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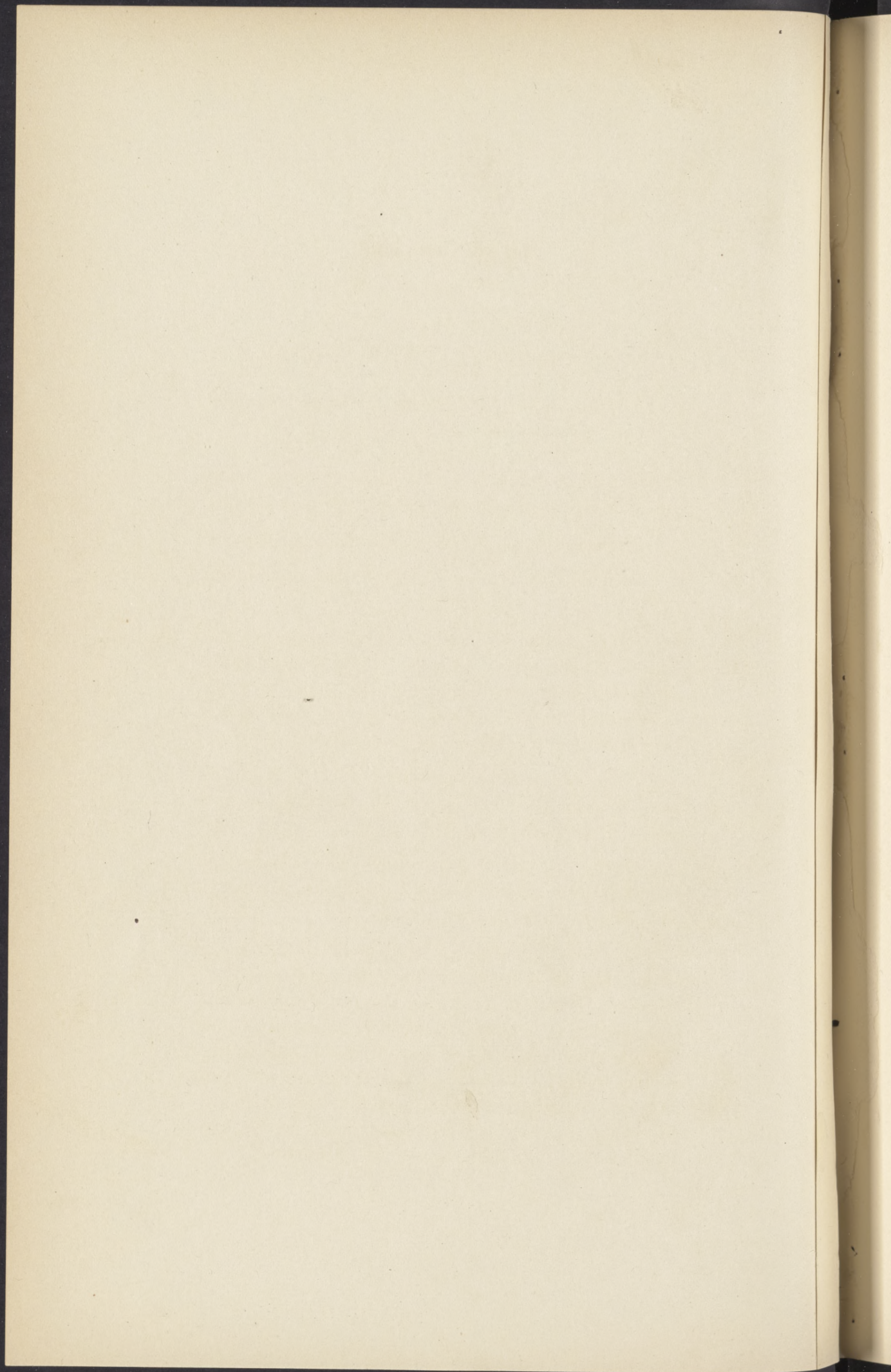
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Bill of Complaint.

(Filed February 9, 1925.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Frances Allison Noice, residing at Williams, Arizona, respectfully shows that

1. She is a daughter of William O. Allison.
2. William O. Allison died on December 18th, 1924.
3. William O. Allison left him surviving, his widow, Caroline A. Allison; his son, John Allison; his daughter, Katherine McLean; and his daughter Frances Allison Noice, the complainant herein, who are his heirs at law and next of kin. 20
4. The last will and testament of William O. Allison was duly probated by the Prerogative Court of New Jersey.
5. Letters testamentary have been issued to Harry J. Schnell and Frank V. Baldwin, the executors and trustees named in said will. 30
6. By his last will and testament said testator attempted to dispose of his residuary estate as follows: "All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the 40

Bill of Complaint.

10 Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my trustees to use this trust fund for the purpose of carrying out such plan.

“If, however, such plan does not receive my approval, then I order and direct my said trustees to use this trust fund for the development and maintenance of said Palisades section in accordance with my wishes as expressed to them.”

20 7. The aforesaid provisions for the disposition of the residuary estate of said William O. Allison are invalid.

8. Said testator made no other testamentary disposition of his residuary estate.

9. Said residuary estate consists in part of real estate and in part of personal property.

30 10. Part of said residuary estate consists of shares of stock in certain corporations which were controlled and conducted by the testator in his lifetime.

11. Said stock cannot be sold to advantage and should be distributed in kind.

12. Complainant is entitled as one of the heirs at law and next of kin of said William O. Allison, to that part or share of said residuary estate provided by the Statutes in respect to descent of real property and distribution of personal property.

40 13. Complainant is without adequate remedy at law, and, therefore, prays:

Bill of Complaint.

(a) That Harry J. Schnell and Frank V. Baldwin executors and trustees under the Will of William O. Allison, deceased, Caroline A. Allison, John Allison and Katharine McLean who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made; 10

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

(c) That the aforesaid provisions of the will of William O. Allison as to the disposition of his residuary estate may be decreed to be invalid, and that the complainant as one of the heirs at law and next of kin, may be decreed to be entitled to that part or share of said residuary estate as provided by law. 20

(d) That said Executors may account to complainant in this court for her share or part of said residuary estate;

(e) That said Executors may be directed to withhold from sale and to distribute in kind, such corporate stock in the corporations controlled and conducted by testator in his lifetime. 30

(f) That complainant may have such further and other relief as may be equitable.

MORRISON, LLOYD & MORRISON,
Solicitors and of counsel with
complainant.

**Answer and Counterclaim of Defendants, Caro-
line A. Allison, John Allison and
Katharine MacLean.**

(Filed April 6, 1925.)

10 The answer of the defendants, Caroline A. Allison, John Allison and Katharine MacLean (named in the bill of complaint as Katherine MacLean) to the bill of complaint herein and the counterclaim of said defendants against the complainant and against Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, deceased.

 These defendants, Caroline A. Allison, John Allison and Katharine MacLean, say:

20 1. They admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 12 of the complaint and say that they have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

30 2. And these defendants further answering say that this action was commenced without notice to them; that they have not declined to join in this action as complainants; that on the contrary they have requested that they be joined as complainants; and that complainant has declined to consent that they be joined as complainants, and that they have been and are desirous that this court shall decree that the provisions of the will of William O. Allison, set forth in paragraph 6 of the complaint, are invalid, and they pray that such decree as this court may make upon complainant's bill shall provide that no part of the costs or counsel fees that may be allowed complainant and her solicitors shall be chargeable
40 against these defendants, or their share of the

Answer and Counterclaim of Defendants.

estate of William O. Allison, or against any part of said estate except the share or portion to which complainant may be decreed to be entitled.

By way of counterclaim against the complainant and against Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, deceased, the defendants, Caroline A. Allison, John Allison and Katharine MacLean, say: 10

3. William O. Allison died on December 18, 1924, a resident of the Borough of Englewood Cliffs, in the County of Bergen and State of New Jersey, and left him surviving his widow, Caroline A. Allison, a resident of the City of Syracuse, County of Onondaga and State of New York, his son, John Allison, a resident of the City of Englewood, County of Bergen and State of New Jersey, his daughter, Katharine MacLean, a resident of the Borough of Englewood Cliffs, County of Bergen and State of New Jersey, and his daughter, Frances Allison Noice, a resident of Williams, in the State of Arizona, and said Caroline A. Allison, John Allison, Katharine MacLean and Frances Allison Noice are the only heirs at law and next of kin of William O. Allison. 20

4. William O. Allison made a last will and testament dated July 11, 1924, which, upon the petition of Harry J. Schnell and Frank V. Baldwin, the executors named therein, was duly admitted to probate by the Prerogative Court of the State of New Jersey by an order dated December 29, 1924. A true and complete copy of said last will and testament as so admitted to probate is hereto attached marked Exhibit A. Letters testamentary were duly issued by said Prerogative Court to said Schnell and Baldwin, who have duly qualified 30 40

Answer and Counterclaim of Defendants.

as executors under said will, and are now acting or purporting to act as executors and trustees under said will with the purpose and intention of carrying out all the provisions thereof. The clause of said will numbered "XI", which purports to dispose of all the rest, residue and remainder of the estate of William O. Allison and to create a trust to maintain and develop the Palisades along the Hudson, in the Borough of Englewood Cliffs, and vicinity, is null and void, and the said Schnell and Baldwin, as executors and trustees under said will, have no power or authority to carry out any of the provisions of said clause or to use or dispose of any part of the estate of William O. Allison for the purpose of maintaining or developing the Palisades along the Hudson in the Borough of Englewood Cliffs or vicinity.

5. Caroline A. Allison, John Allison, Katharine MacLean and Frances Allison Noice, as the heirs at law and next of kin of William O. Allison, are entitled to, and are the beneficial owners of, the rest, residue or remainder of said estate, and while questions arose prior to the commencement of this suit with respect to the rights and interests of said parties as between themselves, they have since the commencement of this suit settled all such questions and determined as between themselves their respective rights and interests in and to said estate, by entering into an agreement dated March 13, 1925, to the effect that in so far as they, or any of them, are entitled to, or have any interest in, said estate, the same shall be divided equally among them so that each of said parties shall receive an equal one-fourth share thereof. A true and complete copy of said agreement is hereto attached marked Exhibit B. By reason of

Answer and Counterclaim of Defendants.

the fact that William O. Allison made no lawful or valid disposition of the rest, residue and remainder of his estate, and by reason of said agreement, dated March 13, 1925, Caroline A. Allison, John Allison, Katharine MacLeon and Frances Allison Noice are entitled to, and are the beneficial owners of the rest, residue and remainder of said estate, in equal shares, each having an undivided one-fourth interest thereof. 10

6. On or about January 7, 1925, and thereafter from time to time, these defendants claimed to said Schnell and Baldwin, executors and trustees under the will of William O. Allison, that the clause of said will numbered "XI", which purports to dispose of all the rest, residue and remainder of said estate, was null and void and that the widow and children of William O. Allison were entitled to the rest, residue and remainder of said estate, and on or about March 20, 1925, these defendants delivered to said Schnell and Baldwin, as such executors and trustees, a duplicate original of said agreement dated March 13, 1925, and thereby requested said Schnell and Baldwin, as such executors and trustees, to recognize forthwith that the widow and children of William O. Allison were entitled to the entire residue of said estate, in equal shares, and to make distributions thereof among said parties in equal shares at as early a date or dates as might be feasible. The said Schnell and Baldwin, as such executors and trustees, have continuously refused, and still refuse, to recognize that the clause of said will numbered "XI" is null and void or that the widow or children of William O. Allison have any right, title or interest in or to said estate, and have continuously claimed, and still claim, that said clause is lawful and valid and that they have lawful 20 30 40

Answer and Counterclaim of Defendants.

power and authority to carry out the provisions of said clause and to use and dispose of the rest, residue and remainder of said estate for the purpose of maintaining and developing the Palisades along the Hudson, in the Borough of Englewood Cliffs, and vicinity.

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7. The estate of William O. Allison consists of real and personal property having a value in excess of \$1,000,000 and includes all the stock of a corporation named the Allison Land Company which owns about eight hundred acres of unimproved land in the County of Bergen and State of New Jersey, and all the stock of certain corporations which own, control and publish two trade papers or magazines, and various other stocks, bonds and securities. The value of said eight hundred acres of land is not uniform but varies considerably according to the nature and location thereof. Neither the stock of the Allison Land Company nor the stocks of the corporations which own, control and publish said trade papers or magazines are listed or quoted on any exchange or other market, there have never been any sales thereof, and the value of said stocks is necessarily indefinite and uncertain. Appraisers have been appointed to value of the said stocks and the other assets of said estate and the Comptroller of the Treasury of the State of New Jersey is now engaged in determining the amount of the inheritance taxes payable by or out of said estate. The determination of said inheritance taxes involves not only the valuation of said stocks and other assets but also the *construction* of the clause of said Will numbered "XI" and the question whether the widow and children of William O. Allison are entitled to the rest, residue and remainder of said estate or whether said Schnell

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Answer and Counterclaim of Defendants.

and Baldwin, as executors and trustees under said will, are entitled to use and dispose of the same for the purpose of maintaining and developing the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. The said Schnell and Baldwin, as such executors and trustees, have not commenced any suit or other proceeding for the construction of said clause or the determination of said question or made any effort to delay the determination of the inheritance taxes payable by or out of said estate or made any plan or arrangement for obtaining a judicial determination with respect to the validity and effect of said clause or the rights or interests of parties hereto with respect to the rest, residue and remainder of said estate.

10

The said widow and children are directly concerned and interested in the determination of the inheritance taxes and in all other matters affecting the rest, residue and remainder of said estate, and it is essential for the protection of the rights and interests of these defendants, and for the proper and orderly administration of said estate, that this court should construe said clause numbered "XI" and determine the validity and effect thereof and the rights and interests of the parties hereto with respect to the rest, residue and remainder of said estate, at the earliest practicable date.

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30

8. These defendants are without adequate remedy at law and therefore pray

(a) that Frances Allison Noice, the complainant herein, and Harry J. Schnell and Frank V. Baldwin, executors and trustees under the will of William O. Allison, two of the defendants herein, may answer the coun-

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Answer and Counterclaim of Defendants.

terclaim contained in this answer and each statement therein;

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(b) That this court shall construe the clause of the will of William O. Allison numbered "XI" which purports to dispose of all the rest, residue and remainder of his estate and determine and decree that the same is null and void, that said Schnell and Baldwin, as executors and trustees under said will, have no power or authority to carry out any of the provisions of said clause or to use or dispose of any part of said estate for the purpose of maintaining or developing the Palisades along the Hudson, and that Caroline A. Allison, John Allison, Katharine MacLean and Frances Allison Noice are entitled to and the beneficial owners of the rest, residue and remainder of said estate in equal shares, each having an undivided one-fourth interest therein;

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(c) that said Schnell and Baldwin, as executors and trustees under said will, be enjoined and restrained from carrying out any of the provisions of the clause of said will numbered "XI" and from using or disposing of any part of the estate of William O. Allison for the purpose of maintaining or developing the Palisades along the Hudson, and that said Schnell and Baldwin, as such executors and trustees, be ordered and decreed to hold the rest, residue and remainder of said estate for the benefit of Caroline A. Allison, John Allison, Katharine MacLean and Frances Allison Noice in equal shares and ultimately to convey, assign, transfer and deliver the same to, and distribute the same

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Answer and Counterclaim of Defendants.

among, said parties in equal shares, so that each of said parties shall receive an equal one-fourth share thereof; and

(d) that these defendants may have such other and further relief as may be equitable.

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JOHN J. TREACY,
Solicitor and of Counsel for the
defendants, Carolina A. Allison,
John Allison and Katharine
MacLean.

Exhibit A.

I, WILLIAM O. ALLISON, of the Borough of Englewood Cliffs, in the County of Bergen and State of New Jersey, do make this my last Will and Testament, hereby revoking all other Wills and Codicils by me at any time heretofore made.

20

I: It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow men, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity.

30

II: I nominate, constitute and appoint Harry J. Schnell and Frank V. Baldwin, and the survivor of them, to be the executors of this my last Will and Testament and the Trustees of the Trusts hereinafter created.

III: I direct the payment by my executors of my debts and funeral expenses as soon as possible after my death.

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Exhibit A, Annexed to Answer and Counterclaim.

10 IV: I give and bequeath to JEAN SCHNELL "my little sweetheart" daughter of Harry J. Schnell. the sum of Twenty thousand Dollars (\$20,000.). It is probable that I will give her this amount during my lifetime. If I do so, then this bequest to be void and of no effect.

V: I give and bequeath to LOUISE BOGERT, wife of Daniel G. Bogert, the sum of Five thousand Dollars (\$5,000.).

VI: I give and bequeath to MABEL POWERS, in appreciation of the faithful and dependable service rendered by her, the sum of Two Thousand, five hundred dollars (\$2,500.).

20 VII: I give and bequeath to HARRY J. SCHNELL, Jr., son of Harry J. Schnell, the sum of One thousand dollars (\$1,000) as a wedding present.

VIII: I give and bequeath to TONY SCIANDRA, the sum of Two hundred and fifty dollars (\$250).

30 IX: I order and direct my Trustees to set apart and keep properly invested such part of my estate as will produce an income of Twenty-five dollars (\$25.00) per month, and I order and direct that the said sum of Twenty-five dollars (\$25.00) per month shall be paid to GEORGE D. CONKLIN during his lifetime. Upon his death this Fund shall form part of my residuary estate.

40 X: I have made no bequest in this my Will to my wife, children or grandchildren, for the reason that I have already made adequate provision for them by conveying to the Allison Land Company certain securities particularly described in a Trust Agreement dated July 2nd, 1923. I hereby direct that all the rights reserved to me under said agreement shall be exercised by my Executors and Trustees herein named.

Exhibit A, Annexed to Answer and Counterclaim.

XI: All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my Trustees to use this Trust Fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them.

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XII: I hereby authorize and empower my executors and Trustees to sell any and all real property standing in my name at the time of my death, and to execute such instruments as may be necessary to effectuate this power.

30

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, this 11th day of July, A. D. Nineteen Hundred and Twenty-four.

WILLIAM O. ALLISON (L. S.)

Witnesses:

THOS. J. HUCKIN,
CHARLES E. VAN WAGONER.

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Exhibit A, Annexed to Answer and Counterclaim.

10 Signed, Sealed, Published and Declared by the said WILLIAM O. ALLISON, the above named Testator, to be his last Will and Testament, in the presence of us, who were both present at the same time, and who subscribed our names as witnesses thereto in the presence of the Testator and at his request.

THOS. J. HUCKIN of Englewood, N. J.

CHARLES E. VAN WAGONER of Englewood Cliffs,
N. J.

SCHEDULE B.

20 AGREEMENT made this 13th day of March, 1925 between CAROLINE A. ALLISON, of Syracuse, New York, JOHN B. ALLISON, of Englewood, New Jersey, KATHARINE A. MACLEAN, of Englewood, New Jersey, and FRANCES ALLISON NOICE, of Williams, Arizona.

