

**NEW JERSEY COURT OF ERRORS
AND APPEALS**

In the Matter of JOSEPHINE
S. HUBERT and MARY L.
TYNDALE for an Order to
Sell Lands of
JOSEPH WEST, deceased,
limited over.

On Petition
of Josephine
S. Hubert for
Part of the
Proceeds of
sale.

On Excep-
tions to
Master's
Report, and
On Appeal
from decree
of Chancery,
advised by
Vice Chan-
cellor, John
H. Backes.

STATE OF THE CASE

SAMUEL CRAIG COWART,
Solicitor and Counsel for Appellants,
Freehold, N. J.

LINDABURY & STEELMAN,
Solicitors of Josephine S. Hubert, Appellee,
Essex Bldg., Newark, N. J.

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IN CHANCERY OF NEW JERSEY

In the Matter of the Application
of JOSEPHINE S. HUBERT
and MARY L. TYNDALE, for
an Order to Sell Lands of
Joseph West, deceased,
limited over.

} Petition of
Josephine S. 10
Hubert for a
Part of the
Proceeds.

TO HIS HONOR, EDWIN ROBERT WALKER,
CHANCELLOR OF THE STATE OF NEW
JERSEY: 20

The petition of Josephine S. Hubert, of the
City and State of New York, respectfully shows:

1. That Joseph West, late of the City and
State of New York, died seized of certain lands
located in the City of Newark, Essex County,
New Jersey, bounded and described as follows:

“BEGINNING at a stake standing in the
fence by the road that leads to Second River
thence running north 34 degrees east, along
the road to a bend in the fence; thence to
the corner of the land formerly belonging to
Samuel Huntington 6 chains and 73 links;
thence north 67 degrees 12 minutes west 20
chains to the highway leading to water ses-
sions; thence South 13 degrees west 5 chains
and 60 links; thence to the place of BEGIN-
NING. Containing twelve acres more or less.

Saving and excepting thereout a small 40

piece taken off the front of the premises to strengthen the highway.

Bounded east on the road leading from Newark to Belleville, north by land formerly Samuel Huntington's, west by the road leading to Water Sessions, south by land formerly in possession of John Hawthorne, and all the right whatever the same may be of the party of the first part in the highway adjacent to the said premises."

20 2. That the said Joseph West died testate, and in and by his will disposed of said land and premises in the following manner. By the first paragraph of his will he appointed his daughters, Mary L. and Josephine S. West, executrices, and a nephew, Thomas West, executor, of said will and testament, and by the fourth paragraph thereof authorized them to sell the above described premises, and certain other premises, as follows:

10 "4. I hereby authorize them to sell the gore of land corner of Plane and State Streets, situate in Newark, New Jersey, occupied by a stone cutter, and apply the proceeds to the payment of my debts and assessments. Also a gore of land in rear of the corner of State and Broad Streets, in the City of Newark, New Jersey, now leased for twenty-one years to be sold at any time they think best and the proceeds to be used for the same purpose as the one before mentioned. Also a tract or parcel of land situated in the City of Newark, New Jersey, running from Belleville Av. to Mount Prospect Av. containing nearly twelve acres of land. The whole front which is left after opening streets on Belleville Av. and to the

40 depth of about one-half of said ground to be

leased by my executors for twenty-one years with a renewal of twenty-one years more. The net income to be divided equally between my daughters Mary L. and Josephine S. West during their life separate and apart from their husbands—at their decease to their lawful heirs.

3. That said will of Joseph West was duly admitted to probate by the Surrogate of the County of New York, State of New York, on September 25, 1871, and was also admitted to probate in the County of Essex, State of New Jersey, on January 9, 1873, and letters testamentary issued thereon to your petitioner and Mary L. West (now deceased), in both states, they being two of the executors in said will named; that thereafter the letters testamentary issued to your petitioner and Mary L. West (now deceased) by the Surrogate of Essex County were revoked by order made November 12, 1895, and on December 13, 1900, an exemplified copy of said will was duly filed in the office of the Surrogate of Essex County.

4. That a bill was filed praying for construction of the will of the said Joseph West, and particularly that part thereof hereinabove set forth as "Item 4" of said will, in which proceeding it was determined by this honorable court that the lands and premises sold in the above entitled proceedings, being a part of that tract set forth and described in Paragraph 1 hereof, were devised by "Item 4" of said will of Joseph West to your petitioner and your petitioner's sister, Mary L. Tyndale, for life, with remainder over to the lawful heirs of your petitioner and the said Mary L. Tyndale.

5. Your petitioner further shows that the said Mary L. Tyndale is now deceased, without issue

her surviving, her death having occurred on July 17th, 1922, and leaving your petitioner as her only heir at law.

30 6. Your petitioner as the only heir at law of the said Mary L. Tyndale, deceased, is seized of a one-half interest in the remainder of said lands and premises so devised, which have been sold in the proceedings, and she is now entitled to have and receive one-half of the proceeds there-
 of which have been realized from the sale of said premises under the order of this Court, and is also entitled to have and receive one-half of the income that has accrued on the proceeds of sale aforesaid to the date of the death of the said Mary L. Tyndale, and is entitled to have and receive all the income which has accrued since that date on the one-half of which your petitioner is now entitled to as the heir at law of the said
 20 Mary L. Tyndale, as well as to the other one-half which your petitioner is entitled to have and receive on account of her life estate in the other one-half of said premises.

10 7. Your petitioner further shows that at the time application was made to sell lands limited over, said remainder was vested in a certain person or persons as were the prospective heirs at law of your petitioner and the said Mary L. Tyndale, and their names and relationship were as follows:

Joseph West, the aforesaid testator, had three brothers, William, Thomas and Simon West; two sisters of the whole blood, Margaret and Christina West; and one sister of the half blood, Mary Jenkins; all now deceased.

That William West married, and that the following were his children, viz: Christina, Mary F., Margaret, Sarah E., Joseph and George West.

40 That said Christina West intermarried with one Stevens, and upon his death with one Van-

Schoiek, since deceased, and that she has had no children.

That Mary F. and Margaret West are unmarried.

That Sarah E. West intermarried with Ira Lockwood, now deceased; that she has had two children, Edna and Marion Lockwood, the said Marion having died unmarried, and the said Edna Lockwood being also unmarried.

That Joseph West married and has had three children, Josephine, Mary and Thomas West; that the said Josephine West is unmarried; that the said Mary West intermarried with Thomas M. Davis and has had five children, Olive Ruth, E. Jeannette, Dorothy M., Irene and Catharine Mae Davis, all infants under fourteen years of age; that the said Thomas West married and has had one child, Marion West, who is an infant under the age of fourteen years. 10

That said George West was married, but died without leaving descendants. 20

That Thomas West died unmarried.

That Simon West married and that Thomas West was his only child; that said Thomas West married and died without having had any children.

That Margaret West intermarried with Washington Smith, and that said Margaret West Smith had two children, Washington I. and Ella D. Smith.

That one Elizabeth F. Cutter alleges that she is also a child of Margaret West Smith, and that there are no living children or descendants of children of the said Elizabeth F. Cutter. 30

That the said Washington I. Smith married and is now dead, having had one child, Mary (Minnie) W. Smith; that the said Mary (Minnie) W. Smith intermarried with one F. W. McLaughlin, and has had two children, Janet G. and Frances E. McLaughlin, both unmarried in- 40

fants above the age of fourteen years, as stated in said petition.

That Ella D. Smith married George H. Leatherbee and died leaving no children or descendants of children.

That Christina West intermarried with one Francis Deacon, and that she had five children, Joseph W., John F., William, Christina, and Mary Deacon.

30 That Joseph W. Deacon married and died without having had any children.

20 That John F. Deacon married and is now deceased, and that he had five children, Lilian F., Mary Eleanor, Henrietta Elizabeth, Grace Edna, and Charles Taylor Deacon; that the said Lilian F. intermarried with one Charles F. Echterbacher and has had one child, Grace Viola Echterbacher, an infant under the age of fourteen years; that the said Mary Eleanor Deacon is unmarried; that the said Henrietta Elizabeth Deacon, Grace Edna Deacon and Charles Taylor Deacon are infants above the age of fourteen years and unmarried.

10 That the said William Deacon married and has had five children, Harry, William Francis, George E., Percival C., and Florence H. Deacon; that said Harry Deacon is married and has had two children, Arthur C. Deacon and Marion A. Deacon, both infants under the age of fourteen years as stated in said petition; that the said William Francis Deacon is unmarried; that the said George E. Deacon and Percival C. Deacon are infants above the age of fourteen years and unmarried; and that the said Florence H. Deacon is an infant under the age of fourteen years, as stated in said petition.

That the said Christina and Mary Deacon died unmarried.

40 That Mary Jenkins was a sister of the half blood of said Joseph West, and that she married

one Nathan Skidmore; that there were two children of this marriage, Thomas and Joseph Skidmore, both now deceased.

That the said Thomas Skidmore married and had one child, William H. Skidmore; that the said William H. Skidmore married his cousin, Margaret Skidmore, and had one child, Janet Skidmore, an infant above the age of fourteen years and unmarried.

That the said Joseph Skidmore married and had nine children, Mary E., Joseph, John, Janet, Hannah, Margaret, Bella, Laura and Thomas; that Mary E. Skidmore died unmarried; that Joseph Skidmore married and is now dead, and that he had one child, Janet, who intermarried with Albert Ford, and that it is not known whether said Janet Ford is now alive and bears the same name or has died leaving children or descendants of deceased children; that said John Skidmore married and is now dead, and that Joseph Skidmore is his only living child and descendant and he is unmarried, and that the said John Skidmore had one other child, Katie, who intermarried with one George LaFarge and died leaving no children or descendants of children; that the said Janet Skidmore intermarried with one Alexander Clark and is now dead, and that her children were Joseph M., Douglas, Alexander, May (Mary J.), Howard P., and Harrison Clark; that Joseph and Harrison Clark died unmarried; that M. Douglas Clark is unmarried; that Alexander Clark is married but has had no children; that said May (Mary J.) Clark intermarried with George McNeill (MacNeill), and has had no children; that said Howard P. Clark married and has had two children, Howard Clark and Anna Marie Clark, both infants under the age of fourteen years, as stated in said petition. That said Hannah Skidmore intermarried with one Ambrose Egbert, and died having had one

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child, Joseph Egbert, who married but has had no children. That said Margaret Skidmore married her cousin, William H. Skidmore, as aforesaid, and is now dead, and that she had one child, Janet Skidmore, as aforesaid; that Bella Skidmore intermarried with one Thomas Richards, and has had no children; that said Laura Skidmore intermarried with one Charles Hacker and has had one child, Dorothy Hacker, who is
 30 an infant under the age of fourteen years, as stated in said petition; that said Thomas Skidmore married and has had two children, Wilbur Kemp Skidmore and Chester Joseph Skidmore, both unmarried.

That the said Mary Skidmore, half sister of said Joseph West, upon the death of Nathan Skidmore, her husband, married John C. Joralemon; that there were two children of this marriage, Christina and Cornelius Joralemon.

20 That the said Christina Joralemon intermarried with one Samuel Eaton, and that there were two children born of this marriage, Mary Ellen Eaton, and Fannie Eaton. That the said Mary Ellen Eaton intermarried with one Hubert G. Knapp, and has had five children, Hubert J., Fannie, Ellen, Clifford and Arthur; that the said Hubert J. Knapp died unmarried; that said Fannie Knapp intermarried with one James O. Hattin and has had two children, Florence C. and
 10 James Hattin, and that the said Florence C. Hattin and James Hattin are both infants under the age of fourteen years as set forth in said petition; that the said Ellen, Clifford and Arthur Knapp are infants under the age of fourteen years. That the said Fannie Eaton intermarried with one Frank Willmore, and has had four children, Merton, Meda, Lillian and Stanley Willmore; that the said Merton Willmore is unmarried; that the said Meda Willmore is an infant
 40 over the age of fourteen years and unmarried;

that the said Lillian Willmore died unmarried; and that the said Stanley Willmore is an infant under the age of fourteen years as set forth in said petition. That upon the death of the said Samuel Eaton the said Christina Eaton married one John Peet, and upon his death one Henry Wernsmann, and that no children were born of either of these marriages.

That the said Cornelius Joralemon married and has had three children, John B. Joralemon and two others who died in infancy; that the said John B. Joralemon married and has had two children, Edna May Joralemon and Robert John Joralemon, both infants under the age of fourteen years as stated in said petition. 10

That the person who is entitled to vested rights in said lands is your petitioner, and the persons who may be entitled to prospective estates therein as lawful heirs of your petitioner are the said Christina VanSchoick, Mary F. West, Margaret West, Sarah E. Lockwood, Edna Lockwood, Joseph West, Josephine West, Mary Davis, Olive Ruth Davis, E. Jeannette Davis, Dorothy M. Davis, Irene Davis, Catharine Mae Davis, Thomas West, Marion West, Mary (Minnie) McLaughlin, Janet G. McLaughlin, Frances E. McLaughlin, Elizabeth F. Cutter, Lilian F. Echterbecher, Grace Viola Echterbecher, Mary Eleanor Deacon, Henrietta Elizabeth Deacon, Grace Edna Deacon, Charles Taylor Deacon, William Deacon, Harry Deacon, Arthur C. Deacon, Marion A. Deacon, William Francis Deacon, George E. Deacon, Percival C. Deacon, Florence H. Deacon, William H. Skidmore, Janet Skidmore, Janet Ford, and the children and descendants of said Janet Ford, Joseph Skidmore, H. Douglas Clark, Alexander Clark, May McNeill or Mary J. MacNeill, Howard P. Clark, Howard Clark, Anna Marie Clark, Joseph Egbert, Bella Richards, Laura Hacker, Dorothy Hacker, 20 30 40

Thomas Skidmore, Chester Joseph Skidmore, William Kemp Skidmore, Christina Wernemann, Mary E. Knapp, Fannie Hattin, Ellen Knapp, Clifford Knapp, Arthur Knapp, Florence C. Hattin, James Hattin, Fannie Willmore, Merton Willmore, Meda Willmore, Stanley Willmore, Cornelius Joralemon, John B. Joralemon, Edna May Joralemon, and Robert John Joralemon.

30 Your petitioner further shows that there has been realized from the sale of said lands so limited over, the sum of \$40,014.63, besides interest accruing thereon.

Your petitioner therefore prays that there may be paid over to her by the Clerk of this Court one-half of the proceeds of sale of said lands and premises sold in this cause, together with one-half of the income therefrom accruing, prior to July 17th, 1922, the date of the death of the said Mary L. Tyndale, and all of the income accruing
20 since said date.

And your petitioner will ever pray, etc.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX } ss.

Harrison P. Lindabury, being duly sworn according to law on his oath deposes and says:

That he is the solicitor of the said Josephine S. Hubert and has had charge of the conduct of the above entitled proceeding to sell lands limited over; that Josephine S. Hubert, the petitioner in the foregoing petition named, is the daughter of Joseph West, deceased, and one of the petitioners in the application to sell lands limited over; that he has read the foregoing petition and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

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HARRISON P. LINDABURY.

Subscribed and sworn to }
 before me, this eighth }
 day of July, 1924. }

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MAUD A. HORNER, Notary Public.

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IN CHANCERY OF NEW JERSEY

30	In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, limited over.	}	On Petition &c. Order of Reference
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20 Upon reading the petition of Josephine S. Hubert, filed in the above matter, duly verified, and praying for the payment to the said Josephine S. Hubert of a part of the money now on deposit with the Clerk of this Court in this matter, together with any interest which may have accrued or which may accrue thereon,

10 And it further appearing that Josephine S. Hubert claims to be entitled to receive one-half of the proceeds of the sale of said lands and premises sold in this cause, together with one-half of the income therefrom accruing prior to July 17, 1922, the date of the death of the said Mary L. Tyndale, the sister of the petitioner, and all income accruing since that date.

40 It is, on the 19th day of July, 1924, on motion of Lindabury & Steelman, solicitors of petitioner, **ORDERED**, that it be referred to Richard Stockton, one of the Special Masters of this Court, to ascertain and report the truth of the allegations of said petitioner, and to inquire and report whether the said Josephine S. Hubert is entitled to receive the proceeds mentioned above now on

deposit with the Clerk of this Court in the above entitled cause, together with any interest which may have accrued thereon, and that said Master report with all convenient speed.

Respectfully advised,
BAYARD STOCKTON, V. C.

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IN CHANCERY OF NEW JERSEY

30	In the Matter of the Application of Josephine S. Hubert and Mary L. Tyndale for an order to sell lands of Joseph West limited over.	}	On Petition of Josephine S. Hubert for part of the proceeds of sale.
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REPORT OF SPECIAL MASTER.

20 In pursuance of an order of reference made herein on July 19th, 1924, whereby it was referred to the subscriber, one of the Special Masters of this Court, to ascertain and report the truth of the allegations of the petition filed herein by Josephine S. Hubert and to inquire and report whether the said petitioner is entitled to receive a part of the principal of the proceeds of sale now on deposit with the Clerk of this Court, together with any accrued interest thereon.

10 I, Richard Stockton, as such Special Master, hereby report to his Honor, the Chancellor, that I have been attended by Leland Taliaferro, representing Lindabury and Steelman, solicitors of the said petitioner, and have considered the matters referred to me by said order.

40 And I find and report that Joseph West, late of the City and State of New York, died in the said City of New York on September 9th, 1871, seized of real estate including the tract of twelve acres, more or less, in the City of Newark, Essex

County, New Jersey, described in the said petition; and that the said Joseph West left a last will and testament dated September 5th, 1871, which was proved before the Surrogate of New York County on September 25th, 1871, and that an exemplified copy of the said will and probate proceeding was filed and recorded on December 13th, 1900, in the office of the Surrogate of the County of Essex, New Jersey, and that by said will the testator directed the executors of his will to lease the said twelve acre tract and provides that "the nett income to be divided equally between my daughters, Mary L. and Josephine S. West during their life separate and apart from their husbands, at their decease to their lawful heirs."

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And I further find and report that the said Mary L. West thereafter married Julius H. Tyndale and that the said Josephine S. West thereafter married Charles A. Hubert, and that said Mary L. Tyndale died at 420 West 116th Street, New York City, on July 15th, 1922, and that said Josephine S. Hubert is living and resides at 420 West 116th Street, New York City, and is the petitioner in this proceeding; and that the said husband of said Mary L. Tyndale went out west over forty years ago and she never heard from him after that, and that the said husband of said Josephine S. Hubert obtained a divorce from her thirty-six years ago in California on the charge of desertion.

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And I further find and report that the said premises, or portions thereof, were sold under the direction of this Court from time to time, under an order for sale made herein on September 26th, 1916, in a proceeding entitled the same as the title herein and filed as docket 41 page 240, and that the net proceeds of sale were from time to time deposited with the Clerk of this Court and that he now has on deposit to the credit of

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30 this proceeding approximately the sum of forty thousand dollars (\$40,000), and that the said Josephine S. Hubert testified before me that her said sister Mary L. Tyndale died without having issue born to her and that she had never adopted any child, and that the said Josephine S. Hubert was the only heir at law of the said Mary L. Tyndale and also the sole devisee in her last will and testament which was proved before the Surrogate of New York County and, as her sole heir at law, claims to be entitled to the one half part of the said proceeds of sale of the said premises, and accrued interest thereon, under the terms of said will as construed by this court.

20 And I find and report that on February 3rd, 1913, a bill of complaint was filed in this Court by the said Mary L. Tyndale and Josephine S. Hubert, as executrices of the said will of Joseph West, deceased, against Minnie Smith McLaughlin, et als, docket 36 page 19, praying that said will be construed by this court and by it determined in whom is vested the said lands and premises, and that a Final Decree was made in said suit on August 24th, 1915, adjudging that the living nephews and nieces of the said testator, comprising the defendants Joseph West, John F. Deacon, Margaret West, Mary Frances West, Sarah E. Lockwood, William Deacon and Christina Van Schoick, formerly Christina Stevens, born Christina West, are, upon a proper construction of said will, and by said decree were declared to be, in default of issue of said Mary L. Tyndale and Josephine S. Hubert, presumptive lawful heirs of said Mary L. Tyndale and Josephine S. Hubert within the meaning and intent of said Joseph West in his will and as such have a vested remainder in fee in the said lands and real estate, subject to the estate of the said Mary L. Tyndale and Josephine S. Hubert, as
40 tenants for life therein.

