

(5) To John Shannon, complainant's son, her father's gold watch.

(6) To Mary F. Ryan, property known as No. 12 Fleet Street, Jersey City, and the contents not otherwise disposed of.

(7) To the College of St. Elizabeth, certain oil paintings and furniture.

(8) To Sister Mary Agnes Sharkey, arm-chair.

(9) To Goie Shannon, wife of the complainant, certain wearing apparel and diamond ear-rings.

(10) To Mrs. John Milton, diamond sun-burst pin.

(11) To Agnes O'Connor, emerald and diamond ring.

The twelfth clause of the will makes certain provisions which will be hereinafter discussed, and which clause together with the thirteenth clause give rise to this controversy. The inventory of the personal estate before the payment of debts is \$30,827.37. The debts amount to \$1,000, making the net personal estate approximately \$29,827.37.

The Spuyten Duyvil real estate was sold for approximately \$3500.00. The value of the New Jersey real estate is approximately \$14,750, so that the total net worth of the testatrix is approximately \$48,077.

This bill was filed by complainant as the executor alleging that the personal estate while sufficient to pay all the debts of the testatrix is not sufficient to pay the pecuniary legacies in full, and that a question or doubt has arisen as to the proper meaning of the thirteenth clause. *The proceeds of the Spuyten Duyvil real estate*

being insufficient to satisfy the legacies (there being a deficiency in the personal estate); query: is such deficiency to be made up out of the remaining residuary estate or are the legacies to abate?

The provisions of the twelfth and thirteenth clauses of the will are as follows:

TWELFTH: I give and bequeath to my nephew Joseph G. Shannon, Five Thousand Dollars; to my second cousin, John Ryan, Two Thousand Dollars; to John Shannon, son of Joseph G. Shannon, for his education in the Catholic faith, Five Thousand Dollars; to the Little Sisters of the Poor of St. Francis Hospital, Jersey City, One Thousand Dollars; to the Passionate Sisters of Carrick, Pa., Five Hundred Dollars; to St. Joseph's Hospital, Paterson, N. J., Five Hundred Dollars; to my faithful servant, Margaret McAneney, Two Thousand Five Hundred Dollars; to the Home of the Blind, Jersey City, Five Hundred Dollars; to the Passionate Monastery, West Hoboken, New Jersey, an offering for one thousand masses for the deceased members of the Shannon family, the same to be said as soon as possible after my death, One Thousand Dollars; to the Little Sisters of the Poor, St. Michael's Hospital, Newark, N. J., Five Hundred Dollars; to Monsignor P. E. Smyth of St. Joseph's Church, Jersey City, Five Hundred Dollars; to Father Thomas Canty, of St. Joseph's Church, Jersey City, One Thousand Dollars; to the Sisters of Charity, St. Elizabeth's Convent, Convent Station, New Jersey, Ten Thousand Dollars, the interest whereupon is to be used to defray as far as possible, the expenses of the incumbents of two scholarships, one to be known as the "Ellen J. B. Shea Memorial

Scholarship," open to any student at St. Elizabeth's, who during the life of Sister Mary Agnes Sharkey shall be chosen and designated by her, and after her death shall be designated by the President of the College of St. Elizabeth. The second—known as the "Rita Scholarship" in loving memory of my daughter Rita Bosdevez Burke, which shall be open by competitive examination, to such students at St. Elizabeth's as are girl graduates of St. Joseph's Parochial School at Jersey City, New Jersey, the successful competitor to enjoy, so far as possible, the full course at St. Elizabeth's Academy, Convent Station, New Jersey; to Roberta Shannon, daughter of John H. Shannon of Jersey City, the sum of Five Thousand Dollars; to the Trappist Fathers of Kentucky, as an offering for masses for the deceased members of the Michael Shannon family, One Thousand Dollars; to the Catholic Church Extension Society of Chicago, for the erection of two chapels in memory of my parents, Michael and Margaret Shannon, and to be called St. Michael and St. Margaret Chapels, One Thousand Dollars; to Anne Milton, daughter of John Milton of Jersey City, to be used for her education, Five Thousand Dollars; to my cousin Ellen Gilmore, of Jersey City, One Thousand Dollars; to my cousin Margaret Padian of Jersey City, One Thousand Dollars; to the Holy Name Cemetery Association of Jersey City, the income from which is to be applied to the perpetual care of the Michael Shannon plot, One Thousand Dollars; to my cousin Agnes O'Connor of Newark, New Jersey, One Thousand Dollars; to All Soul's Hospital, Morristown, New Jersey, Five Hundred Dollars; to Sister M. Pauline Kelligar, of Convent Station, New Jersey, Five Hundred

Dollars; to Sister Mary Agnes Sharkey of Convent Station, Five Hundred Dollars; to my cousin Sister M. Colomba O'Connor of St. Mary's Orphan Asylum, South Orange, New Jersey, Five Hundred Dollars. (The legacies bequeathed are \$48,000.)