30 WHEREAS, WILLIAM O. ALLISON died a resident of the State of New Jersey on or about December 18, 1924, and the parties to this agreement are his heirs at law and next of kin, Caroline A. Allison being his widow, John B. Allison his son and Katharine A. MacLean and Frances Allison Noice his daughters; and

40 WHEREAS, the said William O. Allison made a will dated July 11, 1924, which has been admitted to probate by the Prerogative Court of New Jersey by an order dated December 29, 1924, and the parties hereto all claim that the clause of said will numbered "XI", which purports to dispose of the residue of the estate, is null and void and that they, as the heirs at law and next of kin, are

Exhibit A, Annexed to Answer and Counterclaim.

the only persons who are entitled to, or have any interest in, said residue; and

WHEREAS, questions have arisen with respect to the rights and interests of the parties hereto as between themselves and said parties desire, by this agreement, to settle all such questions and determine as between themselves their respective rights and interests in and to the estate of said William O. Allison; 10

NOW, THEREFORE, the parties hereto, each in consideration of the agreements of the other herein contained, hereby agree as follows:

1. The parties hereto agree that in so far as they or any of them are entitled to or have any interest in the estate of said William O. Allison, including both real and personal property, the same shall be divided equally among them so that each of the parties hereto shall receive an equal one-fourth share thereof. Such division shall be made in kind, unless the parties hereto shall hereafter otherwise agree. 20

2. The parties hereto join in requesting the Executors and Trustees under said will to recognize forthwith that the parties hereto are entitled to the entire residue of said estate in equal shares and to make distributions thereof among the parties hereto in equal shares at as early a date or dates as may be feasible, without waiting for the expiration of one year from the death of said William O. Allison. 30

3. The parties hereto agree to execute and deliver such further instrument or instruments as may be necessary or appropriate and generally to co-operate with each other for the purpose of bringing about a division and distribution of the 40

Exhibit A, Annexed to Answer and Counterclaim.

residue of said estate among the parties hereto in equal shares at as early a date or dates as may be feasible. Each party agrees not to attack, oppose or question in any manner the right or claim of any other party hereto with respect to one-fourth of such residue.

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4. This agreement shall apply to, bind and enure to the benefit of the Executors, administrators and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

20

CAROLINE A. ALLISON	[L. S.]
KATHARINE ALLISON MACLEAN	[L. S.]
JOHN B. ALLISON	[L. S.]
FRANCES ALLISON NOICE	[L. S.]

STATE OF NEW YORK, }
 COUNTY OF ONONDAGA, } ss.:

30

I, SMITH T. FOWLER, Clerk of the County of Onondaga, and of the Supreme and County Courts therein, the same being Courts of Record, do hereby certify, that SAUL ALDERMAN, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the County of Onondaga, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

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Exhibit A, Annexed to Answer and Counterclaim.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, the 17 day of March, 1925.

(Seal) SMITH T. FOWLER,
Clerk.

10

STATE OF NEW YORK, }
COUNTY OF ONONDAGA, } ss.:

BE IT REMEMBERED that on this 17th day of March, the year of our Lord one thousand nine hundred and twenty-five, before me the subscriber, a Notary Public, personally appeared CAROLINE A. ALLISON, who I am satisfied is one of the individuals mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

20

SAUL H. ALDERMAN,
Notary Public.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss.:

BE IT REMEMBERED that on this 14 day of March, in the year of our Lord one thousand nine hundred and twenty-five, before me the subscriber, a Notary Public, personally appear JOHN B. ALLISON, who I am satisfied is one of the individuals mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

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(Notarial Seal) CHAS. D. STANTON,
Notary Public.

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Exhibit A, Annexed to Answer and Counterclaim.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss.:

10 BE IT REMEMBERED that on this 14 day of March, in the year of our Lord one thousand nine hundred and twenty-five, before me the subscriber, a Notary Public, personally appeared KATHARINE A. MACLEAN, who I am satisfied is one of the individuals mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

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(Notarial Seal)

CHAS. D. STANTON,
Notary Public.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

30 BE IT REMEMBERED that on this 13th day of March, in the year of our Lord one thousand nine hundred and twenty-five before me the subscriber, a Notary Public, personally appeared FRANCES ALLISON NOICE, who I am satisfied is one of the individuals mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

40

A. W. WEST
(Notarial Seal)

Answer of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees Under the Will of William O. Allison, Deceased.

(Filed June 6, 1925.)

The answer of Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees under the will of William O. Allison, deceased. 10

The defendants, Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees under the will of William O. Allison, deceased, answering the bill of complaint say:

1. Paragraphs 1 to 6 inclusive are admitted.
2. Paragraph 7 is denied.
3. Paragraphs 8 to 10 inclusive are admitted. 20
4. Paragraph 11 is denied.
5. Paragraphs 12 and 13 are denied.

Defendants, Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees under the will of William O. Allison, deceased, further answering the bill of complaint, say:

6. That testator was born in Bergen County on the shore of the Hudson River under the palisades and lived in Bergen County on or near the palisades during all of his lifetime. From early boyhood until his death he was deeply impressed with the natural beauty of the palisades and with the importance of maintaining the same unimpaired. 30

7. When it became apparent, in the latter part of the last century, that the scenery of the palisades was seriously menaced by quarrying operations then being conducted thereon, the testator actively engaged with others in arousing the public sentiment, which occasioned the enactment by 40

Answer of Executors and Trustees.

10 the legislature of this State of the act creating the Commissioners of the Palisades Interstate Park, and authorizing such commissioners to acquire land between the top of the palisades and the high water line of the Hudson River, and to establish and maintain thereon a public park, which said act is entitled "An Act to provide for the selection, location, appropriation and management of certain lands along the palisades of the Hudson River for an interstate park and thereby to preserve the scenery of the palisades" and was approved March 22d, 1900.

20 8. The testator exhibited a keen interest in the work of the said Commissioners of the Palisades Interstate Park and rendered material assistance from time to time in the acquisition of lands for said park, particularly in the Borough of Englewood Cliffs and vicinity. The said commissioners have acquired under the authority of said act and now hold title to all the lands lying between the top or steep edge of the palisades and the high water line of the Hudson River from the Borough of Fort Lee in Bergen County and the south to the boundary line between this state and the State of New York on the north and have established 30 a public park thereon in accordance with the provisions of said act and the various supplements thereto.

9. The palisades of the Hudson include not only the land lying between the high water line of the Hudson River and the top of the cliffs but also the land on top of the palisades extending westerly approximately one-half mile from the edge of the cliffs.

40 10. From time to time both before and after the establishment of said public park the testa-

Answer of Executors and Trustees.

tor acquired large tracts of land on top of the palisades in the Borough of Englewood Cliffs and vicinity. Such lands were acquired by him in order to enable him to put into effect one of the dominant purposes of his life which was to preserve the palisades in their scenic beauty for the benefit of the public. Title to such lands was either taken by the testator in his own name or in the name of the Allison Land Company, a corporation of the State of New Jersey, organized by him for that purpose and of which he owned all of the capital stock except qualifying shares held by the directors. Titles taken by the testator in his own name were subsequently conveyed by him to such corporation and were so held at the time of his decease.

11. The purpose and intent of the testator, in and by the eleventh paragraph of his said will, was to establish a public park on top of the palisades in the Borough of Englewood Cliffs and vicinity, adjacent to the lands of the Palisades Interstate Park, and to devote the lands owned by the Allison Land Company, and his entire residuary estate, to the maintenance and development of such park for the use of the public generally, to the end that the integrity, grandeur and scenic beauty of the palisades, as well west as east of the cliffs, might be preserved for all time for the pleasure of Almighty God and the use and benefit of his fellow men. These defendants submit that such purpose was public and charitable in its nature and should be upheld by this honorable court.

12. The plan for the maintenance and development of the park in accordance with the wishes of the testator mentioned in said eleventh paragraph of said will had to do with mere administra-

Answer of Executors and Trustees.

tive details subordinate to and independent of the creation of the charity intended and in no way limited or qualified the same.

10 These defendants pray that the bill of complaint may be dismissed and submit that they should be permitted to proceed with the execution of said trust as soon as the estate of the said William O. Allison, deceased, shall have been settled and the residue thereof turned over to them as such trustees.

SEUFERT & ELMORE,
Solicitors for defendants, Harry
J. Schnell and Frank V. Baldwin.

20

R. V. LINDABURY,
JOSIAH STRYKER,
of counsel.

A True Copy.

THOMAS BARBER,
Clerk.

30

40

Answer of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees Under the Will of William O. Allison, Deceased, to Counterclaim of Defendants, Caroline A. Allison, John Allison and Katherine McLean.

(Filed June 9, 1925.)

10

Answer of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, Deceased, to the counterclaim filed by Caroline A. Allison, John Allison and Katherine McLean.

The defendants, Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees under the will of William O. Allison, Deceased, answering the counterclaim filed by Caroline A. Allison, John Allison and Katherine McLean, say:

20

1. Paragraph 3 is admitted.
2. Paragraph 4 is admitted with the exception of the last sentence thereof, which said last sentence is denied.
3. These defendants admit that John Allison, Katherine McLean, and Frances A. Noice are the heirs at law and next of kin of William O. Allison, Deceased, and that the said Caroline A. Allison is the widow of the said William O. Allison, Deceased. They deny that said Caroline A. Allison, John Allison, Katherine McLean or Frances Allison Noice or any of them are entitled to or are beneficial owners of the rest, residue or remainder of the said estate or any part thereof. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of paragraph 5 regarding the agreement alleged to have been made between the said Caro-

30

40

Answer of Executors and Trustees to Counterclaim of Defendants.

10 line A. Allison, John Allison, Katherine McLean and Frances Allison Noice. These defendants deny that said Caroline A. Allison, John Allison, Katherine McLean or Frances Allison Noice or any of them are entitled to or are the beneficial owners of the residuary and remainder of said estate or any part thereof or that William O. Allison made no lawful or valid disposition of said remainder as alleged in said paragraph 5.

20 4. Paragraph 6 is admitted except that these defendants have no knowledge or information sufficient to form a belief as to whether the alleged duplicate original of the agreement therein mentioned is a duplicate original of an agreement actually executed and delivered.

5. Paragraph 7 is admitted except that these defendants deny that the said widow and children are in any wise concerned or interested in the determination of the inheritance taxes or in any other matters affecting the rest, residue and remainder of said estate.

30 These defendants, Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees under the will of William O. Allison, Deceased, further answering the said counterclaim say:

6. That testator was born in Bergen County on the shore of the Hudson River under the palisades and lived in Bergen County on or near the palisades during all of his lifetime. From early boyhood until his death he was deeply impressed with the natural beauty of the palisades and with the importance of maintaining the same unimpaired.

40 7. When it became aparent in the latter part of the last century, that the scenery of the pali-

Answer of Executors and Trustees to Counter-claim of Defendants.

sades was seriously menaced by quarrying operations then being conducted thereon, the testator actively engaged with others in arousing the public sentiment, which occasioned the enactment by the legislature of this State of the act creating the Commissioners of the Palisades Interstate Park, and authorizing such commissioners to acquire land between the top of the palisades and the high water line of the Hudson River, and to establish and maintain thereon a public park, which said act is entitled "An act to provide for the selection, location, appropriation and management of certain lands along the palisades of the Hudson River for an interstate park and thereby to preserve the scenery of the palisades" and was approved March 22d, 1900.

8. The testator exhibited a keen interest in the work of the said Commissioners of the Palisades Interstate Park and rendered material assistance from time to time in the acquisition of lands for said park, particularly in the Borough of Englewood Cliffs and vicinity. The said commissioners have acquired under the authority of said act and now hold title to all the lands lying between the top or steep edge of the palisades and the high water line of the Hudson River from the Borough of Fort Lee in Bergen County on the south to the boundary line between this State and the State of New York on the north and have established a public park thereon in accordance with the provisions of said act and the various supplements thereto.

9. The palisades of the Hudson include not only the land lying between the high water line of the Hudson River and the top of the cliffs but also

Answer of Executors and Trustees to Counter-claim of Defendants.

the land on top of the palisades extending westerly approximately one-half mile from the edge of the cliffs.

10 10. From time to time both before and after
the establishment of said public park the testator
acquired large tracts of land on top of the pali-
sades in the Borough of Englewood Cliffs and
vicinity. Such lands were acquired by him in
order to enable him to put into effect one of the
dominant purposes of his life which was to pre-
serve the palisades in their scenic beauty for the
benefit of the public. Title to such lands was either
taken by the testator in his own name or in the
name of the Allison Land Company, a corporation
20 of the State of New Jersey, organized by him for
that purpose and of which he owned all of the
capital stock except qualifying shares held by the
directors. Titles taken by the testator in his own
name were subsequently conveyed by him to such
corporation and were so held at the time of his
decease.

30 11. The purpose and intent of the testator, in
and by the eleventh paragraph of his said will,
was to establish a public park on top of the pali-
sades in the Borough of Englewood Cliffs and
vicinity, adjacent to the lands of the Palisades
Interstate Park, and to devote the lands owned by
the Allison Land Company, and his entire resi-
duary estate, to the maintenance and development
of such park for the use of the public generally,
to the end that the integrity, grandeur and scenic
beauty of the palisades, as well west as east of the
cliffs, might be preserved for all time for the
pleasure of Almighty God and the use and benefit
40 of his fellow men. These defendants submit that

Complainants' Replication.

such purpose was public and charitable in its nature and should be upheld by this Honorable Court.

12. The plan for the maintenance and development of the park in accordance with the wishes of the testator mentioned in said eleventh paragraph of said will had to do with mere administrative details subordinate to and independent of the creation of the charity intended and in no way limited or qualified the same.

10

These defendants pray that the above mentioned counterclaim may be dismissed.

SEUFERT & ELMORE,
Solicitors for Defendants,
Harry J. Schnell and Frank
V. Baldwin, Executors
and Trustees under the
will of William O. Allison,
Deceased.

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R. V. LINDABURY,
JOSIAH STRYKER,
of Counsel.

Complainant's Replication.

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(Filed June 9, 1925.)

The complainant joins issue on the answer of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, Deceased, defendants in the above entitled matter.

MORRISON, LLOYD & MORRISON,
Solicitors for Complainant.

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Petition.

(Filed June 11, 1925.)

IN CHANCERY OF NEW JERSEY.

10 The complainant, Frances Allison Noice, respectfully shows:

1. That on February 9, 1925, she filed her bill in this matter alleging that the provision in the will of William O. Allison, deceased, for the disposition of his residuary estate, was invalid.

20 2. That the defendants Caroline A. Allison, John Allison and Katherine McLean have filed an answer alleging in substantially the same manner as complainant that said attempted disposition of the residuary estate is invalid. That the defendants Harry J. Schnell and Frank V. Baldwin, executors and trustees under the will of William O. Allison, deceased, have filed an answer denying the invalidity alleged by the complainant.

30 3. Said provision is as follows: "All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood to submit to me a plan for such development and maintenance. If such plan is sub-
40 mitted and receives my approval, then I direct

Petition, Dated June 11, 1925.

my trustees to use this trust fund for the purpose of carrying out such plan.

If, however, such plan does not receive my approval, then I order and direct my said trustees to use this trust fund for the development and maintenance of said Palisades section in accordance with my wishes as expressed to them.” 10

4. The trust which the testator attempted to establish may be for the benefit of the public and the Attorney General of the State of New Jersey is therefore, a proper party defendant in this suit.

Petitioner therefore prays that she may have leave to amend the bill of complaint by adding the following paragraph: 20

“By the provision in the will of William O. Allison set forth in paragraph sixth of the bill of complaint, said testator attempted to establish a trust which may be for the benefit of the public, and the Attorney General of the State of New Jersey is, therefore, made a defendant in this suit.”

And also by inserting the following paragraph in the prayer of the bill: 30

“And that the Attorney General of the State of New Jersey, being attended with a copy of this bill, may appear and put in an answer thereto.”

And your petitioner will ever pray, etc.

FRANCES ALLISON NOICE,
by WM. J. MORRISON, JR.
Solr.

Petition, Dated June 11, 1925.

STATE OF NEW JERSEY, }
 COUNTY OF BERGEN, } ss.:

10 WILLIAM J. MORRISON, JR., being duly sworn according to law on his oath, says that he is a member of the firm of Morrison, Lloyd and Morrison, solicitors of the complainant; that he has read the foregoing petition and that the matters and things therein stated are true, to the best of his knowledge, information and belief.

Sworn to and subscribed before }
 me this 8th day of June, 1925. }

WILLIAM J. MORRISON, JR.

20 W.M. E. DECKER,
 Master in Chancery,
 N. J.

Certified a true copy.
 MORRISON, LLOYD & MORRISON,
 Solrs. of Complt.

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Order to Show Cause.

(Filed June 11, 1925.)

The complainant having applied by petition for leave to amend her bill by alleging that the trust mentioned therein which the testator attempted to establish, may be for the benefit of the public, and that the Attorney General of the State of New Jersey is, therefore, a proper defendant in the suit, and by inserting a prayer that the Attorney General may appear and put in an answer:

10

It is, on this 10th day of June, 1925, ORDERED that the defendants show cause before the Chancellor at the Chancery Chambers in the Court House, City of Paterson, on Monday, the 22nd day of June, 1925, at ten o'clock in the forenoon (day-light saving time, nine o'clock standard time) why an order should not be made permitting the complainant to amend the bill in accordance with the prayer of the petition;

20

And further ORDERED that copies of the petition and of this order, which may be certified by the solicitors for the complainant, be served upon the defendants or their solicitors, and upon the Attorney General of the State of New Jersey, within five days from the date of this order. Respectfully advised.

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E. R. WALKER,
C.

VIVIAN M. LEWIS,
V. C.

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Order for Amendment.

(Filed June 25, 1925.)

10 The complainant having applied by petition for leave to amend her bill and an order to show cause having been made, service of which has been acknowledged by the solicitors for the other parties to the suit, and also by the Attorney General of the State of New Jersey, and no cause appearing to the contrary, and William M. Seufert, counsel for the defendant executors stating that said executors had pleaded that the eleventh paragraph of the will of William O. Allison, deceased, created a public trust and William J. Morrison Jr. counsel for the complainant stating that the At-
20 torney General had suggested that he be made a party, and John J. Treacy, counsel for defendants Caroline A. Allison, *et al.* stating that he did not consider the Attorney General a necessary party, but in view of the statements of counsel for complainant and defendant executors he would not oppose the admission of the Attorney General as a party;

It is on this 23rd day of June, 1925, ORDERED that the complainant's bill be amended by adding the following paragraph:

30 "By the provision in the will of William O. Allison set forth in paragraph sixth of the bill of complaint, said testator attempted to establish a trust which may be for the benefit of the public, and the Attorney General of the State of New Jersey is, therefore made a defendant in this suit."

And also by inserting the following paragraph in the prayer of the bill:

40 "And that the Attorney General of the State of New Jersey, being attended with a copy of this bill, may appear and put in an answer thereto."

Respectfully advised.

E. R. WALKER,
C.

VIVIAN M. LEWIS.

**Answer of Edward L. Katzenbach, Attorney
General of the State of New Jersey.**

(Filed July 2, 1925.)

The defendant, answering, says:

1. He has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 1, 2 and 3 of the bill of complaint. 10

2. Paragraphs 4 and 5, and paragraph 6, as amended, are admitted.

3. Paragraph 7 is denied.

4. Paragraph 8 is admitted.

5. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 9, 10 and 11. 20

6. Paragraph 12 is denied.

This defendant further answering says:

1. The devise and bequest of the residuary estate of the said testator, William O. Allison, is for a charitable use and valid, and as such is for the benefit of the public, rich and poor alike.

And this defendant prays that the Bill of Complaint may be dismissed with his proper costs and charges in this behalf sustained. 30

EDWARD L. KATZENBACH,
Attorney General.

Petition.

(Filed November 30, 1925.

Your petitioners, Caroline A. Allison, John Allison and Katherine MacLean, respectfully show:

10 1. This suit was begun on February 9, 1925, on which date the bill herein was filed.