The conclusions of Vice-Chancellor Backes filed July 12th, 1915, upon which said decree was made, are reported in Volume 84 of New Jersey Equity page 652 et seq.; the learned Vice-Chancellor therein says, respecting the premises in question:

“The view I indulge of this devise is that the land was to be held by the executors and not to be sold for forty-two years, in the lifetime of the daughters, during which period they were to have the income. At their death, in that time, or thereafter, the fee was to vest in their respective heirs at law, as purchasers—now, presumably, the defendants. The fact that the complainants have survived the term of years created by the trust, does not alter the defendants’ estate; it simply postpones the enjoyment—in the meantime, an estate for life is in the complainants, by operation of law.”

Later, in the said conclusions, the Vice-Chancellor holds that the only reasonable construction to be given to the words the testator used in his will in respect to the said premises is,

“That he intended thereby to nominate as takers of his estate, after the death of his daughters, those who stood in the relation of heirs at law to them. As such the defendants, nephews and nieces, are now entitled to be protected against waste of their prospective inheritance.”

And I therefore find and report that, following the conclusions of the Vice-Chancellor, the said defendants are entitled to notice when it is sought to dispose of one-half of the principal of their prospective inheritance.

And I further find and report that it has not been proved to my satisfaction that the legal title to one-half of said lands and premises, or the said proceeds of sale thereof, was vested in the said Mary L. Tyndale, who this court, as above shown, declared to be only a tenant for life therein; and therefore the said petitioner, Josephine S. Hubert, as the only heir at law of the said Mary L. Tyndale, deceased, is not seized in fee, or in her own right, of the said one-half part thereof nor now entitled to the payment thereof to her. However, this does not apply to the income on the said fund, the said petitioner being now entitled to all the accumulations thereof which have accrued and to the whole of the future income during her life.

And I therefore recommend that the said petition be dismissed as to the payment to the said petitioner, Josephine S. Hubert, of any of the principal of the fund but the said petition be granted as to the payment of all income therefrom, as above stated.

Respectfully submitted this 18th day of August, 1924.

RICHARD STOCKTON,
Special Master in Chancery.

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IN CHANCERY OF NEW JERSEY

<p>In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, limited over.</p>	}	<p>On Petition of Josephine S. Hubert, for Part of Proceeds of sale.</p>	10
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**EXCEPTIONS TO REPORT OF SPECIAL
MASTER**

20.

The petitioner, Josephine S. Hubert, hereby
excepts to the report filed in this cause on Octo-
ber 8th, 1924, bearing date August 18th, 1924,
made by Richard Stockton, one of the Special
Masters of this Court, for the following reasons:

FIRST EXCEPTION: For that the said Spec-
ial Master has reported as follows:

“And I find and report that on February 30
3rd, 1913, a bill of complaint was filed in
this Court by the said Mary L. Tyndale and
Josephine S. Hubert, as executrices of the
said will of Joseph West, deceased, against
Minnie Smith McLaughlin et als., docket 36,
page 19, praying that said will be construed
by this Court and by it determined in whom
is vested the said lands and premises, and
that a final decree was made in said suit on
August 24th, 1915, adjudging that the living 40.

30 nephews and nieces of the said testator, comprising the defendants Joseph West, John F. Deacon, Margaret West, Mary Frances West, Sarah E. Lockwood, William Deacon and Christina VanSchoick, formerly Christina Stevens, born Christina West, are, upon a proper construction of said will, and by said decree were declared to be, in default of issue of said Mary L. Tyndale and Josephine S. Hubert, presumptive lawful heirs of said Mary L. Tyndale and Josephine S. Hubert, within the meaning and intent of said Joseph West in his will and, as such, have a vested remainder in fee in the said lands and real estate, subject to the Estate of the said Mary L. Tyndale and Josephine S. Hubert, as tenants for life therein.

20 The conclusions of Vice Chancellor Backes filed July 12th, 1915, upon which said decree was made, are reported in Volume 84 of New Jersey Equity, page 652 et seq.; the learned Vice Chancellor therein says, respecting the premises in question:

10 ‘The view I indulge of this devise is, that the land was to be held by the executors and not to be sold for forty-two years, in the lifetime of the daughters, during which period they were to have the income. At their death, in that time, or thereafter, the fee was to vest in their respective heirs at law, as purchasers—now, presumably, the defendants. The fact that the complainants have survived the term of years created by the trust, does not alter the defendants’ estate; it simply postpones the enjoyment—in the meantime, an estate for life is in the complainants, by operation of law.’

40 “Later, in the said conclusions, the vice-chancellor holds, that the only reasonable construc-

tion to be given to the words of the testator used in his will in respect to the said premises is:

‘That he intended thereby to nominate, as takers of his estate, after the death of his daughters, those who stood in the relation of heirs at law to them. As such, the defendants, nephews, and nieces, are now entitled to be protected against waste of their prospective inheritance.’

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“And I therefore find and report that, following the conclusions of the Vice Chancellor, the said defendants are entitled to notice when it is sought to dispose of one-half of the principal of their prospective inheritance.”

And the petitioner insists that the said nephews and nieces were found to be, by the decree of this Court, only presumptive lawful heirs of the said Mary L. Tyndale and Josephine S. Hubert, within the meaning and intent of the will of Joseph West, deceased, subject to be divested, upon it appearing that some other person or persons were actually the heirs or heir at law of the said Mary L. Tyndale and Josephine S. Hubert, or one of them.

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And the said Josephine S. Hubert, your petitioner having survived the said Mary L. Tyndale, is the only heir at law of the said Mary L. Tyndale, within the meaning and intent of the will of the said Joseph West, deceased, and as such entitled to have and receive one-half of the proceeds of the land limited over heretofore sold in this proceeding, and that the said living nieces and nephews mentioned in the decree of this Court, are not heirs at law of the said Mary L. Tyndale, have no interest in one-half of said fund, and are not entitled to have notice of this application by reason of the said lands having been sold and converted into cash, the proceeds

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thereof now in the hands of the Clerk of this Court, and that the Special Master should have so reported.

SECOND EXCEPTION: For that the said Special Master has reported as follows:

30 "And I further find and report that it has not been proved to my satisfaction, that the legal title to one-half of said lands and premises, or the said proceeds of sale thereof, was vested in the said Mary L. Tyndale, who this Court, as above shown, declared to be only a tenant for life therein; and therefore, the said petitioner, Josephine S. Hubert, as the only heir at law of the said Mary L. Tyndale, deceased, is not seized in fee, or in her own right, of the said one-half part thereof, nor now entitled to the payment thereof to her."

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And petitioner insists that it fully appears by the proof annexed to the report, that the petitioner is the only heir at law of the said Mary L. Tyndale, and as such is now entitled to have and receive one-half of the money now on deposit in the Court of Chancery in this cause, proceeds of the sale of lands limited over which have been sold in this cause under the order of this Court, and that the said Special Master should have so reported.

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LINDABURY & STEELMAN,
Solicitors of petitioner.

IN CHANCERY OF NEW JERSEY

In the Matter of the Application
of JOSEPHINE S. HUBERT) On Petition,
and MARY L. TYNDALE, for) &c.
an Order to Sell Lands of)
Joseph West, deceased,) Order to
limited over.) Show Cause. 10

This matter coming on to be heard on exceptions to Master's Report, and it appearing that the petitioner, Josephine S. Hubert, has petitioned for the payment to her of one-half of the proceeds from the sale of lands, sold under the order of this Court made in this cause (together with the accrued income thereon), as the heir at law of petitioner's sister, Mary L. Tyndale, now deceased, and the person entitled thereto as devisee under the will of Joseph West deceased. 20

And it further appearing that, upon the application to sell said lands in this cause, certain persons were made defendants, as prospective heirs at law of the said petitioner and her sister, Mary L. Tyndale, now deceased, (there being a gift over under the will of Joseph West of a remainder in said lands so sold to the lawful heirs of his daughters, the said Josephine S. Hubert and Mary L. Tyndale), which said persons so made defendants as prospective lawful heirs, were as follows: 30

Christina VanSchoick, Mary F. West, Margaret West, Sarah E. Lockwood, Edna Lockwood, Joseph West, Josephine West, Mary Davis, Olive Ruth Davis, E. Jeannette Davis, Dorothy M. Davis, Irene Davis, Catherine Mae Davis, Thomas West, Marion West, Mary (Minnie) McLaughlin, Janet G. McLaughlin, Frances 40

E. McLaughlin, Elizabeth F. Cutter, Lilian F. Echterbecher, Grace Viola Echterbecher, Mary Eleanor Deacon, Henrietta Elizabeth Deacon, Grace Edna Deacon, Charles Taylor Deacon, William Deacon, Harry Deacon, Arthur C. Deacon, Marion A. Deacon, William Francis Deacon, George E. Deacon, Percival C. Deacon, Florence H. Deacon, William H. Skidmore, Janet Skidmore, Janet Ford, and the children and descendants of said Janet Ford, Joseph Skidmore, M. Douglas Clark, Alexander Clark, May McNeill, or Mary J. MacNeill, Howard P. Clark, Howard Clark, Anna Marie Clark, Joseph Egbert, Bella Richards, Laura Hacker, Dorothy Hacker, Thomas Skidmore, Chester Joseph Skidmore, Wilbur Kemp Skidmore, Christina Wernsmann, Mary E. Knapp, Fannie Hattin, Ellen Knapp, Clifford Knapp, Arthur Knapp, Florence C. Hattin, James Hattin, Fannie Willmore, Merton Willmore, Meda Willmore, Stanley Willmore, Cornelius Joralemon, John B. Joralemon, Edna May Joralemon and Robert John Joralemon.

And it further appearing that said persons so made defendants, as prospective lawful heirs of the said Josephine S. Hubert and Mary L. Tynedale, did not appear before the said Master or have notice of the proceedings before him on this application.

It is thereupon, on this 13th day of January, A. D., 1925, on motion of Harrison P. Lindabury, proctor for petitioner, **ORDERED**, that the said persons, Christina VanSchoick, Mary F. West, Margaret West, Sarah E. Lockwood, Edna Lockwood, Joseph West, Josephine West, Mary Davis, Olive Ruth Davis, E. Jeannette Davis, Dorothy M. Davis, Irene Davis, Catharine Mae Davis, Thomas West, Marion West, Mary (Minnie) McLaughlin, Janet G. McLaughlin, Frances E. McLaughlin, Elizabeth F. Cutter, Lilian F. Echterbecher, Grace Viola Echterbecher, Mary Eleanor

Deacon, Henrietta Elizabeth Deacon, Grace Edna Deacon, Charles Taylor Deacon, William Deacon, Harry Deacon, Arthur C. Deacon, Marion A. Deacon, William Francis Deacon, George E. Deacon, Percival C. Deacon, Florence H. Deacon, William H. Skidmore, Janet Skidmore, Janet Ford, and the children and descendants of said Janet Ford, Josephine Skidmore, M. Douglas Clark, Alexander Clark, May McNeill or Mary J. MacNeill, Howard P. Clark, Howard Clark, Anna Marie Clark, Joseph Egbert, Bella Richards, Laura Hacker, Dorothy Hacker, Thomas Skidmore, Chester Joseph Skidmore, Wilbur Kemp Skidmore, Christina Wernsmann, Mary E. Knapp, Fannie Hattin, Ellen Knapp, Clifford Knapp, Arthur Knapp, Florence C. Hattin, James Hattin, Fannie Willmore, Merton Willmore, Meda Willmore, Stanley Willmore, Cornelius Joralemon, John B. Joralemon, Edna May Joralemon, and Robert John Joralemon,

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show cause before this Court at the Chancery Chambers, Prudential Building, at Newark, New Jersey, on Tuesday, the 27th day of January, 1925, why the exceptions to the Master's Report should not be sustained, and one-half of the moneys, proceeds of the sale of lands sold under the order of this Court in this cause, together with the accrued income thereon, paid to the said Josephine S. Hubert, the petitioner, as the only heir at law of Mary L. Tyndale, deceased, as prayed in said petition.

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It is further **ORDERED**, that a true but uncertified copy of this order be mailed, postage prepaid, to each of the said parties defendant at their last known post office address within 5 days from the date of this order.

Respectfully advised,

JOHN H. BACKES, V. C.

A true copy,
H. P. LINDABURY. 40

IN CHANCERY OF NEW JERSEY

In the Matter of the Application
of JOSEPHINE S. HUBERT
and MARY L. TYNDALE, for } Opinion
30 an Order to Sell Lands of
Joseph West, limited over. }

1. Res adjudicata is not applicable, where, in a previous suit, between the same parties, the question in issue was not ripe for decision and was not tried or determined.

20 2. A devise to testator's daughters for life and "at their decease to their lawful heirs," held that upon the death of one of the daughters without issue, the surviving sister takes, as her heir at law.

On Petition for Distribution.

For petitioner, Lindabury & Steelman.

10 For defendants, Samuel C. Cowart.

BACKES, V. C.

40 The will of Joseph West, dec'd., provides *inter alia*, "I hereby authorize them (executors) to sell (describing lands not here involved). Also a tract or parcel of land situated in the City of Newark, N. J., running from Belleville Av. to Mount Prospect Av., containing nearly twelve acres of land. The

whole front which is left after opening street on Belleville Av., and to the depth of about one-half of said ground to be leased by my executors for twenty-one years with a renewal of twenty-one years. The nett income to be divided equally between my daughters, Mary L. and Josephine S. West during their life separate and apart from their husbands —**at their decease to their lawful heirs.** The rear half on Belleville Ave. to be sold and after paying taxes and assessments the balance to be invested on Bond and Mortgage.” 10

In Tyndale v. McLaughlin, 84 N. J. Eq. 652, the foregoing was construed, and it was held, that the Daughters were entitled to the income, during the leasehold, of that portion of the tract directed to be leased by the executors; that, as the term had expired, they held a life tenancy in common in the land and that by the true meaning of the words “at their decease to their lawful heirs” the fee vested in their heirs—then, presumably, the therein defendants, nephews and nieces of the testator, and then next of kin of the daughters. The defendants there are the respondents here. The land has since been sold under an order to sell lands limited over, and the proceeds are in court. Mary L. (West) Tyndale died recently, without issue, and her sister, Josephine, petitioned for one-half of the fund, as her “lawful heir,” within the meaning of the will. The matter was referred to a master who reported adversely to the prayer of the petition, to which an exception was filed. 20 30

The respondents, who lay claim to the whole of the fund as prospective remaindermen, set up, that the decree in Tyndale v. McLaughlin is **res adjudicata**, and so the master thought. That is not so. In the former action the daughters, as the life tenants, were charged with waste, to 40

which they replied, that under the will they took an estate in fee under the rule in Shelley's case, and, or, that the testator died intestate, as to the remainder, and they took by descent, and, consequently, that the nephews and nieces had no standing to complain. The point decided was that the daughters were not owners in fee, and that the nephews and nieces as heirs presumptive of the testator's daughters had a standing to call the life tenants to account. The principle of res adjudicata is not applicable. The question now presented was not then ripe for decision. Tuttle v. Woodworth, 62 N. J. Eq. 532; Ogden v. Me-Lane, 73 N. J. Eq. 159; Nagle v. Conrad, 79 N. J. Eq. 124. The causes for action are not the same and the question was not litigated or determined. Mershon v. Williams, 63 N. J. L. 398; Hoffmeier & Son v. Trost, 83 N. J. L. 358; Sharbero v. Miller, 72 N. J. Eq. 248; Schilstra v. Van Den Heuvel, 82 N. J. Eq. 155; Nagle v. Conrad, 125 Atl. Rep. 20.

There is nothing in the will to indicate that the testator used the words, "lawful heirs," other than in the sense of their definite legal meaning, and, as the surviving sister alone answers the description of lawful heir of the testator's now deceased daughter, she takes under the devise "at their death to their lawful heirs." Tuttle v. Woodworth, supra; Oleson v. Somogyi, 90 N. J. Eq. 342. In re. Buzby's Estate, 94 N. J. Eq. 151; American Builders Corporation v. Galligan, 94 N. J. Eq. 731. It is probably true, as the respondents argue, that the testator did not intend either daughter to enjoy more than a life interest, but it is to be added, that it is not at all perceivable, from anything in the will or the surrounding circumstances attending its execution, that his mind's eye was ever upon them as ultimate takers, for it is plain, that he expected his daughters would marry, and have issue, and that upon

their death, their respective descendants would take the remainder.

And if it be regarded that the testator intended that the devise of the remainder should become effective, in enjoyment, only at the death of both daughters, the respondents would not take as heirs to the one now dead, and could not, except upon the extremely remote possibility of both dying at the same instant. The relationship of heir at law of the surviving daughter to her deceased sister precludes the claim of the nephews and nieces, and the share will be ordered paid to the surviving daughter.

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IN CHANCERY OF NEW JERSEY

30 In the Matter of the Application
of JOSEPHINE S. HUBERT,
et al., for Order to Sell Iands,
&c.

On Excep-
tions to
Master's
Report on
Petition of
Josephine S.
Hubert for
part of
proceeds of
sale.

NOTICE OF MOTION FOR RE-HEARING

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To Lindabury & Steelman, solicitors for Pet'r.,
Dear Sirs:

10 You are hereby notified that on Tuesday, July
7th, A. D. 1925, at ten o'clock in the forenoon, or
as soon thereafter as counsel can be heard, at
the Chancery Chambers, in the Prudential Build-
ing, at Newark, New Jersey, I will apply to Hon-
orable John H. Backes, the Vice Chancellor to
whom the above cause was referred, for an order
granting a re-hearing in the above entitled mat-
ter on the ground:

(1) That the conclusions of the Vice Chancel-
lor heretofore filed in this cause are not suppor-
ted by the facts in this cause and are contrary to
law and the decisions of this and other states.

40 (2) On the ground that the conclusions of the

Vice Chancellor in this cause are res adjudicata and contrary to the decree in this cause, in the case of Tyndale vs. McLaughlin, reported in 84 New Jersey Equity, 14th Buchanon, page 652, which held that the said Josephine S. Hubert and her sister, Mary L. Tyndale, were only entitled to a life estate in the said lands in Newark, New Jersey, belonging to the estate of their father, Joseph West, deceased, and that certain nephews and nieces of Joseph West, deceased, who were defendants in said original cause, in which Mary L. Tyndale and Josephine S. Hubert, executrices of Joseph West, deceased, were complainants and Minnie Smith McLaughlin, et als were defendants, were the prospective remaindermen entitled to the estate in remainder of said Newark Lands, belonging to the estate of Joseph West, deceased. 10

(3) On the ground, that the estate in remainder does not vest in the remaindermen, until the death of both of the life tenants, viz. until the death of Josephine S. Hubert, the surviving executrix of the estate of Joseph West, deceased. 20

(4) On the ground, that the fact that Josephine S. Hubert is the surviving heir at law of her sister, Mary L. Tyndale, and entitled as such to her estate, both as her heir at law and as her residuary devisee, under her will, only gives her a right to the real estate, of which the said Mary L. Tyndale actually died seized in fee, and, as she did not die seized in fee of the one-half of the Newark lands, or of the proceeds of sale of the same, representing the land itself, therefore, she is not entitled to the fee of these lands or to the proceeds of the sale of the same, under the will of her father, Joseph West, deceased, because the estate in remainder under his will was not to vest until the death of both of the life tenants, 30 40

viz. until the deaths both of Mary L. Tyndale and of Josephine S. Hubert, the petitioner in this cause.

Dated July 3, 1925.

Very respectfully,
SAMUEL CRAIG COWART,
Sol'r and Counsel for Mary
Frances West, et als,
Respondents.