THIRTEENTH: Should my personal estate be insufficient to enable the foregoing pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvil, in the State of New York, as may be necessary, in such manner as in his judgment is deemed best to produce funds to supply the deficiency.

By the fourteenth paragraph or clause, the testatrix devised the balance of her estate in one or a commingled mass to her three nephews, viz. Joseph G. Shannon, John Hall Shannon and Robert Shannon in equal shares.

The question which this Court has to deal with must, of course, be solved by ascertaining what was the intention of the testatrix.

ARGUMENT

I

General Rule

It is settled law in this State "Where a testator bequeaths pecuniary legacies and follows this with a general residuary clause, the legacies are charged upon the entire residuary estate, real as well as personal." The matter was set at rest in this State by the decision of the Court of Errors and Appeals in the case of *Corwine vs. Corwine*, 24 N. J. Equity, page 579.

See also *Johnson vs. Paulson*, 32 N. J. Equity, page 390.

Stevens vs. Flower, 46 N. J. Equity, page 340.

Price vs. Price, 52 N. J. Equity, page 326.

Turner vs. Gibbs, 48 N. J. Equity, page 526.

Paterson General Hospital vs. Blauvet, 72 N. J. Equity, page 725.

Lavaggi vs. Borella, 73 N. J. Equity, page 419.

The rule as adopted by the Court of Appeals in the Corwinne case was taken from Hawkins on Wills in the following language:

“It has been said that a testator generally intends the legacies given by his will to be a charge on his residuary real estate, as well as on his personal estate, but in the absence of an expressed charge, they are held to be so only when the residuary real and personal estate are given together * * it being a rule of construction that if legacies are given generally and the residuary of the real and personal estate is afterward given in one mass, the legacies are a charge on the residuary, real, as well as the personal estate.”

The general rule being as stated, it seems to us it is incumbent upon complainant or those who assert the contrary to show that testatrix intended to except the legacies in question and her residuary real estate from the general rule. In other words, it is our insistence that a presumption is created in favor of the proposition that testatrix intended to charge the legacies upon the New Jersey real estate and it is the burden of the other side to rebut that presumption.

II

As evidence of the fact that testatrix intended to create an exception to the general rule, the residuary devisees point to the thirteenth clause of the will which reads as follows:

“ THIRTEENTH : Should my personal estate be insufficient to enable the following pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvil, in the State of New Jersey, as may be necessary, in such manner as in his judgment is deemed best, to produce funds to supply the deficiency.”

What the residuary devisees say is that by the direction of the thirteenth clause testatrix intended to limit the right of the legatees to have resort or recourse to make up any deficiency to the proceeds of the Spuyten Duyvil property and that its proceeds were exclusive.

In order to determine whether that is so or not, it seems to us important to examine the other provisions of her will because they throw light upon what in all probability was her intention in that respect, viz.—whether she desired or intended to limit the making up of any deficiency to the proceeds of the Spuyten Duyvil property.

It is evident from examination of the will that practically the entire estate of the testatrix is disposed of by the twelfth clause, all of the preceding gifts being of insignificant value and of minor importance, with the exception perhaps of the Mercantile Stock bequeathed by paragraph two and the property 12 Fleet Street bequeathed by paragraph six. A few minutes' consideration of the nature and extent of some of the gifts made

by testatrix under the twelfth clause will lead to the conclusion, we think, that those bequests testatrix intended be paid at all hazards and in any event. They are as follows:

- (1) Joseph G. Shannon \$5,000, her favorite nephew.
- (2) John Shannon, son of Joseph for his education in the Catholic faith, \$5,000.
- (3) Little Sisters of the Poor, \$1,000.
- (4) Passionate Sisters of Carrick, Pa., \$5,000.
- (5) St. Joseph's Hospital, \$500.
- (6) Margaret McAneney, \$2,500.
- (7) Home of the Blind, \$500.
- (8) Passionate Monastery, \$1,000.
- (9) Little Sisters of the Poor, \$500.
- (10) Monsignor Smyth, \$500 for Masses.
- (11) Father Canty, \$1,000 for Masses.
- (12) Sisters of Charity, \$10,000 for Scholarships.
- (13) Roberta Shannon, \$5,000.
- (14) Trappist Fathers, \$1,000 for Masses.
- (15) Catholic Church Extension Society, \$1,000 for Chapels.
- (16) Holy Name Cemetery, \$1,000 care of grave.

Various small sums to various persons in religious life.