20 2. Your petitioners are three of the defendants in this suit; your petitioner Caroline A. Allison being the widow, and your petitioners John Allison and Katharine MacLean being two of the three children of William O. Allison, deceased, who died December 18, 1924. The complainant Frances Allison Noice is the only other child of said William O. Allison. Said four persons are the only heirs at law and next of kin of said William O. Allison.

3. The said William O. Allison left a paper writing purporting to be his last will and testament which was admitted to probate by the Prerogative Court of this State, in and by which said William O. Allison attempted to dispose of the residue of his estate in trust as follows:

30 All the rest, residue and remainder of my property, real and personal, whatsoever and where-soever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance.
40 such plan is submitted and receives my approval,

Petition, Dated November 30, 1925.

then I direct my Trustees to use this Trust for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustee to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them. 10

4. The complainant filed the bill in this suit praying that the aforesaid provisions as to the disposition of the residuary estate of William O. Allison be declared invalid, and that she be decreed to be entitled to her share of said estate as one of the heirs and next of kin of said William O. Allison as provided by law.

5. The complainant did not ask these petitioners to join with her as complainant as required by the rules of this court nor would she permit them to join as complainant in the suit. The complainant joined these petitioners as defendants with the individuals who are purporting to act as the executors of said William O. Allison. 20

6. On or about April 6, 1925, your petitioners filed an answer to the bill, containing a counterclaim, which they served upon the complainant and the defendants executors. On or about June 6th, 1925, the defendants executors filed an answer to the bill and on June 9, 1925, an answer to your petitioners' counterclaim containing certain denials and certain allegations of new matter. On or about June 9, 1925, the time of the complainant to answer your petitioners' counterclaim expired, but the complainant has not filed any answer thereto. 30

On or about June 23, 1925, this Court made an order amending the bill by adding the following paragraph: 40

Petition, Dated November 30, 1925.

“By the provision in the will of William O. Allison set forth in paragraph sixth of the bill of complaint, said testator attempted to establish a trust which may be for the benefit of the public, and the Attorney General of the State of New Jersey is, therefore, made a defendant in this suit.”

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and by inserting the following paragraph in the prayer of the bill:

“And that the Attorney General of the State of New Jersey, being attended with a copy of this bill, may appear and put in an answer thereto.”

20

On or about July 2, 1925, the Attornel General filed an answer to the bill as amended containing certain denials and certain allegations of new matter. Your petitioners have not yet answered the bill as amended or replied to the new matter alleged in the answer of the defendants executors, but their time to do so will expire on the 22nd day of September, 1925 unless extended. The defendants executors have not answered the bill as amended although their time to do so has already expired. The Attorney General has not yet answered the counterclaim of your petitioners but has taken the position that he is not required to do so unless said counterclaim is served upon him.

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7. The present posture of the pleadings in the suit is accordingly as follows. The case is at issue between the complainant and your petitioners and the complainant and the defendants executors on the original bill but not on the amended bill. It is at issue between the complainant and the Attorney General on the amended bill. It is at issue between your petitioners and the complainant on

Petition, Dated November 30, 1925.

the counterclaim. It is not at issue between your petitioners and the defendants executors or between your petitioners and the Attorney General on the counterclaim. It is obvious that the amendment of the bill so as to make the Attorney General a party after the filing of various pleadings by the other parties has caused confusion and uncertainty as to the issues and the correct method of completing the issues as between all the parties.

10

Your petitioners take the position that the trust which William O. Allison attempted to establish is not for the benefit of the public and could not conceivably be held to be for the benefit of the public and that there was no occasion for making the Attorney General a party and consequently desire to put in issue the allegations which were added to the bill by the order of this Court made June 23, 1925. They also desire to reply to the new matters alleged in the answer of the defendants executors, and that the Attorney General be required to answer their counterclaim and to avoid, if possible, the necessity of filing an amended or supplemental answer or an amended or supplemental counterclaim (which would practically be a repetition of the answer and counterclaim heretofore filed) and the delays which would follow if the other parties were required or permitted to file answers to such an amended or supplemental counterclaim, and they submit that inasmuch as the Attorney General has been made a party when the case was almost at issue as between the other parties, he should be required to accept the pleadings as they are and that the Court may, by order, determine the method of finally completing the issues.

20

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Your petitioners accordingly pray that an order be made (1) amending the answer of your petition-

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Petition, Dated November 30, 1925.

ers so as to include a denial of each and every allegation added to the bill by the order of this Court made June 23, 1925, without affecting the counterclaim set forth in said answer or the answer to said counterclaim filed by the defendants executors, (2) requiring and directing the Attorney General to file an answer to the counterclaim of your petitioners within days after the service of a copy thereof upon him, (3) granting such other and further relief as may be proper in order to complete the issues in this case.

CAROLINE A. ALLISON
JOHN ALLISON
KATHARINE MACLEAN
by

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JOHN J. TREACY
Solicitor

Order.

(Filed November 30, 1925.)

The petition of Caroline A. Allison, John Allison and Katharine MacLean, several of the parties defendant herein having come on to be heard and it appearing that the complainant's bill of complaint was filed February 9, 1925; that the petitioners Caroline A. Allison, John Allison and Katharine MacLean filed an answer to said bill containing a counterclaim against complainant, and also against the petitioners' co-defendants Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, deceased, on April 6, 1925; that the said defendants executors filed their answer to the bill

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Order.

on June 6, 1925; and their answer to the petitioners' counterclaim on June 9, 1925; that on June 23, 1925, and before the time for filing a replication to the said answer of said defendants executors to the petitioners' counterclaim had expired, this court made an order amending the bill of complaint so as to make the Attorney General a party defendant to this suit; that the said Attorney General filed an answer to the bill as thus amended on July 2, 1925; that the petitioners have not yet answered the bill as amended or replied to the new matter alleged in the answer of the defendants executors, and the defendants executors have not answered the bill as amended; and all the parties being desirous of avoiding the duplication of pleadings and the delay incidental thereto which would be necessitated if the petitioners should file an answer to the amended bill and a supplemental or amended counterclaim and all parties consenting, it is on this 30th day of November, 1925,

ORDERED (1) that the answer of the defendants Caroline A. Allison, John Allison and Katharine MacLean be amended by adding the following paragraph:

"These defendants deny the allegations contained in the paragraph added to the complaint by the amendment thereof, made by the order herein dated June 23, 1925;"

(2) that the counterclaim of defendants Caroline A. Allison, John Allison and Katharine MacLean be amended by adding the following to the prayer:

(e) "That the Attorney General of the State of New Jersey having been made a party to this suit, he may upon being attended with a copy of this counterclaim put in an answer thereto;"

Order.

10 (3) that as to the other parties to this suit it shall not be necessary for the defendants Caroline A. Allison, John Allison and Katharine MacLean to file or serve such amended counterclaim and the counterclaim heretofore filed shall remain and be considered their statement of the rights and claims of said Caroline A. Allison, John Allison and Katharine MacLean in the same manner as if the amended counterclaim were filed, and the answer of the defendants executors heretofore filed to said counterclaim shall remain and be considered as their statement of their rights and claims in the same manner as if the same were filed to the amended counterclaim; and that the defendants Caroline A. Allison, John Allison and Katharine MacLean be deemed to have filed a replication to the answers to their counterclaims which replication shall be deemed to include a denial of all new matter in said answers except the allegation in paragraph 10 of the answer of defendants' executors to the said counterclaim, that William O. Allison acquired title to land on and near the Palisades in the Borough of Englewood Cliffs and vicinity and that title to the same was held by Allison Land Company at the time of his death.

20
30 (4) that the answer of the defendant executors to the complaint be amended by adding the following paragraph:

40 "These executors admit the allegations contained in the paragraph added to the complaint by the amendment thereof made by the order herein dated June 23, 1925, and further state that the trust set forth in paragraph 11 of the said Last Will and Testament of William O. Allison, deceased, is a valid trust for the benefit of the public to wit: The peoples of the various municipalities occupying and

Order.

adjacent to the Palisades and the people of the State of New Jersey.”

that the complainant shall be deemed to have filed a replication thereto in statutory form.

(5) that the Attorney General be allowed 20 days from the date hereof to answer or object to the amended counterclaim of the defendants Caroline A. Allison, John Allison and Katherine MacLean. 10

(6) that the solicitors for said petitioners within five days from the date hereof, serve upon the Attorney General a copy of this order which may be certified by said solicitors.

E. R. WALKER, 20
C.

Respectfully advised:
JAMES F. FIELDER,
V. C.

It is consented that the above order be made.

MORRISON, LLOYD & MORRISON,
Solicitors of Complainant. 30

SEUFERT & ELMORE,
Solicitors of defendants
Schnell & Baldwin, executors.

EDWARD L. KATZENBACH,
Attorney General.

Order of Reference.

(Filed December 30, 1925.)

This matter being opened to the court by Morrison, Lloyd and Morrison, solicitors of the complainant, and upon reading the consents hereto
 10 underwritten;

It is thereupon on this 30th day of December, 1925, ORDERED that the above stated cause be referred to Honorable J. F. Fielder, one of the Vice Chancellors of this court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

E. W. WALKER,
 C.

20 We consent to the making of the above order.

SEUFERT & ELMORE
 Solrs. of defendants, Schnell
 and Baldwin, executors

JOHN J. TREACY
 Solr. for defendants, Caroline A. Allison, John Allison and Katherine McLean

30 EDWARD L. KATZENBACH
 Attorney General for the
 State of New Jersey.

Transcript of Testimony.

IN CHANCERY OF NEW JERSEY.

Between

FRANCES ALLISON NOICE,
Complainant,

and

HARRY J. SCHNELL, *et al.*,
Defendants.

} On Bill, &c.

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TRANSCRIPT OF SHORTHAND NOTES taken on final hearing in above stated cause, March 2 and April 1, 1926, at Chancery Chambers, Jersey City, before His Honor James F. Fielder, Vice Chancellor.

20

Appearances

MESSRS. MORRISON, LLOYD & MORRISON, by WILLIAM J. MORRISON, Esq., and HENRY M. BRIGHAM, Esq., of the New York bar, for the Complainant.

MESSRS. SEUFERT & ELMORE, (MR. SEUFERT) Solicitors for the Defendant Executors and Trustees; MR. STRYKER, of LINDABURY, DEPUE & FAULKS, of Counsel; VICTOR A. WHITLOCK, Esq., of the New York Bar, of Counsel.

30

HON. EDWARD L. KATZENBACH, Attorney General, *pro se.*

JOHN J. TREACY, Esq., Solicitor of Defendants, CAROLINE A. ALLISON, JOHN ALLISON and KATHERINE MACLEAN; ROBERT H. McCARTER, Esq., of the New Jersey Bar, and GRAHAM SUMNER, Esq., and EDWARD L. ROBINSON, both of the New York Bar, of Counsel.

40

Frances A. Schouten, Complainant—Direct.

COMPLAINANT'S CASE.

FRANCES A. SCHOUTEN, the complainant, sworn as a witness on her own behalf, testifies as follows:

Direct examination by Mr. Morrison:

- 10 Q. William C. Allison was your father, was he not? A. Yes, sir.
 Q. When did he die? A. December 18, 1924.
 Q. Did he leave a will? A. He did.

Mr. Morrison: We offer in evidence certified copy of the will of William O. Allison.

(Marked Exhibit C-1.)

- 20 Q. At the time of your father's death, who were the members of his family? A. My mother, Caroline A. Allison; my sister, Katherine A. MacLean; my brother, John B. Allison, and myself, Frances Allison Schouten.

Q. Are these members of the family now living? A. Yes.

The Court: When you say "members of the family," you mean heirs at law and next of kin.

- 30 Mr. Morrison: Heirs at law and next of kin.

Q. I show you a paper and ask you whether that is an agreement made between the heirs at law and the next of kin of your father's estate? A. Yes.

Mr. Morrison: We offer that agreement in evidence.

(Marked Exhibit C-2.)

- 40 Q. When were you married to Mr. Schouten? A. June 29, 1925.

Argument of Counsel and Court.

Mr. Morrison: If the Court please, the bill was filed by Mrs. Schouten as Frances Allison Noice. She has since married and we ask leave to amend so as to state her present name.

The Court: There is no objection to that amendment. It may be made. 10

Mr. Morrison: In the will there is reference to certain trust agreements theretofore made by the testator. Judge Seufert has been good enough to say that he will produce them.

Mr. Seufert: I expected to have them here, but unfortunately I do not now find them among my papers. They are all the same as the copy you have.

Mr. McCarter: It seems to us that these trust agreements are utterly irrelevant. In his will he refers to certain trust agreements having been made as a reason why he does not make any specific bequest of any extent to his wife and children, and then comes this residuary clause, which is the clause in question, and the contest with reference to that is: Is that a valid clause? If it is, the will is all right. If it is not, then the residuum goes to the heirs and he died intestate as to it. It seems to us that it is unnecessary to bother about matters that really cannot affect the case at all, as we look at it. 20 30

Mr. Morrison: We think the trust agreements should be laid before the Court.

The Court: How will the contents of the trust agreements bear upon the validity of the residuary clause?

Mr. Morrison: I do not know that they will, except I think that when we lay docu- 40

Argument of Counsel and Court.

ments before you, we ought to lay them all before you. We won't press it if the defendants insist it is not admissible. In other words, we don't care to argue.

10 Mr. Stryker: Representing the trustees, we would be glad to have these trust agreements in evidence. It seems to us that they are a part of the situation of the testator, the circumstances which surrounded him at the time he made his will, and that the Court can construe the will with greater certainty if it is in possession at the time it construes the will, of all the surrounding facts and circumstances that were before testator at the time he made it. We feel that the cir-

20 cumstances which surrounded the testator, the situation in which he was at the time he made this will, may have a very considerable bearing upon this question and that these trust agreements are a part of that situation.

The Court: I sustain the objection to the trust agreements.

No cross-examination.

Mr. Morrison: We rest.

30 Mr. Stryker: The the cross-complainants going to offer anything?

Mr. McCarter: No.

DEFENDANTS' CASE.

The Court: What is your offer, Mr. Stryker?

40 Mr. Stryker: We desire to prove that the testator, for a long time prior to his death, had a dominant purpose of developing and maintaining the Palisades; that to enable him to carry out this purpose he, from time

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to time, covering a long period of years commencing prior to the time of establishing the Palisades Interstate Park, bought land on top of the Palisades outside of the limits purchased by the Park and also under the Palisades as well, and that he conveyed this land which he had bought under the Palisades for a small consideration to the State at the time the Palisades Park was established; that he materially assisted the State in securing the titles of other owners of land in that vicinity, and that he also materially assisted the State in other way in establishing the Park and in the conduct of the Park after it was established; that he continued, after the establishment of the Park, buying land on top of the Palisades which he maintained in its natural state, never making any use of it, never selling any of it, but continuing it in its natural state until his death. We desire to show the location and character of this land. We desire to show that much of it is well adapted for the purposes of a park, by reason of its surroundings, by reason of its situation and character.

We also desire to show that there is much other land in that vicinity, not owned by the testator, which is now available and adaptable for park purposes, for the purpose of maintaining and developing the Palisades in accordance with the trust established by this will.

The Court: I don't grasp that last statement. Other land in the neighborhood than the land owned by this Estate?

Mr. Stryker: Yes, Your Honor, so that it

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would be entirely practicable to use the funds of this Estate——

The Court: In the purchase of other lands?

10 Mr. Stryker: In the purchase of other lands, for the purpose of developing the Palisades.

20 We wish to show the scheme in the mind of the testator, that his idea of maintaining and developing the Palisades, under the facts which existed at the time he made his will and which continued, was entirely a practicable and workable scheme; that there is no question, when you apply to the provisions of the will to the facts as they existed at that time and as they now exist,—that there is no question that if this fund is devoted to that purpose, the Palisades will be maintained and available for all time for the benefit of the public.

30 We desire to show further that at the time the testator made his will, he refers, as Your Honor will recall, to the fact that he had requested two prominent residents of Englewood to outline a plan for him and stated that if that plan should be outlined and accepted by him, he desired to have it adopted. We desire to show—I think we are undoubtedly entitled to show—that that plan was never even presented to the testator; that that plan which he had requested these two prominent residents to prepare, was not prepared and was not presented.

40 Your Honor also doubtless recalls that he refers to the maintenance and development of the Palisades, in accordance with his “known wishes.”

Argument of Counsel and Court.

The Court: As I recall the reading of the will, he provides that if this plan was not submitted to him, then the property was to be developed along the line he had made known to his trustees.

Mr. Stryker: Not exactly that. I think 10
there was a material difference. I think I
should perhaps call Your Honor's atten-
tion to the first clause of the will. He says
in the first clause: "It is my desire and in-
tention to dispose by gift of a large part of
my remaining estate for the purpose of
pleasing Almighty God, benefitting my fel-
low men, and as far as possible developing
that section of the Palisades along the Hud- 20
son, located in the Borough of Englewood
Cliffs and vicinity." That, we think, shows
conclusively that the testator had in mind a
charitable gift. He did not provide for the
developing of the Palisades for any pur-
poses of profit or as a commercial enter-
prise. What he intended to do was to pro-
vide for the development of the Palisades
for the benefit of his fellow men, as a pub-
lic enterprise, for the benefit of the public
generally. 30

Now, after making some specific bequests
and after mentioning that he had already
made adequate provision for his family by
a trust agreement, he says:

"All the rest, residue and remainder of
my property, real and personal, whatsoever
and wheresoever situate not hereinbefore
specifically bequeathed, I give and devise
and bequeath unto my said trustees, in trust
nevertheless, to maintain and develop in 40
accordance with my known wishes,"—we

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10 think that referred to his wishes which were known to practically everybody that knew him—to maintain and develop the Palisades, and as expressed in the first paragraph,—his wish as known even before he made his will, his wish as expressed in the first paragraph, which was to maintain and develop the Palisades as far as possible for the benefit of his fellow-men, and to please Almighty God.

20 Now, he further says: “I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my trustees to use this Trust Fund for the purpose of carrying out such plan.” We desire to show that that sentence was not operative, because the plan was not submitted. He did not intend the gift to fail, if that plan should not be submitted or if no plan should be submitted. He says: “If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them.”

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40 We desire to show by testimony of the trustees that the testator never expressed any plan or scheme to them; that they were familiar, through conversations with the testator and through their association with him, with his desire as expressed in the will,

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to maintain and develop the Palisades for the benefit of the public, and that he never did give to them any plan for the maintenance or development of the Palisades; so that the situation, if we show this, as we shall be prepared to show on some subsequent date, would be that the testator had made a gift for the benefit of the public, for the maintenance and development of the Palisades as a public benefit; that at the time he made the gift, he had no plan in mind; he had requested two prominent citizens of Englewood to devise a plan for him. If a plan had been devised and had been approved by him, doubtless a codicil to the will would have embodied the plan. We desire to show that that was not done; that upon the will itself it appears that if that plan should not be accepted, testator nevertheless intended this gift to be made, and he wished to make it in accordance with his known wishes as expressed in the will; and we desire to show by testimony of these trustees that any wishes he may have expressed were nothing more or less than what is expressed in the will; that is, we are not offering this testimony for the purpose of varying the will or for the purpose of showing that the testator meant something he did not say. We are not offering it for that purpose at all. We are merely offering it to place the Court in the situation in which the testator was placed at the time he made the will, so that the Court may look through the eyes of the testator and determine, in the light of the information which he had at that time, what he meant by

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Argument of Counsel and Court.

the language which he used, the language being readily susceptible of the interpretation which I ask the Court to place upon it. We submit that that is what the Court of Chancery invariably does in cases of this kind involving the construction of wills.