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IN CHANCERY OF NEW JERSEY

<p>In the Matter of the Application of JOSEPHINE S. HUBERT, et al., for Order to Sell Lands, &c.</p>	}	<p>On Excep- tions to Master's Report on Petition of Josephine S. Hubert for part of proceeds of sale of lands</p>	10
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ON MOTION FOR RE-HEARING ORDER

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This matter coming on to be heard, on petition
of Josephine S. Hubert for part of proceeds of
sale of lands in Newark, New Jersey, and it ap-
pearing to the Court that a notice has been duly
given to Messrs. Lindabury & Steelman, solici-
tors for the petitioner, by Samuel Craig Cowart,
solicitor and counsel for Mary Frances West, et
als, respondents; that application would this day
be made for an order granting a re-hearing in
the above entitled matter on certain grounds set
forth in said notice; which notice has been duly
served upon said Lindabury & Steelman, solici-
tors for the petitioner, and it appearing that said
Lindabury & Steelman had heretofore also served
upon the respondents in said matter, or their
respective solicitors, a notice that application
this day would be made to this Court to settle the
form of the decree on the conclusions of Hon.
John H. Backes, the Vice Chancellor to whom
the above matter has been referred, heretofore

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filed by said Vice Chancellor, and it appearing to the Court that the said motion for a re-hearing should first be considered and disposed of before settlement of the form of the decree in this matter, and it appearing to the Court, that said Samuel Craig Cowart, as solicitor and counsel for Mary Frances West and other respondents in said cause desires further time to file a reply brief in reply to the reply brief heretofore filed
 30 by Lindabury & Steelman, solicitors for the petitioner, and prays for a re-hearing of the said matter, before settlement of the form of the decree in said cause, and the Court having heard the argument of the said Samuel Craig Cowart, counsel for the respondents and the argument of Harrison P. Lindabury of the firm of Lindabury & Steelman, of counsel with the petitioner:

It is on this 7th day of July, A. D. nineteen hundred and twenty-five, ORDERED, that a re-
 20 hearing of said cause be granted and that the same shall be heard at the Chancery Chambers in the Prudential Building, in Newark, New Jersey, before Honorable John H. Backes, Vice Chancellor, on Tuesday, July 28, A. D. 1925, at ten o'clock in the forenoon (Daylight saving time) or as soon thereafter as counsel can be heard, and it is further ordered that the said Samuel Craig Cowart file his reply brief or supplemental brief
 10 in the said cause in this Court on said date, and that he serve a copy of said reply brief in behalf of the respondents upon Messrs. Lindabury & Steelman, solicitors for the petitioner, on or before Tuesday, July 21, 1925.

Respectfully advised,

[Sgd] JOHN H. BACKES, V. C.

IN CHANCERY OF NEW JERSEY

<p>In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, deceased, limited over.</p>	}	<p>On Appli- cation of Josephine S. Hubert, for Part of Proceeds of sale.</p>	10
		NOTICE	

TAKE NOTICE, that on Tuesday, July 7th, 1925, at 10:30 o'clock (new time), or as soon thereafter as counsel can be heard, we will apply to the Chancellor at the Chancery Chambers, Prudential Building, Newark, New Jersey, to settle the decree in the above matter and the allowance of counsel fees. 20

Dated June 29, 1925.

LINDABURY & STEELMAN,
Solr. for Petitioner.

To Samuel C. Cowart, Esq.,
Sol. J. Berger,
James F. Kelly, and
Herbert W. Taylor, 30
Solicitors for the appearing respondents.

IN CHANCERY OF NEW JERSEY

30 In the Matter of the Application
of JOSEPHINE S. HUBERT
and MARY L. TYNDALE, for
an Order to Sell Lands of
Joseph West, deceased,
limited over

On Excep-
tions to
Master's
Report.
On Petition
of Josephine
S. Hubert
for part of
Proceeds of
Sale.

DECREE ON EXCEPTIONS

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10 Exceptions having been filed by the petitioner,
Josephine S. Hubert, to the report of Richard
Stockton, one of the Masters of this Court, on
matters referred to him by an order of this
Court, made on the 19th day of July, 1924, and it
appearing that the parties defendant in this
cause did not appear before said Master or have
notice of the proceedings before him upon this
application, and an order to show cause having
been made on the 15th day of January, 1925, di-
recting said defendants to show cause before this
Court on the 27th day of January, 1925, why the
exceptions to the Master's report should not be
sustained, and one-half of the moneys, proceeds
of the sale of lands sold under the order of this
Court in this cause, together with the accrued
40 income thereon, ordered paid to the said Jose-
phine S. Hubert, the petitioner, as the only heir-

at-law of Mary L. Tyndale, deceased, as prayed in the petition, and it further appearing, that the order to show cause has been duly served on all of the defendants, and the matter now coming on to be heard, in the presence of Harrison P. Lindabury, of counsel with the petitioner, Josephine S. Hubert; Samuel C. Cowart, of counsel for the respondents, Mary F. West, Margaret West, Emma West, Administratrix of Joseph West, deceased; Josephine West, Mary E. Davis and Thomas West, heirs of Joseph West, deceased; Sol J. Berger and James F. Kelly, of counsel with William Deacon; and Herbert W. Taylor of counsel with Mary J. MacNeill, and none of the other defendants and respondents appearing, and the Court having considered the matter and heard the arguments of counsel thereon,

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It is, on this 29th day of July, 1925, **ORDERED**: That the first exception to the Master's report be and the same is hereby allowed, notice having been given to all of the defendants and parties in interest in this cause, pursuant to the order of this Court, made on the 13th day of January, 1925:

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That the second exception to the Master's Report be and the same is hereby allowed, in that it is found that the said petitioner, Josephine S. Hubert, is the only heir at law of the said Mary L. Tyndale, deceased, and is now seized in fee, in her on right, to one-half the proceeds from the sale of lands sold in this cause, as the only lawful heir of the said Mary L. Tyndale, deceased, within the intent and meaning of the will of Joseph West, deceased, and that the said report should be modified accordingly.

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It is further **ORDERED**, that the Master's Report, as modified in accordance with the foregoing, be and hereby is, in all things, ratified and confirmed, according to the true intent and meaning thereof.

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It is further **ORDERED, ADJUDGED AND DECREED**, and the Chancellor doth, by virtue of the power and authority of this Court, **ORDER, ADJUDGE AND DECREE** that Josephine S. Hubert is the only heir at law of her sister, Mary L. Tyndale, deceased, upon a proper construction of the will of Joseph West, deceased, and as such has a vested interest in fee in one-half of the lands ordered sold in this cause, and in one-half of the proceeds thereof, said lands having been sold and the proceeds deposited with the Clerk of this Court.

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It is further **ORDERED**, that the Clerk of this Court be and hereby is directed to pay to the said Josephine S. Hubert, out of the moneys deposited with him in this cause, one-half of the proceeds from the sale of said lands heretofore sold in this cause.

It is further **ORDERED**, that there be paid to Harrison P. Lindabury, of counsel with petitioner, costs to be taxed.
Respectfully advised

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JOHN H. BACKES, V. C.

E. R. WALKER, C

A True Copy
THOMAS BARBER, Clerk.

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IN CHANCERY OF NEW JERSEY

<p>In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, deceased, limited over</p>	}	<p>On Excep- tions to Master's Report, and On Petition of Josephine S. Hubert for part of pro- ceeds of sale of lands in Newark.</p>	10
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**NOTICE ON APPEAL FROM DECREE OF
THE CHANCELLOR DATED JULY 29, 1925**

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The petitioners, Margaret West, Mary Frances West, Christina VanSchoick, (nee West), William Deacon, surviving nieces and nephews of Joseph West, deceased, the testator, and Emma West, widow and administratrix of Joseph West, Jr., deceased, and Josephine West, Mary E. Davis and Thomas West, sole heirs at law of said Joseph West, Jr., deceased, and Charles T. Deacon and Etta F. Ruggee, heirs at law of John F. Deacon, deceased, the said Margaret West, Mary Frances West, Christina VanSchoick, William Deacon, Joseph West, Jr., deceased, and John F. Deacon, deceased, being the persons named as answering defendants in the cause in which Mary L. Tyndale and Josephine S. Hubert, executrices etc., of Joseph West, deceased, are complainants, and Minnie Smith McLaughlin, et als.,

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are defendants, also your petitioners, Mary Jennie McNeill, M. D. Clark, and Alexander W. Clark, Jr., hereby appeal from the decree made by the Chancellor, Honorable Edwin Robert Walker, advised by Vice Chancellor, John H. Backes, bearing date, July 29, 1925, "allowing the second exception to the Master's Report in the above matter, on the petition of Josephine S. Hubert for one-half of the net proceeds of sale of lands in Newark, New Jersey, sold under the order of this Court, as the only heir at law of Mary L. Tyndale, deceased, as prayed in the petition, and ordering, adjudging, and decreeing that Josephine S. Hubert is the only heir at law of her sister, Mary L. Tyndale, deceased, upon a proper construction of the will of Joseph West, deceased, and as such, has a vested interest, in fee, in one-half of the land ordered sold in this cause, and in one-half of the proceeds thereof, said lands having been sold and the proceeds deposited with the clerk of this Court, and also further ordering that the clerk of this Court shall be, and is thereby directed, to pay to the said Josephine S. Hubert, out of the moneys deposited with him in this cause, one-half of the proceeds from the sale of said lands heretofore sold in this cause, together with the costs of said petitioner, Josephine S. Hubert, to be taxed."

And your petitioners appeal from the whole and every part of said decree, dated July 29, 1925, made in this Court in the above stated cause, to the Court of Errors and Appeals, in the last resort in all causes except, as to that part of the said decree, which orders that the Master's Report shall be confirmed to the extent in which he advises that the accrued income, and the income due and to grow due on the principal amount of the net proceeds of the sale of lands of the estate of said Joseph West, the testator, now on deposit in the Court of Chancery of New Jer-

sey, shall be paid to the said Josephine S. Hubert, as surviving life tenant of the said lands during the term of her natural life.

Dated August 7, 1925.

SAMEL CRAIG COWART,
Sol'r. and counsel for Appellants
and Respondents in above matter.

I conceive that there is good cause for appeal
in the above stated cause. 10

SAMUEL CRAIG COWART,
of counsel with the appellants.

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**NEW JERSEY COURT OF ERRORS
AND APPEALS**

30	<p>In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, deceased, limited over.</p>	}	<p>On Excep- tions to Master's Report on Petition of Josephine S. Hubert for part of proceeds of sale of lands Newark, N. J. On Appeal from decree of the Chan- cellor dated July 29, 1925.</p>
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PETITION OF APPEAL

10 To the Honorable the Court of Errors and Ap-
peals in the last resort of all Causes:

40 Your petitioners, Margaret West, Mary Fran-
ces West, Christina VanSchoick, (nee West),
William Deacon, surviving nephews and nieces
of Joseph West, deceased, the testator, and Em-
ma West, widow and administratrix of Joseph
West, Jr., deceased, and Josephine West, Mary
E. Davis and Thomas West, sole heirs at law of
Joseph West, Jr., and Charles T. Deacon and
Etta F. Ruggie, heirs at law of John F. Deacon,
deceased, the said Margaret West, Mary Frances

West, Christina VanSchoick, William Deacon, Joseph West, Jr., deceased, and John F. Deacon, being the persons named as answering defendants in the cause, in which Mary L. Tyndale and Josephine S. Hubert, executrices, &c., of Joseph West, deceased, are complainants, and Minnie Smith McLaughlin, et als., are defendants, also your petitioners, Mary Jennie McNeill, M. D. Clark and Alexander W. Clark, Jr., heirs at law and descendants of Mary Jenkins, deceased, a half sister of said Joseph West, the testator above named hereby respectfully appeal from the decree made by the Chancellor, Hon. Edwin Robert Walker, advised by Vice Chancellor, John H. Backes, bearing date July 29, 1925, allowing the second exception to the Master's Report, in the above matter, on the petition of Josephine S. Hubert for one-half of the net proceeds of sale of lands in Newark, New Jersey, sold under the order of the Court of Chancery of New Jersey, as the only heir at law, of Mary L. Tyndale, deceased, as prayed in her petition, in above matter, and ordering and adjudging and decreeing that said Josephine S. Hubert, is the only heir at law of her sister, Mary L. Tyndale, deceased, upon a proper construction of the will of Joseph West, deceased, and, as such, has a vested interest in fee in one-half of the land ordered sold in this cause, and in one-half of the proceeds of sale thereof; said lands having been sold and the proceeds deposited with the clerk of the Court of Chancery, and also further ordering that the Clerk of the Court of Chancery shall be and was thereby directed to pay to the said Josephine S. Hubert, out of the moneys deposited with him in said cause, one-half of the net proceeds from the sale of said lands heretofore sold in said cause, together with the costs of the said petitioner, Josephine S. Hubert, to be taxed.

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And your petitioners appeal from the whole and every part of said decree dated July 29, 1925, made in said Court of Chancery in the above stated cause, to the Court of Errors and Appeals, in the last resort in all causes, except as to that part of the said decree, which orders that the Master's Report shall be confirmed to the extent in which he advises that the accrued income and the income due and to grow due on the principal amount of the net proceeds of the sale of lands, of the estate of said Joseph West, the testator, now on deposit in the Court of Chancery of New Jersey, shall be paid to the said Josephine S. Hubert, as surviving life tenant of the said lands, during the term of her natural life, on the following grounds:

1. On the ground, that the matter in controversy in this cause is *res adjudicata*, for the reason that all the rights of the petitioner, Josephine S. Hubert, and of these appellants, as defendants or respondents, were fixed, settled, and adjudicated by the decree in our Court of Chancery, dated August 24, 1915, reported in 84 New Jersey Equity, page 684, in the case of Mary L. Tyndale and Josephine S. Hubert, complainants, vs. Minnie Smith McLaughlin, et als., defendants, in which said cause, the matter now in controversy, was settled and decided, adversely to the said Josephine S. Hubert, the present petitioner, and her sister, Mary L. Tyndale, now deceased.

2. On the ground, that neither party took an appeal from the decree in said former action, which involved the same question now in controversy and therefore, the petitioner, Josephine S. Hubert, cannot now, in this present action, reverse the decision of the Chancellor in the former action.

3. On the ground, that the present action, or cause, involves the construction of the will of Joseph West, deceased, as to who was entitled to the fee of certain lands in Newark, N. J., of which he died seized, on September 9, 1871, under his last will and testament, dated September 5, 1871, and probated in the Surrogate's Office of the County of New York, State of New York, on September 21, 1871, and recorded in Book 190 of Wills, page 320, and afterwards probated in the Surrogate's Office of the County of Essex, in the State of New Jersey, on January 9, 1873, and now on file in the office of the Secretary of State for New Jersey, at Trenton, after the death of his two daughters, Mary L. Tyndale and Josephine S. Hubert, tenants for life of said lands according to the decree in said cause, in which said Mary L. Tyndale and Josephine S. Hubert were complainants, and Minnie Smith McLaughlin, Margaret West, Mary Frances West, Christina VanSchoick, Joseph West, Jr., now deceased, John F. Deacon, now deceased, William Deacon, and others, were defendants, in which said decree, it was held that certain then surviving nephews and nieces of said testator, Joseph West, deceased, including these appellants, Mary Frances West, Margaret West, Christina VanSchoick, William Deacon, and including the defendants; Joseph West, Jr., and John F. Deacon, both now deceased, were the prospective remaindermen, entitled to the fee of said lands after the death of said life tenants, Mary L. Tyndale and Josephine S. Hubert, and that the said estate in remainder was then vested in them in fee, subject to the life estates therein of said Mary L. Tyndale and Josephine S. Hubert; that John H. Backes, Vice Chancellor, and Chancellor Edwin Robert Walker, who so construed the will of said Joseph West, in the year 1915, in said decree, dated August 24, 1915, are the same

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Chancellor and Vice Chancellor, who have now reconstrued the said will, adversely to these appellants, and now hold by the decree hereby appealed from, that at the death of said Mary L. Tyndale, the title to one-half of said lands in Newark, N. J., (or one-half of the net proceeds of sale of said lands, in which said Mary L. Tyndale only had a life estate, or the right to the income therefrom, during the term of her natural life), vested in fee in her sister, the said Josephine S. Hubert, as sole heir at law of said Mary L. Tyndale, as remainderman, under the will of said Joseph West, deceased, which decision and decree thereon now, in part, reverse the former decree in said former cause of Mary L. Tyndale, et al., vs. Minnie Smith McLaughlin, et als.

These appellants, therefore, respectfully, submit that this present decree should be reversed and set aside, and that the exceptions taken by said Josephine S. Hubert to said Master's Report, in said cause, should be disallowed, and said Master's Report should be allowed and confirmed in every particular, as reported, for the reason that this present decree, in effect, reconstrues, adversely to these appellants, a will previously construed in their favor, upon the same subject matter, which was in controversy ten years ago, between the same parties, complainant and defendant, except that some of the parties have since died, and that, as neither party appealed from the former decree, the Court of Chancery cannot now reverse itself, in whole or in part, in any proceedings to reconstrue said will, as the Court itself is bound by its own decree, and even if there was any supposed error by the Court in its previous adjudication, it cannot now, ten years later, correct any alleged or supposed error, by reversing in whole, or in part, its previous decree, which purported to fix and settle all the rights and interests of the respec-

tive parties in said lands in Newark, and in the proceeds of sale of same, and the matter in controversy is res adjudicata, and the Court cannot, in effect, appeal from its own prior decision, or correct any error made by the Court itself, if there was an error, made in its former decision and decree.

Your petitioners, therefore, pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. 10

And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

Respectfully submitted,
 SAMUEL CRAIG COWART,
 Sol'r. and Counsel of Appellants.

Endorsed:

“Filed Sept. 22, 1925 20
 THOMAS F. MARTIN, Clerk.”

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**STATE OF NEW JERSEY
DEPARTMENT OF STATE**

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of—Petition of Appeal—In the Matter of Application of Josephine S. Hubert and Mary L. Tyndale, for Order to Sell Lands of Joseph West, deceased, limited over, as the same is taken from and compared with the original.

Filed Sept. 22, 1925, and now remaining in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal of said Court at Trenton, this twenty-second day of September, A. D. 1925.

T. F. MARTIN,
Secretary of State.

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(Seal)

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**NEW JERSEY COURT OF ERRORS
AND APPEALS**

<p>In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, deceased, limited over.</p>	}	<p>On Excep- tions to Master's Report on Petition of Josephine S. Hubert for part of proceeds of sale of lands Newark, N. J.</p>	<p>10</p>
	}	<p>On Appeal from decree of the Chan- cellor dated July 29, 1925</p>	<p>20</p>

**ANSWER OF RESPONDENT
JOSEPHINE S. HUBERT**

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The answer of the above named respondent to the petition of appeal in the above entitled cause.

This respondent, not acknowledging all or any of the matters, which in said petition of appeal, are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was on the 29th day of July, 1925, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, 40

this respondent prays to refer thereto when the same shall be produced.

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

HARRISON P. LINDABURY,
Solicitor for and of Counsel
with Petitioner-Respondent.

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the 9th day of November, A. D. 1925, at 11 o'clock a. m., or as soon thereafter as counsel can be heard.

Very respectfully,
 SAMUEL CRAIG COWART,
 Sol'r. and Counsel for
 Respondents, Appellants.

Dated October 10, 1925.

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Due and legal service of within notice of argument in the above cause is hereby acknowledged this 14th day of October, A. D. 1925, and we consent to the filing of said notice as in time, for argument in above cause, at the October term of said Court, and stipulate that the hearing of said cause shall be brought on at the present October term of said Court of Appeals, waiving twenty days service of copy of the State of the Case to be printed as soon as possible.

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LINDABURY & STEELMAN,
 Sol'rs. and Counsel for
 Josephine S. Hubert,
 Pet'r., Appellee.

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IN CHANCERY OF NEW JERSEY

BETWEEN

<p>MARY L. TYNDALE and JOSEPHINE S. HUBERT, executrices of Joseph West, deceased, <div style="text-align: right;">Complainants,</div> <div style="text-align: center;">and</div> MINNIE SMITH Mc- LAUGHLIN, et als., <div style="text-align: right;">Defendants.</div></p>	}	<p>On Bill &c. 10 FINAL DECREE. August 24, 1915</p>
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This matter coming on to be heard in the presence of Atwood L. DeCoster, solicitor of complainants, and Harrison P. Lindabury, of counsel, and Samuel C. Cowart, solicitor and of counsel with Joseph West, John F. Deacon, Margaret West, and Mary Frances West, defendants, and McDermott & Enright, solicitors for and of counsel with Christina VanSchoick, defendant, 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 said pleadings, proofs and arguments, and it appearing to the Court, among other things, that Joseph West, late of the City, County and State of New York, departed this life on or about the 9th day of September, 1871, seized of certain lands, particularly of lands located in the City of Newark, Essex County, New Jersey, leaving in force and unrevoked a last Will and Testament bearing date the 5th

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day of September, 1871, a copy of which is inserted in and made a part of the bill of complaint in this cause: which said last Will and Testament was afterwards duly proved before and admitted to probate by the then Surrogate of the County of New York in the State of New York on the 25th day of September, 1871, and letters testamentary issued thereon to Josephine S. West and Mary L. West, the executrices therein

30 named, the daughters of said Joseph West, deceased, and now the complainants under the names of Mary L. Tyndale and Josephine S. Hubert, and which said last Will and Testament was also admitted to probate by the then Surrogate of the County of Essex in the State of New Jersey, on the 9th day of January, 1873, and letters testamentary issued thereon to the said Josephine S. West and Mary L. West, which letters testamentary were afterward by an order of the

20 Judge of the Orphans' Court of the County of Essex, revoked, and the said Mary L. West and Josephine S. West removed as executrices under said Will; that afterward, on or about the 13th day of December, 1900, an exemplified copy of said last Will and Testament, with the probate proceedings thereon, was filed by the said complainants in the office of the Surrogate of said County of Essex, New Jersey, and duly recorded therein, and letters of administration de bonis

10 non cum testamento annexo of Joseph West, deceased, issued to said complainants: that the said Joseph West, deceased, did in and by his said last Will and Testament provide as follows, to wit: (the paragraphs having been numbered by the Court in the conclusions filed in this cause and in this decree for convenience and ready reference)

40 (1) "First: I appoint my daughters, Mary L. and Josephine S. West, executrix, and

Thomas West, my nephew, of Englishtown, Monmouth Co., New Jersey, Executor, without giving any security for the same.