Is it conceivable that the testatrix intended that the gift of \$5,000 to her favorite nephew should be reduced for the benefit of two other nephews, whom as the record shows she had not seen for many years until just before her death? Testatrix was a devout Roman Catholic, and according to the testimony, felt that if her favorite nephew, Joseph, died before his son John reached manhood, the son might be educated other

than as a Catholic. Is it reasonable to suppose that the testatrix intended a gift of that character should be subject to the contingency that the funds should not be available if the Spuyten Duyvil property did not sell for a sufficient sum? What was probably the thing nearest to her heart is the gift of \$10,000 to St. Elizabeth's Convent for scholarships, one in the name of her daughter Rita. The testimony shows that this daughter of the testatrix was her only child, that she had died in young womanhood as the result of child birth, and that her death was a great grief to testatrix. Can it be imagined that testatrix, who had no relations nearer to her than three nephews, two of whom she did not see frequently, intended that those nephews should benefit at the expense of a gift of this character—provision having already been made for her favorite nephew and his son?

Having in mind, as has been said, that testatrix was a devout Roman Catholic, is it to be supposed that the gifts of money to various priests and institutions for the offering of masses for the souls of her family were to be subject to reduction in favor of said nephews? Likewise is it to be supposed that testatrix intended that the perpetual honoring of her father and mother through the erection of chapels should perhaps be defeated if the Spuyten Duyvil property did not bring as much as the residuary devisees say she thought it would bring?

The value of her whole estate is \$48,077. The legacies and gifts under the twelfth clause amount to \$48,000. In view of the condition of the law in the State of New York, is it not more consistent for us to assume that the thirteenth clause is found

in this will in order to prevent a shortage or rather to make up any shortage that might exist in the personal estate? It was declared by the New York Court of Appeals in the Case of *Brill vs. Wright*, 112 N. Y., page 129: "Where in a will general legacies are given followed by a gift of all the rest and residue of the real and personal property of the testator by a residuary clause in the usual form and nothing more, it must now, we think, be regarded as the established rule in this State that the language of the will alone, unaided by extrinsic circumstances, is not sufficient to charge the legacies upon the lands included in the residuary devise."

That principle was approved in the case of *Irwin vs. Teller*, 188 N. Y., Page 32 and seems to be the settled law of that State. See also *Ely vs. Megie*, 219 N. Y., page 127.

It seems to us that in the light of the will as a whole, and of all the circumstances, viz., the testatrix died without relatives nearer to her than nephews, two of those nephews she had not been very friendly with, in fact one of them, Robert Shannon, was not even called to attempt to show any friendly relationship between him and his aunt; the favorite nephew and his son provided for; testatrix, a devout Roman Catholic, endeavored to provide for what under the special circumstances she regarded as the objects of her bounty and to follow a natural charitable inclination; her New York real estate being of little or only speculative value; the law of New York being as stated, the reason for the existence of the thirteenth clause, is to put the New York real estate beyond peradventure or doubt upon a parity with the New Jersey real estate which latter by force of the

cases cited would be charged with the payment of the legacies. To hold that resort might be had only to the Spuyten Duyvil property to make up any deficiency, and that thereby the door of access to the New Jersey real estate was closed, it seems to us would be doing violence to what was the real intention of the testatrix when the will is considered as a whole in the light of the circumstances existing at the time of its making and the nature and character of the gifts under it.

Appellants rely for their construction of the will in question upon the case of *Johnson vs. Poulson*, 32 N. J. Eq. 390. That case, however, is quite distinguishable from the one under consideration. It appeared in the Johnson case that testator by the third item of his will, gave legacies to his three daughters and then gave to his two sons "all the rest and residue of my property including the farm on which I now live * * * subject, nevertheless, to certain payments to be made by them hereinafter mentioned." The Court of Errors in considering the application of its opinion in *Corwine vs. Corwine* said that while there is a similarity between some of their important phrases, the residuary clause in the Johnson will and that part of the will which precedes the residuary clause, do not, as in the former case, show the same absence of words and provisions bearing against the implication or inference on which the rule adopted in the former case was founded. The Court says in the Johnson case,

"The rule itself being a judicial interpretation of words used with reference to the other conditions of the will is subservient as rules of construction in all cases are to the cardinal and pre-

dominant one which seeks the purpose of the testator from all parts and provisions of the instrument considered together."

The particular question in the Johnson case was whether or not the legacies to the daughters were chargeable on the farm devised by the residuary clause to his two sons. It appeared that Johnson had also made provision for the use by his widow of the farm so devised apparently in contemplation of her continued residence and ownership there in connection with his sons. The Court found that fact to be an indication that the arrangement thus *primarily* made, was not favorable to the view that the farm should be liable to be sold for the legacies *afterwards* given.