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Our position is that the testator intended a charitable gift for the maintenance and development of the Palisades as a public benefit; that he provided no plan in his will for the maintenance and development of the Palisades; that the reference which he made to a plan in his will was a reference to a future plan which he recognized might or might not be perfected. We desire to show that it was not perfected; that the provision which he made in his will that if the plan should not be perfected, then the trustees should nevertheless maintain and develop the Palisades, is the provision under which the trust is to be established.

20

We also take the position, if the Court please, that the testator, by referring to his "known wishes," by referring to his wishes as expressed to his trustees, referred merely to wishes as expressed in his will and as frequently expressed by him to others, that is, to his general purpose to make a gift but not a plan by which the gift should be applied. Now, I think the Court will be very much better able to determine whether our view of what the testator meant is the correct one, or whether the view, whatever it may be, that the counsel for the heirs at law and next of kin may take, is the correct one, if the Court will permit introduction of evidence of facts

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Argument of Counsel and Court.

showing the situation, circumstances surrounding the testator at the time he made this will. We are not offering this evidence for the purpose of varying one word in the will. We are offering it merely to place the Court in the position occupied by the testator at the time he made the will, so that the Court can with certainty see what he meant by the language which he used. 10

We submit that the object mentioned in the will is a public object in and of itself; that while it does not seem to us to be doubtful what the testator meant by this language, we believe that the testator's heirs at law and next of kin will intimate that he intended to tie up the trustees to some undisclosed plan. Certainly, if he didn't intend to do that, "in accordance with my known wishes" does not refer to any plan; "in accordance with my wishes as expressed," does not necessarily refer to any plan. If he didn't intend to tie them up to a plan, then we submit it is important to disclose by parol evidence what is the character of the wishes expressed. If those wishes are supplemental of the will, if those wishes are of a testamentary character, not expressed in the will, it might be important. But if they are not of a testamentary character, if they merely refer to the dominating purpose of the testator's life, to make this handsome gift for the benefit of the public of this State, why, then, there is nothing in that expression which can in any way militate against the validity of the trust. Then we have a situation where the testator has made a gift of his residuary estate 30 40

Argument of Counsel and Court.

to trustees for the benefit of the public. I cannot conceive how the Court would be otherwise than helped by the admission of this testimony.

10 (Further argument by Mr. Katzenbach and opposing argument by Mr. McCarter.)

20 The Court: I am not called upon now to determine whether on the face of the will the clause under discussion is invalid. I am only called upon to determine whether the testimony the executors desire to offer ought to be received or not. As I understand the rule, parol evidence to show the purpose or intent of the testator, which is clearly expressed in the will, is not admissible; but it has been decided any number of times in this State that testimony may be received of the surroundings and circumstances of the testator, if that testimony will aid the Court in reaching a conclusion upon a bequest or devise which is somewhat indefinite or somewhat doubtful in the manner of expression. The testimony the executors desire to offer, they say, comes under the latter head. I think it much better that I should take this testimony, that I should hear it, instead of refusing to accept it, for I cannot tell, especially at this time, whether the testimony proposed to be offered will be of any aid or not, or whether it will be in the nature of admissible testimony, that is, testimony that I can consider after it has been received. I have decided that I will take the testimony subject to striking it out entirely or in part.

40 (Adjournment to Thursday, April 1, 1926, at ten o'clock in the forenoon.)

George L. Lewis, for Defendant—Direct.

Court met pursuant to adjournment, this 1st day of April, 1926, at ten o'clock in the forenoon.

Appearances as heretofore.

DEFENDANTS' CASE.

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GEORGE L. LEWIS, SWORN as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Stryker:

Q. Where do you live? A. Short Hills, New Jersey.

Q. What is your occupation? A. I am with the Bankers Trust Company of New York City.

Q. You have ben with the Bankers Trust Company for some time? A. Six years.

Q. Do you know Mr. Seward Prosser? A. Yes

Q. What is his connection with the Bankers Trust Company? A. He is chairman of the board of directors.

Q. Do you recall seeing Mr. Allison, Mr. William O. Allison, in May, 1923? A. I do.

Q. What were the circumstances under which you went to see him at that time? A. Mr. Prosser had been talking with Mr. Allison, I believe in Englewood—

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Mr. McCarter: I object, and we object to any conversations between Mr. Prosser and this gentleman or Mr. Prosser and Mr. Allison.

The Court: Mr. Lewis is saying that Mr. Prosser had been to see Mr. Allison or that Mr. Allison had been to see Mr. Prosser. To that statement, if you object, I sustain the objection.

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Mr. McCarter: Yes; we object to that.

George L. Lewis, for Defendant—Direct.

Q. Did anyone give you a letter to Mr. Allison?

A. Yes; Mr. Prosser gave me a letter of introduction to Mr. Allison.

Q. As a result of what Mr. Prosser told you, you went to see Mr. Allison? A. That is right.

10 Q. Where did you see Mr. Allison? A. At his office.

Q. About what matter?

20 Mr. McCarter: We do not, of course, expect to pursue the policy of objecting to the matters which Your Honor has held tentatively to permit. Of course, our attitude is the same as it was when we were here before; and with the Court's permission, we will enter our objection now to all of this testimony as tending to add to the will by oral testimony, and we will, unless Your Honor prefers otherwise, refrain from making specific objection to other questions, unless such other questions seems to be particularly objectionable.

30 The Court: I would be very glad to have you follow that policy, but the difficulty will be that there may be some questions clearly inadmissible, even under the ruling that I have made. I think perhaps you had better object as you go along.

Mr. McCarter: We object to this question.

The Court: Objection overruled.

A. Shall I explain this?

By the Court:

40 Q. About what matter did you go to see Mr. Allison? A. I went to see him about some prop-

George L. Lewis, for Defendant—Direct.

erty along the Palisades that he had indicated he would like——

Mr. McCarter: I move that that be stricken out.

The Court: It may be stricken out.

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By Mr. Stryker:

Q. I will ask you another question: Did Mr. Allison tell you anything about any request that he had made of Mr. Prosser and someone else?

Mr. McCarter: That we object to.

Mr. Stryker: The purpose of that question is to identify, or to assist in identifying, the two prominent residents of Englewood that are mentioned in the will as having been requested by Mr. Allison to submit a plan to him. It seems to me that under the circumstances a statement by the testator that he had made such a request of Mr. Prosser and someone else would be admissible and material for the purpose of identifying these two men. The will does not identify them except to say that they are two prominent residents of Englewood. We wish to show who those two prominent residents of Englewood were, and to show, in addition to that, what I understand counsel will concede, that neither Mr. Morrow nor Mr. Prosser ever did submit a plan. We would like to show that Mr. Morrow and Mr. Prosser were the two prominent residents of Englewood referred to in the will, and I submit that we are entitled to show that by statements made by the testator to this witness.

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George L. Lewis, for Defendant—Direct.

The Court: I will admit the testimony for that purpose.

A. Mr. Allison told me that he had approached Mr. Prosser and outlined what he desired to
10 go—

Mr. McCarter: I object. That is going beyond what Your Honor has permitted.

Q. Just confine yourself to the question. A. He told me later that he had asked Mr. Morrow and Mr. Prosser to make a suggestion.

Q. I did not get that. A. He later said that he had asked Mr. Prosser and Mr. Morrow to make a recommendation to him.

20 Q. With regard to what? A. With regard to the disposition of certain property along the Palisades adjoining Englewood.

Q. When did he tell you that?

Mr. McCarter: Same objection.

The Court: Same ruling.

A. In one of my talks with him in the summer of 1923.

30 Q. Which Mr. Prosser did this refer to? A. Mr. Seward Prosser.

Q. Which Mr. Morrow? A. Mr. Dwight Morrow.

Q. Did you ever go to Englewood to see Mr. Allison? A. I did.

Q. And where did you see him there? A. Well, I met him at the New Jersey side of that ferry—I think it is 125th street ferry.

40 Q. Then where did he take you after that? A. He took me over some property along the Palisades.

Q. Whereabouts along the Palisades? A. Well,

George L. Lewis, for Defendant—Direct.

it was north from the Fort Lee ferry and east of Englewood.

Q. Do you know whether it was north of Englewood or whether it was in Englewood or north of Englewood? A. Well, I don't know just how to describe it, without some sort of a map to guide me. It was along the Palisades and adjacent to Englewood. We walked quite a distance. 10

Q. Was it on top of the Palisades or underneath the Palisades? A. On top.

Q. Where was it with regard to Mr. Allison's residence? A. Some of it was south of a house that I supposed was his residence. We went over to this house afterwards—two houses, as a matter of fact—and a little of it was north of that property. 20

Q. What kind of property was it—vacant property or improved property? A. Unimproved lots.

Q. How extensive was it? A. Well, there was considerable property there.

Q. Now, did you discuss with Mr. Allison any plans or schemes?

Mr. McCarter: We object to that.

The Court: Objection overruled.

A. Mr. Allison outlined a suggestion that he had made, as I understand, for the endowment of a university there, in 1916, to President Wilson. 30

Mr. McCarter: That answer does not give any conversation between him and Mr. Allison, which Your Honor, as I understand it, admits, but it presupposes that there had been some previous talk which I do not think it is competent or proper that this witness should incorporate in his answer.

The Court: I understand the witness to mean that Mr. Allison had told him that. 40

George L. Lewis, for Defendant—Cross.

By the Court:

Q. Mr. Allison told you of a plan that he had in mind in 1916? A. Yes.

Q. For the endowment of a university on this property? A. Yes.

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By Mr. Stryker:

Q. Did he tell you what had become of that plan?

Mr. McCarter: Objected to.

The Court: Objection overruled.

A. The plan had not materialized.

Q. Was that what he told you? A. That is what he told me.

20 Q. Did he suggest any other things that he had considered?

Mr. McCarter: Same objection.

The Court: Same ruling.

A. He told me that he had considered a park, and asked that Mr. Prosser and Mr. Morrow make a recommendation for something that they believed would be the best thing that could be done with that property for the interest of the community and for the State of New Jersey.

30

Cross-examination by Mr. McCarter:

Q. You took a letter of introduction, didn't you, to Mr. Allison? A. I did.

Q. You went at the suggestion of Mr. Prosser, as a matter of business on the part of the Bankers Trust Company, didn't you? A. Not to my knowledge. It had no—

40 Q. Did you read the letter of introduction? A. I did.

George L. Lewis, for Defendant—Cross.

Mr. McCarter: Mr. Stryker, will you let me have the letter?

(Letter is produced.)

Q. Look at the letter that I show you, dated May 17, 1923, and see if that is the letter that you bore? A. That is right. 10

Mr. McCarter: I ask that it be marked for identification.

(Letter is marked D C-1 for identification.)

Q. I notice that this letter says: "In any event, won't you talk to Mr. Lewis and let him see whether there is anything we can do that will be good business for us and at the same time be useful to you." Did you observe that? A. I did. 20

Q. Didn't you have kind of an eye to the main chance? Were you not there on business? A. No; I was not on business directly.

Q. Well, indirectly. A. There is always the possibility of business.

Q. You were not over there for love? A. Is that a question?

Q. Yes. What is the answer? A. I went over to see Mr. Allison at Mr. Prosser's request. 30

Q. And presented this letter of introduction? A. And presented this letter of introduction.

Q. You say you looked at some vacant property. More than one piece? A. As I recall, there were several pieces.

Q. Close together? A. I believe two of them were.

Q. And what about the others? A. Well, they were all adjacent, but not necessarily connected. 40

Q. All within a very short distance of one another? A. That is right.

George L. Lewis, for Defendant—Cross.

Q. Do you know where they were specifically located? A. Well, they were specifically located along the Palisades, by Englewood.

Q. That is a long distance. Were any in Englewood proper or in some other borough? A. Well,
10 they were to the east of Englewood.

Q. That is what I am trying to find out. Where were they with reference to what you supposed was Mr. Allison's residence? A. Some of the property, I believe, ran into his residence.

Q. Into part of his residential tract? A. That is right.

Q. And the other was contiguous to that? A. South, I believe, of it.

Q. It was that property that he showed you?
20 A. That is right.

Q. Concerning which the remarks you have testified to, were made? A. Remarks?

Q. I say: It was that property concerning which the remarks that you have testified to, were made? A. Yes.

Mr. Stryker: That question is not clear. He testified to a lot of remarks. I think counsel ought to specify what remarks he means. It is not fair to the witness.

30 The Court: I will allow Mr. Lewis to make any explanation he desires.

By the Court:

Q. Do you want to add anything to that? A. The property that he particularly pointed out, I believe, was somewhat south of these two houses that I understood he lived in, as I remember his saying this was one of the largest tracts that was together, of the property that he owned. I believe
40 it was directly opposite Englewood.

Thomas J. Huckin, for Defendants—Direct.

Q. Directly east of Englewood? A. Directly east of Englewood; and that was the property that he spoke of as being the property that he wished to do something with.

THOMAS J. HUCKIN, sworn as a witness on the part of the defendants, testifies as follows:

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Direct examination by Mr. Stryker:

Q. You are an attorney and counsellor at law of the State of New Jersey? A. I am.

Q. And practice your profession in Englewood? A. Yes.

Q. Did you know Mr. William O. Allison? A. I did.

20

Q. Do you recall drafting his will for him in July, 1924? A. I do.

Q. Referring, Mr. Huckin, to the eleventh paragraph of Mr. Allison's will—

The Court: This is the will in question, the one that Judge Huckin drew?

Mr. Strlker: Yes; the will in question.

Q. (Continuing) In which Mr. S. Allison said in part: "I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the city of Englewood, to submit to me a plan for such development and maintenance." Did Mr. Allison tell you at the time you drew that will, who those two prominent residents were?

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Mr. McCarter: We object to that.

Mr. Morrison: We also object to it.

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The Court: Objections overruled.

Thomas J. Huckin, for Defendants—Direct.

A. He did.

Q. Whom did he tell you they were?

Mr. McCarthy: Same objection.

The Court: Same ruling.

10 A. Dwight Morrow and Seward Prosser.

Mr. Morrison: I have no questions.

Mr. McCarter: No questions.

Mr. Stryker: If the Court please, I understand that counsel for the cross complainant, and I assume Mr. Morrison also, stipulate that Dwight Morrow and Seward Prosser, nor either of them, ever submitted a plan to Mr. Allison for the development and maintenance of the Palisades.

20

Mr. Morrison: We concede that.

Mr. McCarter: That is right, as far as we are concerned.

Mr. Stryker: We wish to offer in evidence the letter marked D C-1 for identification, which is addressed by Seward Prosser to Mr. Allison.

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(Letter heretofore marked D C-1 for identification, received in evidence and marked Exhibit D-1.)

Mr. Stryker: We also wish to offer in evidence appraisal of lands and buildings of the Allison Land Company in Bergen County, New Jersey. I might say that I think it is conceded that all of the capital stock of the Allison Land Company was owned by Mr. Allison at the time of his death.

40

Mr. Sumner: That is conceded in the pleadings.

Thomas J. Huckin, for Defendants—Direct.

Mr. Morrison: I think that is true.

Mr. Stryker: This appraisal shows various plots of lands and values placed upon them as of the date of Mr. Allison's death and shows reduced maps of the tract of land.

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Mr. McCarter: We have no objection to the document as indicating pictorially the different pieces of property of which the testator died seized or of the company of which he was the sole stockholder; but, as counsel has already stated, the maps are reductions and we cannot concede that the scale shown on those reductions is correct. We can show, we think, that it is inaccurate. Subject to that one suggestion, we have no objection to the document.

20

Mr. Stryker: I understand that the scale is absolutely accurate. I also understood from Mr. McCarter that he would consent to the admission of this appraisal and maps without the production of the originals. We can readily get the original maps and produce them.

Mr. McCarter: The maps have been reduced by photography and the picture shows the same scale as the original—one inch equals 500 feet.

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The Court: I understand that these copies of the maps are reduced in size through the process of photography and that the original map of which the photograph was taken has delineated on it the scale of one inch to 500 feet.

Mr. McCarter: That is correct.

Mr. Stryker: It is reduced in proportion. We will offer this now and later we can

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Frank Baldwin, for Defendants—Direct.

furnish to counsel and the Court the original map.

The Court: Or you can agree what the scale is on this map.

(Appraisal is marked Exhibit D-2.)

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Mr. Stryker: I offer in evidence carbon copy of the inventory and appraisal of the estate of William O. Allison, deceased, the carbon copy being offered by consent of counsel.

(Marked Exhibit D-3.)

The Court: Who made that?

20

Mr. Stryker: The appraisal was made by Julius D. Moore and David L. Edwards and filed in the Prerogative Court. It is an exact copy of the appraisal, which Mr. McCarter agreed to have admitted, rather than a certified copy.

The Court: It was in connection with the probate of the will?

Mr. Stryker: Yes.

30

FRANK BALDWIN, sworn as a witness on the part of the defendants, testifies as follows:

Direct examination by Mr. Stryker:

Q. Where do you live? A. Manhattan.

Q. What is your occupation? A. Vice President of the Empire Trust Company.

Q. You are one of the executors and trustees under the last will and testament of William O. Allison, deceased? A. I am.

40

Q. Did you know, prior to Mr. Allison's death,

Frank Baldwin, for Defendants—Direct.

that you were to be named as an executor and trustee of his will? A. No, sir.

Q. How long had you known Mr. Allison? A. Eighteen years—fifteen years—something like that.

Q. Had he ever communicated to you any plan which he wished to have carried out in the disposition of his residuary estate? 10

Mr. McCarter: We object to that question for the same reason.

Mr. Stryker: That only calls for yes or no.

The Court: Objection overruled.

A. No.

Mr. McCarter: Your Honor sees that quite shrewdly, and as we think improperly, that question was asked and answered. It was quite natural for the Court to take the view that the next question would be the objectionable question—in other words: “What did he say?” It seems to me that the fact whether he did or did not is an inadmissible fact here, under our conception of this case. You see the will reads: “if, however, said plan does not receive my approval, then I order and direct my said trustees to use this trust fund for the development and maintenance of said Palisades section in accordance with my wishes as expressed to them.” We think that the conclusion results from that phrase that you cannot contradict or in any way vary from that, namely, that there was an intention that the plan should exist with reference to this thing and that it should be expressed either before the will was made 30 40

Frank Baldwin, for Defendants—Cross.

or before his death, and that therefore the answer that the witness has given is violative of that view, and the question to which we objected should have been overruled. We ask, therefore, that the answer be stricken out.

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The Court: Motion denied. I might say to counsel that this view strikes me, that in this eleventh clause of his will the testator devised his estate to his trustees, in trust to maintain and develop, in accordance with wishes expressed to the trustees. If the trustees do not know what the wishes are, if they were not made known to the trustees by Mr. Allison, how can they carry out the terms of his will?

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Mr. McCarter: That is our point, and therefore it is immaterial.

The Court: I think it is quite material in the determination of the question.

Cross-examination by Mr. McCarter:

Q. You knew Mr. Allison quite intimately, didn't you? A. Yes, sir.

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Q. And he had talked with you, had he not, before his death, about the project of building a hotel and cottages on the Palisades? A. He had spoken about that indefinitely. He did not say he was going to do it.

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Harry J. Schnell, for Defendants—Direct.