- (2) I also direct my Executors to sell the house and four lots of ground where I now reside, one-half of the proceeds to be placed on Bond and Mortgage in the City of New York, and the remainder to pay my debts and mortgage on the house, 83 Amity St. 10
- (3) I also authorize them to apply to the court to sell the house, thirty-seven Forsyth St., which half belonged to my late brother, Thomas S. West, and the income of said house, that is his share, has been paid to my mother during her life. The proceeds of my late brother's half to be divided according to law. Also wish them to dispose of the farm in Macomb Co., Illinois, which belonged to my late father, Thomas West, to be sold and the proceeds divided according to law, I consenting to loose all the taxes which I have paid on said farm since my father's death. 20
- (4) I hereby authorize them to sell the gore of land, corner of Plane and State Streets, situated in Newark, New Jersey, occupied by a stone cutter, and apply the proceeds to the payment of my debts and assessments. Also a gore of land in rear of the corner of State and Broad Streets in the city of Newark, New Jersey, now leased for twenty-one years—to be sold at any time they think best, and the proceeds to be used for the same purpose as the one before mentioned. Also a tract or parcel of land situated in the city of Newark, New Jersey, running from Belleville Av. to Mount Prospect Av., con- 30 40

30 taining nearly twelve acres of land. The whole front which is left after opening streets on Belleville Av. and to the depth of about one-half of said ground to be leased by my Executors for twenty-one years with a renewal of twenty-one years more. The nett income to be divided equally between my daughters, Mary L. and Josephine S. West, during their life, separate and apart from their husbands—at their decease to their lawful heirs.

(5) The rear half on Prospect Av. to be sold and after paying taxes and assessments, the balance to be invested on Bond and Mortgage.

20 (6) I wish my Executors to hold the property situated, one forty-five Fulton Street,—the other eighty-three Amity Street, in the City of New York now leased—to be kept leased or rented and after paying taxes and all other expenses the balance to be equally divided between my daughters, Mary and Josephine S. West. In case of either dying the buildings to be kept leased or rented and the nett income of the deceased shall be divided equally between my nephews and nieces, Thomas West, Thomas Skidmore, 10 Joseph Skidmore, Joseph W., John, William, Christina and Mary Deacon, Christina Stevens, Mary Frances, Sarah Elizabeth, Margaret, Joseph and George West.

At the decease of both daughters the property shall be sold and the proceeds divided equally between the aforesaid nephews and nieces or the survivors.

40 (7) As soon as convenient I wish my Executors to pay my brother-in-law, Frances

Deacon, two hundred dollars, and my nephew, Thomas West, five hundred dollars for his services.

(8) All money advanced by me to Bartholomew McGown I give him. 81

(9) I also wish my Executors to pay to each of the children of William and Mary C. Hays of Tuckahoe, Westchester Co., Harriet, Ida, Sarah, Lavinia, Fanny and Winfield Hays, when they arrive to the age of twenty-two years." 10

and it further appearing that the bill of complaint herein prays for a construction of the said last Will and Testament of the said Joseph West, deceased, but no specific relief which entitles complainants to a construction of said Will by this Court, and that the answers in the nature of cross-bills of the defendants, Joseph West, John F. Deacon, Margaret West, Mary Frances West and Christina VanSchoick, pray a construction of said Will and relief thereunder, and the Chancellor being of opinion that the said Will should be construed by this Court and the rights and interests of the parties to this cause under said last Will and Testament fixed and determined, and it appearing that the nephews and nieces of the said testator, Joseph West, who are at this time so related to the said Mary L. Tyndale and Josephine S. Hubert, daughters of said testator, as to come under the designation of their "lawful heirs" as employed in said Will, are apparently and, in the absence of issue of said Mary L. Tyndale and Josephine S. Hubert (both now above the age of sixty years and apparently beyond the age of child bearing) the presumptive lawful heirs of said Mary L. Tyndale and Josephine S. Hubert and entitled to be protected

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against the waste of their prospective inheritance,

IT IS, on this Twenty-fourth day of August, 1915, by Edwin Robert Walker, Chancellor of the State of New Jersey,

30 ODRERED, ADJUDGED and DECREED, and the said Chancellor doth by virtue of the power and authority of this Court hereby order, adjudge and decree, that **the living nephews and nieces of the said testator, comprising the defendants, Joseph West, John F. Deacon, Margaret West, Mary Frances West, Sarah E. Lockwood, William Deacon and Christina VanSchoiek, formerly Christina Stevens, born Christina West,** now are, upon a proper construction of said Will, and are hereby **declared to be, in default of issue** of said Mary L. Tyndale and Josephine S. 20 Hubert, (the children of the testator), **presumptive lawful heirs of said Mary L. Tyndale & Josephine S. Hubert within the meaning and intent of said testator in his Will and as such have a vested remainder in fee in the lands and real estate referred to in said last Will in the following language, to wit:**

10 "Also a tract or parcel of land situated in the City of Newark, New Jersey, running from Belleville Av. to Mount Prospect Av., containing nearly twelve acres of land," excepting "The rear half on Prospect Av.," which the testator directed to be sold: The said tract of twelve acres being in the bill of complaint more particularly described as follows:

40 "Beginning at a stake standing in the fence by the road that leads to second River, thence running North, 34 degrees East, along the road to a bend in the fence; thence to the corner of the land formerly

belonging to Samuel Huntington, 6 chains and 73 links; thence North, 67 degrees 12 minutes West, 20 chains to the highway leading to Water Sessions; thence South, 13 degrees West, 5 chains and 60 links; thence to the place of beginning, containing 12 acres more or less,

“Saving and excepting thereout a small piece taken off the front of the premises to straighten the highway,

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“Bounded East on the road leading from Newark to Belleville, North by land formerly Samuel Huntington’s, West by the road leading to Water Sessions, South by land formerly in possession of John Hawthorne, and all the right whatever the same may be of the party of the first part in the highway adjacent to the said premises.”

Subject to the estate of the said **Mary L. Tyndale** and **Josephine S. Hubert**, as tenants for life therein.

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And it is further ORDERED, ADJUDGED and DECREED, that upon a proper construction of said Will the expression “**At the decease of both daughters the property shall be sold and the proceeds divided equally between the afore-said nephews and nieces or the survivors**” at the close of the 6th paragraph of said Will as above set forth, is referable and limited to the property previously mentioned in said 6th paragraph, to wit: “the property situated, one, forty-five Fulton Street, the other, eighty-three Amity Street, in the city of New York,” and that the nephews and nieces mentioned in said 6th paragraph or the survivors of them, are not through the language employed in said 6th paragraph, the residuary beneficiaries generally under the said Will, but take, after the **death of the testator’s** daughters, **Mary L. Tyndale** and **Josephine S. Hubert**,

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the properties mentioned in and made the subject of said 6th paragraph.

And it is further ORDERED, ADJUDGED and DECREED, that the said living nephews and nieces of said testator are entitled to be protected against the **waste of their prospective inheritance**, and that the said complainants were and are under a duty to protect the estate of the remaindermen in the said lands and premises, and to that end to continue in the care, possession and control of the said premises during their life, and that the said complainants were and are under a duty to keep down and pay the taxes and other liens upon or against said premises, and, as **life tenants thereof** to so care for said lands and premises as to prevent the taxes and assessments levied or charged against the same from becoming and remaining liens thereon, and that the said complainants were and are under a duty to redeem for the benefit of the estate of said testator and the protection of the remaindermen such portions of said lands as the said complainants have permitted to be sold, encumbered, or taken in possession by others, for taxes or assessments levied or charged against the same.

And it is further ORDERED, ADJUDGED and DECREED, that the said Mary L. Tyndale and Josephine S. Hubert, as executrices of the said Joseph West, deceased, and individually, within thirty days from service of a copy of this decree upon the solicitor of complainants, redeem the lands and real estate hereinabove described, or such portions of the same as have been sold for taxes or assessments levied or charged against the same by the City of Newark, or the Mayor and Common Council of the City of Newark, or the authorized taxing authorities of the said City of Newark, to the end that the said lands and premises so sold for taxes or assessments may be made free and clear of all liens

for taxes or assessments and all proceedings to enforce the payment of said taxes or assessments, and all certificates, deeds or other instruments purporting or pretending to convey said lands and premises or any part thereof to collect and satisfy such taxes or assessments levied upon or charged against the same.

And it is further ORDERED, ADJUDGED and DECREED, that the complainants are entitled, under a proper construction of said will as heirs at law or next of kin to the property of said testator, real and personal, not finally disposed of by said will, including the proceeds of sales of the property referred to in paragraph 5 of said will as hereinabove set forth. 10

And it is further ORDERED, ADJUDGED and DECREED, that the costs of the said complainants, including a counsel fee of three thousand dollars, which is hereby granted and allowed to the solicitor and counsel of said complainants, and the costs of the answering defendants, including a counsel fee of one thousand, five hundred dollars, which is hereby granted and allowed to Samuel C. Cowart, solicitor for and of counsel with Joseph West, and others, and a counsel fee of one thousand five hundred dollars, which is hereby granted and allowed to McDermott & Enright, solicitors for and of counsel with the defendant, Christina VanSchoick, be paid by the said complainants out of the corpus of the estate of said deceased, in remainder in their hands, or which may hereafter come to their hands, received from all sources excepting the proceeds of the sale of lands in the said city of Newark hereinabove first particularly described, to wit: "Also a tract or parcel of land situate in the city of Newark, New Jersey, running from Belleville Av. to Mount Prospect Av., containing nearly twelve acres of land," excepting "The rear half on Prospect Av.," and in default of 20 30 40

payment by said complainants that the said costs and counsel fees be paid, unless this court shall otherwise order, out of the proceeds of the sale of said last mentioned lands and premises or some portion thereof when the same shall be sold under an appropriate order of Court in proper proceedings taken for the sale thereof.

And it is further ordered that any party to this cause have leave to apply to this court hereafter
10 for other or further relief hereunder.

E. R. WALKER, C.

Respectfully advised,
JOHN H. BACKES, V. C.

A True Copy

ROBERT H. McADAMS, Clerk.

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New Jersey Court of Errors and Appeals

In the matter of the application of JOSEPHINE S. HUBERT and MARY L. TYNDALE for an order to sell lands of Joseph West, deceased, limited over.

On Petition of Josephine S. Hubert for Part of Proceeds of Sale of Lands in Newark, N. J., and on Exceptions of Josephine S. Hubert to Master's Report.

ON APPEAL FROM CHANCERY.

Order Advised by Vice-Chancellor
John H. Backes.

**BRIEF OF HARRISON P. LINDABURY,
SOLICITOR AND COUNSEL FOR RESPOND-
ENT, JOSEPHINE S. HUBERT.**

Statement of Facts.

Joseph West died in 1871, leaving a last will and testament wherein and whereby he authorized his executors to lease certain lands in the City of Newark for twenty-one (21) years, with a renewal of twenty-one (21) years more, and then provided:

“the net income to be divided equally between my two daughters, Mary L. and Josephine S. West during their life, separate and apart from their husbands, at their decease to their lawful heirs.”

These lands have been sold in this proceeding.

At his death the testator was survived by his two daughters, Josephine S. Hubert and Mary L. Tyndale (each of them having married since the death of the testator). Mrs. Tyndale has since died, leaving as her only heir-at-law her sister, Josephine S. Hubert, the petitioner, who applied to the Court of Chancery to have paid to her as the sole heir-at-law of her sister, Mary L. Tyndale, one-half of the proceeds of the sale of the lands devised as aforesaid.

The prayer of Mrs. Hubert's application was granted by an order advised by Vice-Chancellor Backes, from which the present appeal is taken, the appellant contending:

(1) That Mrs. Hubert is not an "heir" within the meaning of the clause of the will heretofore quoted.

(2) That even though Mrs. Hubert be the only heir-at-law of her deceased sister, nevertheless, she is debarred from the relief which she seeks by the fact that in 1915, several years before the death of Mrs. Tyndale, the Court of Chancery in *Tyndale v. McLaughlin*, 84 N. J. Eq. 652, adjudicated the question now presented adverse to the claim of the petitioner, Mrs. Hubert, which decision was never appealed.

Your respondent in reply thereto presents the following points.

POINTS.

Point I.

That Mrs. Hubert is an "heir" within the meaning of the clause of the will heretofore quoted. The words "at their decease to their

lawful heirs" have a definite legal meaning, and there is nothing in the will showing a contrary intent on the part of the testator.

Point II.

That the decree in the case of *Tyndale v. McLaughlin*, 84 N. J. Eq. 652, is not res adjudicata as to the claim of Mrs. Hubert for one-half of the principal of the proceeds of the lands sold.

POINT I.

That Mrs. Hubert is an "heir" within the meaning of the clause of the will heretofore quoted. The words "at their decease to their lawful heirs" have a definite legal meaning, and there is nothing in the will showing a contrary intent on the part of the testator.

In the former decision of *Tyndale v. McLaughlin*, the nieces and nephews of Joseph West are referred to as "presumptive heirs." An heir presumptive is defined in 29 C. J. 343, as follows:

"A term which applies to those who will probably inherit from a live ancestor; a person who, if the ancestor should die immediately, would succeed to the estate, but whose right of inheritance may be defeated by the birth of a nearer heir; he who has the present presumption in his favor that he will be heir, but which presumption may be excluded by the intervention of somebody who has a nearer title."

As illustrated in the notes to this definition (note 58):

"Thus, a nephew may be heir presumptive, but not heir apparent. Thus, a daughter is heir presumptive, before a son is born, but not heir apparent. The most remote relation of the whole blood may be heir pre-

sumptive; but the heir apparent can only be he who, if not disinherited, or dead before his ancestor, must take, of course, because it is impossible any other should be nearer, or so near to the inheritance."

Quoted from *Anonymous, Lofft*, 273, 98 Reprint 647.

58 (a), citing *McNutt v. McNutt*, 116 Ind. 545, 561, 19 N. E. 115.

"Children in the lifetime of the parents may be heirs presumptive, but they are not heirs."

And the New Jersey case of *Reese v. Stires*, 87 Eq. 32, at page 35, in passing on the constitutionality of the act of March 3, 1915, entitled "An act amendatory of and supplemental to 'An act directing the descent of real estates,' approved April 16, 1846," which also undertook to abolish estates and interests of dower and curtesy, in an opinion written by Chancellor Walker, states:

"No one can be heir-at-law to a living person. Before the death of the ancestor the person who is next in the line of succession is called an heir apparent if he be heir to the ancestor whenever he happens to die, and heir presumptive if the ancestor should die immediately, but whose right of inheritance may be defeated by the contingency of some nearer heir being born. 2 Bl. Com. 208."

As to what constitutes "heirs" see *Tuttle v. Woolworth*, 62 E. 532. Here the words used in the testator's will were,

"and after her death to set off the said bonds and stocks to my daughter Hattie, or her heirs. If the said Hattie shall die without issue her surviving, or children of such issue, then said bonds and stocks shall revert to my estate and be distributed among my heirs, in the manner provided by the

laws of New Jersey respecting intestate estates.”

At page 538, the Court held:

“The bequest to ‘heirs’ of the testator is a gift of the kind designated as a gift to a class, and the question to be solved is at what period of time is the class of testator’s ‘heirs’ fixed by the will—at the testator’s death or at the time of his widow’s death. The words ‘heirs or next of kin’ are technical legal words, and in their legal sense bear within themselves an indication as to the time intended for fixing the class, which cannot be overlooked. The legal relation or status of ‘heir’ or ‘next of kin’ arises only upon the death of the ancestor, and it arises immediately. In a legal sense, therefore, ‘heirs’ implies a reference to the time of the ancestor’s death, and if a testator makes a devise or gift to his ‘heirs’ or ‘next of kin,’ those standing in that relation at the time of his death would seem to be the persons intended, unless there is something in the will itself to show that the testator had another period in his mind, and that the legal sense of the words is to be restricted by indications that some other time is fixed.”

The West will, or that part of it under consideration, dividing the net income equally between the two daughters during “their life separate and apart from their husbands—at their decease to their lawful heirs,” has been construed by Vice-Chancellor Backes to give to the two sisters the income from the land in question for life, the fee to vest in their respective heirs at law. Applying the Tuttle case above quoted, their respective heirs would be those standing in that relation at the time of their respective deaths.

The Tuttle case is cited in the following later decisions:

Oleson v. Somogyi, 90 N. J. Eq. 342 (Ch. 1919), quoting Vice-Chancellor Emery's opinion in the Tuttle case, at page 343, and *In re Buzby's Estate*, 118 Atl. 835, 94 N. J. Eq. 151 (Court of Errors, 1922).

In the Buzby case, the provision of the will to be construed was:

"I give and bequeath unto my beloved wife during her natural life, or while she remains my widow, all and singular the residue of all my personal estate of whatsoever kind I may be possessed of at the time of my decease, and after her death or marriage, to such person or persons as would by law inherit the same."

At page 154 (94 N. J. Eq.) the Court held:

"The persons who 'would by law inherit' a testator's estate are those who would take it under the statute of descents or the statute of distributions in case he had died intestate. Such persons take by law and not by devise or bequest. Substituting for the words used their equivalent, the bequest of the estate in remainder is 'to those who would take under the statute of distributions in the event of my dying intestate,' as to the estate in remainder; in other words, 'my children, who are my next of kin.' The legal relation or status of heirs-at-law and next of kin arises immediately upon the death of the ancestor; and, therefore, in a bequest by a testator to his next of kin, those standing in that relation at the time of his death are the persons intended. *Tuttle v. Woolworth, supra.*"

The Buzby case was cited and followed under the same circumstances in the Court of Errors case of *American Builders Corporation v. Galligan*, 94 N. J. Eq. 731.

In *Akers' Executors v. Akers*, 23 N. J. Eq. 26, words almost identical to those in the West will were used. After giving all the residue of the real and personal estate upon the death of the testator's wife, to his six children by name, equally to be divided between them, and to their heirs and assigns forever, these words were added:

“But it is my will and desire that the amount so bequeathed to my daughters above named, shall be so secured to them that they only receive the benefit on the portion so bequeathed to them * * *; at their decease the property so bequeathed to go to their children or legal heirs.”

Chancellor Zabriskie, in his opinion at page 28, said:

“No one, I think, can read the clause in question without seeing that the testator intended that the principal of *each* daughter's share should be invested during her life, and the interest only paid to her half yearly, and that on her own receipt; and that at *her* death the principal should go to *her* heirs, and for that end should be retained and kept from the daughters by the executors.”

This case is cited in the later case of *Sherman v. Sherman*, 36 N. J. Eq. 125, where a testator directed proceeds from sale of his estate to be divided into six shares, which were to be given to his brothers and sisters, they to use it during their natural life, and “at their decease the said principal so paid to them to be divided among their lawful heirs, share and share alike.” One of the sisters threatened to dispose of her share in order to defeat her son's interest therein, and in enjoining her from so doing Chancellor Runyon, in his opinion at page 126, said:

“Mrs. Sherman's share of the residue is the fund in question. The construction of

the bequest under consideration presents no difficulty. Mrs. Sherman is to have the use of the fund for life, and at her death the principal is to go to her lawful heirs in equal shares. That is a gift to her of the interest or income of the fund for life, and of the principal of the fund to her children at her death."

Point II.

That the decree in the case of *Tyndale vs. McLaughlin*, 84 N. J. Eq. 652, is not *res adjudicata* as to the claim of Mrs. Hubert for one-half of the principal of the proceeds of the lands sold.

The definition of "*res judicata*" or "*res adjudicata*" as given in 34 Cyc. 1666, is as follows:

"A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment; a thing definitely settled by judicial decision; the thing adjudged."