It likewise appeared that the testator Johnson had expressly subjected the residuary estate to the payment of certain legacies thereafter bequeathed and (under the doctrine of *Expressio unius est exclusio alterius*) therefore a circumstance existed unfavorable to the view that the farm was given to be subject to the legacies *preceding*.

It also appeared in the case that the proofs did not satisfactorily establish the insufficiency of the personal estate and further the Court adopted the view expressed by the House of Lords in the case of *Conron vs. Conron*, 7 H. L. Cas. 168, that the effect of a specific devise of land is to exempt it from payment of legacies unless the contrary intention clearly appears.

It will be seen therefore, that *Johnson vs. Poulson* is substantially and in important particulars, different from the case at bar. Here we have satisfactory proof that the personal estate is insufficient. Here we have no limitation upon the

residuary devise to the three nephews. Here no question arises as to the residuary devise not being specific nor in this case do we find the particular legacies claimed to be a charge preceded by any disposition of any part of the residuum.

It seems to us further, that in view of the nature of this will the legacies under the twelfth clause are general to the extent of the available personality, demonstrative as to the proceeds of the Spuyten Duyvil property, and as to the deficiency thereafter, if any, general with the right of recourse to the residuary or New Jersey real estate.

III

In order to succeed, the nephews must establish that testatrix intended the legacies given under the twelfth clause to be specific insofar as any deficiency might exist with reference to the Spuyten Duyvil real estate. How that can be done, we do not understand. The essential element of a specific gift is that it must be given in specie.

“A specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it and enable to be delivered to the legatee as a thing *suit generis*. The testator fixes upon it, as it were, a label by which it may be identified and marked for delivery to the owner; and the title to it, as a separate thing, vests at once on the death of the testator in the legatee.”

Harper vs. Bibb, 47 Ala. 547, and see cases quoted in L. R. A. New Series, Volume 11, p. 55.

A typical illustration of a specific legacy may

be found in the will here under consideration—in the gift to Joseph G. Shannon of the stock of the Mercantile Trust Company and of a specific devise in the gift to Mary Ryan of the land known as 12 Fleet Street. A construction of a will or of a gift in favor of its being specific rather than general or demonstrative, is not regarded with favor by the Courts as was said by Chief Justice Gummere, speaking for the Court of Appeals in *Blair vs. Scribner*, 67 N. J. Eq. 584. At. 588,

“The true construction of the ‘further meaning’ clause is concededly, doubtful; and this fact alone goes far to defeat the claim that by it the testator intended to revoke the gifts made for the benefit of his grandchildren in the event of his subsequently converting the stocks and bonds mentioned in the trust provisions of his will, for it is a primary rule in the construction of wills that a clear intention on the part of the testator must appear in order to make a legacy specific.”

That case is an interesting illustration of how far our Courts are willing to go in order to find a legacy to be demonstrative rather than specific. The Court of Appeals reversed the Court of Chancery whose opinion will be found in 65 N. J. Eq. 498. At page 517 Vice Chancellor Emory quoting from an opinion of Vice Chancellor Kent in *Walton vs. Walton*, 7 Johns. Ch. 262, gives an interesting explanation or illustration of a demonstrative legacy. In the case referred to by Vice Chancellor Kent as taken from the Civil law, testator gave to Pamphila 400 pieces of gold and referred to a debt which his agent owed him and to his property in the army, and to his cash. He

died without altering his will, but after he had converted all that property to other uses, and the question was whether the legacy was due. The answer of Julian the civilian, was that the testator intended only to point out to his heirs the funds from which the legacy could be most easily drawn without intending to annex a condition to a pure gift, and that the legacy was consequently to be paid. That is analogous to the present situation. Here testatrix intended to point out the fund or source from which any deficiency might be drawn or made up. As Vice Chancellor Emory continues:

“To arrive at the testator’s intention to make the legacy specific or demonstrative the whole will must be considered, and the question is whether upon the whole will it appears that the bonds or securities are intended merely as the primary source for the payment of a legacy in money, which is to be paid at all events, or whether the bonds or securities specified are the things which are intended to be given and are the *only source* for the payment of the legacy. If the former, the legacy is demonstrative, and on failure of the primary source of payment the legacy as one of money, is payable from the general estate.”

While, of course, the Court of Appeals reversed the Vice Chancellor, nothing was said by that Court to indicate it disagreed with his view of the fundamental law of the case. The reversal is predicated upon his misapplication of the law and upon the fact that he erroneously construed the provisions of the Blair will.

An interesting collection of cases classifying legacies will be found in the foot note in re Snyder, 11 L. R. A. (N. S.) P. 49. At Page 65 will be found the case of *Gordon vs. Duff*, 28, Beav. 519, affirmed in 3 DeG. F. & J. 662, in which it is held, if a person bequeaths a legacy and charges that legacy on a particular fund, then the general estate is liable though the particular fund upon which it is charged should fail.