HARRY J. SCHNELL, one of the defendants, sworn as a witness on the part of the defendants, testified as follows:

Direct examination by Mr. Stryker:

Q. Where do you live? A. South Orange, New Jersey. 10

Q. What is your occupation? A. I am engaged in the publishing business in New York.

Q. In what kind, what sort of publishing? A. I am president and treasurer of the Oil, Paint & Drug Publishing Company, and of the "Oil, Paint & Drug, Inc.", and of the Druggists Circular and of various trade circulars, and the Painters' Magazine.

Q. Was the testator financially interested in those publications? A. Yes. 20

Q. He owned practically all of the stock of those companies? A. He owned all of the stock of the companies first named, of the company last named, and substantially all of the stock of the Oil, Paint and Drug Publishing Company and of the Druggists Circular.

Q. For how long were you connected with Mr. Allison prior to his death? A. About thirty-five years. 30

Q. Were you familiar with his affairs and intimately acquainted with him during that time? A. I was.

Q. Did you know, Mr. Schnell, prior to Mr. Allison's death, that you were named as an executor and trustee in his will? A. I did.

Q. Did Mr. Allison ever tell you anything of having requested two prominent residents of Englewood to submit plans to him for the development and maintenance of the Palisades? 40

Harry J. Schnell, for Defendants—Direct.

Mr. McCarter: Objected to for reasons stated.

The Court: Objection overruled.

A. He did.

Q. Do you recall when that was? A. I do.

10 Q. About when was it? A. In May, 1923.

Q. What did Mr. Allison tell you at that time?

Mr. McCarter: Same objection.

The Court: The answer may be proper or it may contain improper matter. I will take the answer subject to your motion to strike it out.

A. Mr. Allison called me into his private office,
20 which adjoined mine, and introduced me to Mr. Lewis, and Mr. Allison—

By the Court:

Q. Mr. Lewis is the gentleman who has testified here? A. Yes; Mr. Lewis is the gentleman who has testified here.

By Mr. Stryker:

30 Q. You may proceed. A. Mr. Allison told me that Mr. Lewis had come to see him at the request of Mr. Prosser and that he had asked Mr. Prosser and Mr. Morrow to submit a plan to him that would carry out his intention to give the bulk of his estate for the benefit of the public.

40 Mr. McCarter: Your Honor will recall that at the other hearing, when we were here, Mr. Stryker undertook to justify this line of inquiry, which your Honor said you would tentatively admit, on the ground that it was designed to put the Court in the

Harry J. Schnell, for Defendants—Direct.

position of the facts and circumstances which surround the execution of the will, and he would not undertake, of course, as he said, to show the purpose and intention of the testator. Now, we do not know what a witness is going to say, of course, and I think that answer should be stricken out because it undertakes to put before your Honor by parol testimony the purpose and intention of the testator. 10

(Opposing argument by Mr. Stryker.)

The Court: Strike out all after the word "intention."

Mr. Stryker: There is another view that may be taken of this situation, if the Court will permit me to say a word further, and that is this: That the testator referred in the eleventh paragraph to his wishes—"in accordance with my known wishes," in one instance, and in another instance, "in accordance with my wishes as expressed to my trustees." Now, that might mean—we think it does mean—that those wishes that he expressed to his trustees were references to this desire on his part to devote the bulk of his estate for the benefit of the public. Now, he told Mr. Schnell that he had that desire and had asked Mr. Morrow and Mr. Prosser to submit a plan for carrying that out. If he did express that wish to his trustees, to devote the bulk of his estate for the benefit of the public, if he expressed that wish and if he referred to that expression of that wish in his will, and in addition to that, as he certainly did, he put that wish in his will in the first para- 20 30 40

Harry J. Schnell, for Defendants—Direct.

10 graph where he said he wished to devote the bulk of his estate “for the purpose of pleasing Almighty God, benefiting my fellow men, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliff and vicinity.”

20 We think that this testimony is material not only for the purpose of identifying these two men, but also as showing the fact that the testator had expressed to one of his trustees the wish to devote the bulk of his estate for the benefit of the public and as showing that in referring to his wishes in the will, he referred not to a plan but to his general intention to devote his estate for the development of the Palisades and the benefit of the public. I think it is admissible for that purpose.

The Court: I do not feel that I will change my ruling.

30 Q. Did you have any further conversations with Mr. Allison at other times with regard to the request which he told you he had made of Mr. Prosser and Mr. Morrow to submit a plan to him?

Mr. McCarter: Same objection.
(Objection overruled.)

A. Yes; there were several.

Q. When did those conversations occur? A. In continuation of the conversation at the time I have already indicated, May, 1923, Mr. Allison said—

40

Harry J. Schnell, for Defendants—Direct.

By the Court:

Q. The question is: When did those conversations occur? A. In May, 1923, and later.

By Mr. Stryker:

Q. When did the later ones occur, if you recall? A. On several occasions. I recall specifically I think in the early part of October, 1924. 10

Q. When did the last one occur? A. About one month before his death in November.

Q. What did he say on that occasion?

Mr. McCarter: Objected to.

The Court: Objection sustained.

Mr. Stryker: I will reframe the question, with the Court's permission. 20

Q. Did Mr. Allison on this occasion, November, 1924, tell you anything about his desire with regard to the disposition of the bulk of his estate?

Mr. McCarter: Same objection.

The Court: Tell me why testimony of any conversations several months after the execution of the will is admissible? The only testimony, as I understand it, that I can listen to, is testimony of the surroundings and circumstances and conditions that existed at the time the testator made his will. 30

Q. Did you have conversations, Mr. Schnell, with Mr. Allison, prior to July 11th, 1924, in which Mr. Allison told you anything with regard to his wishes concerning the disposition of the bulk of his estate?

Mr. McCarter: I object.

Mr. Stryker: That only calls for "yes" or "no". 40

Harry J. Schnell, for Defendants—Direct.

The Court: Objection overruled.

A. I did.

Q. When did you have the first conversation?

A. May, 1923.

10 By the Court:

Q. That was the first one? A. No; there were others prior to that, but in May, 1923—

Q. When were they? A. Several.

Q. Up to July, 1924? A. Up to July, 1924. Shortly before the making of the will, I should say it was maybe in the early part of July or end of June, 1924.

20 Q. Was that the time he told you he was going to name you as one of his executors? A. Yes, and he did this on a number of occasions previously.

Q. When did he first tell it to you? A. Ten years ago.

By Mr. Stryker:

30 Q. Now, you say you had a conversation in May, 1923, and in the latter part of June or early part of July, 1924. Did you have any other conversations with him with regard to this subject matter prior to July 11, 1924? A. I did.

Q. Can you state the time? A. Mr. Allison came to the office almost every day when he was in town and very frequently talked the matter over with me—

Q. Did you have a few conversations of this kind or many of them? A. There were many of them.

40 Q. Did Mr. Allison on those occasions tell you what his wishes were with regard to the disposition of the bulk of his estate?

Harry J. Schnell, for Defendants—Direct.

Mr. McCarter: I object.

The Court: Objection overruled. The answer is "yes" or "no".

A. Yes.

Q. What did he tell you on those occasions?

10

Mr. McCarter: Objected to.

The Court: Objection overruled.

A. He told me that it was his desire to give the bulk of his estate for the benefit of his fellow-men and for the improvement of that section of the State of New Jersey where he was born and brought up and spent his lifetime.

Mr. McCarter: I move that that be stricken out. It seems to be directly within Your Honor's ruling when Mr. Baldwin was on the stand.

20

The Court: He told Mr. Baldwin nothing.

Mr. McCarter: Perhaps I have misnamed the witness. It was one witness—perhaps it was this one—Your Honor struck out the purpose and said it was not a surrounding circumstance, and it seems to me this is the same thing.

30

The Court: I will let it stand.

Q. Did he tell you this, Mr. Schnell, on more than one occasion? A. Yes.

Q. Can you say on how many occasions he told it to you? A. Oh, a dozen times, or more.

By the Court:

Q. That is, prior to July, 1924? A. Oh, yes.

40

Harry J. Schnell, for Defendants—Direct.

By Mr. Stryker:

Q. Did he ever express to you a plan which he desired you to follow, as his trustee, in the disposition of the bulk of his estate for the benefit of the public and of the section in which he lived?

10

Mr. McCarter: I object. The question is leading. If the evidence is competent, he should not be told what was said.

The Court: Objection overruled.

A. He did not.

Mr. Morrison: No cross-examination.

Mr. McCarter: No questions.

20

(Stenographer being requested, repeats following answer:

“A. He told me that it was his desire to give the bulk of his estate for the benefit of his fellowmen and for the improvement of that section of the State of New Jersey where he was born and brought up and spent his lifetime.”)

30

Mr. McCarter: If Your Honor please, we have had that answer read to us and at the expense of being pertinacious, and perhaps banking a little on the thought that perhaps Your Honor had not fully heard the answer, we again suggest that that answer, that it was his desire to give the bulk of his estate for the benefit of the public and to improve the section of New Jersey where he was born and brought up, is directly within Your Honor's views that evidence to show his intention is not competent. It does seem to us that his desire is only another way of saying his purpose. We ask that that answer be stricken out.

40

Harry J. Schnell, for Defendants—Direct.

The Court: I am going to deny the motion. There is a very thin line of demarcation between what I think is admissible and what I think is inadmissible. Perhaps I ought to say to counsel now that while I am listening to the testimony over objection, or admitting it over objection, I may strike it out later. I am taking it now because I think it is perhaps a better plan to take it so that if an appeal is taken the Court will have the testimony and can consider the testimony on the whole record and not send it back with instructions to take testimony that I may have rejected or refused to admit. 10

Mr. Stryker: We rest. 20

(On request of counsel for the cross complainant, a recess of five minutes is taken at this point.)

Mr. McCarter: In view of the opening of counsel the other day and of the testimony given today, with particular reference to the map of the property of which the testator died seized, we would like to offer some deeds by either Mr. Allison or his company, the Allison Land Company, to different persons, showing his disposition of this land that he owned up there, from May 17, 1904, down to and including September 28, 1923, a short time before his death. Counsel said that no sales were made and that title to this property was kept for this great purpose. 30

Mr. Stryker: We might stipulate as to the sales made in a way which would make a smaller record. 40

Harry J. Schnell, for Defendants—Direct.

Mr. McCarter: I do not propose to read the descriptions. I simply want to offer the conveyance in evidence.

10 I offer in evidence certified copy of deed of William B. Dana, widower, and William O. Allison and Caroline, his wife, to the Palisades Trust & Guarantee Company, dated May 17, 1904; recorded June 29, 1904, in Book 584 of deeds, page 378.

Deed from William O. Allison and Caroline F. his wife to J. Richard Tennant and wife, dated November 1st, 1906; recorded November 2, 1906, in Book 644, page 605.

20 Deed from William O. Allison and Caroline F. Allison to Daniel G. Bogert, dated January 15, 1907; recorded January 16, 1907, in book 651 of deeds, page 531.

Deed of Allison Land Company to William B. Dana, dated October 12, 1901; recorded October 23, 1901, in Book 534 of deeds, page 686.

30 Tax deed from John F. Treacy, collector, to the Township of Ridgefield, dated October 15, 1900; recorded October 17, 1900, in Book 512 of deeds, page 400, purporting to convey certain of Mr. Allison's property.

Allison Land Company to the Commissioners of the Palisades Inter-State Park, dated December 18, 1901; recorded December 19, 1901; in book 537 of deeds, page 453.

Allison Land Company to the Commissioners of the Palisades Inter-State Park, dated December 18, 1901; recorded December 19, 1901, in book 537 of deeds, page 497.

40 Deed of Allison Land Company to the Commissioners of the Palisades Inter-State

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Park, dated November 18, 1901; recorded December 19, 1901, in book 537 of deeds, page 453.

Allison Land Company to the Commissioners of the Palisades Inter-State Park, dated December 18, 1901; recorded December 19, 1901, in book 537 of deeds, page 457. 10

Deed of Allison Land Company to the Commissioners of the Palisades Inter-State Park, dated December 18, 1901; recorded December 19, 1901, in book 537 of deeds, page 464.

Allison Land Company to Palisades Improvement Company, dated December 18, 1901; recorded December 19, 1901, in book 537, page 467. 20

Allison Land Company and John L. Riker and Mary J. Riker, his wife to Herman J. Kotten, dated March 13, 1905; recorded March 27, 1905, in book 598 of deeds, page 534.

Allison Land Company to John Talamini, dated July 7, 1907; recorded July 8, 1907, in book 605 of deeds, page 413.

Allison Land Company to Frank J. Sneden, dated August 10, 1906; recorded August 18, 1906, in book 644 of deeds, page 323. 30

Allison Land Company to Harry Cook, dated April 1st, 1907; recorded April 16, 1907, in book 660 of deeds, page 257.

Allison Land Company to the Commissioners of the Palisades Inter-State Park, dated April 29, 1907, recorded May 1, 1907, in book 660 of deeds, page 544.

Allison Land Company to Alfred Bohn, dated June 18, 1907, recorded July 23, 1907, in book 670 of deeds, page 123. 40

Harry J. Schnell, for Defendants—Direct.

Allison Land Company to Michael Frino, dated July 22, 1907, recorded August 24, 1907, in book 669 of deeds, page 661.

10 Allison Land Company to George Lange, and Sofia Dorothea, his wife, dated March 10, 1908; recorded June 8, 1908, in book 695 of deeds, page 534.

Allison Land Company to Harry Cook, dated October 8, 1908, recorded October 20, 1908, in book 705 of deeds, page 287.

Allison Land Company to John Foght Brown, dated October 15, 1913, recorded October 28, 1913, in book 865 of deeds, page 445.

20 Allison Land Company to Karl B. C. Smith, dated January 11, 1916, recorded August 9, 1916, in book 940, page 379.

Allison Land Company to Dwight W. Morrow, dated October 2, 1916, recorded October 23, 1916, in book 943 of deeds, page 485.

Allison Land Company to Richard Varley, dated January 8, 1917, recorded July 2, 1917, in book 964 of deeds, page 480.

30 Allison Land Company to Dwight W. Morrow, dated February 1, 1917, recorded February 7, 1917, in book 955 of deeds, page 175.

Allison Land Company to William W. Calcagni, dated blank, 1921, recorded June 19, 1922, in book 1163 of deeds, page 616.

Allison Land Company to the County of Bergen, dated August 11, 1921, recorded December 8, 1921, in book 1137 of deeds, page 498.

40 Allison Land Company to Richard Fenby Bausman and Jane Bausman, his wife,

Harry J. Schnell, for Defendants—Direct.

dated August 1, 1922, recorded August 10, 1922, in book 1167 of deeds, page 561.

Allison Land Company to Rio Vista Land Corporation, dated November 29, 1922, recorded December 21, 1922, in book 1188 of deeds, page 390.

10

Allison Land Company to the Borough of Fort Lee, dated April 10, 1923, recorded May 2, 1923, in book 1203, page 653.

Allison Land Company to Merritt Park Estates, Inc., dated September 25, 1923, recorded September 26, 1923, in book 1239 of deeds, page 3.

Allison Land Company to Graham Sumner, dated September 28, 1923, recorded October 1, 1923, in book 1227 of deeds, page 557.

20

The Court: You say these deeds convey land in the immediate neighborhood of the real estate of which Mr. Allison died seized?

Mr. McCarter: Yes, sir.

Mr. Seufert: That is not a fact. Some of this land is over at Camp Merritt.

Mr. McCarter: We will identify it by a map and by a witness we propose to introduce. Mr. Allison certainly had disposed of a considerable portion of the land which he owned on the Palisades.

30

We have here a list of these deeds that have just been offered in evidence and some of them have the consideration that was received for the transfer in the deed itself and some have not, but we went through them and put down on this list the compensation that the books of the executors show was received. Suppose we offer this list now, subject to your examination and correction?

40

Edward L. Smullen, for Complainant—Direct.

10 Mr. Stryker: That is satisfactory to me as far as the list is concerned, but we do not concede its relevancy or materiality, but we do not object to it. We do not concede that the land described in the deeds was in the vicinity in question. I would like to keep them out of the record as exhibits.

(By stipulation deeds offered are not marked as separate exhibits.)

EDWARD L. SMULLEN, sworn as a witness on the part of the cross complainants, testifies as follows:

20

Direct examination by Mr. McCarter:

Q. What is your occupation? A. Municipal Engineer and Land Surveyor.

Q. Where? A. Englewood, New Jersey.

30 Q. At the request of Mr. Sumner, of counsel in this case, did you take this geological map of the locality and indicate in colors thereon, to the best of your ability, the location of the tracts of land that are marked in red in this so-called appraisal of the lands and buildings of the Allison Land Company in Bergen County, marked Exhibit D-2 in this case? A. Yes.

Q. How did you indicate on this official map that is on the table the property shown in Exhibit D-2, that is to say, the property described in the so-called appraisal? A. On that appraisal list, each and every one is marked in red. I placed them on here as they were on that blue paper.

Q. In red? A. In red.

40

Q. And have you, as far as you could, attempted

Edward L. Smullen, for Complainant—Direct.

to scale the size? A. I could not; the scale was too small. I just practically sketched them in, showing the location and approximate shape, as they were shown on this. They own some still further up.

Q. What have you shown on the map? A. All his property in Fort Lee, Englewood, Englewood Cliff, the Borough of Cresskill, Alpine, Norwood and Northvale. 10

Q. Is there any property in Exhibit D-2, the appraisal, that could be put on the large Government map before you, that is not put there? A. Yes; there are other parcels; that is, not on this.

Q. In other words, is Montvale shown on the map? A. No, it is not shown on this map.

Q. Now, I will repeat my question: Is there any property in Exhibit D-2, the appraisal, that could be put on the large Government map before you, that is not put there? A. No. 20

Q. Now, did you have before you also the deeds that have been offered in evidence? A. Yes.

Q. And have you endeavored to identify the tracts conveyed by those deeds, on this map? A. I have.

Q. In what color? A. Blue.

Q. All of the property covered by these deeds that could be exhibited on this map are shown on the map in blue? A. Yes. 30

Q. Are there any deeds in that batch of deeds that cover property that could not be put on this particular map? A. No; they are all there.

Q. They are all there? A. Yes, sir.

Q. Can you point out on this map the property where Mr. Allison resided the latter part of his life? A. Just north of Booth avenue.

Q. There is an X mark in front of it? A. Yes. 40

Q. It is just north of Booth avenue and has an

Edward L. Smullen, for Complainant—Cross.

X in front of it? A. Yes, but the house is set back in here.

By the Court:

Q. The house sets back from the road some distance? A. Yes; about 200 feet off the road.

By Mr. McCarter:

Q. You have marked an "X" in front of the property? A. Yes.

Q. And you have shown also about the location of the house on the property in front of which the "X" appears? A. Yes.

20 *Cross-examination by Mr. Seuffert:*

Q. All of this property shown west of the Hudson River on this map is not Palisades, is it? A. No, it is sloped.

Q. Can you indicate on this map approximately where the Palisades are situate, that is, the westerly slope of it, beginning at the westerly end of the plateau? Draw a line right through that?

(Witness does as requested.)

30 Q. All west of that line is on the westerly slope and is not considered Palisades property? A. No; it is not.

By the Court:

Q. This lead pencil line that you have drawn approximately north and south, indicates the top of the Palisades? A. Yes; it does.

40 By Mr. Seuffert:

Q. That is, there is a flat plateau on top of the Palisades? A. Yes.

Edward L. Smullen, for Complainant—Cross.