Concurrence of identity in four respects is requisite, according to Bouvier's Law Dictionary, quoted in note 56, to above definition, as follows:

"In order to make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.'"

In *Hoffmeier & Son v. Trost*, 83 L. 358, recovery was sought by reason of a stop notice given under the Mechanics' Lien Act. Defense was, or rather judgment by trial judge was given for defendant on the ground that the matter was *res adjudicata*, inasmuch as a previous suit had

been brought based upon an alleged contract, made on a day specified to pay for labor, &c., bestowed upon the building in question. On appeal this decision was reversed, and in the opinion written by Judge Trenchard of the Supreme Court at page 359, the following was said on the subject of *res adjudicata*:

“But a matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one.”

Mershon v. Williams, 34 Vroom 398.

“A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence, which is necessary to sustain the second action, would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit. 23 Cyc. 1158.”

In *Mershon v. Williams*, 63 N. J. Law 398 (34 Vr. 398), action was on covenant in a lease, originally for one year, with privilege of four years more upon expiration of first year. Plea of *res adjudicata* inasmuch as defendant had previously obtained judgment against plaintiff in an ejection suit at the expiration of the first year. The Supreme Court on demurrer to the plea made the statement above quoted in *Hoffmeier & Son v. Trost*, and further, at page 401, said:

“The record of the former judgment only works an estoppel as to those matters capa-

ble of being controverted between the parties at the time of the proceedings in the action.

“The record must show that the issue was taken on the same allegations which are the foundation of the second action. The test is whether the proof which would fully support the one case would have the same effect in tending to maintain the other.”

Citing authorities.

The Hoffmeier & Son case above referred to was accepted as laying down the proper principles in regard to the question of *res adjudicata* in *Jamouneau Co. v. Wetherill*, 98 N. J. L. 80 (at page 81), where it was held that a judgment for the defendant in an action to recover the purchase price of a machine, on a finding that there had been no sale, is not *res adjudicata* in a suit in tort to recover damages for the unlawful conversion of the machine. It was also cited by the Court of Errors and Appeals, in *Meirick v. Witeman, Lewis, &c.*, 98 L. 531, where it was held that a judgment entered in a suit brought to recover compensation as secretary under a contract, is not a bar to a suit between the same parties brought afterwards by the plaintiff to recover the value of services under a *quantum meruit*. There is no identity of the thing sued for, and the judgment in the first suit is not *res adjudicata* as to the second suit.

In *East Jersey Water Co. v. City of Newark*, 125 A. 578 (N. J. Ch., July, 1924), *V.-C.* Church said (p. 582):

“The doctrine of *res adjudicata* is that the parties must be the same in both cases. In the cases before me there is an additional party in each case * * * The doctrine of *res adjudicata* was thoroughly discussed in a case to which counsel have not called my attention, but which perhaps is the leading

case on that point in this State. I refer to *Sbarbero v. Miller*, 72 N. J. Eq. 248, the opinion being by Vice-Chancellor Garrison, which was unanimously sustained by the Court of Errors and Appeals in a per curiam decision adopting the Vice-Chancellor's reasoning."

In *Sbarbero v. Miller*, 72 E. 248, in a suit on a bill to set aside a deed of assignment made by an alleged lunatic on the ground of insanity at the time, complainant urged that a prior judgment in an ejectment suit, brought by defendant in the present suit, in which the jury found that the alleged lunatic was insane at the time of the transaction, but that the grantee had no knowledge of such insanity, was binding by way of estoppel against the said defendant insofar as the jury's finding that the grantor was insane. At page 254, the Court held:

"The fundamental principle of *res adjudicata* is that the subject-matter must have been settled in the previous litigation between the same parties.

"A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it.' *Herm. Estop.* 105, sec. 105. 'Even parties and privies are bound only so far as regards the subject-matter then involved, and are at liberty to raise the same questions in another distinct controversy affecting a distinct cause of action.' *Herm. Estop.* 124, sec. 118. 'And they will not be concluded unless the judgment necessarily involved the matter which it is sought to be held as conclusively settled by the litigation.' *Herm. Estop.* 291, sec. 252, *et seq.*

"A verdict and judgment, therefore, are conclusive by way of estoppel only as to the facts, without the existence and proof or admission of which they could not have been rendered."

Cites several cases from other States and *Mullaney v. Mullaney*, 65 N. J. Eq. 384 (Court of Errors and Appeals).

The latter case is not strictly in point, inasmuch as the judgment sought to be set up in bar of the Chancery action was one of the Orphans' Court, given in a matter over which it had no jurisdiction. But the Court, at page 388, does state:

“If I had come to the conclusion that the court had jurisdiction to determine the question of fraud, I should still have thought that its determination would not have been conclusive. Lord Chief Justice DeGrey thus expresses himself in the leading case of the Duchess of Kingston: ‘From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true—first, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar and as evidence conclusive between the same parties directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same question between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.’”

In *Schneider v. Schmidt*, 92 A. 789 (affirmed by Court of Errors in 95 A. 1079, for the reasons given in *V.-C. Emery's* opinion) at page 790, *V.-C. Emery* states:

“The plea of *res adjudicata* must show that the same point at issue on the present

bill was at issue on the former bill, and that the title to relief was the same as in the second bill as in the first."

In *Schilstra v. Van Den Hewel*, 82 E. 155, a bill was filed for the regulations of the affairs of a religious society from which part of the membership had seceded to join another denomination, taking with it church property. Contended that quo warranto proceedings at the instance of the Court of Chancery had in the Supreme Court in which the right of certain defendants to hold office, etc., was tested, and found in their favor, and in which it was decided the meetings at which it was voted to secede were regularly called and the right to secede existed was such an adjudication upon the merits in controversy that examination in the present case into the matters involved was precluded. In denying this contention inasmuch as the present case involved the further question as to whether the defendants in seceding had a right to take the property with them, the Court held at page 161, on the doctrine of *res adjudicata*:

"It was said by Mr. Justice Field, in the case of *Cromwell v. County of Sac*, 94 U. S. 351, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action; in the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

“But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action—not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

“The doctrine of this case was approved by this court in *Paterson v. Baker*, 51 N. J. Eq. (6 Dick.) 49, and in *Clark Thread Co. v. William Clark*, 55 N. J. Eq. (10 Dick.) 658. (See *Hoffmeier v. Trost*, 83 N. J. L. (54 Vr.) 358.)”

The Schilstra case was affirmed by the Court of Errors and Appeals in 82 Eq. 612, with the modification with respect to the adjudication as to which parties constituted the Board of Trustees.

In *Tuttle v. Woolworth*, 62 N. J. Eq. 532, the construction of the following clause in the testator's will arose:

Fifth Item: After bequeathing to executors securities specified in trust, first, to collect interests, etc., etc., and pay expenses of maintaining house, use of which was given to wife and daughter, Hattie, and second to pay the balance of the interest, etc., to the wife during her natural life,

“and after her death to set off the said bonds and stocks to my daughter, Hattie, or her heirs. If the said Hattie shall die without issue her surviving, or children of such

issue, then said bonds and stocks shall revert to my estate, and be distributed among my heirs, in the manner provided by the laws of New Jersey respecting intestate estates."

A similar provision was made in connection with the third item of the will disposing of the house to be used by the wife for life or widowhood, then to Hattie for life, and at her death to convey to her children or sold and proceeds divided, concluding in the event of Hattie's death without issue surviving, in the same manner as above-quoted clause.

Hattie died unmarried, without issue, before her mother's death, by her will devising all her estate derived under her father's will to her mother, who in turn devised to her two nieces. The heirs-at-law of the testator at his death were his daughter Hattie and another daughter and a son. The other daughter and a daughter of the son are the sole survivors of heirs of original testator. The question was whether Hattie, as one of the heirs of the original testator, was entitled to a one-third interest in proceeds of sale of realty when made, and if so, so were her assignees. The same question was involved under the fifth item above, although under the fifth item it was claimed that Hattie became entitled to an absolute vested estate in the fund, subject only to the life interest of her mother, and the clause directing payment over on her death without issue, referred only to her death in the lifetime of the testator.

"It is, moreover, insisted that this construction of the character of the bequest was settled by a decree made on a bill filed by the executors during Hattie's lifetime, and to which she was a party."

Macknet v. Macknet's Heirs, 9 C. E. Gr. 277 (Chancellor Runyon, 1873).

“In this case the question was as to the effect of the widow’s refusal to accept the provisions of the will, in lieu of dower, on the different bequests and devises of the will. But the question now raised as to the nature and effect of the bequest made on the death of Hattie without issue, during the lifetime of the mother, was not directly involved or expressly considered in the case, neither could it have been conclusively determined in advance, and in the absence of the parties or claimants necessary to determine the question.”

Ashurst v. Lippincott, 11 Dick. Ch. Rep. 840, 842 (Errors and Appeals, 1898).

“Nor, on examining the decree made in reference to her interest in the bonds and stocks, does it appear to determine the point now involved. By the decree the executors were not directed to pay over the bonds and stock to Hattie, as if, on the failure of the wife’s interest, by her refusal to accept the legacy, the principal had become payable to Hattie at once, but they were directed to hold and accumulate the balance of the income of the fund, after paying expenses on the house, in trust for Hattie, and no express direction was made as to paying her any portion of the principal. The widow, subsequent to this decree, accepted the provisions of the will (*Macknet v. Macknet*, 2 Stew. Eq. 54 (1878)), and the executors, having theretofore held the fund, as expressly directed by the will, until after the death of the widow, the question as to the distribution of the fund after her death now comes directly before the court. All the claimants to the fund have now, for the first time, their day in court as to its disposition, and are entitled to have the question considered as *res nova*, and not *res adjudicata*.”

The Tuttle case is cited in *Ogden v. McLane*, 73 E. 159, at page 161, where the Court of Chancery states the following rule:

“This court will not instruct trustees in regard to their duty with respect to the payment or transfer of the trust estate in their hands until the time for such payment and transfer has arrived. *When the time to act arrives, the parties who then will be affected by the action of the trustees are entitled to be heard*; they are the parties who argue the question, the determination of which directly affects their interest.”

In the Ashurst case above cited, in a suit instituted by Alice Lippincott and others for an accounting and the settlement of the estate of Thomas F. Potter and its division under his will for the benefit of the testator's surviving children, the final decree provided that the trustee should set aside and retain under said will for said Alice Lippincott certain cash and securities named, such division including share of the estate given absolutely to a brother which had not been accounted for. The accounting and division were based upon the assumption that the brother had died in the lifetime of the father. It was later admitted that he died two years after the death of his father, and therefore his share belonged absolutely to all his surviving brothers and sisters equally. *Held*, that Alice Lippincott was not estopped by said decree, so far as the parties to that suit were concerned, from showing in an action against the remaindermen of this share, that a portion of the one-fourth paid over in trust for her under the father's will, was, in fact, her absolute property as next of kin of her brother.

In the original case of *Tyndale v. McLaughlin*, in addition to the fact that Vice-Chancellor

Backes in his conclusions uses these words at page 659 (84 Eq.):

“The view I indulge of this devise is that the land was to be held by the executors and not to be sold for forty-two years, in the lifetime of the daughters, during which period they were to have the income. At their death, in that time, or thereafter, the fee was to vest in their respective heirs-at-law as purchasers—now, presumably, the defendants.”

and at page 660:

“the defendants, nephews and nieces, are now entitled to be protected against waste of the *prospective* inheritance.”

The decree in the latter part of the recital uses these words:

“It appearing that the nephews and nieces of the said testator * * * who are *at this time* so related to the said Mary L. Tyndale and Josephine S. Hubert, * * * as to come under the designation of their ‘lawful heirs’ as employed in said will, are apparently and in the absence of issue of said Mary L. Tyndale and Josephine S. Hubert, the *presumptive lawful heirs* * * * and entitled to be protected, &c., &c.”

and in the ordering part of the decree again it speaks of the nieces and nephews as “*presumptive lawful heirs*”; the decree concludes as follows:

“And it is further ordered that any party to this cause have leave to apply to this court hereafter for other or further relief hereunder.”

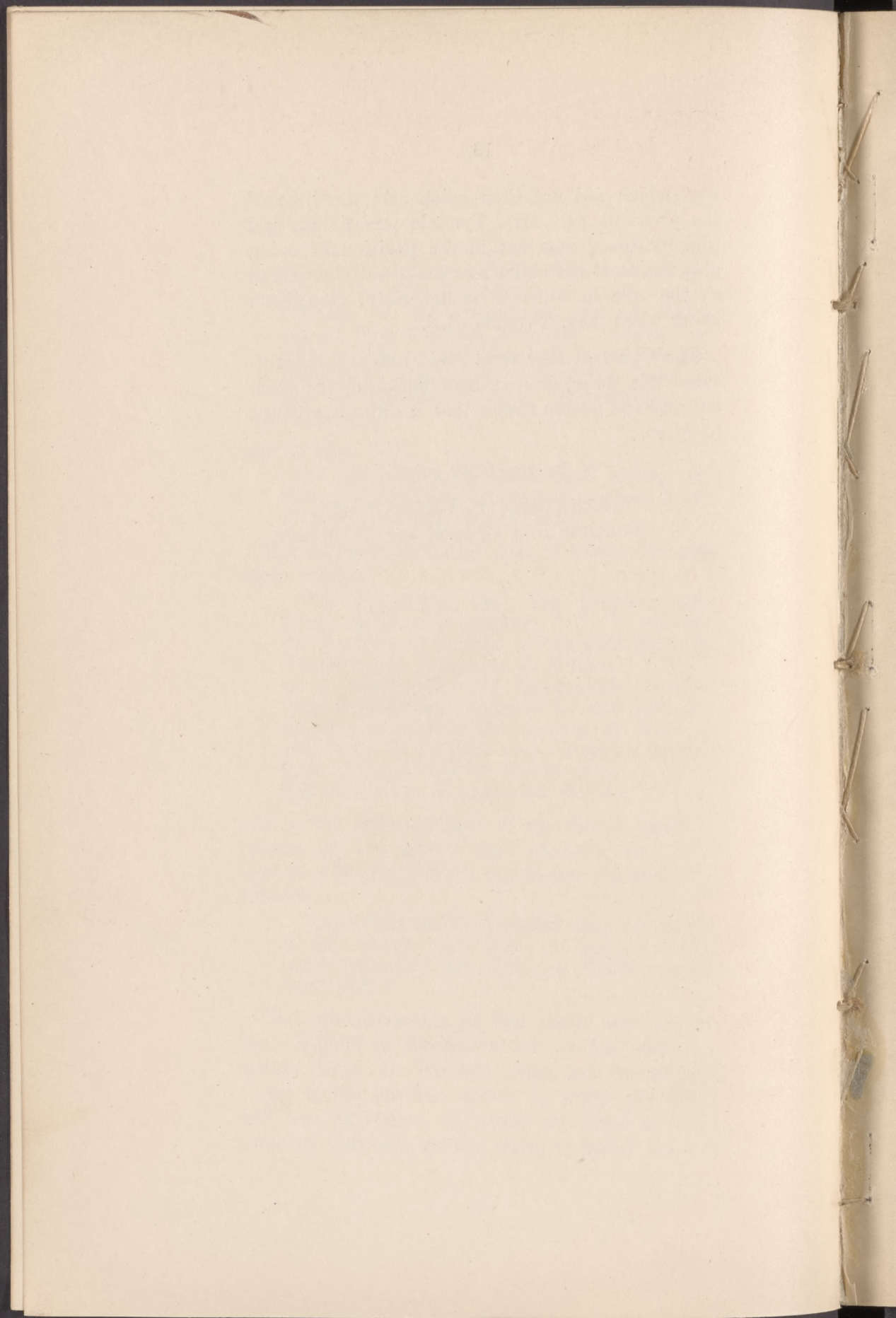
The subject matter of this claim asserted by Mrs. Hubert as the heir-at-law of her deceased sister, Mary L. Tyndale, was not before the Court in the previous action in which the West will was construed. It could not have been at issue in that suit, as the claim is based upon a

fact which did not then exist. At the time of the previous suit Mrs. Tyndale was living, and the petitioner was not in the position of being able to assert the claim now made until her status as the sole heir-at-law of her sister came into being when Mrs. Tyndale died.

The Court at that time could not have adjudicated this claim, and an examination of the opinion and the decree shows that it did not attempt to do so.

Respectfully submitted,

HARRISON P. LINDABURY,
Solicitor and Counsel for Petitioner.



**NEW JERSEY COURT OF ERRORS
AND APPEALS**

In the Matter of the Application of JOSEPHINE S. HUBERT and MARY L. TYNDALE, for an Order to Sell Lands of Joseph West, deceased, limited over.	On Petition of Josephine S. Hubert for part of pro- ceeds of sale of lands in Newark, N. J., and on Exceptions of Josephine S. Hubert to Master's Report	10
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ON APPEAL FROM CHANCERY

Order advised by Vice Chancellor John H. Backes. 20

Brief of Samuel Craig Cowart, Solicitor and Counsel for Appellants.

**STATEMENT OF FACTS ALLEGED
BY APPELLANTS**

This matter comes before the Court on exceptions to the report of Richard Stockton, Esq., as special master on the petition of Mrs. Josephine S. Hubert for payment to her of one-half of the net proceeds of sale of lands in Newark, N. J., belonging to the estate of her father, Joseph West, deceased. 30

Appellants (respondents) received no notice of original petition in time to offer any testimony before the master. When the petition was filed for this distribution no notice by subpoena, or rule to show cause, was served on the defendants, 40

until after the master had made his report, when a rule to show cause was issued and served on defendants.

10 Mrs. Hubert in her petition claims she is entitled to payment of one-half of these proceeds of sale, as well as to the payment of the accumulated income thereon, as sole heir at law of her sister, Mary L. Tyndale, deceased, and as sole residuary devisee under the will of her said sister. Mrs. Hubert and Mrs. Tyndale are the children of Joseph West, the testator, who died in the year 1871, seized of the lands in question in Newark, and of other valuable property in the city of New York and elsewhere. Under the will of their father, Mrs. Hubert and Mrs. Tyndale and Thomas West, a nephew of their father, were appointed executrices and executor. Thomas West never qualified as executor and has since died. Mrs. Hubert and Mrs. Tyndale probated the will in New York and qualified there as executrices and trustees, and also probated it in Essex County, New Jersey, and took out letters of executorship there.

The original will is now on file in the secretary of state's office at Trenton, New Jersey

30 From information received from the late Joseph West of Englishtown, a nephew of Joseph West, the testator, and from other members of the family, I understand that Thomas West, the father of Joseph West, the testator, was engaged in the brush business in New York City, and at his decease, Joseph West, the testator, and his brothers, Thomas Simon West and William West, succeeded to the business. The brothers, Thomas Simon West and William West, died prior to Joseph West, the testator, leaving several children, who, with the children of their sisters, Christina Deacon and Mary Skidmore and Margaret Smith, are the nephews and nieces

40 named in the will of Joseph West, the testator.

Thomas Simon West left one son, Thomas West, of Englishtown, who is named as an executor in the will of his uncle, Joseph West. William West left five children, viz. Joseph West, of Englishtown, Christina Stevens VanSchoick, Mary Frances West, Margaret West and Sarah E. Lockwood.

The fact that Joseph West, the testator, only gave his two daughters a life estate, or the income for life from his residuary estate, with remainder over to these nephews and nieces as residuary devisees, was apparently a recognition of the moral and perhaps equitable right of the children of his deceased brothers and sisters, to share in his estate and in the profits that had resulted from that business, which had come to him from his father, in trust for all of them. 10

From the language used in the disposition of his Newark property, it is evident that the testator also wished to protect his daughters and his estate from any possible danger of their husbands wasting his estate. 20

In behalf of the remaindermen, whom I represent, I contend that the Master's Report should be approved and that the exceptions thereto by Mrs. Josephine S. Hubert should be disallowed.