A demonstrative legacy has been defined as "One of quantity, payable out of a particular fund primarily and out of the general estate if the fund designated proves insufficient." Two elements are necessary to constitute a demonstrative legacy. It must appear in the first place that testator intended to make an unconditional gift in the nature of a general legacy and secondly the bequest must indicate the fund out of which it is payable. Such a legacy is in its nature both general and specific—general in that if the fund be called in or fail the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet specific in that it will not be liable to abate with the general legacies, in case of a deficiency of assets. See 40 Cyc., 994.

It is our contention that as to the Spuyten Duyvil property, the gifts in question are demonstrative legacies. It surely must be assumed that the testatrix intended by the twelfth clause of her will to make unconditional gifts. In case of any shortage of the personalty, Spuyten Duyvil is indicated as the fund out of which such shortage is payable, therefore, as to Spuyten Duyvil the legacies are demonstrative, if there is a shortage after Spuyten Duyvil is sold, the legacies in question do not abate, but have recourse to the general residuary estate.

An analogous case is *Byrne vs. Hume*, 86 Mich. Page 546-49 N. W. 576. Where it is held that a bequest "I give and bequeath to my said father and mother the sum of \$3500, and I desire my executors to pay the sum over to them out of my life insurance money payable to my executor as soon as collected," is a general legacy to be paid out of the general assets of the estate if the insurance money is not collected?

To conclude, we insist that the thirteenth clause of this will cannot in the light of the general provisions of the entire will and in view of the state of the New York law and in consideration of the value of the estate be regarded as exclusive, and a more reasonable and sensible construction is to hold that the gifts under the twelfth clause were intended by the testatrix to be paid in full in any event.

We therefore respectfully insist that the opinion of the Court below should be affirmed.

JOHN MILTON
Of Counsel with Respt.

New Jersey Court of Errors and Appeals.

Between

JOSEPH SHANNON, Executor &c., of
the Last Will and Testament of
Ellen J. B. Shay, deceased,

Complainant-Respondent,

and

JOHN RYAN, et als.,

Defendants-Respondents.

10

BRIEF OF APPELLANTS.

This appeal brings up for review a decree of the Court of Chancery construing the Will of Ellen J. B. Shay, deceased. The said Ellen J. B. Shay died a resident of Jersey City, leaving a last will and testament wherein she ordered her executor to pay all her just debts and funeral expenses as soon as practicable after her decease and authorized and empowered said executor to sell any and all her real estate save her home in Jersey City at public or private sale, upon such terms as in his judgment should be deemed advisable. She then makes certain specific bequests and by the twelfth paragraph of her will makes a large number of pecuniary bequests to charitable and religious institutions and to relatives and friends.

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The controversy arises over the construction to be placed upon paragraph thirteen of her will as to whether this language makes the legacies in paragraph twelve chargeable upon the real estate devised in the residuary clause of the will, or whether it limits these legacies to the personal property and the proceeds of sale of the Spuyten

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Duyvil property mentioned in said paragraph thirteen, which reads as follows:

10 “Should my personal estate be insufficient to enable the foregoing pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvel in the State of New York, as may be necessary, in such manner as in his judgment is deemed best, to produce funds to supply the deficiency.”

By the 14th paragraph of her will it is provided:

“All the rest, residue and remainder of my estate, wheresoever situated and of whatsoever character, I give, devise and bequeath unto my three nephews, Joseph Gilmore Shannon, John Hall Shannon, and Robert Shannon, in equal shares to them, their assigns absolutely forever.”

20 It appears by the bill filed, that the personal estate of the testatrix was sufficient to pay all the debts owed by her at the time of her decease, but was not sufficient to pay in full the pecuniary bequests provided for in the 12th paragraph of her will. The executor, under the power conferred by the will, then proceeded to sell the Spuyten Duyvil property. The sale of this property, however, did not produce sufficient funds to enable the executor to pay all of the pecuniary bequests in
30 full. The only other property owned by the testatrix consisted of certain real estate situate in Jersey City, N. J. This, by the 14th paragraph of her will, comprised the residue and remainder of her estate and by such 14th paragraph, was to go to her three nephews therein named.

The question which the complainant presents to the Court is whether or not it was the intention of the testatrix, in the event of her personal estate being insufficient to pay the legacies provided for
40 in the 12th paragraph of her will, to sell only the

Spuyten Duyvil property to make good such deficiency, or, in case the Spuyten Duyvil property did not produce sufficient funds to enable her to pay said legacies in full, was the real estate comprising the residue of her estate charged with the payment of said legacies.