Q. And from there there is a decline into the northern valley? A. Yes.

Q. The Palisades property is east of that line that you have spoken of and on top of the Palisades? A. Yes.

Q. These properties here (indicating), are just approximately added in? A. That is all. 10

Q. And as to the size of the property here, the blue section; that is only approximate? A. That is all.

By the Court:

Q. What is this piece marked in green? A. That is a tax title.

Q. Covered by one of these deeds? A. One of these deeds. 20

By Mr. Seuffert:

Q. A tax title? A. I don't know if it is a tax title. It is a tax sale.

Q. Against what? A. Against this piece of property.

Q. You don't know whether Mr. Allison ever owned that property? A. No; I have to take it from the deeds offered. 30

Q. These small pieces here (indicating) immediately adjoining the west side of the river, are what? A. Cliff property.

Q. Under the cliff? A. Under the cliff.

Q. And they are not part of— A. (Interrupting) Palisades Inter-State Park.

Q. The edge of the cliff is on the righthand side the way I am looking at it. The west side of the edge of the cliff is indicated by the line along the brown strip on the westerly side of the river? A. Right along here, that line here, diagonal line distinguished from the top of the cliff. 40

Edward L. Smullen, for Complainant—Re-direct.

Re-direct examination by Mr. McCarter:

Q. (Indicating on map) This piece south of Palisade avenue at the edge of the cliff—do you know that piece? A. Yes.

10 Q. Who owns that now? A. I don't know.

Q. Don't know that that was made a part of the property of the Sisters of the Peace, to the south of it? A. I do not.

Mr. McCarter: We offer the map in evidence.

(Map is marked Exhibit D C-3.)

Mr. Seuffert: If course, it is subject to the accuracy of the size of these plots.

20

Direct examination by Mr. McCarter:

Q. How accurately did you attempt to designate the size of the several tracts? A. Why, I tried it by scaling. Some of the property according to scale would make just a small little line. I increased it in proportion to show the location.

Q. You did it as accurately as you could because of the scale of D C-3? A. Right.

30 Q. Here is a deed, one of those that have been offered in evidence, Allison Land Company to Carl B. C. Smith, dated January 11, 1916. Can you identify that property? A. It is up in Tenafly.

Q. Mark that "20". A. (Witness does so.)

Q. Now, can you identify the property, Allison Land Company to Dwight W. Morrow, dated October 2, 1916? A. Yes.

Q. Mark that "21". A. (Witness does so.)

40 Q. Can you identify the property, Allison Land

Edward L. Smullen, for Complainant—Re-direct.

Company to Richard Varley, dated January 8, 1917? A. Yes.

Q. Mark that "22". A. (Witness does so.)

Q. Can you identify the second tract that was conveyed to Mr. Morrow by deed dated February 1st, 1917? A. Yes.

10

Q. Mark that "23". A. (Witness does so.)

Q. Can you identify the property conveyed to William N. Calcagni, dated blank, 1921? A. Yes.

Q. Mark it "24". A. (Witness does so.)

Q. Please identify and mark as No. 25 the property conveyed to the County of Bergen, August 11, 1921. A. (Witness does so.)

Q. Please identify and mark as No. 26 property conveyed to Bausman and wife, dated August 1st, 1922. A. (Witness does so.)

20

Q. Please identify and mark as No. 27 the property conveyed to the Rio Vista Land Corporation, dated November 29, 1922. A. (Witness does so.)

Q. Please identify and mark as No. 28, property conveyed to the Borough of Fort Lee, dated April 11, 1923.

Mr. Seuffert: That is a sewer right of way across one of these pieces of property.

Mr. McCarter: That is all right, but we are identifying it just the same.

30

A. (Witness does as requested.)

Q. Next identify and mark as No. 29 the property conveyed to the Merritt Park Estates, Inc.

A. (Witness does so.)

Q. Identify and mark as No. 30 the property conveyed to Graham Sumner, dated September 28, 1923. A. (Witness does so.)

40

Edward L. Smullen, for Complainant—Re-cross.

Re-cross-examination by Mr. Seuffert:

Q. Do you know what part of this property is improved and what part is unimproved, that is, on the property that you have marked in blue; is any of that property improved property? A.
 10 Only one. That is the one here, the Kotten property.

By Mr. McCarter:

Q. Mark it No. 10. A. (Witness does so.)

By Mr. Seuffert:

Q. Where is No. 11, the Talamini place? A. Here (witness indicates).

20 Q. Is that vacant or improved land, so far as you can tell? A. I don't know.

Q. You don't know anything about the character of the land? A. Not that particular place.

Q. You don't know that that is the hotel building, sold as a hotel? A. No; I don't know it under that name.

Q. Do you know that that is the village of Coitsville? A. Yes.

30 Q. Not Palisades land? A. No; that is a residential section.

Q. This part marked "22", that is merely a right of way over Mr. Allison's land? A. I don't know.

Q. You don't know what it is? A. No.

Q. You have never been on the land? A. I have been on the land, yes.

Q. Don't you know that that is a right of way that Mr. Allison gave to Mr. Varley to get from his place? A. I don't know.

40 Q. Or a drain? A. No; I do not know what the agreement was with Mr. Allison.

Edward L. Smullen, for Complainant—Re-cross.

Q. As a matter of fact, you know nothing about the character of this land except for the fact that you have blued it on this map? A. Yes.

Mr. McCarter: I do not want to have any misunderstanding. We have not thought it worth while to identify by numbers the dates anterior to 1915. We can, if Your Honor desires, or if counsel desires, have the witness identify every piece of land in these deeds. We thought probably we need not go back of 1915. We have not withheld anything. 10

We rest.

Mr. Morrison: We rest.

Mr. Seuffert: We rest. 20

CASE CLOSED.

30

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Stipulation.

2. That the map which was offered in evidence on behalf of the defendants, Caroline A. Allison, John Allison and Catherine MacLean, and received as Exhibit DC-3, need not be printed in the State of the Case but shall be produced at the argument of the appeal, and will be treated as part of the Record.

10

3. That Exhibit D-2, appraisal of real estate, may be summarized as follows:

“That the testator at the time of his death owned substantially all of the stock of the Allison Land Company, a New Jersey corporation, that said last mentioned Company at the time of the testator’s death owned twenty-six separate tracts of land located in Bergen County, New Jersey, substantially as shown in red on the map which was offered and received in evidence as Exhibit DC-3 and that the numbers of acres, assessed value and appraised value of said land in various boroughs and cities in said County were as follows:”

20

<i>District</i>	<i>No. Acres</i>	<i>Assessed Value</i>	<i>Total Appraised Value</i>
Borough of Fort Lee.....	140,967	\$137,100.00	\$190,362.50
Borough of Englewood Cliffs and City of Englewood.....	330.23	241,002.00	562,799.00
Continued	41.415	19,050.00	25,197.00
Borough of Tenafly.....	222.97	70,175.00	75,374.00
Borough of Alpine.....	43.19	7,800.00	11,885.00
Borough of Cresskill.....	43.23	6,400.00	12,135.00
	<hr/>	<hr/>	<hr/>
	822.002	\$481,527.00	\$877,752.50

30

40

Stipulation.

4. That Exhibit D-3, consisting of an inventory and appraisal of the estate of the testator, may be summarized as follows:

10 “That the testator, at the time of his death, owned personal property consisting of cash in bank, bonds and stocks, inclusive of stock in the Allison Land Company, of the total appraised value of \$3,107,426.26; that the stock in the Allison Land Company owned by testator was appraised at \$1,883,745.85.”

5. That, except for the above summaries, neither Exhibit D-2 nor D-3 shall be printed in the State of the Case, but such exhibits shall be produced at the argument of the appeal, and will be treated as part of the Record.

20

6. That the list of deeds made by the testator and the Allison Land Company during the years 1900 to 1923, inclusive, which was offered in evidence on behalf of the defendants, Caroline A. Allison, John Allison and Katherine MacLean, shall be printed in the State of the Case and marked “Exhibit DC-2” and that the certified copies of the deeds described in said list which was offered in evidence on behalf of the same defendants need not be printed in the State of the Case, but may be summarized as follows:

30

“That the testator and the Allison Land Company, during the years 1900 to 1923, inclusive, made sales of twenty-nine separate tracts of land located in Bergen County, N. J., the dates of the deeds, the names of the grantees, the consideration received and the acreage of land covered being as stated on Exhibit DC-2 and the location of twenty-four of said tracts of land being substantially as

40

Stipulation.

shown in blue on the map which was offered and received in evidence as Exhibit DC-3".

Dated, December , 1926.

MORRISON, LLOYD & MORRISON,
Solicitors of Complainant. 10

JOHN J. TREACY,
Solicitor of Defendants, Car-
oline A. Allison, John Alli-
son and Catherine Mac-
Lean.

EDWARD L. KATZENBACH,
Attorney General *pro se.*

SEUFFERT & ELMORE,
Solicitors of Harry J. Schnell 20
and Frank V. Baldwin, Ex-
ecutors and Trustees under
the will of William O. Alli-
son, Deceased.

Exhibit C-1.

I, WILLIAM O. ALLISON, of the Borough of Englewood Cliffs, in the County of Bergen and State of New Jersey do make this my last Will and Testament, hereby revoking all other Wills and Codicils by me at any time heretofore made. 30

I: It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow man, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity. 40

Exhibit C-1.

II: I nominate, constitute and appoint Harry J. Schnell and Frank V. Baldwin, and the survivor of them, to be the executors of this my Last Will and Testament and the Trustees of the Trusts hereinafter created.

10

III: I direct the payment by my executors of my debts and funeral expenses as soon as possible after my death.

20

IV: I give and bequeath to JEAN SCHNELL "my little sweetheart", daughter of Harry J. Schnell, the sum of Twenty thousand Dollars (\$20,000). It is probable that I will give her this amount during my lifetime. If I do so, then this bequest to be void and of no effect.

V: I give and bequeath to LOUISE BOGERT, wife of Daniel G. Bogert, the sum of Five thousand Dollars (\$5,000).

VI: I give and bequeath to MABEL POWERS, in appreciation of the faithful and dependable service rendered by her, the sum of Two thousand, five hundred dollars (\$2,500).

30

VII: I give and bequeath to HARRY J. SCHNELL, JR., son of Harry J. Schnell, the sum of One thousand dollars (\$1,000) as a wedding present.

VIII: I give and bequeath to TONY SCIANDRA, the sum of Two hundred and fifty dollars (\$250).

40

IX: I order and direct my Trustees to set apart and keep properly invested such part of my estate as will produce an income of Twenty-five (\$25.00) per month, and I order and direct that the said sum of Twenty-five dollars (\$25.00)

Exhibit C-1.

per month shall be paid to GEORGE D. CONKLIN during his lifetime. Upon his death this Fund shall form part of my residuary estate.

X: I have made no bequest in this my Will to my wife, children, or grandchildren, for the reason that I have already made adequate provision for them by conveying to the Allison Land Company certain securities particularly described in a Trust Agreement dated July 2nd, 1923. I hereby direct that all the rights reserved to me under said agreement shall be exercised by my Executors and Trustees herein named. 10

XI: All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my Trustees to use this Trust Fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them. 20 30

XII: I hereby authorize and empower my executors and Trustees to sell any and all real prop- 40

Exhibit C-1.

erty standing in my name at the time of my death, and to execute such instruments as may be necessary to effectuate this power.

10 IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, this 11th day of July, A. D., Nineteen Hundred and Twenty-four.

(Signed) WILLIAM O. ALLISON (L. S.)

Witnesses:

Thos. J. Huckin.

Charles E. Van Wagoner.

20 Signed, Sealed, Published and Declared by the said WILLIAM O. ALLISON, the above named Testator, to be his last Will and Testament, in the presence of us, who were both present at the same time, and who subscribed our names as witnesses thereto in the presence of the Testator and at his request.

Thos. J. Huckin of Englewood, N. J.

Charles E. Van Wagoner of Englewood Cliffs, N. J.

(Certificate of certification attached.)

30

Exhibit C-2.

See agreement annexed to answer and counterclaim of Caroline Allison and others, p. 14, *et seq.*

40

Exhibit D-1.

(Copy)

BANKERS TRUST COMPANY
 16 Wall Street,
 New York City.

May 7, 1923.

10

My dear Mr. Allison:

Following our talk at the bank meeting the other night, I have been thinking quite a lot about the suggestions that you threw out, and it occurred to me that possibly you will be good enough to talk about the affairs of your estate to Mr. George L. Lewis who will present this letter.

It seems to me if you could get Mr. Lewis, who is of our Trust Department, to begin thinking about your situation, that we might be able to make some constructive suggestions to you that ultimately you would accept. In any event, won't you talk to Mr. Lewis and let him see whether there is anything we can do that will be good business for us and at the same time be useful to you.

20

Yours very sincerely,

SEWARD PROSSER.

30

William O. Allison, Esq.,
 100 William Street,
 New York, N. Y.

S.P.A.

2.

Exhibits D-2 and D-3, Etc.See stipulation, p. 90, *et seq.*

40

Exhibit DC-2.

DEEDS BY WILLIAM O. ALLISON

SINCE 1900

10	<i>Date</i>	<i>Deed Numbered</i>	<i>Grantee</i>	<i>Consideration</i>	<i>Acreage</i>
	May 17 1904	1	Palisades Trust & Guar- anty Co.....	No record ex- cept nominal 10.00	1.501 acres
	Nov 1 1906	2	J. Richard Tennant and wife	52,000.00	not given
	Jan 15 1907	3	Daniel G. Bogert.....	1,500.00	not given

20

Land Sold for Taxes

Oct 15 1900	4	Township of Ridgefield..	500.32	50	acres
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*Deeds by The Allison Land Co.
Since 1900*

30	Oct 12 1901	5	Wm. B. Dana.....	exchange 1.00	not given
	Dec 18 1901	6	Commissioners of the Pal- isades Interstate Park	1,881.25	4.3 acres
	Dec 18 1901	7	Commissioners of the Pal- isades Interstate Park	10,967.50	15.46 acres
	Dec 18 1901	8	Commissioners of the Pal- isades Interstate Park	1,340.00	2.68 acres
	Dec 18 1901	9	Palisades Improvement Company	2,006.70	not given
	Mar 13 1905	10	Herman G. Kotten.....	25,000.00	not given

40

Exhibit DC-2.

<i>Date</i>	<i>Deed Numbered</i>	<i>Grantee</i>	<i>Consideration</i>	<i>Acreage</i>		
Jul 7 1905	11	John Talamini.....	12,000.00	5.940 acres		
Aug 10 1906	12	Frank P. Sneden.....	100.00	not given		
Apr 1 1907	13	Harry Cook.....	100.00	not given	10	
Apr 29 1907	14	Commissioners of the Palisades Interstate Park	2,500.00	not given		
Jun 18 1907	15	Alfred Bohn.....	100.00	not given		
Jul 22 1907	16	Michael Frino.....	200.00	not given		
Mar 10 1908	17	George Lange and wife..	no record except nominal 1.00	17.55 acres		
Oct 8 1908	18	Harry Cook.....	200.00	not given	20	
Oct 15 1908	19	J. Foght Brown.....	no record except nominal 1.00	30 acres		
Jan 11 1916	20	Karl B. C. Smith.....	5,000.00	not given		
Oct 2 1916	21	Dwight W. Morrow.....	47,416.00	47.416 acres		
Jan 8 1917	22	Richard Varley.....	552.50	1.37 acres		
Feb 1 1917	23	Dwight W. Morrow.....	30,836.00	27.418 acres	30	
	1921	24	Wm. M. Calcagni.....	400.00	not given	
Aug 11 1921	25	The County of Bergen..	No consideration except nominal 1.00 said to be gift	.812 acres		

Exhibit DC-2.

<i>Date</i>	<i>Deed Numbered</i>	<i>Grantee</i>	<i>Consideration</i>	<i>Acreage</i>
Aug 1 1922	26	Richard F. Bausman and wife	14,224.75	2.849 acres
10 Nov 29 1922	27	Riovista Land Corpora- tion	12,245.16	not given
Apr 10 1923	28	Borough of Fort Lee.....		.086 acres
Sep 25 1923	29	Merritt Park Estates Inc.	38,170.50	52 acres
Sep 28 1923	30	Graham Sumner.....	9,916.34	3.3 acres

20 Pursuant to paragraph 6 of the stipulation, as appears on page 92, copies of these deeds were not printed as a part of the record.

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Conclusions.

(Filed July 9, 1926.)

Mr. WILLIAM J. MORRISON; Mr. HENRY M. BRIGHAM, of the New York Bar, for Complainant.

Mr. WILLIAM M. SEUFERT and Mr. JOSIAH STRYKER; Mr. VICTOR A. WHITLOCK, of the New York Bar, for HARRY J. SCHNELL *et al.*, Executors and Trustees. 10

HON. EDWARD L. KATZENBACH, Attorney General, Defendant, *pro se.*

Mr. JOHN J. TREACY and Mr. ROBERT H. McCARTER; Mr. GRAHAM SUMNER and Mr. EDWARD L. ROBERTSON, of the New York Bar, for Defendants CAROLINE A. ALLISON, *et al.* 20

FIELDER, V. C.:

William O. Allison died December 18, 1924, leaving a will dated July 11, 1924, admitted to probate in the Prerogative Court. The will is as follows, its pertinent paragraphs being quoted in full:

“I. It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow man and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity. 30

“II. I nominate, constitute and appoint Harry J. Schnell and Frank V. Baldwin and the survivor of them, to be the executors of this my last will and testament and the trustees of the trusts hereinafter created.” 40

Conclusion.

10 Paragraphs 3 to 9, inclusive, provide for the payment of debts, for bequests to five persons amounting to a total of \$28,750 and for an annuity of \$25 per month, all to friends and employees. Paragraph 9 states that no provision is made for his wife, children or grandchildren because he has made other adequate provision for them.

20 "XI. All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate, not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my trustees to use this trust fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said trustees, to use this trust fund for the development and maintenance of said Palisades section in accordance with my wishes as expressed to them."

30

The twelfth and final paragraph gives the executors and trustees power to sell real property.

40 The disposition of the testator's residuary estate is attacked by his widow and children (whom I shall hereafter designate as complainants) as invalid on the ground that the purpose or terms of the trust is not disclosed by the will and that said trust is not charitable and is in violation of the rule against perpetuities.

Conclusion.

Evidence was given on behalf of the trustees to show that the expressions used in the will were not intended to confine or limit the trustees to any plan or method for the maintenance and development of the Palisades which the testator might have expressed to them and to show that the testator's intention was to require his trustees to develop the Palisades for the benefit of the public, in furtherance of wishes which he had expressed generally and which he also expressed in the first paragraph of his will. Such evidence was received over objection from the complainants and subject to their motion to strike out. I am now convinced it was inadmissible and cannot be considered.

10

The gift in question to be valid as not opposed to the rule against perpetuities, must be shown to be for a charitable purpose only, which purpose must be found within the will itself from the language therein employed by the testator. Extrinsic evidence of the circumstances, situation and surroundings of the testator may be considered for the purpose of placing the court in the situation of the testator and thus enable the court to understand the meaning of doubtful or ambiguous expressions used by him, but no proof can be considered to supply an omitted description or designation of the person to whom or object to which the testamentary gift is to apply. The determination of whether the gift is for a charitable purpose or object depends upon the intention of the testator if it can be found in the will and if it cannot be found there, the deficiency cannot be supplied by the testimony of persons who attempt to give their recollection, understanding or interpretation of what the testator said to them (*Griscom v. Evens*, 40 N. J. Law, 402; af-

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40

Conclusion.

firmed 42 N. J. Law, 579; *Farnum v. Pennsylvania Co.*, 87 N. J. Equity, 108; affirmed 87 N. J. Equity, 652).