I contend that Mrs. Hubert is not entitled, as the heir at law of her sister, Mary L. Tyndale, or as devisee under her said sister's will, to payment of one-half of the corpus, or principal, of the net proceeds of sale of the Newark lands, which have been sold by decree of the Court of Chancery and are now held in trust by the Court of Chancery of New Jersey, for the following reasons: 30

POINTS

FIRST: Mrs. Tyndale did not die seized or possessed of one-half of the lands in question, or possessed of one-half of the corpus, or principal, 40

of the net proceeds of sale of the lands in question. She only had a life estate in the lands sold, and was only entitled to one-half of the net income therefrom, during her lifetime. The estate in remainder in said lands does not fall, or come to the remaindermen, until the death of **both of the life tenants**, viz. Mary L. Tyndale and Josephine S. Hubert. The residuary clause does not state that, at the death of either one of them, the one-half of the lands was to go to that one's lawful heirs, but the language of the will is as follows:

10 "The net income to be divided equally between my daughters, Mary L. and Josephine S. West, during their life separate and apart from their husbands—at **their decease to their lawful heirs.**"

20 The words, "at **their** decease to **their** lawful heirs" fixed the time when the estate in remainder falls, or comes to the remaindermen and determined the persons, who will be the remaindermen, viz., the persons who will be their lawful heirs at the **decease of both of the life tenants.**

SECOND POINT

SECONDLY: This contention is supported by the final decree in the case of Tyndale vs. McLaughlin, filed August 24, 1915, hereafter referred to.

30 No appeal from said decree was taken by the complainants, Mary L. Tyndale and Josephine S. Hubert.

The question under consideration therefore is, "Res Adjudicata," and the decree of the Court cannot now be changed by this petition of Josephine S. Hubert.

40 There is nothing in the will of the testator, Joseph West, to indicate that, at the death of either of his daughters, he intended that the corpus of her one-half share of either the New York

or Newark property of which she was the life tenant, should go to the surviving daughter.

On the contrary, he provided distinctly as to the New York property, that, at the decease of either daughter, the buildings were to be kept leased, and the net income of the deceased daughter's share, in which she had a life estate, should be divided equally between the nephews and nieces named in his will. At the decease of **both** daughters, the property was to be sold and the proceeds divided equally between the aforesaid nephews and nieces, or the survivors. 10

In disposing of the Newark property, there is nothing to indicate that he intended that, at the death of either daughter, the surviving daughter should take any share of the corpus of the estate, of which the deceased daughter was tenant for life.

As each daughter was only seized of a life estate, the fee would not pass by descent to the heirs of that daughter, but the testator designates to whom the fee should go at the death of **both** daughters, namely, he designates the persons who would be their lawful heirs at the decease of both of his daughters, and the estate in remainder was evidently intended to be held in abeyance and not to absolutely fall, or pass, to the remaindermen until the death of **both** daughters. 20

Vice Chancellor Backes in his very able and careful conclusions in this case, Tyndale vs. McLaughlin, reported in 84 N. J. Equity pages 652, etc., on pages 659 and 660, says: 30

"The view I indulge of this devise is that the land (referring to the Newark land) was to be held by the executors and not to be sold for forty-two years, in the lifetime of the daughters, during which period, they were to have the income. At **their death**, in that time, or thereafter, the fee was to vest in their respective heirs at law as purchasers—now, **presumably, the defen-** 40

dants. The fact that the complainants have survived the term of years created by the trust does not alter the defendants' estate; it simply postpones the enjoyment—in the meantime, **an estate for life is in the complainants**, by operation of law."

On page 660, Vice Chancellor Lackes further says:

10 "Another indication established by text writers and decisions of a use by a testator of the word, "heirs," as a word of purchase and not as a word of limitation, occurs, where the life estate is only an equitable estate and the remainder is a legal estate. Thus, where property is devised under an active trust for the benefit of a life tenant and then the legal estate is devised, at the death of the life tenant, direct to his heirs, the word, "heirs," cannot be taken to have been used to indicate a succession of inheritance of
20 the legal estate from the life tenant, because the life tenant never held the legal estate. The case in hand only furnishes an additional example for the application of this doctrine. Here, of course, we have no battle with the rule in Shelley's case, because the testator devised the land in trust for a term of years. The devise over to the "lawful heirs" could not therefore, in law, effect an estate in fee in the ancestor."

30 Vice Chancellor Backes at the conclusion of his opinion says:

"From this it is to be concluded that the testator could not have employed the terms according to their technical meaning, and it follows that the only reasonable construction to be given to their use is that he intended thereby to nominate as takers of his estate, **after the death of his daughters**, those who stood in the relation of heirs at law to them. As such, the **defendants, nephews and nieces**, are now entitled to be pro-
40

ected against waste of their prospective inheritance."

In view of these conclusions of the Vice Chancellor and of the final decree founded thereon, I contend that under the will of Joseph West, the testator, and under the construction of the will by decree of the Court of Chancery, Mrs. Hubert is not entitled to the payment to her of one-half of the principal of the fund now in the hands of the clerk of Chancery, representing the net proceeds of sale of the lands in Newark, of which her sister, Mary L. Tyndale, now deceased, was life tenant with her. 10

THIRD POINT

THIRDLY: I further contend that Mary L. Tyndale could not by her will devise the said estate in remainder or any portion of it, to her surviving sister, Josephine S. Hubert, for the reason that, under the will of her father, the testator, Joseph West, she had **no power of appointment** by which she could legally devise the fee of said estate in remainder in said lands, or the corpus of the proceeds of sale of the same. 20

The petitioner, Josephine S. Hubert, and her sister, Mary L. Tyndale, in her lifetime, long acquiesced in this construction of their father's will.

After they had probated the will in Essex County, New Jersey, and had sold several parcels of Newark property, on their own application, they were removed as executrices by order of the Essex County Orphans Court, dated November 12, 1895. A few days after this, notwithstanding their removal as executrices, on November 29, 1895, they sold a lot on Summer Avenue to one Joseph W. Mandeville for \$4500.00, and gave him a deed for it. Some Title Company objected to the deed as illegal and not conveying a proper title. On December 17, 1906, they filed a petition 30 40

in the Essex County Surrogate's Office, reciting this fact and praying for substitutionary administration with the will annexed of Joseph West, deceased, and on December 17, 1906, letters of substitutionary administration were issued to them by the Surrogate of Essex County. In an amended petition, dated January 2, 1907, sworn to by the said Mary W. Tyndale and Josephine W. Hubert, using the middle letter "W" for West, evidently, instead of their given name, the latter petition apparently being substituted for their original petition, which was dated November 5, 1906, the petitioners stated that they had sold the said tract of land for the sum of \$4500.00, that they had received said sum and had invested the same in accordance with the will of said Joseph West, deceased, and the securities now remained in their possession to be disposed of as in said will provided. The following clause then appears in the amended petition.

20 "Your petitioners further show, that they are sole next of kin and heirs at law of the said Joseph West, dec'd., and believe that they are entitled to enjoy the use of the said sum of four thousand five hundred dollars (\$4500.00) during the term of their natural lives."

In the affidavit attached to the petition, they both swear that they have read the same, etc., and that the matters and things therein contained are true.

30 I submit that this shows that they put the same construction upon the will as to the intention of the testator, which has been put upon it by the Court of Chancery and by the Master in his report on this petition.

40 Furthermore, Mrs. Hubert and Mrs. Tyndale, before the sale of the Newark lands by order of this Court of Chancery, made numerous sales as executrices and trustees from these Newark lands, amounting to \$29,858.58, for which they

have never accounted in the Essex County Orphans' Court, to show the investment of the Trust Funds or their disposition. A statement of these sales is attached to this brief.

They have also wasted hundreds of dollars of the estate in remainder and jeopardized the estate in remainder, by allowing the Newark property to be sold several times for taxes. They also mismanaged the Newark lands by leasing them at ridiculously low rentals and then failing to collect the rents and pay the taxes when due. (See statement of rentals attached). 10

I, therefore, respectfully submit that the Master's report should be approved in his conclusion, that the legal title to one-half of said lands and premises, or the proceeds of sale thereof, was not vested in the said Mary L. Tyndale, but that she was only a tenant for life therein, and that the petitioner, Josephine S. Hubert, as the only heir at law of said Mary L. Tyndale, deceased, is not seized in fee, or in her own right of the said one-half part thereof, and is not now entitled to the payment thereof to her. In regard to the income, however, on the said trust fund, I agree with the Master, that the intention of the testator, apparently, was that the two daughters should enjoy the income of the Newark lands during their lifetime to be divided between them, and that the surviving one of them should take the whole income during her natural life, and that therefore, Josephine S. Hubert, the petitioner, should be paid the present accumulation of income on said trust fund and should be paid the future income therefrom during the term of her natural life. 20. 30.

I, therefore, respectfully submit that the prayer of the petitioner as to the payment of one-half of the corpus, or principal, of the net proceeds of sale of said Newark lands should be denied, but that the prayer of the petitioner, as to the pay- 40

ment of the income due and to grow due on said net corpus of the proceeds of sale of said Newark lands should be granted, and that the same should be paid to her during the term of her natural life.

10 After Vice Chancellor John H. Backes had filed his conclusions in the above matter, holding that Josephine S. Hubert was entitled to one-half the corpus of the net proceeds of sale of the Newark lands, it seemed somewhat presumptuous on my
 10 part to ask for a rehearing in the case, as such rehearing must necessarily involve what the ancient Romans would term "an argumentum ad hominem," and what the Bible would term, "a kicking against the pricks."

20 Notwithstanding this rather anomalous situation I still labored under the impression that, upon a review of the whole case, in reply to the very able brief of Mr. Harrison P. Lindabury, counsel for the present sole petitioner, (appellee)
 20 Josephine S. Hubert, and upon a re-discussion of the basic principles of law, upon which the learned Vice Chancellor had founded his conclusions, I might still be able to convince the Chancellor that he should not change his original decree in the case of Tyndale vs. McLaughlin, filed August 24, 1915, reported (but not fully reported) in 84 N. J. Equity 652. Therefore I applied for and was granted a rehearing but Vice
 30 Chancellor Backes refused to change his conclusions and hence this appeal.

DISCUSSION OF VICE CHANCELLOR BACKES' CONCLUSIONS

40 (1) The first dictum set forth in the Vice Chancellor's conclusions, on this petition of Josephine S. Hubert for payment to her of one-half of the principal of the net proceeds of sale of the lands in Newark belonging to the estate of

Joseph West, her father, on which her sister, Mary L. Tyndale, received the income during her life, is as follows:

“Res adjudicata” is not applicable, where in a previous suit, between the **same** parties, the question in issue was not ripe for decision and was not tried or determined.”

The above dictum admits, that the previous suit of Tyndale vs. McLaughlin, was between the same parties and it **was** between the same parties, except that some of them have since died.

The remaining question therefore is, was the matter now in issue ripe for decision and tried and determined in that original case. I contend that it was **ripe** then and was **determined**.

The question then in issue, and now in issue, was and is—what is the true construction of the intention of Joseph West, the testator, in disposing of his Newark lands, and what rights and interests therein vested by his will in his two daughters and in his nephews and nieces, the latter of whom claimed to be entitled to the estate in remainder in said lands, at the termination of the life estates therein of his two daughters, Mary L. Tyndale and Josephine S. Hubert.

I respectfully submit that the final decree in Tyndale vs. McLaughlin settled and determined these two questions.

The decree speaks for itself in the following clear and explicit language, which I quote,

“It appearing that the bill of complaint herein prays for a construction of the said last will and testament of the said Joseph West, deceased, but no specific relief which entitles complainants to a construction of said will by this Court, and that the answers in the nature of cross-bills of the defendants, Joseph West, John F. Deacon, Margaret West, Mary Frances West and Christina VanSchoick, prays a construction of said will and relief thereunder, and the Chancellor being

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of opinion that the said will **should be construed by this Court and the rights and interests of the parties to this cause under said last will and testament fixed and determined**, and it appearing that the nephews and nieces of the said testator, Joseph West,—who are, at this time, so related to the said Mary L. Tyndale and Josephine S. Hubert, daughters of said testator, as to come under the designation of “their lawful heirs,” as employed in said will—are apparently and, in the absence of issue of said Mary L. Tyndale and Josephine S. Hubert (both now above the age of sixty years and apparently beyond the age of child bearing) **the presumptive lawful heirs of said Mary L. Tyndale and Josephine S. Hubert and entitled to be protected against the waste of their prospective inheritance.**

“It is, on this twenty-fourth day of August, 1915, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree, that the living nephews and nieces of the said testator, comprising the defendants, Joseph West, John F. Deacon, Margaret West, Mary Frances West, Sarah E. Lockwood, William Deacon and Christina VanSchoick (formerly Christina Stevens, born Christina West) now are, upon a proper construction of said will, and are hereby declared to be, in default of issue of said Mary L. Tyndale and Josephine S. Hubert (the children of the testator), **presumptive lawful heirs** of said Mary L. Tyndale and Josephine S. Hubert, within the **meaning and intent** of said testator in his will and as such **have a vested remainder in fee** in the lands and real estate referred to in said last will in the following language.”

“(Here follows a description of the Newark lands).”

“And it is further ordered, adjudged and decreed, that the said **living nephews and nieces** of said testator are entitled to be protected against the **waste of their prospective inheritance**, and that the said complainants were and are under a duty to **protect the estate of the remaindermen** in the said lands and premises, and to that end to continue in the care, possession and control of the said premises during their life, and that the said complainants were, and are, under a duty to keep down and pay the taxes and other liens upon, or against, said premises and, as **life tenants** thereof, to so care for said lands and premises as to **prevent** the taxes and assessments levied or charged against the same from becoming and remaining liens thereon, and that the said complainants were and are under a duty to redeem, for the benefit of the estate of said testator and the **protection of the remaindermen**, such **portions of said lands** as the said complainants have **permitted to be sold**, or encumbered or taken into possession by others, for taxes or assessments levied or charged against the same.”

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“And it is further ordered that any party to this cause have **leave to apply to this Court hereafter for other or further relief hereunder**.

I respectfully submit that it is clear, from the language of said decree, above quoted, that the learned Chancellor did **adjudicate** the matter now in issue on this application of Josephine S. Hubert, because the **same subject matter**, namely, the true construction of the will of Joseph West, the testator, was in controversy, the said Josephine Hubert was a party and the Chancellor by his decree, as he so states, fixed and determined **all the rights and interests of all the parties** to said cause of Tyndale vs. McLaughlin, both complainant and defendant.

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If he had considered that the death of either

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Mrs. Tyndale or Mrs. Hubert would put the survivor of either of them, in the class of remaindermen or presumptive remaindermen, he would have so decreed, but he evidently determined that the estate in remainder did not come, into possession, to the remaindermen, until the death of both the complainants, as life tenants, and would then vest in such heirs at law of both of them as survived both life tenants, at the death of the last life tenant.

10 Mr. Lindabury in his reply brief to my original brief gives the definition of "res adjudicata" as given in 34 Cyc. 1666, as follows:

"Matter adjudged: a thing judicially acted upon or decided; a thing or matter settled by judgment; a thing definitely settled by judicial decision; the thing adjudged."

He also states that according to Bouvier's law dictionary, there must be a concurrence of identity in four respects as follows:

20 "In order to make a matter "res adjudicata" there must be a concurrence of the four conditions following, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; (4) identity of the quality in the persons for, or against whom the claim is made."

I respectfully submit that the present matter and question in controversy is "res adjudicata," because it has all "the ear marks" and the necessary elements above required. Undoubtedly this present controversy relates to the Newark land, which was the subject of controversy in the case of Tyndale vs. McLaughlin, and therefore, it fulfils the first requirement of "res adjudicata" above mentioned, and as Josephine S. Hubert and her sister, Mary L. Tyndale, in the original suit, were claiming rights and interests in the Newark land, which were in conflict, as now, with the rights and interests claimed by the de-

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fendants and respondents in this present action, therefore, the second requirement to constitute a case of res adjudicata is also fulfilled:

As to the third requirement, identity of persons and of parties to the action, there is no question that the present parties and persons in the present dispute, are the same parties and persons in the original suit, except those who have died since the determination of that suit.

The only element remaining for consideration is the fourth element above mentioned, which requires an identity in the quality of the persons for or against whom the claim is made. 10

In regard to this requirement I contend that the present persons interested in this application of Mrs. Hubert, which is objected to by my clients, the respondents, (appellants) are the same identical persons, as in the original suit, and have the same qualities. The Chancellor in making up his decree in the original cause must have considered, and we have no reason to think that he did not consider, the possibility of the death of one of the complainants, who were sisters, leaving the other sister as her heir at law, because he states in his decree in the year 1915, that he was fixing and determining the rights and interests of all the parties to that suit. I, therefore, respectfully submit that the fourth element, to constitute res adjudicata, in this present controversy, was present in the original controversy or action, and that the death of one of the sisters does not of itself constitute a res nova, or new action, between the parties to the original suit. 20 30

SECOND DICTUM IN VICE CHANCELLOR'S PRESENT CONCLUSIONS

The second dictum in the learned Vice Chancellor's conclusions is as follows:

"(2) A devise to testator's daughters for life and, "at their decease," "to their lawful heirs," 40

held, that, upon the death of one of the daughters, without issue, the surviving sister takes as her heir at law."

SECOND

In reply to this conclusion of the Vice Chancellor, I would respectfully suggest that this dictum is only true in fact in two respects, viz.

1st. It is true that the surviving sister, Josephine S. Hubert, was the sole heir at law of her
 10 deceased sister, Mary L. Tyndale, at the time of said Mary L. Tyndale's death on the 17th day of July, A. D. 1922, and is entitled to all the estate, both real and personal, of which said Mary L. Tyndale died seized in fee as to real estate, or possessed, as to personal property, both as sole devisee under the will of said Mary L. Tyndale and as her then sole surviving heir at law, but
 20 said Mary L. Tyndale did not die seized of any lands in Newark, New Jersey, or New York City, of which her father, Joseph West, the testator, died seized, because by the will of her father, she only enjoyed a life estate in his lands in both states, and under her father's will, the income from one-half of the lands in New York State in which Mary L. Tyndale had a life estate, from the date of her death is, during the lifetime of her surviving sister, Josephine S. Hubert, payable to the surviving nephews and nieces of the
 30 testator named in his will, and at the death of said surviving sister, Josephine S. Hubert, the whole of the estate in remainder vests in fee in the said nephews and nieces of the testator named in his will, or in their survivors.

But, according to the final decree of the Chancellor, the estate in remainder, as to the one-half of the lands in Newark, on which the said Mary L. Tyndale, enjoyed the income during her
 40 natural life, does not vest in fee until both daughters have died, and then, at the death of the sur-

viving sister, it vests in fee in whoever are at that time, the heirs at law of **both of the life tenants**, and as Mary L. Tyndale had **no power of appointment**, under the will of her father, no devise in her will to her sister, could dispose of these lands in fee, or divest the remaindermen of their estate in remainder, as fixed and determined by the said final decree.

The dominant intention and purpose of Joseph West, the testator, as shown all through his will, was clearly to provide an income for life for each of his daughters, with remainder over, as to the New York property to his nephews and nieces and as to his Newark lands, to whomsoever proved to be the lawful heirs of both of his daughters at **their** death, namely, at the death of the surviving daughter.

He says in his will, at the close of the devise of the Newark lands, the following:

“The net income to be divided equally between my daughters, Mary L. and Josephine S. West, during **their life** separate and apart from **their** husbands—**at their decease to their lawful heirs.**”

I have been willing to concede all along in this controversy that it was reasonable to presume from the language of the testator above quoted, in disposing of the estate in remainder, that when he used the words “at **their** decease” “to **their** lawful heirs,” his use of the plural pronoun showed that his intention was, that the income from the whole of the Newark property should be enjoyed by his two daughters **jointly** free from the control of their husbands, during the period of their **joint** lives, and that, when both have died, the estate in remainder should vest in whoever at that time would be their lawful heirs.

This also is the view taken by the special master, Mr. Richard Stockton, in his report, to which exception has been taken by Josephine S. Hubert, the petitioner.

I, therefore, still think that Mrs. Hubert is entitled to the net income on the whole of these proceeds of sale of the Newark lands in question, but at her death, the principal of the whole of this trust fund should be distributed to whomsoever are found to be the next of kin of both of said daughters at that time.

10 The Vice Chancellor in the body of his conclusions later admits that the complainants in the case of Tyndale vs. McLaughlin did lay claim to the whole of the fund and that the point decided was that the daughters were **not** owners in fee, and that the nephews and nieces, as heirs presumptive of the testator's daughters, had a standing to **call the life tenants to account**.

20 In the light of this part of the Vice Chancellor's conclusions, I fail to see why he now decides that "the principle of res adjudicata, is not applicable to the present case, or that the question now presented was not then **ripe for decision**, or that the causes for action were not the same and the question now in issue was **not litigated and determined**."

30 There was no lack of filial regard for his daughters in giving them only a life estate, as that seemed to be the only way to guard them against waste of his estate, either by them or their prospective husbands, but in addition to that wise provision for their life support, he evidently kept in view the trust contained in the will of his father, Thomas West, which required him to operate the brush business to which he succeeded, for the benefit of the whole family, which constrained him to leave his residuary estate, at the death of both daughters, to his surviving nephews and nieces.