The personal estate is the primary fund for the payment of legacies.

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40 Cyc, 2001;

Massaker vs. Massaker, 13 N. J. E., 264;

Sims vs. Sims, 10 N. J. E., 158;

Kitchell vs. Young, 46 N. J. E., 506.

"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 made."

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40 Cyc., 2011;

Lafay vs. Lafay, 43 N. J. E., —;

Johnson vs. Poulson, 32 N. J. E., 390;

Leigh vs. Savidge, 14 N. J. E., 124;

Sims vs. Sims, 10 N. J. E., 158.

"The real estate is never charged with the payment of legacies unless the testator intended it should be, and that intention must either be expressly declared or fairly and satisfactorily inferred from the language and dispositions of the will."

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Johnson vs. Poulson, 32 N. J. E., 393.

Complainant, however, alleges that inasmuch as the residuary estate comprises both land and personal property and is given in one mass, the legacies are a charge on the residuary real as well as personal estate, and cites *Corwine vs. Corwine*, 9 E. C. Green, 579, and cases following that case as authority for such proposition.

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In the *Corwine* case, the will, after certain pecuniary legacies and specific bequests, gave to the testator's son the entire residue of the estate, both real and personal.

The Court held:

10 "If legacies are given generally and the residuary of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real, as well as personal estate."

This general rule in the *Corwine* case has been affirmed by our Courts many times.

20 *Johnson vs. Poulson*, 32 N. J. E., 390;
 Stevens vs. Flower, 46 N. J. E., 340;
 Price vs. Price, 52 N. J. E., 326;
 Turner vs. Gibbs, 48 N. J. E., 526;
 Paterson General Hospital vs. Blauvelt,
 72 N. J. E., 725;
 Lavaggi vs. Borella, 73 N. J. E., 419.

While it is true that the law in the *Corwine* case is still "good law", such rule is only applied in those cases where there is no evidence of contrary intention appearing in the will.

In commenting upon the *Corwine* case, the Court of Errors and Appeals, in the case of *Johnson vs. Poulson*, said:

30 "The intention of the testator to charge the legacies on his land was deduced in that case solely from the words 'residue of real and personal estate.' There was nothing else in the will to indicate, expressly or by implication, an intention either in favor of or against such a charge. The long established rule, repeatedly declared by the courts of this state, makes personal estate 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
 40 expressly declared or fairly and satisfac-

torily inferred from the language and dispositions of the will. This rule was held, in *Corwine vs. Corwine*, to be met and its requirements satisfied, by giving to the word 'residue' its natural and proper force and effect. It signifies what is left of a number or a quantity after something has been abstracted. The residue of a farm is what remains of it after something has been taken away. The residue of a blended mass of real and personal estate is what remains after the mass has been diminished by something subtracted. Hence, when pecuniary legacies are first given, and, afterwards, the residue of the testator's estate, real as well as personal, his intention to have the legacies payable out of the real, if the personal estate be insufficient, appears, in the absence of any inconsistent words or provisions in the will, by necessary implication, from the words 'residue' or 'remainder', when applied to the two kinds of property combined. It is to be observed, from the nature and grounds of this rule of construction, that it cannot prevail except where the inference arising from the words above used, taken in their natural and reasonable sense, is not restrained or avoided by other words or provisions in the will, to which due effect must be given in collecting the intent from the instrument as a whole."

In the case of *Paterson General Hospital Association vs. Blauvelt*, 72 N. J. E., 719, Vice Chancellor Garrison, in commenting upon the *Corwine* case, said:

"In the case of *Johnson vs. Poulson*, 32 N. J. E., 390, the rule in *Corwine vs. Corwine*, supra, is explained, and is shown to apply only to those cases in which there is no evidence of contrary intention appearing in the will. That is to say, a will giving legacies generally, and following that with a residuary clause blending all of the property, real and personal, therein, will be construed as charging the legacies on the blend-

ed mass of real and personal property left by the testator. But if there is anything in the will which shows a contrary intent, then the charge does not necessarily result from a residuary clause of the character mentioned."

Let us examine the will to ascertain whether the testatrix has, by anything therein, evinced a
 10 contrary intention.

By the 12th paragraph, she makes a large number of bequests amounting to a very large sum of money. That she had in mind at the time that she might not have a personal estate sufficient to satisfy all of the bequests in full, is apparent for she provides against such a deficiency by the 13th paragraph of the will. This paragraph provides:

20 "Should my personal estate be insufficient to enable the foregoing pecuniary legacies to be paid, then I direct my executor to sell either all or so much of my land at Spuyten Duyvil, in the State of New York, as may be necessary, in such manner as in his judgment is deemed best, to produce funds to supply the deficiency."