10 Admissible evidence was given which shows that the testator's estate, above the amount required to pay the legacies, exceeds three million dollars and includes all the stock of a land company which holds title to some twenty-six separate and un-

20 connected tracts of land along and below the Palisades in an area extending along the west side of the Hudson River approximately six miles. If the testator had some idea for preserving and developing the Palisades for the benefit of the public, or believed that he could in some way benefit the public through the use of his residu-

30 ary estate in connection with such preservation and development, he certainly was not clear in his own mind how he could put his idea into practical effect. In the eleventh paragraph of his will he said, first, that his gift was to his trustees to develop the Palisades in accordance with his known wishes and then he went on to say that his wishes (or ideas) had not yet matured into definite plans and that he was seeking the advice of others and if their advice appealed favorably to him, he would

40 make known to his trustees the plans he would formulate upon such advice and that the trustees should carry out such plans. If, however, no suggested plan met with his approval, then his trustees should use the trust fund for the development and maintenance of the Palisades in accordance with his wishes as expressed to "them". As he had not settled on a plan at the time he executed his will and was then casting about for one, his statement as to his wishes must have had reference to wishes he intended to express

Conclusion.

to his trustees at a time subsequent to the execution of his will. But if not and if his trustees were aware of his wishes at or prior to the execution of his will, it was his plan, nebulous though it might be and not any plan of his trustees, which he desired carried out. The trustees were not to originate plans; their function was limited to the execution of plans communicated to them before or after the execution of the will, or if he had communicated no plan to them, then in accordance with what they might know of his wishes. His plan, whether communicated to his trustees or not, was to form part of the purpose or object he had in mind. A plan was intended to be an essential part of the purpose of his gift. 10

In the first part of the eleventh paragraph, the testator stated that his trustees are to maintain and develop the Palisades "in accordance with my known wishes", which may mean in accordance with his wishes as expressed to persons other than his trustees. He had given some indication of his wishes to two prominent residents of Englewood and when, at the end of the paragraph, he said if these men failed to submit a plan which received his approval, his trustees should develop and maintain the Palisades "in accordance with my wishes as expressed to them," the word "them" may refer to the two Englewood men or to his trustees. In any event, he intended that the trust fund should be used for the development and maintenance of the Palisades according to a special plan or in a specific manner which he had expressed, or proposed to express, to some person or persons and not generally, along any lines which his trustees might deem proper, but since he failed to even indicate in his will what his plans or wishes were, it is impossible for this 20 30 40

Conclusion.

10 court to say whether his purpose was charitable, or partly charitable and partly not and recourse cannot be had to statements which the testator may have made to others to supply or define his intention, because such statements are not part of his will and cannot be made so, in the face of the statute which provides the formalities which must be observed in the execution of a valid will.

But, say the trustees, the first and eleventh paragraphs of the will must be read together and being so read, a gift to charity is disclosed. The definition of a charity, as approved by our Court of Errors and Appeals, in *Mackenzie v. Trustees, &c.*, 67 N. J. Equity, 652, is as follows:

20 "A charity, in its legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show
30 that it is charitable in its nature."

Nothing in the language of paragraph 11 by which the gift is made, describes a gift charitable in its nature. Paragraph 1 is in the nature of a preamble in which the testator endeavored to set forth the desire and intention which moved him in disposing of his estate in the manner afterward specified. He stated his motives as three-fold: first, to please Almighty God; second, to benefit his fellow man and, third, to assist in developing a
40 portion of the Palisades. The first two of these

Conclusion.

motives may have reference to his bequests to six
 friends and employees and may have no reference
 whatever to the Palisades, but all three, or per-
 haps only the first and third, or the third alone,
 may have been the moving cause for giving his
 residuary estate to trustees. The desire to please
 God and the desire to develop the Palisades, 10
 taken separately or together do not disclose an in-
 tention to make a gift for charitable purposes.
 For instance, the testator may have believed that
 his God created the Palisades and that it would
 please Him if he could, in some measure, protect
 their pristine grandeur from the hand of the van-
 dal by developing and restricting their use to resi-
 dential purposes only. If his desire to benefit his
 fellow man and his desire to develop and main- 20
 tain the Palisades should be read together, do they
 disclose a gift necessarily charitable? It will be
 remembered that the eleventh paragraph is silent
 as to the purpose or for whose benefit he desired
 the Palisades developed and maintained and the
 first paragraph does not say that it was his desire
 to benefit his fellow man *by* the development and
 maintenance of the Palisades, but, if such was his
 desire, it may have been his opinion that his fel-
 low man would be benefited by a plan or purpose 30
 which our courts would not consider charitable.
Goodell v. Union Association, 29 N. J. Equity, 32;
Livesey v. Jones, 55 N. J. Equity, 204; affirmed 56
 N. J. Equity, 453; *Hyde's Executors v. Hyde*, 64
 N. J. Equity, 6; *Hegeman's Executors v. Roome*,
 70 N. J. Equity, 562 and *Thomas v. Scheible*, 91
 N. J. Equity, 451, are instances where testators
 have attempted to benefit their fellow men by gifts
 which the courts have declared invalid because
 made in perpetuity for purposes not strictly char- 40
 itable.

Conclusion.

10 It is settled in this state that if the trust sought to be established can be used for purposes not strictly charitable, or partly for purposes charitable and partly for purposes not strictly charitable, the trust is invalid (*Norris v. Thomson*, 19 N. J. Equity, 307; affirmed 20 N. J. Equity, 489; *Van Syckle v. Johnson*, 80 N. J. Equity, 117 and cases last cited). The difficulty here is, first, that the will is indefinite and does not provide generally for the development and maintenance of the Palisades for the benefit of the testator's fellow man and leave it to the trustees to devise the details for carrying out a general plan of public benefit and, second, that it does provide for such development and maintenance within certain limitations, namely, according to a plan which the

20 testator had in mind, concerning which he failed to disclose anything from which it can be determined that such plan was, or is, wholly charitable in its nature and therefore the gift must fail (*Norcross v. Murphy*, 44 N. J. Equity, 522; *Smith v. Smith*, 54 N. J. Equity, 1; affirmed 55 N. J. Equity, 821).

30 The result of my conclusions is that the testator's widow and children are entitled to his residuary estate. The proofs show that they have entered into a written agreement to divide said estate in equal shares among themselves and the trustees will therefore be decreed to distribute said residue among them in accordance with their agreement.

Final Decree.

(Filed July 15, 1926.)

This cause coming on to be heard in the presence of William J. Morrison, Solicitor of the complainant, Frances Allison Noice; John J. Treacy, Solicitor of the defendants Caroline A. Allison, John Allison and Katherine MacLean; William M. Seufert, Solicitor for the defendants Harry J. Schnell and Frank V. Baldwin, executors and trustees under the Will of William O. Allison, deceased, and Edward L. Katzenbach, Attorney General of the State of New Jersey; and the court having examined the pleadings and having taken proofs orally in open court, and considered the arguments of counsel thereon; and it appearing therefrom that the bill of complaint of the complainant, Frances Allison Noice, and the counterclaim of the defendants, Caroline A. Allison, John Allison and Katherine MacLean, were filed for the purpose of having the eleventh paragraph of the Will of William O. Allison, deceased, declared invalid, and it appearing from said counterclaim of said defendants, Caroline A. Allison, John Allison and Katherine MacLean, and the proofs herein that the complainant, Frances Allison Noice, and said defendants, Caroline A. Allison, John Allison and Katherine MacLean have agreed among themselves that such part of the estate of said William O. Allison as they may be entitled to shall be divided equally among said four persons; and it appearing that said clause numbered "XI" of the Will of said William O. Allison, deceased, which purports to give, devise and bequeath all the rest, residue and remainder of the estate of said William O. Allison to the said defendants Harry J. Schnell and Frank V.

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Final Decree.

Baldwin, as trustees in trust to maintain and develop the Palisades along the Hudson is invalid.

It is thereupon on this 15th day of July, 1926,
ORDERED, ADJUDGED and DECREED,

10 (a) the clause of the Last Will and Testament of William O. Allison numbered "XI" which purports to dispose of all the rest, residue and remainder of his estate is null and void, and that said Harry J. Schnell and Frank V. Baldwin, as executors and trustees under said Will, have no power or authority to carry out any of the provisions of said clause or to use or dispose of any part of said estate for the purpose of maintaining or developing the Palisades along the Hudson;

20 (b) that Caroline A. Allison, John Allison, Katherine MacLean and Frances Allison Noice are entitled to and are the beneficial owners of the rest, residue and remainder of said estate in equal shares, each having an undivided one-fourth interest therein;

30 (c) that said Harry J. Schnell and Frank V. Baldwin as such executors and trustees hold the rest, residue, remainder of said estate of William O. Allison, deceased, for the benefit of Caroline A. Allison, John Allison, Katherine MacLean and Frances Allison Noice in equal shares and that they convey, assign, transfer and deliver the same to, and distribute the same among said parties in equal shares, so that each of said parties shall receive an equal one-fourth share thereof,

40 (d) that a counsel fee of \$20,000.00 be allowed to the complainant; that a counsel fee of \$30,000.00 be allowed to the defendants Caroline A. Allison, John Allison and Katherine MacLean, and that a counsel fee of \$20,000.00 be allowed to the defendant executors Harry J. Schnell and Frank V. Baldwin,

Notice of Appeal.

all said counsel fees to be paid by said executors out of the trust funds in their hands.

E. R. WALKER,
Chancellor.

Respectfully advised,
JAMES F. FIELDER,
V. C.

10

Notice of Appeal.

(Filed September 27, 1926.)

The defendant, Edward L. Katzenbach, Attorney General of the State of New Jersey, hereby appeals to the Court of Errors and Appeals in the Last Resort in All Causes from the final decree made in the above-entitled cause, on July 15, 1926, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Fielder, and from the whole and every part thereof excepting the part thereof in and by which counsel fees are allowed.

20

Dated September 27, 1926.

EDWARD L. KATZENBACH,
Attorney General of the
State of New Jersey.

30

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

EDWARD L. KATZENBACH,
Attorney General.

40

Petition of Appeal.

(Filed September 27, 1926.)

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

10 The petition of Edward L. Katzenbach, Attorney General of the State of New Jersey, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Fielder, bearing date July 15, 1926, in a certain cause in said Court of Chancery wherein
20 the said Frances Allison Noice was complainant and the said Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the Will of William O. Allison, deceased, Caroline A. Allison, John Allison, Katherine MacLean and your petitioner were defendants, in this respect, to wit:

30 That the said decree is in error in adjudging to be null and void that clause of the last will and testament of William O. Allison numbered "XI" in and by which said testator disposed of all the rest, residue and remainder of his estate and in and by which said testator created a trust to maintain and develop the Palisades along the Hudson in the Borough of Englewood Cliffs and vicinity.

40 That the said decree is in error in adjudging that the complainant, Frances Allison Noice, and the defendants, Caroline A. Allison, John Allison and Katherine MacLean, are entitled and are the beneficial owners of the rest, residue and remainder of the estate of the said William O. Allison, referred to in that clause of his last will and testament numbered "XI";

Petition of Appeal.

That the said decree is in error in adjudging that said Harry J. Schnell and Frank V. Baldwin, as Executors and Trustees, hold the said rest, residue and remainder of said estate of William O. Allison, Deceased, for the benefit of said Frances Allison Noice, Caroline A. Allison, John Allison and Katherine MacLean; 10

The Court of Chancery erred in not decreeing and adjudging that the disposition of the rest, residue and remainder of the estate of said William O. Allison, referred to in the clause of his last will and testament numbered "XI", was not a lawful and valid disposition of said estate;

The Court of Chancery erred in adjudging that the last will and testament of said William O. Allison was indefinite with respect to the disposition of the property referred to in that clause of his last will and testament numbered "XI"; 20

The Court of Chancery erred in not decreeing and adjudging that in and by his last will and testament said William O. Allison created a valid trust for public charity with respect to the property referred to in the clause of said last will numbered "XI".

The Court of Chancery erred in not decreeing and adjudging that the purpose and intent of the said William O. Allison in and by that clause of his last will and testament numbered "XI" was to establish a public park on top of the palisades in the Borough of Englewood Cliffs and vicinity, adjacent to the land of the Palisades Interstate Park, and to devote the lands owned by the Allison Land Company, and his entire residuary estate, to the maintenance and development of such park for the use of the public generally, to the end that the integrity, grandeur and scenic beauty of the palisades, as well west as east of the cliffs, 30 40

Petition of Appeal.

might be preserved for all time for the pleasure of Almighty God and the use and benefit of his fellow men.

10 Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden excepting the part thereof in and by which counsel fees are allowed, and that petitioner may have such other relief in the premises as to this court shall seem proper.

EDWARD L. KATZENBACH,
Attorney General of the
State of New Jersey.

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Notice of Appeal.

(Filed October 15, 1926.)

The defendants, Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the Will of William O. Allison, Deceased, hereby appeal to the Court of Errors and Appeals in the Last Resort in All Causes from the Final Decree made in the above entitled cause on July 15, 1926, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Fielder, and from the whole and every part thereof excepting the part thereof in and by which counsel fees are allowed. 10

Dated, October 14, 1926.

SEUFERT & ELMORE, 20
Solicitors of Harry J. Schnell and
Frank V. Baldwin, Executors
and Trustees under the Will of
William O. Allison, Deceased.

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

WILLIAM M. SEUFERT,
Of Counsel. 30

Petition of Appeal.

(Filed October 15, 1926.)

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

10 The petition of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, Deceased, the appellants in the above entitled cause, respectfully shows that:

20 1. Petitioners find themselves aggrieved by a Final Decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Fielder, bearing date July 15, 1926, in a certain cause in said Court of Chancery wherein Francis Allison Noice was complainant and Caroline A. Allison, John Allison, Katherine MacLean and your petitioners were defendants, in this respect, to wit:

30 That the said decree is in error in adjudging and decreeing that the clause of the last will and testament of William O. Allison, Deceased, numbered "XI" which purports to dispose of all the rest, residue and remainder of his estate is null and void.

40 That the said decree is in error in adjudging that your petitioners as Executors and Trustees under the said will of said William O. Allison, Deceased, have no power or authority to carry out any of the provisions of the clause of said last will and testament of said William O. Allison, Deceased, numbered "XI", or to use or dispose of any part of said estate for the purpose of maintaining or developing the Palisades along the Hudson.

Petition of Appeal.

That the said decree is in error in adjudging that the complainant, Francis Allison Noice and the defendants, Caroline A. Allison, John Allison and Katherine MacLean are entitled to and are the beneficial owners of the rest, residue and remainder of the Estate of the said William O. Allison, Deceased, which was referred to in the clause of said last will and testament numbered "XI." 10

That said decree is in error in adjudging that your petitioners as Executors and Trustees hold the said rest, residue and remainder of the said Estate of said William O. Allison, Deceased, for the benefit of the said Francis Allison Noice, Caroline A. Allison, John Allison and Katherine MacLean. 20

That the Court of Chancery erred in adjudging that the said last will and testament of said William O. Allison, Deceased, was indefinite with respect to the disposition of the property referred to in that clause of his said last will and testament numbered "XI".

That the Court of Chancery erred in not decreeing and adjudging that the disposition of the rest, residue and remainder of the said Estate of said William O. Allison, Deceased, referred to in the clause of his said last will and testament numbered "XI", was a lawful and valid disposition of said estate. 30

That the Court of Chancery erred in not decreeing and adjudging that the said William O. Allison, Deceased, in and by his said last will and testament, created a valid trust for public charity with respect to the property referred to in the clause of said last will and testament numbered "XI". 40

Petition of Appeal.

10 That the Court of Chancery erred in not decreeing and adjudging that the purpose and intent of the said William O. Allison, Deceased, in and by the clause of his said last will and testament numbered "XI", was to devote the said rest and residue of his estate for the maintenance and development of the Palisades in the Borough of Englewood Cliffs and vicinity as a public charity and to vest in your petitioners as his trustees, discretion as to the manner in which said rest and residue should be devoted to the maintenance and development of the Palisades in said vicinity as a public charity.

20 Your petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, excepting the part thereof in and by which counsel fees are allowed and that your petitioners may have such other relief in the premises as to this court may seem proper.

SEUFERT & ELMORE.

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**Answer to Petition of Appeal From
Court of Chancery.**

(Filed September 30, 1926.)

The answer of Caroline A. Allison, John Allison and Katherine MacLean, appellees, to the petition of appeal of the Attorney General of the State of New Jersey. 10

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on July 15th, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced. 20

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

JOHN J. TREACY,
Solicitor for Caroline A. Allison,
John Allison and Katherine
MacLean. 30

ROBERT H. McCARTER,
Of Counsel.

Answer to Petition of Appeal.

(Filed October 4, 1926.)

10 The answer of Frances Allison Noice (now Frances Allison Schouten), the above named appellee, to the petition of appeal of Edward L. Katzenbach, Attorney General of the State of New Jersey, the appellant in the above entitled cause.

20 This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on July 15th, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee 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 taxed in favor of this appellee.

30 MORRISON, LLOYD & MORRISON,
Solicitors for and of Counsel with
Appellee.

Endorsed:

“Filed Oct. 4, 1926,

JOSEPH F. S. FITZPATRICK,
Clerk.”

Answer to Petition of Appeal.

(Filed October 16, 1926.)

The answer of Frances Allison Noice (now Frances Allison Schouten), the above named appellee, to the petition of appeal of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, deceased, appellants in the above entitled cause.

10

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on July 15th, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

20

This appellee is advised and believes that the said decree is agreeable in equity; and she prays that the same may be affirmed with costs to be taxed in favor of this appellee.

MORRISON, LLOYD & MORRISON,
Solicitors for and of Counsel with
Appellee.

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**Answer to Petition of Appeal From Court of
Chancery.**

10 The answer of Caroline A. Allison, John Allison and Katherine MacLean, appellees, to the petition of appeal of Harry J. Schnell and Frank V. Baldwin, Executors and Trustees under the will of William O. Allison, deceased.

20 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on July 15th, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

JOHN J. TREACY,
Solicitor for Caroline A. Allison,
John Allison and Katherine
MacLean.

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ROBERT H. McCARTER,
Of Counsel.

New Jersey Court of Errors and Appeals

BETWEEN

FRANCES ALLISON NOICE,
Complainant-Respondent,

and

HARRY J. SCHNELL and FRANK V.
BALDWIN, Executors and Trus-
tees under the will of William
O. Allison, Deceased,
Defendants-Appellants.

**BRIEF ON BEHALF OF THE ATTORNEY GEN-
ERAL AND OF HARRY J. SCHNELL AND
FRANK V. BALDWIN AS EXECUTORS AND
TRUSTEES OF WILLIAM O. ALLISON, DE-
CEASED, DEFENDANTS-APPELLANTS.**

Statement of Facts.

The question presented by this appeal is whether the trust created by the will of William O. Allison, Deceased, is a valid charitable trust. The Court of Chancery in a Decree advised by Vice Chancellor Fielder declared the trust invalid.

Separate appeals have been taken by the Attorney General, representing the public, and by the Trustees named in the will. The parties have stipulated that these appeals may be argued together on one State of the Case. In order to save the court the labor of examining separate briefs in support of the appeals, the Attorney

General and counsel for the Trustees have joined in one brief.