40 There was no injustice to his daughters, because they never were entitled, as heirs of their father, to the whole of the profits of said "Brush Business," to which their father had succeeded on the death of their grandfather.

This fully accounts for the way in which Joseph West disposes, in his will, of his estate in remainder at the death of both of his daughters. He intended it should go back to the descendants of his brothers and sisters to whom he had never accounted for the trust in his life time, as there is no account on file showing distribution of the estate of Thomas West, father of the testator, in accordance with the terms of his will.

I contend that the Special Master, Mr. Richard Stockton, whom I consider one of the ablest special masters this Court of Chancery has ever appointed, and like his brother, Mr. Bayard Stockton, is signally gifted with that rare horse sense, or common sense, which is the most important factor in the settlement of any legal question—was absolutely right when he construed this will to mean just as Vice Chancellor Backes and Chancellor Walker construed it in their decree in August, 1915, that the two daughters had a **life estate only** in these Newark lands, that the income was payable to both of them during the term of their joint lives, separate and apart from their husbands, and at the termination of the term of their joint lives, then at that time, the estate in remainder vested in fee simple in their lawful heirs at that time, whom the decree found, in the absence of issue of both of the life tenants, would unquestionably be the nephews and nieces of the testator, or their legal representatives, as the prospective remaindermen.

My esteemed friend and adversary, Mr. Harrison P. Lindabury, took no appeal from this decision of the Court of Chancery, and I took no appeal as I was satisfied with the correctness of the decision. I contend that the Court of Chancery is also bound by its previous construction of the will and cannot now unsettle its previous decision by putting a different construction on

the intention of the testator. It is unquestionably a clear case of "res adjudicata."

10 The cases cited in the Vice Chancellor's present conclusions to support his re-construing the will, as "res nova," and not "res adjudicata," are not only not on "all fours" with his prior conclusions and his settlement of his previous decree in the case of Tyndale vs. McLaughlin, (known as the West case) but are not even on **two legs**, so to speak, in respect to analogy, with this case.

They all involve either a difference in the devise, or a difference in some facts such as the introduction, in some of the cases, of new parties, who were not made parties to the original action.

The first case cited—Tuttle vs. Woolworth, 62 N. J. Eq., 532, certainly is not similar to this West case.

20 I will now devote the remainder of my argument to some discussion of one or all of the cases cited in the Vice Chancellor's present conclusions and in Mr. Lindabury's "Reply Brief," to my original brief in this case.

DISCUSSION OF CASES CITED IN VICE CHANCELLOR BACKES' CONCLUSIONS

1. Tuttle vs. Woolworth 62 Eq. 532.

This case is not analogous to the case of Tyndale vs. McLaughlin.

30 1st. Because all the claimants to the fund were not parties to the original suit, see page 536, which holds:

"All the claimants to the fund have now for the first time, their day in Court, as to its disposition, and are entitled to have the question considered as res nova and not res adjudicata." (See page 535 at bottom).

40 But the question now raised as to the nature and effect of the bequest made on the death of

Hattie, without issue, during the lifetime of the mother, was not directly involved or expressly considered in the case, neither could it have been conclusively determined in advance, and in the absence of the parties or claimants necessary to determine the question.

Ashhurst vs. Lippincott, 11 Dick. Chy. Rep. 840-842 (Errors and Appeals 1898)

The devise in Tuttle vs. Woolworth above cited was thus:

“But if the said Hattie (daughter of testator) shall die without issue her surviving, then I direct my executors to sell the said house and lot and distribute the proceeds thereof, among my heirs, according to the laws of the State of New Jersey.” 10

This is entirely different from the devise by Joseph West in relation to the Newark lands.

In Tuttle vs. Woolworth, at the termination of the life estate of his daughter, the estate in remainder vested in whoever were the lawful heirs of the testator, at that time, according to the laws of the State of New Jersey. 20

In the West case, as I contend, the estate in remainder vests, at the termination of both life estates of his daughters, as the plural pronoun is used in two places, in the devise, viz.—“at **their** death to **their** lawful heirs.

2. Ogden vs. McLane, 73 Eq. 159, the second case cited in the Vice Chancellor's conclusions, is in no respect analogous to the West case. 30

In that case the devise was to the daughter for life, with power of appointment as to the estate in remainder.

3. Nagle vs. Conard 79 N. J. Eq. 124, is not in any way a case in point. Testator died intestate as to certain property. It was held that testator disposed of the income from his property only and that as to the corpus thereof he died intestate. 40

4. Marshon vs. Williams, 63 N. J. Law 398.

Case in law not equity.

A plea of a former judgment only works an estoppel as to those matters capable of being controverted between the parties at the time of the proceedings in the former action.

Sets out same elements of *res adjudicata* as quoted by Mr. Lindabury in his brief from Bouvier's Law Dictionary.

5. *Sharbero vs. Miller*, 72 N. J. Eq. 248.

10 “Judgment in favor of plaintiff in ejectment, defended on the ground that his title was founded on a conveyance executed by one not having sufficient mental capacity, is not *res adjudicata* that the grantor was non compos, although the jury in a special finding so found. The judgment being entered for plaintiff, this element did not enter in.”

6. *Schilstra vs. VanDen Heuvel*, 82 Eq. page 156.

20 This was a church fight in the Reformed Church of America.

It is not a case in point on *res adjudicata*, as shown by section 2 of Syllabus—quote this section on page 156.

7. *Oleson vs. Somogyi*, 90 Eq. page 342.

30 Testatrix gave property to trustees to pay income for life to her son, and, if necessary, use part of corpus for his benefit, he being her sole heir at law and next of kin and directs that after death of son, estate shall be distributed among her legal heirs and next of kin, the estate goes to the **nephews** and **nieces** of testatrix, on the son's death, to the exclusion of the son's widow.

8. *In re Thomas Buzby's Estate*, 94 N. J. Eq., page 151, this case only related to residuary personal property and is not a case **in point**.

40 “The policy of the law requires that legacies be held to be vested rather than contingent unless

such holding is clearly inconsistent with the testator's intention."

"When the absolute property in a fund is bequeathed in fractional interests in succession at periods which must arrive, the interests of the first and subsequent takers vest together, unless a contrary purpose is apparent from the language of the will."

I respectfully submit, that the exceptions taken by Josephine S. Hubert to Special Master, Richard Stockton's report—disallowing her petition for distribution to her of one-half of the corpus, or principal, of the net proceeds of sale of the Newark lands, as heir at law of her sister, Mary L. Tyndale, deceased,—should be disallowed and that the Special Master's report should be confirmed in every respect, and a decree made accordingly in conformity with the former decree of this Court of Chancery, in the case of Tyndale vs. McLaughlin, which the Special Master concluded **fixed** and **determined**, as therein stated, all the rights and interests of the parties, both complainant and defendant, or petitioner and respondent, in this present application, which deals with the Newark lands of the late Joseph West, deceased.

I also pray, in behalf of my clients, who are the prospective remaindermen of the present fund representing the net proceeds of sale of these lands, that no part of the fund now in the Chancery Court, either principal or interest, be paid over to Josephine S. Hubert, surviving executrix of Joseph West, as surviving trustee for the estate of her father, but should be held in this state for protection of, and final distribution to, the remaindermen, at the death of Josephine S. Hubert, and that not even the income be paid to said petitioner, Mrs. Hubert, until, on an accounting in the Court of Chancery and in the Courts of New York of her administration of her

trust, in connection with the lands and personal property in the States of New Jersey, New York and Illinois, she shows that she is entitled to be paid the income from the present investments of the proceeds of sale of the Newark lands, without deduction for any waste or loss to the estate, by reason of her neglect or mismanagement of the trust estate.

10 I charge that Mrs. Hubert and her sister, Mary L. Tyndale, have wasted the assets of the trust estate in both New Jersey and New York, and grossly neglected the premises and failed to pay taxes assessed against the lands in both states and that they have grossly neglected to keep up the repairs on the properties in New York City, so that thousands of dollars are lost to the estate in remainder and to the remaindermen by the gross mismanagement of the lands in trust.

20 I insist that the prospective inheritance of the remaindermen should be protected from this waste, both in New York and in this state, by holding intact the assets in trust in the Court of Chancery—as a matter of comity between states, for the protection of the remaindermen in both states.

I again respectfully insist that the Special Master's report should be approved in every particular.

30 Respectfully submitted,
 SAMUEL CRAIG COWART,
 Solicitor and Counsel for
 Respondents, Appellants.

ESSEX COUNTY ORPHANS' COURT

In the Matter of the Estate
of
Joseph West, deceased } PETITION

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The petition of Mary W. Tyndale and Josephine W. Hubert of the city of New York, County of New York and State of New York, respectfully shows that Joseph West, late of New York, died in the year one thousand eight hundred and seventy-one, leaving a last will and testament wherein he constituted and appointed your petitioners and Thomas West executors thereof, and therein and thereby vesting in the said executors with full power and authority to grant, sell, bargain and convey certain of the lands whereof said testator died seized to any person or persons in fee simple, or otherwise, at public or private sale; that the said will was duly probated before the Surrogate of the County of Essex and by him duly recorded in his office and that probate thereof was duly granted and letters testamentary issued to your petitioners as executrices thereof.

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Your petitioners further show that by order of this Court bearing date the twelfth day of November, one thousand eight hundred and ninety-five, they were removed as executrices of said estate and that on the seventeenth day of December, one thousand nine hundred and six, letters of substitutionary administration with the said will of Joseph West, deceased, annexed, were duly issued by the said Surrogate of the County

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of Essex to your petitioners and that your petitioners as such administrators have duly entered into bond to the Ordinary in the sum of one hundred dollars (\$100) with sureties approved by said Surrogate and with condition prescribed by law.

Your petitioners further show that the said Joseph West, deceased, died seized of a certain tract of land in the city of Newark, county of Essex and State of New Jersey, to wit:

10 BEGINNING at a point in the easterly line of Summer Avenue distant fifty feet northerly from the north-easterly corner of Summer and Arlington Avenues; thence running northerly along said easterly line of Summer Avenue one hundred and eleven feet and three inches, thence south sixty-six degrees, thirty-one minutes east, one hundred and fifteen feet on a line drawn at right angles to Summer Avenue; thence southerly parallel
20 with Summer Avenue one hundred and twenty-one feet, four and one-half inches more or less to the northerly line of a lot recently sold to one Michens; thence westerly along said northerly line and at right angles to Summer Avenue one hundred and fifteen feet to the place of beginning.

That on the twenty-ninth day of November, one thousand eight hundred and ninety-five, and subsequent to your petitioners' removal as executrices of the will of the said Joseph West, deceased,
30 your petitioners sold the aforesaid tract of land to one Joseph W. Mandeville for the sum of four thousand five hundred dollars (\$4500), which sum your petitioners have been advised is a just and fair price for said premises; that your petitioners have received the said sum of four thousand five hundred dollars (\$4500) in full satisfaction for said lands, and have invested the same in accordance with the will of the said
40 Joseph West, deceased, and the securities now

remain in their possession to be disposed of as in said will provided.

Your petitioners further show that they are the sole next of kin and heirs at law of the said Joseph West, deceased, and believe that they are entitled to enjoy the use of the said sum of four thousand five hundred dollars (\$4500.) during the term of their natural lives.

Your petitioners therefore pray that this Court may make an order authorizing them as substitutionary administrators with the will annexed of the said Joseph West, deceased, to execute a deed of conveyance to the said Joseph W. Mandeville for the above described premises for the purpose of perfecting the sale heretofore made by them and confirming the title in the said Joseph W. Mandeville.

Dated Newark, N. J.

January 2nd, 1907.

(Signed) MARY W. TYNDALE
JOSEPHINE W. HUBERT

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ESSEX COUNTY: ss

Mary W. Tyndale and Josephine W. Hubert, being duly sworn upon their respective oaths, depose and say that they are the petitioners in the foregoing petition named: that they have read the same and that the matters and things therein contained are true to the best of their knowledge and belief.

10 Sworn and subscribed
before me this 2nd day
of January, 1907

J. BAYARD KIRKPATRICK,
Master in Chancery of
New Jersey.

MARY W. TYNDALE
JOSEPHINE W. HUBERT

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ESSEX COUNTY ORPHANS' COURT

In the Matter of the Estate
of
Joseph West, deceased.
To George E. Russell,
Surrogate of the County of
Essex

} PETITION

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The petition of Mary W. Tyndale and Josephine W. Hubert, of the City of New York, in the County of New York and State of New York, **respectfully**, shows that Joseph West, late of the City of New York, in the County of New York and State of New York, died on the ninth day of September, one thousand eight hundred and seventy-one, leaving a last will and Testament in and by which he appointed your petitioners the executrices thereof; that the said will was duly probated before the surrogate of the County of Essex and by him duly recorded in his office, and that probate thereof was duly granted and letters testamentary issued to your petitioners as such executrices, and

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Your petitioners further say that your petitioners, after taking upon themselves the burden of administration, were, by order of this court, bearing date the twelfth day of November, one thousand eight hundred and ninety-five, removed as executrices for said estate, as will more fully appear by the records of this court.

Your petitioners further show that subsequent to said removal they made, executed and delivered, a deed for certain property situated in the

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City of Newark, County of Essex and State of New Jersey, to one Joseph W. Mandeville, and received therefor the consideration price of Four Thousand Five Hundred Dollars (\$4500.).

Your petitioners further show that said sum of Four thousand five hundred dollars **has been invested in accordance with the provisions** of the Will of the said Joseph West, deceased, and **securities now remain in their possession** in New York to be disposed of as in said will provided.

10 Your petitioners further show that they are informed and believe the truth to be that **said deed** by them delivered to the said Joseph W. Mandeville, is illegal and of no effect, and does not convey to the said Joseph W. Mandeville any title to the lands intended to be conveyed.

Your petitioners therefore pray that letters of substitutionary administration with the will of the said Joseph West, deceased, annexed, may be granted to them.

20 Dated Newark, N. J.,
November 5th, 1906.

(Signed) MARY W. TYNDALE
JOSEPHINE W. HUBERT

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STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

Mary W. Tyndale and Josephine W. Hubert,
 being duly sworn upon their respective oaths,
 according to law, depose and say, that they are
 the petitioners in the foregoing petition named;
 that the matters and things therein contained are
 true to the best of their knowledge and belief.

Sworn and subscribed before
 me this 5th day of November, 1906 10

J. BAYARD KIRKPATRICK,
 M. C. C. of N. J.

(Signed) MARY W. TYNDALE,
 JOSEPHINE W. HUBERT

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The following Stipulation was filed in the original suit of Tyndale vs. McLaughlin before the decree, in that suit, on August 24, 1915, set forth in the State of the Case on pages 53-62.

IN CHANCERY OF NEW JERSEY

10	Between Mary L. Tyndale, et al., executrices of Joseph West, deceased <div style="text-align: center;">Complainants</div> and Minnie Smith McLaughlin, et als, <div style="text-align: center;">Defendants</div>	}	On Bill, &c. Stipulation
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It is hereby stipulated and agreed between the parties in the above entitled cause, by their respective solicitors, that the following facts are agreed upon as undisputed.

1. It is admitted that on or about September 9, 1871, Joseph West, late of the City of New York, County and State of New York, died seized of certain lands situate in the city of Newark, running from Belleville Avenue to Mount Prospect Avenue, containing nearly twelve acres, more particularly described in Bill of Complaint.

2. It is admitted that said Joseph West left a last will and testament dated September 5, 1871, a copy of which is correctly set forth in the Bill of Complaint, except that the residuary clause, which begins with the words, "At the decease of both daughters, the property shall be sold, &c.,"

should begin in a separate sentence and separate line with a period before the word "At" and a capital letter "A" in the word "At," as in the original will on file in the office of the Secretary of State of New Jersey at Trenton.

3. It is also admitted that said will was first duly probated in the office of the Surrogate of the County of New York, in the State of New York, and was subsequently also probated, or an exemplified copy thereof was filed in the office of the Surrogate of the County of Essex, and letters of executorship were issued to Josephine S. West and Mary L. West, two of the Executors named in said will, by Robert C. Hutchings, Surrogate of the County of New York, on September 25, 1871, and by George D. Moore, Surrogate of the County of Essex, State of New Jersey, on January 9, 1873, that Thomas West, the third executor, never appears to have qualified as executor, and that he is now dead.

4. It is admitted that Josephine S. West afterwards married one Charles A. Hubert, and that Mary L. West afterwards married one Julius H. Tyndale, and that the said Josephine S. Hubert and Mary L. Tyndale were the only surviving children and heirs at law of the said Joseph West, deceased, and that they are at present residents of the city of New York, and that neither of them has any children and their only next of kin are the nephews and nieces, and descendants of nephews and nieces of the said Joseph West, deceased, named in said will and in the bill of complaint in this cause.

5. It is admitted that the said executrices have sold certain portions of the said tract of twelve acres in the city of Newark, N. J., from the northwesterly part thereof, the proceeds of which

sales have amounted approximately, to the sum of \$10,000 and that they have been leasing the southeasterly one-half part approximately, of said tract of land, since the death of said Joseph West, deceased, and it is admitted that at the death of said Joseph West, there were no buildings erected on said tract of land, but that since his death certain buildings have been erected on a portion thereof by tenants of the said executrices under leaseholds.

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6. It is admitted that the rentals from leases of the southeasterly portion of said premises, if annually collected, at the times when the same were payable, were sufficient to pay all taxes and assessments levied on said lands and premises, which were payable by the estate of the said Joseph West, deceased, but that owing to a failure on the part of the representatives of said estate to collect said rentals, the said taxes and assessments have been allowed to go unpaid at different times, and portions of said lands have been sold for taxes, and that that portion of the said tract which has been leased for many years to the Park Athletic Association, and which is now leased to the Criterion Club, was sold for taxes assessed for the year 1911, in fee, on December 30, 1912, to the defendant, Joseph West, for the sum of three hundred eighty-two dollars and seventy cents taxes and costs, and that the Comptroller of the City of Newark, has executed and delivered to the said Joseph West, a certificate of sale of that portion of said lands in fee, which certificate is dated January 29, 1913, under the terms of which certificate of sale, the right to redeem said land will expire at the end of two years from December 30, 1912; that the said tract of land has since been sold for taxes assessed thereon for the year 1912, to one Charles

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Bierman, and that neither of said sales have been discharged and the lands redeemed therefrom by the said executrices of Joseph West, although under the terms of the lease to said Park Athletic Association, and also under the terms of the lease of the said Criterion Club, the tenant was and is obligated to pay the taxes, and the rentals under said leases, if properly collected by the said executrices, were sufficient to pay these taxes and assessments, and prevent a sale of said lands. 10

7. It is admitted that the said unsold portion of said tract of land in the City of Newark is in a section which is rapidly developing and increasing in value both for business and residential purposes; and that the present value of said lands belonging to the estate of Joseph West is between \$125,000 and \$150,000.

8. It is admitted that the portion of said tract at northwest corner of Belleville (now Lincoln) Avenue, and Arlington Avenue, described as lot No. 11, Block No. 622, in Newark City Atlas, has been leased until recently to Park Athletic Association at \$240 per year, and is now rented to the Criterion Club for a term of five years at a rental of \$1,000 per year, from 20
and that the tenant under each lease agreed to pay the taxes, and that said executrices have given said Criterion Club an option to purchase said plot of ground for the sum of \$40,000, although the will of Joseph West contains no direction to sell this part of the said lands during the lifetime of said executrices; that the southwest corner of Belleville Ave. and Lincoln Ave. has for many years, viz., from Sept. 1, 1884, and until the present year, been leased to Orange and Newark Horse Railroad Company, (now owned or operated by Public Service Railway Co.), at 30
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a rental of from \$100 to \$150 per year, the tenant to pay the taxes; that one J. Byard Kirkpatrick, acting as attorney and agent for said executrices, on or about July 1, 1907, leased to one Jacob Scriba, Jr., a valuable portion of said tract of land at northwest corner of Wakeman and Arlington Avenues, 50 feet front on Wakeman Avenue by 100 feet deep on Arlington Avenue, at a rental of \$75 per year, for a term of twenty years from said date, and another valuable tract of land in the rear of same, fronting about 15 feet on Arlington Avenue, at a rental of \$60 per year, for the same term of twenty years from July 1, 1907, without any provision for increasing said rentals during said long term of tenancy, which is likely to extend beyond the lifetime of both executrices, one of whom, Mary L. Tyndale, is now about 69 years of age, and the other, Josephine S. Hubert, is now about 63 years of age; that the leases to said Jacob Scriba, Jr., do not provide that his tenancy shall cease at death of said executrices or on the first day of July succeeding their death, or within a reasonable time thereafter, in case it should be deemed for the interest of said Joseph West's estate to sell said lands or dispose of them in order to settle said estate; that said executrices have leased to one Marcus E. B. Husk, another portion of said premises on Wakeman Ave., at \$12 per year, another portion on Wakeman Ave. to one Cornelius Paxton or Charlotte E. Paxton, for a sash and blind and carpenter shop at a rental of per year; and another portion of said premises on Wakeman Ave. to one John L. Scribner, for a paint shop at a rental of per year.