Here, by direct, clear and precise language, the testatrix has provided a source or fund from which any deficiency, in her personal estate, should be made up; she directs that such source
 30 or fund shall be used to produce moneys to supply any deficiency, for the purpose of making payments of said legacies in full. Testatrix knew at the time she made the will that she had other real estate. Had she intended that all of her real estate should, if necessary, be used to supply the deficiency, if any, she would have said so. Having expressly set apart the Spuyten Duyvil property for that purpose, she must have intended that such property only should be so
 40 used and to have intended that the balance of

her real estate should not be so used. The maxim "*expressio unius est exclusio alterius*" applies.

The rule in the Corwine case does not apply here.

If the Corwine rule does not apply, there is nothing in the will showing any intention to charge the legacies upon the real estate, except, of course, upon the Spuyten Duyvil real estate. 10

An intention to charge legacies upon real estate must clearly appear, or be clearly deducible from the language and disposition of the will.

40 Cyc—2013 (and cases cited)
Price v. Price, 52 N. J. Eq. 326.

Testatrix believed that the Spuyten Duyvil property was worth a great deal more than it brought at sale. From this, it may be argued that had she known that the Spuyten Duyvil property was not sufficient to pay the legacies, she would have charged them upon the residuary estate, but this presumption is not necessary, nor is it in this case the logical presumption, considering the fact that the residuary estate is given to her three nephews—the nearest blood relatives she had—and that the presumption is that blood relatives will be favored rather than strangers (*Scott v. Stebbins*, 91 N. Y. 605,) 20

the most likely presumption is that had she known such a fact, she would have refrained from making so many miscellaneous pecuniary bequests. 30

Whether we call the legacy specific or demonstrative, it makes no difference, as all rules of construction must give way to the intention of the testator. This is a cardinal rule in the construction of wills. We must first seek the intent of the testator. After this, we can apply the rules and adopt the classification.

It has been argued that the legacies are demon- 40

strative, which means that the testator intended that they should be paid at all events, and that the charge on the New York property was merely the desire to have those lands sold first, but the testator does not say this. Instead of saying, "sell those lands first" she clearly shows her intent to extend her bounty to her nieces and nephews, by saying in the very next paragraph, "all the rest and residue to my nieces and nephews." Does she not in effect say, "I give my personalty and the New York property to the legatees mentioned in paragraph 13, and the Jersey City property (residue) to my nieces and nephews?" If she did not mean this, then we say the reference to the New York property is meaningless. If she meant to charge her lands, even to the exclusion of her nieces and nephews, why does she refer particularly to the New York lands?

10

20 It was her intent that limiting the extent of her bounty to the legatees in paragraph 13 to the New York property, she would then secure for her residuary legatees at least the real estate in New Jersey not charged with the payment of legacies.

"The testator may, if he desires, relieve the residuary legatee from primary liability for a deficiency by charging the debts upon a particular fund."

40 Cyc. 1903.

30

The direct charge of these legacies on the New York lands shows absolutely that she intended to limit these legacies, or the deficiency in the personalty, to the sale of the New York property. Are not these legacies in question more in the nature of specific as to the New York property, and therefore, subject to abatement if that fund fails?

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"Where a gift is of a fund itself in whole or in part, or is so charged upon the object

made subject to it as to show intent to burden that object alone with the payment, it is deemed specific."

Woerner Law of Administrators Volume
2, p. 1054.

Page v. Leapingwell, 18 Ves. 463.

In re Van Nest, 43 N. J. Eq. 126.

We have before argued that the doctrine or rule arising from the blending of real and personal in a residuary clause, and a classification of legacies as demonstrative or specific, and all rules in the aid of construction must give way to the testator's intent, and we urge that such intent was plainly set out in the will in question. 10

We have before us a clear illustration of the doctrine of *expressio unius est exclusio alterius*.

A testator died seized of real estate consisting of a homestead farm and several tracts not contiguous thereto. By his will he gave to his wife the use of all his property, real and personal, during life. By the second item, he gave to two daughters \$2,500. each to be paid out of the personal property, if sufficient; if not sufficient, the residue to be made out of my real estate by a sale of my detached lands from my homestead farm. On the settlement of the estate there was insufficient to pay the legacies to the daughters. A bill was filed seeking to have the legacies declared a lien upon all the real estate devised by the testator. The Court said: 20 30

"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 either be expressly declared, or fairly and satisfactorily inferred from the language of the will. There can be no question but what the testator meant to charge any deficiency in the pay- 40

ment of legacies arising from want of personal property upon the pasture property. *

10 * * His directions to his executors, that the amount of the legacies remaining unprovided for by the personal estate is to be made out of the real estate, by a sale of so much of all his lands, detached from his homestead farm, as may be necessary for that purpose, is clear and explicit, and the only question is, does the later provision, with reference to the pasture lot, indicate that such charge and direction was limited to that lot. * * *