9. It is also admitted that annexed to these stipulations is a true copy of the original petition filed by said executrices on December 17, 1906, in the Essex County Surrogate's Office,

praying for letters of substitutionary administration with will annexed of said Joseph West, dec'd., said petition being dated November 5, 1906, that annexed to these stipulations is also a true copy of the petition of said executrices, dated January 2, 1907, petitioning the Essex County Orphans Court for an order authorizing them, as substituted administrators, with the will annexed, of said Joseph West, deceased, to execute a deed of conveyance to one Joseph W. Mandeville, for certain lands described in said petition, which were a portion of the said twelve acre tract in Newark, N. J., of which said Joseph West died seized. It is admitted that on the 12th day of November, 1895, the said executrices, at their own request, were removed and relieved from said executorship of the Essex County Orphans Court, and on the 29th day of November, A. D. 1895, although they were no longer executors and trustees, they executed a deed as executrices of Joseph West, deceased, to said Joseph W. Mandeville for a portion of said lands as aforesaid, for the consideration of \$4500, and they applied for substitutionary administration, as aforesaid, to quiet and make good said Mandeville's title.

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10. It is admitted that on or about January 16, 1908, certain portions of the lands in question were sold for taxes for the year 1906 to Charles Bierman, who afterwards assigned the certificates of sale to one J. Byard Kirkpatrick, who, although acting at the time as agent and attorney for said executrices, had the certificates assigned to himself individually, and employed one James R. Nugent as attorney to perfect the tax title in himself individually under the Martin Act; that the defendants in this cause did not know of this until an investigation of the taxes affecting said premises was made by Samuel C. Cowart, as at-

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torney for Joseph West, one of the defendants in this cause, and then it was found that said Kirkpatrick had sufficient funds of the estate in his hands collected from rentals to pay said taxes and redeem said tax sales, and that there was a surplus due the estate from said Kirkpatrick, and said certificates of sale were then discharged, but that said executrices until said situation was disclosed by the investigation aforesaid, had paid no attention to the redemption of said lands from said tax sales or to the appropriation of said rents to payment of said taxes in arrears.

It is also admitted that the taxes for year 1911, amounting to \$382.70, and for year 1912, amounting to \$381.05, assessed against the Athletic Club tract, are still unpaid, and that the sales for those years are still unredeemed, and that the taxes assessed against the same tract for year 1913, amounting to \$411.06, are still unpaid; that the taxes assessed for year 1913, on that portion of the tract at N. W. corner of Wakeman and Arlington Avenues, known as lots 116-128, amounting to \$149.48, are unpaid; and that the taxes assessed for year 1913 on S. W. corner of Wakeman and Arlington Avenues, viz., lots 104 to 114, inclusive, amounting to \$109.08, are still unpaid, making the total amount of taxes now due and unpaid on said lands, about fourteen hundred and thirty-three 33-100 dollars, besides interest thereon, part of which is at 12% interest.

11. It is admitted that said executrices have never filed any account of their receipts of assets or from sales or rentals of lands, of said estate, either in Orphans Court of the County of New York, or in the Surrogate's office of the County of Essex, New Jersey, and that they have never rendered any statement or account of the same to any of the defendants, except a partial statement of rents received from Newark lands as

rendered by said J. Byard Kirkpatrick, which it is admitted, was not a complete and satisfactory statement.

12. It is admitted by the defendants that they have no legal right to bring an action of ejectment against the complainants in this cause to determine the question of the title to said lands and the rights of the remaindermen therein under the will of said Joseph West, because the complainants under said will are in any event entitled to the use and enjoyment of said lands and to the net income from the rents, issues and profits thereof, (after payment of taxes and legal assessments thereon), during the terms of their natural lives. 10

13. The complainants admit that in their administration of the estate of said testator, Joseph West, deceased, they have appropriated to their own use the proceeds of sales of said lands and the amounts received from rentals except so much thereof as has been applied since the testator's death to the payment of municipal and county and state taxes and assessments levied upon said lands annually by the city of Newark, and that they have not kept the net proceeds of sales of said lands invested on bond and mortgage as directed in the will of said deceased; and they admit that if under a proper construction of the will of said deceased, they are only tenants for life of said lands and are only entitled to the net income therefrom and from mortgage investments of the net proceeds of sale during their lifetime, and if the defendants in this cause, or some one or more of them, are the remaindermen, or residuary devisees, in whom the fee of said lands legally and equitably vests at the death of the complainants, then the complainants have committed waste in their management of said es- 20 30 40

tate and the defendants are entitled to relief in this Court under their answers by way of cross bill.

10 14. It is further stipulated and agreed by the parties to this cause, that they each and all waive any right to determine the matters at issue or in controversy in this cause by resort to legal proceedings in a Court of law, and they hereby submit to the jurisdiction of this Court of equity in order to obtain a proper construction of the said will and of the rights and interests of the respective parties to and in said lands remaining unsold in the city of Newark, N. J.

20 15. It is admitted that the defendant, Minnie Smith McLaughlin, if she has any interest in said lands in question, it vests in her as the child of Washington Smith, deceased, who was a son of Margaret Smith, a deceased sister of the testator, Joseph West, deceased, and it is admitted that neither said Minnie Smith McLaughlin, or her father, Washington Smith, or her grandmother, Margaret Smith, are mentioned in the residuary clause in said will, and that she is not a descendant of any of the nephews and nieces mentioned in said will, but it is admitted that if the complainants should die intestate, then the said Minnie Smith McLaughlin would be one of their next of kin and lawful heirs.

30 16. It is admitted that all of the nephews and nieces named in the residuary clause in the will of said Joseph West, deceased, survived the testator; that the nephew, Thomas West, has since died testate, and by his will gave the income of his estate to his widow, Ellen N. West, with remainder to Christina Stevens, Mary F. West, Margaret A. West, Sarah E. West, Joseph West and George W. West; that George W. West, Joseph W. Deacon, Christina Deacon and Mary

40 Deacon, three more of the nephews and one of

the nieces named in said will, have, since the death of said testator, Joseph West, died without issue; that Christina Stevens, another niece named in said will, has re-married, and that her name is now Christina VanSchoick; that Sarah E. West, another niece, is married, and that her name is now Sarah E. Lockwood, and that she is now a widow; that said Christina Deacon and Mary Deacon died unmarried, and intestate; that Thomas Skidmore, another nephew named in the residuary clause in said will, has, since the death of the said testator, died, leaving one child, William Skidmore, who resides in the State of New York; that Joseph Skidmore, another nephew named in said residuary clause in said will, has died, since the death of said testator, leaving several children.

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It is admitted that of the nephews and nieces named in the residuary clause of said will of Joseph West, deceased, the only ones now surviving are John F. Deacon, William Deacon, Christina Stevens VanSchoick, Mary Frances West, Sarah E. Lockwood, Elizabeth West, Margaret West and Joseph West, all of whom are made defendants in this cause, with the said Minnie Smith McLaughlin.

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17. It is admitted that the complainants, who are the executrices of Joseph West, deceased, reside in the City and State of New York, and that they have never given any bonds or other security for the faithful discharge of their duties in administering this estate in New Jersey, except a bond for one hundred dollars, filed in the office of the Surrogate of Essex County, when they were appointed substituted administrators with the will annexed of said Joseph West, deceased.

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**COPY OF WILL OF THOMAS WEST,
FATHER OF JOSEPH WEST.**

10 Will of Thomas West } Will dated January 5, 1821
 } Probated in New York County
 } Surrogate's Office on February
 } 28, 1821. Recorded in Book 56 of
 } Wills, page 276. February 28,
 } 1821.

20 In the Name of God, Amen, I, Thomas West,
 of the City of New York, Brush Maker, being of
 sound mind, memory and understanding, do here-
 by make my last will and testament. First: I
 30 leave and bequeath unto my wife, Mary, all my
 Household furniture, together with the interest
 of one thousand dollars, during her natural life,
 which fund on her decease is to revert to the
 general fund of the estate to be divided equally
 among the children. Second, I leave and be-
 queath unto my eldest son, Joseph, the sum of
 one hundred dollars, to be paid on his attaining
 the age of twenty-one years; should he die before
 that period, then this sum to go unto the general
 40 fund of my estate, to be equally divided among
 the survivors. Third, I leave and bequeath the
 residue of my property unto my six children,
 Joseph, Thomas, Simon, Margaret, Christina and
 William, and to my step-daughter, Mary Jenkins,
 to be equally divided among them or the sur-
 vivors of them, share and share alike, which
 division is to take place on my eldest son, Joseph,
 attaining the age of twenty-four years and not
 before; the estate must then be settled and my

said son Joseph, and my aforesaid step-daughter, Mary Jenkens, must then be paid their respective portions. The remaining children's portions must be put out seperately at interest, my executors applying the said interest for their support and each child to be paid the principal only as they respectively attain the age of twenty-four years; and my will and desire is that should my said son Joseph, die before he attains the age aforesaid, that my estate be nevertheless settled as aforesaid at the time he would have attained the age of twenty-four years had he lived. Fourth, it is my will, wish and desire that the Brush & Bellows making business, which for several years past and still is carried on in this city by Mr. John Earl & Myself under the firm name of Earl & West, should be, if agreeable to Mr. Earl, continued **after my decease under the same firm for the benefit of my family** and that my eldest son Joseph, take my place in the concern and further that my family be supported out of the profits of the same. Fifth, whatever sum of money over and above the one thousand dollars to be put out at interest for my wife, Mary, that can be spared out of the concern so managed by Mr. Earl & my son Joseph for the support of my family after the sale of the Schooner Charleston Packet & the Collection of the present concern debts or that can be spared at any furture time or in any other way shall be put out at interest and the interest arising from the same to be again (at the end of every year) put out at interest untill my son Joseph attains the age of twenty-four years, for the benefit of the whole family, unless the said business should not pay the expenses of the family, then, and in that case, a part or the whole of the said interest must go towards paying such expenses. But in the event of Mr. Earl's death, his wishing to decline business or his desire to dissolve the con-

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cern, then, and in that case, my estate must be settled as soon thereafter as practicable and the **whole amount put out at interest for the support of my family** aforesaid, nevertheless subject to all the other conditions mentioned in the third article in this will, and lastly I leave my wife, Mary, my friends, John Earl and Thomas Murrow, to be my true and lawfull executors to this my last will and testament, & Guardians to my Children aforesaid & request they will give unto

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my said Children suitable Education & trades for their Stations in life and I hereby publish and declare this to be my last Will and Testament. As witness my hand and seal in the City of New York this fifth day of January in the year of our Lord one thousand eight hundred and twenty-one.

[LS] (Signed) THOMAS WEST.

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The word "be" written on erasure on the 15th line of this page. Witnesses: Thomas Rutter, Charles Wollen, Joseph Marsh, City and County of New York, ss. Be it remembered that on the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and twenty-one, personally came and appeared before James Campbell, Surrogate of said County, Charles Wollen, of the City of New York, Brush

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Maker, who, being duly sworn on his oath declared that he saw Thomas West sign and seal an instrument in writing purporting to be the Will of the said Thomas West, bearing date the fifth day of January, in the year last aforesaid (the preceding whereof is a true copy) and heard him publish and declare the same as and for his last Will and Testament, that at the time thereof he, the said Thomas West, was of sound disposing mind and memory to the best of the knowledge and belief of this deponent, that his name

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subscribed as a witness to the said will is of his own proper hand-writing which he subscribed as a witness thereto in the presence of the testator and that he saw Thomas Rutter and Joseph Marsh and the other witnesses to the said will subscribe their names as witness thereto in the presence of the testator.

JAMES CAMPBELL.

State of New York } 10
 County of New York } ss.

I, Martin G. McCue, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of the last will and testament of Thomas West, deceased, admitted to probate February 28th, 1821, and recorded in liber 56 of Wills, page 276, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record. 20

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York, this 10th day of March, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] MARTIN G. McCUE,
 Clerk of the Surrogate's Office. 30

COPY OF WILL OF JOSEPH WEST

IN THE NAME OF GOD, AMEN.

10 I, Joseph West, of the City of New York, being of sound and understanding mind and knowing the uncertainty of life, do make and declare this to be my last Will and Testament, all former Wills are hereby revoked.

20 First, I appoint my daughters, Mary L. and Josephine S. West, executrix, and Thomas West, my nephew, of Englishtown, Monmouth County, New Jersey, executor, without giving any security for the same. I also direct my executors to sell the house and four lots of ground where I now reside, one-half ($\frac{1}{2}$) of the proceeds to be placed on Bond and mortgage in the City of New York, and the remainder to pay my debts and mortgage on the house, 84 Amity Street. I also authorize them to apply to the Court to sell the house, 37 Forsyth Street, which half belonged to my late brother, Thomas S. West, and the income of said house that is his share has been paid to my Mother during her life. The proceeds of my late brother's half to be divided according to law, also wish them to dispose of the farm in Macomb Co., Illinois, which belonged to my late father, Thomas West, to be sold and the proceeds divided according to law, I consenting to lose all the taxes which I have paid on said farm since my father's death. I hereby authorize them to sell the gore of land, corner of Plane and State Streets, situated in Newark, New Jersey, occupied by a stone cutter, and apply the proceeds to the payment of my debts and assessments, also a gore of land in rear of the corner of State and Broad Streets, in the City of Newark, New Jersey, now leased for twenty-one (21)

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years, to be sold at any time they think best, and the proceeds to be used for the same purpose as the one before mentioned, also a tract or parcel of land situated in the City of Newark, New Jersey, running from Belleville Avenue to Mount Prospect Avenue, containing nearly twelve (12) acres of land, the whole front of which is left after opening streets on Belleville Avenue and to the depth of about one-half of said ground to be leased by my executors for twenty-one (21) years with a renewal of twenty-one (21) years more, **the net income to be divided equally** between my daughters, Mary L. and **Josephine S. West** during their life, separate and apart from their husbands, **at their decease to their lawful heirs.** The rear half on Prospect Avenue to be sold and after paying taxes and assessments the balance to be **invested on bond and mortgage.** I wish my executors to hold the property situated one, forty-five Fulton Street, and the other, eighty-three Amity Street, in the city of New York, now leased, to be kept leased or rented and after paying taxes and all other expenses the balance to be equally divided between my daughters, Mary and Josephine S. West. In case of either dying, the buildings to be kept leased or rented and the net income of the deceased shall be divided equally between my nephews and **nieces**, Thomas West, Thomas Skidmore, Joseph Skidmore, Joseph W., John, William, Christina and Mary Deacon, Christina Stevens, Mary Frances, Sarah Elizabeth, Margaret, Joseph and George West.

At the decease of both daughters the property shall be sold and the proceeds divided equally between the aforesaid nephews and **nieces** or the survivors. As soon as convenient I wish my executors to pay my brother-in-law, Francis Deacon, two hundred (\$200.) dollars, and my nephew, Thomas West, five hundred (\$500.) dol-

lars, for his services. All money advanced by me to Barthelomew McGowan I give him. I also wish my executors to pay to each of the children of William and Mary C. Hayes of Tuckahoe, Westchester County, Harriet, Ida, Sarah, Lavinia, Fanny and Winfield Hayes, when they arrive at the age of twenty-two (22) years (no amount stated).

The word gore interlined on second page, third line, interlined before signing.

10 Signed and sealed this the fifth of Sep'r., one thousand eight hundred and seventy-one, in the city of New York.

JOSEPH WEST.

We, the undersigned, at the request of the testator and in his presence and in the presence of each other do here subscribe our names as witnesses.

20 Margaret Smith, 136 Waverly Place, New York
John F. Deacon, 136 Waverly Place, New York
Mary Frances West, 353 East 83 Street, New York

Probated Sept. 21, 1871, before Robert C. Hutchings, Surrogate.

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JOSEPH WEST EST.

Statement of Sales of Newark Property by Executrices before sales by order of Court of Chancery.

Jan. 10, '73	To Mayor etc. of Newark, Rec'd. in Book Z-16, page 126	\$ 1401.30	
Feb. 15, '73	To Lina Arnold, rec'd. in Book Y-16, page 29	2000.00	10
Apr. 1, '73	To Jno. P. Wakeman, rec'd. in Book C 17, page 63	5000.00	
Feb. 28, '74	To Mayor, etc. of Newark, Rec'd. in Book G-18, page 274, Arlington Ave.	100.00	
Feb. 28, '74	To Mayor &c of Newark, rec'd in Book G-18, page 274, Arlington Ave.	1.00	20
Apr. 1, '74	To Mayor &c. of Newark, Rec'd. in Book G-18, page 276, Wakeman Ave.	1.00	
Apr. 1, '74	To Mayor &c. of Newark, Rec'd. in Book G-18, page 277, Wakeman Ave.	1.00	
Nov. 4, '75	To Henry R. Baker, Rec'd. in Book L-18, page 552. Gore land, corner State & Plane Sts.	500.00	30
July 3, '78	To Mayor &c. of Newark, Rec'd. in L-19, page 179 Summer Ave. opening	1173.89	
Nov. 14, '78	To Mayor &c. of Newark, Rec'd. in Book G-20, page 58	1920.15	40

	Nov. 14, '78	To Mayor &c. of Newark, Rec'd. in Book G-20, page 59	4363.24
	Apr. 30, '96	To Peter Young. Rec'd. in Book X-29, page 399	2100.00
	May 13, '96	To Geo. F. Small. Rec'd. in Book Y-29, page 158	2100.00
10	Apr. 15, '96	To Mary E. Murphy. Rec'd. in Book Y-29, page 162	2150.00
	Mar. 8, '07	To Jos. W. Mandeville. Rec'd. in Book M-41, page 539. (Cons. \$1.00 see mortgage)	4500.00
20	Sep. 28, '95	To Lewis R. Mickens. Rec'd. in Book L-29, page 181	1500.00
	Jan. 11 '96	To Lewis R. Mickens, Rec'd. in Book N-29, page 467. Cons. \$1.00	1.00
	Nov. 29, '95	To Jos. W. Mandeville. Rec'd. in Book Y-32, page 32. Cons. \$4500. (See above confirmatory deed)	
30	Mar. 6, '96	To John J. Small Rec'd. in Book N-29, page 522	1050.00
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			\$29,858.58
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(See Leases)

LEASES

- To the Orange & Newark Horse Car Railroad Company, dated Sept. 1, 1884, rec'd. in Book N-22, page 490, Essex County, leases plot at southwest corner of Belleville & Arlington Aves. for 21 yrs. rental **\$100.00** per year, 100.00
- Covenant to extend lease for 21 yrs. at a reasonable rental on same conditions. Tenant pays the taxes & assessments whatsoever 10
- To the Criterion Club, body corporate, dated May 5, 1913, rec'd. in Book L-52, page 256, Mar. 12, 1913, term one year, rent per year 1,000.00
- Lessee to pay water rents and assessments. Option to purchase at \$40,000 plot at northwest corner of Lincoln & Arlington to Wakeman. 20
- To Jacob Scriba, Jr., dated July 1, 1907, rec'd. July 8, 1912, in Book Z-50, pages 576 and 578, leased for 20 years, lot N. W. Corner Arlington & Wakeman; 50 ft. on Wakeman, 100 ft. on Arlington, at rental of \$75.00 per year, and lot in the rear 35 ft. on Arlington at \$60.00 per year for 20 yrs., from July 1, 1907, total rental per year 135.00
(see as to taxes) 30
- Another lease to Nathan A. Smith and Ackerson J. States, dated June 15, 1894, rec'd. in Book I-29, page 456, Oct. 31, 1895, leases same lot afterwards leased to Scriba, N. W. Cor. Ar- 40

lington & Wakeman, 50 by 100 ft., for 5 years at rental of \$70.00 per year to be used as a coal office. Tenant to pay taxes and water rent.

(See lease lot adjoining to Marcus E. Husk at \$25.00 per year) 25.00

(See also lease of carpenter shop, &c., on Wakeman Ave. to W. L. Paxton at rental of \$75.00 per year) 75.00

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