20 The complainants claim, that it was the intention of the testator, not only to charge the payment of these legacies on the detached lands, but also upon all the real estate of which he died seized. There is no pretence that there is any express declaration to that effect, but it is argued that such intention is to be fairly inferred from the language and dispositions of the will. * * * *But we have here not only no such general charge on all the real estate, but an express limitation of the lands charged.* The construction contended for renders the designation of the detached lands, as those to be sold in case of a deficiency of personal estate to pay the legacies, entirely meaningless. He has designated them as the ones to be resorted to in that emergency, and, by this, has clearly indicated that he did not intend to charge them upon the homestead farm. *Expressio unius est exclusio alterius.*"

30 *Kitchell v. Young*, 46 N. J. Eq. 506.

40 Testator devised lands to her executors, in trust, to collect the rents and profits and to pay over to her sister during he life out of the rents, issues and profits, \$500.00 semi-annually. The rents were insufficient to enable the executor to make the payment. It was claimed by the legatee that she is entitled to have any deficiency made up from other sources of the estate, or from a sale of the lands devised by said clause. The Court said:

"Reading the whole will I find the plain intent to be to pay \$1,000 annually out of the rents, issues and profits, and therefore, out of what the trustees had of such rents, issues and profits wherewith to make payment. If they have not had, and shall not have, enough to make a full payment in any one year, no more can be extracted from them, or from the corpus of the estate, or from the residuary legatees."

10

Hopkins v. Hopkins, 64 N. J. Eq. 14.

It is true that in both of the above cases there is no mention of the blending of real and personal property in the residuary clause, but that does not effect its application to the case at bar.

The testator said what she meant in words that have been interpreted by this court as being a limitation.

"Where a will expressly charges land with the payment of legacies, this tends to negative any intention to charge it with other legacies not expressly charged, and where the will charges the personalty, it tends to show that the testator did not intend to charge the realty."

20

40 Cyc., 2016.

"The testator may order his debts and expenses to be paid out of the personalty, out of the realty, out of both or any particular piece or parcel thereof."

Woerner American Law of Administrators, Vol. 2 p. 1195.

30

"Where a deficiency is anticipated and provided for by express terms of the will, then the will must govern and the loss must be borne by those on whom the testator places it."

Towe v. Swayze, 106 Mass. 100.

40 Cyc, 1903.

McLean vs. Robinson, 126 Mass., 537.

40

"Residuary legacies are effected by the gen-

eral rule that unless it appears from the will that the legacies were meant to be paid in all events, or unless the intent of the testator to charge the legacies upon real estate is fairly deducible from the will. They do not abate in favor of general legacies."

Woerner, Law of Administrators, page 989.

- 10** We contend that the charge of the pecuniary legacies on the New York property is meaningless if, as our opponents contend, all the lands are equally chargeable. Their only answer to this is that the courts of New York have not adopted the doctrine of charging real estate by reason of the blending of real and personal property in a residuary clause, and that the testator inserted the words "charging the New York property" for the purpose of making the New York property
- 20** equally chargeable with the New Jersey real estate. We contend, however, that whatever the doctrine may be in New York, it does not concern this case in the least.

- We are concerned only with the testator's intention and we reach her intention by what she said. Her reason for making the legacy a charge on the New York property is not open to inquiry. If the court is to inquire as to why she charged the New York property, this is going beyond the four corners of the will, which the
- 30** courts will not do.

Can it be said that the testator intended her next of kin should get nothing? Was it merely to prevent intestacy that she employed the residuary clause? When we consider for a moment that the natural objects of her bounty were her nephews, doesn't it conclusively prove that she meant that they should receive a portion of her estate?

- 40** "Heirs-at-law shall not be disinherited by

conjecture, but only by express words or necessary implication. * * * It may be safely laid down that of two equally probable interpretations of a will, that shall be adopted which prefers kindred of testators to strangers."

Shouler, 5th Ed., Vol. 1, §480.

"A presumption arises in favor of the residuary legatee against everyone except the particular legatee, since the testator is supposed to give his personalty away from the former only for the sake of the latter." 10

Shouler, 5th Edition, §519.

The personalty is the primary fund and the only fund for the payment of legacies, unless the testator, by direct words, or by necessary implication, charges the realty. The burden of proof is always, of course, upon the party claiming to change the order of the law and this expression of intention to change the order of the law must arise from the will and not from extrinsic evidence. 20

We maintain that the legatees of Paragraph 13 have not sustained the burden of showing the testator's intention to charge the New Jersey realty with the payment of legacies, and the decree of the Court of Chancery should be reversed.

Respectfully submitted,

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