The Respondents are the heirs at law and next of kin of the testator. They are Caroline A. Allison, widow of the testator, John Allison, Katherine MacLean and Frances Allison Noice (now Schouten) children of the testator.

William O. Allison, the testator, died on December 18, 1924, leaving an estate appraised at the time of his death at \$3,107,426.26, of which \$1,883,745.85 consisted of stock of the Allison Land Company, a corporation owning land principally on top of the Palisades and all of the capital stock of which was owned by the testator (Case, p. 91, l. 15, *et seq.*).

The will in question was executed by the testator on July 11, 1924, (Case, p. 96, l. 10) and following his death was duly probated before the Prerogative Court. A copy of the will appears on pages 93 to 96 of the case. Paragraphs 2 to 8 inclusive contain bequests to friends and employees aggregating \$28,750.00. Paragraph 9 bequeaths an annuity to one George D. Conklin. The 10th paragraph recites that the will contains no bequest to the testator's wife, children or grandchildren for the reason that he had already made adequate provision for them by conveying certain securities in trust to the Allison Land Company and this may be assumed to be true as no attempt was made to dispute it. The trust agreement referred to in paragraph 10 was offered but excluded upon objection by counsel for Caroline A. Allison, John Allison and Katherine McLean (Case p. 45). By the 2nd paragraph of his will the testator appointed Harry J. Schnell and Frank V. Baldwin as Executors and Trustees and by the 12th paragraph he authorized and empowered them to sell any and all

real property standing in his name at the time of his death.

By far the larger part of the estate is disposed of by the residuary clause which is contained in the 11th paragraph. In order to learn the testator's purpose it is necessary to read this paragraph in connection with the 1st paragraph of the will which obviously refers thereto. The 1st paragraph (Case, p. 93) is as follows:

"I: It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefiting my fellow man, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity."

The 11th paragraph is as follows:

"XI: All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my Trustees to use this Trust Fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them."

The testimony of Thomas J. Huckin, the draftsman of the will, who was present at its execution, showed that the testator at the time the will was drawn told Mr. Huckin that the two prominent residents of Englewood who are mentioned but not named in the 11th paragraph of the will as having been requested by the testator to submit to him a plan for the development of the Palisades were Messrs. Seward Prosser and Dwight Morrow (Case, p. 63, l. 30, *et seq.*; p. 64, ll. 1-10). The parties stipulated that neither of these gentlemen ever submitted a plan to the testator for the development and maintenance of the Palisades. (Case, p. 64, ll. 12-25).

It appeared by the testimony of Mr. Lewis, however, that Mr. Prosser in May, 1923, about a year and two months prior to the execution of the will, had sent him to see Mr. Allison giving him a letter of introduction, which appears as Exhibit D-1, Case p. 97; that at this interview the testator told Mr. Lewis that he had asked Mr. Prosser and Mr. Morrow to make a recommendation to him (Case, p. 58, l. 13, *et seq.*).

Mr. Baldwin, one of the Executors and Trustees, testified that the testator never communicated to him any plan which he wished to have carried out for the maintenance and development of the Palisades or the disposition of his residuary estate (Case p. 67, l. 9).

Mr. Schnell, the other Executor and Trustee, testified that he had long been associated with the testator in various publishing businesses conducted by the testator (Case, p. 69); that on the occasion of Mr. Lewis' visit to the testator the testator told him (Mr. Schnell) that he had asked Mr. Prosser and Mr. Morrow to submit a plan to him that would carry out his intention to give

the bulk of his estate for the benefit of the public (Case, p. 70, l. 30).

Mr. Schnell also testified that the testator in conversations with him had frequently told him that it was his desire to give the bulk of his estate for the benefit of his fellow man and for the improvement of that section of the State of New Jersey where he was born and brought up and spent his lifetime (Case pp. 73, 74, and particularly p. 75, l. 12, *et seq.*).

Mr. Schnell further testified that the testator never expressed to him any plan which he desired his trustees to follow in the disposition of the bulk of his estate for the benefit of the public and the improvement of the section in which he lived (Case, p. 76, l. 6, *et seq.*).

The Respondents claim that it does not appear from the 11th paragraph of the will that the testator intended to establish a charitable trust and that it does appear that he required his trustees to follow a plan which would be disclosed to them but which is not stated in the will and that this plan was an essential part of the gift so that the gift was not intended to take effect unless the plan should be followed.

The Attorney General and the Trustees claim that when the language of the first paragraph is read in connection with the 11th paragraph it appears that the primary object of the testator was to establish a trust for the purpose of preserving the integrity, grandeur and scenic beauty of the Palisades on lands adjacent to the Palisades Interstate Park, in Englewood Cliffs and vicinity and that this was to be done for the pleasure of Almighty God and the use and benefit of his fellow man and that this is a public charity.

The Appellants further claim that the provision of the 11th paragraph which requires the trus-

tees to follow the plan to be suggested by Mr. Prosser and Mr. Morrow if submitted to and approved by the testator is inoperative because no such plan was ever formulated; and that the testator provided for this contingency by adding the last sentence of paragraph 11 to cover it. By this last sentence he provided that his purpose to preserve the Palisades for the benefit of the public should not fail if no plan should be submitted but should be carried out by his trustees. His references in the 11th paragraph to his wishes does not refer to any plan for the development of the Palisades but to the desire expressed in the first paragraph of his will to develop the Palisades for the benefit of his fellow man and the pleasure of Almighty God. Under the last sentence, therefore, of paragraph 11 the trustees were free to devise a plan which should be in accordance with paragraph 1 of the will.

The learned Vice Chancellor sustained the Respondents' contentions and determined that the trust was void. His conclusions are printed on pages 101 to 108 of the Case and the appeal is taken from the Final Decree (Case p. 109, *et seq.*), which adjudges that the testator's heirs at law and next of kin are entitled to his residuary estate.

ARGUMENT.

I.

The gift of the residue of testator's estate is for a charitable purpose.

The situation of the testator at the time he made his will appears in part from its provisions and in part from the testimony which has been offered. After making provision for his family (See paragraph 10 of will, Case p. 95) he had a large estate remaining almost all of which he wished to devote to the service of his fellow man for the purpose of pleasing Almighty God. He had spent his entire life in the vicinity of the Palisades and was evidently impressed with their grandeur and beauty. He was familiar with the efforts made by this State and by the State of New York to preserve the scenery of the Palisades as he had sold a large amount of land under the cliffs to the Palisades Park Commission. He was also cognizant of the fact that the efforts of these two States to preserve the scenery of the Palisades had not included the land on top in the vicinity of Englewood Cliffs. He desired to have this place of great natural beauty maintained and preserved for all time to come, for the benefit of the public and conceived that by accomplishing this purpose he would not only be serving his fellow man but pleasing God. He had been unable to decide definitely upon the plan which should be followed in the expenditure of his money for this purpose and had called to his assistance two prominent residents of Englewood. He had, however, definitely decided that his large estate should be ex-

pended for the preservation of the scenery of the Palisades in the Borough of Englewood Cliffs and vicinity for the use of the public and he provided that this should be done whether or not he was able to definitely formulate a plan.

We submit that the gift of the residue of testator's estate for this purpose is a valid charitable gift.

In *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. E. 652, Judge Green, speaking for this court, refers to the fact that although the Statute of Charitable Uses is not in force in this State there is no difference between the common law of England and the law of this State as to what constitutes the legal definition of a charity. The learned Judge said (at p. 664):

“It was said in *Norris v. Thomson's Executors*, 19 N. J. Eq. (4 C. E. Gr.) 307, 312 (1868), that the statute of charitable uses (43 Eliz. c. 4) is not in force in this state, and the remark has been perhaps too freely quoted; nevertheless, its accuracy is, for the present, of but little concern. This court, in the same case on appeal (*Thomson's Executors v. Norris*, 20 N. J. Eq. (5 C. E. Gr.) 489, 522) (1869), speaking by Chief Justice Beasley, said: ‘I do not understand that there is any difference whatever between the common law of England and the law of this state as to what constitutes the legal definition of a charity. And, by this common law, I mean the system, so far as respects this question, which has grown up in a series of decisions founded, in part, upon 43 Elizabeth c. 4—the statute of charitable uses. The doctrine of the English court of chancery, with regard to the mere classification of things which are and those which are not charities, has been very generally recognized in this country.’

Lewin, writing of trusts generally (*Lew. Trusts* (7th Eng. ed.) 20) says:

'*Public trusts and charitable trusts may be considered, generally, as synonymous expressions. * * * a public or charitable trust has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character.*'

Tudor, writing of charitable trusts especially (Tud. Char. Trusts (2d Eng. ed.) 5-15), says of gifts within the statute of Elizabeth, or by analogy within its spirit or intendment, that they are gifts for the benefit of the poor, gifts for the advancement of learning, gifts for the advancement of religion, *gifts for public and general purposes*. Tyssen, writing of Charitable Bequests (Tys. Char. Beq. 5, 6), speaks to the same effect, adding that *many purposes have been held to be charitable which are not mentioned in the statutory list.*"

In *Taylor v. Trustees of Bryn Mawr*, 34 N. J. E. 101, Chancellor Runyon, speaking of charitable trusts, said:

"The law of this State does not differ from the common law of England on the subject, which has grown up in a series of decisions founded in part on that statute." (43 Eliz. ch. 4) citing *Thomson's Executors v. Norris*, 5 C. E. Green 489.

See also:

Hesketh v. Murphy, 36 N. J. Eq. 304, at page 306, where Chief Justice Beasley, speaking for this court, held that the Chancellor of this State had the same power concerning charitable gifts as was originally vested as a purely judicial function in the Chancellor of England and expressed a doubt as to whether the Statute of Charitable Uses enlarged the jurisdiction of the English Chancellor.

In view of these decisions there can, we submit, be no doubt but that the English cases on the question of what constitutes a charity are in point.

One of the early definitions of a charity is the one stated by Lord Camden in *Jones v. Williams*, Ambler 651. The definition is as follows:

“A gift to a general public use which extends to the poor as well as to the rich.”

This definition is quoted in *2 Perry on Trusts*, 5th Ed., Sec. 698, page 327, and has been approved by many decisions in this country among which are the following:

Nightingale v. Goulburn, 5 Hare 484;
Wright v. Lynn, 9 Pa. 433;
Coggeshall v. Pelton, 7 Johns. ch. 292;
Mitford v. Reynolds, 1 Phill. Ch. 185;
Perin v. Carey, 24 How. 465, at p. 506;
Jackson v. Phillips, 14 Allen Mass. 539 at
 p. 556;
Chapman v. Newell, 125 N. W. 324, 326;
Harrington v. Pier, 82 N. W. 345, 357;
*Trustees of Newcastle Common v. Meg-
 ginson*, 77 Atl. 556;
*New England Sanitarium v. Inhabitants
 of Stoneham*, 91 N. E. Reporter 385,
 387.

Another definition of a charitable trust given by Perry, Vol. 2, 5th Ed. p. 314, is as follows (italics ours):

“Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all the gifts for the public convenience, benefit, utility or ornament, in whatever manner the donors desire to have them applied.”

In *Ould v. Washington Hospital*, 95 U. S. 311, the definition of a charitable use given by Mr. Justice Swain is as follows:

“A charitable use where neither law nor public policy forbids may be applied to almost anything that tends to promote the well-doing and well-being of social man.”

In *Harrington v. Pier*, 82 N. W. 345, at p. 357, the court, after reciting several definitions of a charity, states the following:

“Another definition often quoted was given by Mr. Binney in the Girard Will Case, 2 How. 127, 11 L. Ed. 205. It is as follows: ‘Whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish.’”

The same definition was quoted by the Supreme Court of Iowa in *Chapman v. Newell*, 125 N. W. 324, at p. 326. The court said, defining a charitable gift:

“It is ‘Whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense.’ *Vidal v. Girard*, 43 U. S. 127, 11 L. Ed. 205. Something done or given for the benefit of our fellows or of the public. *Knight’s Estate*, 159 Pa. 500, 28 Atl. 303. Any general public use extending to all, rich or poor, is not void although in some forms it creates a perpetuity.”

In *Powerscourt v. Powerscourt*, 1 Moll. 616, the testator bequeathed £2,000 to be laid out until his son became of age for purposes expressed as follows:

“in the service of my Lord and Master and I trust Redeemer.”

This was held to be a good charitable bequest although it was argued that private charity would satisfy the bequest.

In *Townley v. Bedwell*, 6 Ves. 194, the testator bequeathed his botanic garden to S for life or so long as she shall think fit to reside on the said premises, and all the residue of the stock, funds, personal estate and other property unto trustees to maintain and improve the said collection of plants either in his garden or in such new garden as they might think proper so far as the property which he devised to his said trustees would permit, and added *that he trusted that this would be a public benefit*.

The contention made in that case was that the bequest so far as it related to the land was void under the statute of mortmain *because it was for a public charity*. The Lord Chancellor determined that the bequest was for a public charity and was, therefore, within the statute and relied, in so determining, upon the expression of the testator that he trusted that the devise would be a public benefit.

See reference to this case in *Mitford v. Reynolds*, 19 Eng. Ch. Rep. at 191.

In Re Verrall, 1 Chan. Div. 1916, at page 100, the question involved was whether the National Trust for Places of Historic Interest or Natural Beauty which was incorporated under the National Trust Act of 1917 was bound by the Mortmain and Charitable Uses Acts of 1888 and 1891. The trust was incorporated for the purpose “of promoting the permanent preservation for the benefit of the nation” of lands and tenements (including buildings) of beauty or historic interest, and

as regards lands for the preservation of their natural aspect, features and characteristics.

In determining the question the court was required to decide whether the corporation was organized for the purposes of public charity. The court, by Astbury, J., said in part (*italics ours*):

“The National Trust Act, 1907, which incorporated the plaintiff trust, provided that the trust should be established ‘for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.’

The question is whether the objects and purposes of this trust as so established are charitable or not. The National Trust contends that its purposes are not confined to what are known in the laws as charitable purposes, and a number of authorities have been cited with the view of pressing that contention.

Apart altogether from the authorities I should have thought *prima facie* there could be little doubt that the National Trust holds its property upon what is essentially a charitable trust for the benefit of the nation generally. The question is whether the authorities do or do not support that view.

In *Income Tax Commissioners v. Pemsel* (1) Lord Macnaghten, quoting largely from Sir Samuel Romilly’s argument in *Morice v. Bishop of Durham* (2), said: ‘How far then, it may be asked, does the popular meaning of the word “charity” correspond with its legal meaning? “Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.’ In terms

there can be no question that the fourth head obviously and necessarily includes such purposes as those defined by the private Act, but it is suggested that Lord Macnaghten's words must be taken with qualification, and that he did not mean that all purposes falling within the fourth head are charitable.

In *In Re Foveaux* (1) Chitty J. said: 'The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community.' Then again within that test it seems to me that unquestionably this is and must be a charitable purpose.'

The court held that the trust was organized for the purpose of public charity. This case, we submit, is closely in point with the case at bar. The undoubted purpose of the testator by his gift was to preserve and maintain the natural beauty of the Palisades for the benefit of the public. One of the purposes of the National Trust in the case last cited was to preserve and maintain the natural beauty of places to be selected by it, also for the benefit of the public. Both, we submit, come within the definitions of a charity above cited.

Little would be gained by multiplying definitions of a charity. The following cases illustrate the wide range of subjects to which the foregoing definitions have been applied:

In *Mitford v. Reynolds*, 1 Phill. Ch. 185, a bequest for the benefit of the native inhabitants of Dacca, Bengal, India, was held to be a valid charity.

In *Jones v. Williams*, Ambler 651, a trust for supplying water to a town was sustained as a charity.

In *Cressan's Appeal*, 30 Pa. 437, a bequest for planting and renewing shade trees was determined to be a charity.

In *In Re Bartlett*, 40 N. E. 899, 900, the Supreme Court of Massachusetts held that a gift for a public park was a good charity.

In *White v. Newark*, 89 N. J. Eq. 5, the Court of Chancery held that a bequest to the Fresh Air Fund of the City of Newark for the purpose of sending poor persons to the country was a good charity.

In *New Jersey Title Guarantee & Trust Company v. Smith*, 90 N. J. Eq. 386, 390, a bequest to erect a building in F. for the benefit of the inhabitants was held by this court to be a good charity.

In *Rhode Island Hospital Trust Company v. Benedict*, 103 Atl. 146, the Supreme Court of Rhode Island held that a gift to erect a monument in a public park was a good charity. In this case the court, quoting from *In Re McDowell's Will*, 217 N. Y. 454, said:

“ ‘Many definitions of a charitable trust have been formulated, but all the definitions that have been attempted carry the implication of public utility in its purpose. * * * If the purpose to be attained is personal, private, or selfish, it is not a charitable trust. When the purpose accomplished is that of public usefulness, unstained by personal, private, or selfish considerations, its charitable character insures its validity.’ ”

In the case last cited it was pointed out that the enumeration of public charities contained in the statute of 23 Elizabeth, ch. 4, is not exclusive but is regarded merely as an enumeration of principles that as was said by the Lord Chancellor in *Commissioner v. Pemsel*, L. R. App. Case. 531:

“When a purpose by analogy was deemed by the Court of Chancery to be within the spirit and intendment, it was held to be ‘charitable’ within the meaning of the statute.”

The learned Vice Chancellor quoted the definition of a public charity given by this court in *MacKenzie v. Trustees, etc.*, 67 N. J. Eq. 652, and which is as follows:

“ ‘A charity, in its legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature.’ ”

He stated that nothing in the language of paragraph XI by which the gift is made describes a gift charitable in its nature and ignored the effect of paragraph I of the will. Referring to this paragraph, he said:

“Paragraph 1 is in the nature of a preamble in which the testator endeavored to set forth the desire and intention which moved him in disposing of his estate in the manner

afterward specified. He stated his motives as three-fold: first, to please Almighty God; second, to benefit his fellow man and, third, to assist in developing a portion of the Palisades. The first two of these motives may have reference to his bequests to six friends and employees and may have no reference whatever to the Palisades, but all three, or perhaps only the first and third, or the third alone, may have been the moving cause for giving his residuary estate to trustees" (Case, p. 106, l. 33, *et seq.*).

In this view, we submit, the learned Vice Chancellor fell into error. The testator in paragraph 1 expressed it as his desire and intention to dispose by gift of a large part of his remaining estate for the purposes mentioned. His total estate was in excess of \$3,000,000. The legacies which he gave to friends and employees totaled only \$28,750. plus an annuity to Conklin of \$25. a month. Can it be doubted that when he spoke of disposing of a large part of his remaining estate for the purpose of pleasing Almighty God and benefiting his fellow man that he referred to his residuary bequest of approximately \$3,075,000. rather than to the \$28,000. which he left to friends and employees?

In this connection we wish again to refer to *Townley v. Bedwell*, 6 Ves. 194, where the court relied on testator's declaration that he trusted that his gift "would be a public benefit" in holding that a charity was intended.

The learned Vice Chancellor further says (Case, p. 107, l. 9):

"The desire to please God and the desire to develop the Palisades, taken separately or together do not disclose an intention to make a gift for charitable purposes,"

and suggests the possibility that the testator may have intended to restrict the use of the Palisades land for residential purposes.

The difficulty with this suggestion is that it contemplates the development of the Palisades for profit, when it is clear from the will that the testator had no such idea. One must entirely ignore the language of paragraph 1 to reach the conclusion suggested by the Vice-Chancellor. The disposition of the large part of the testator's estate was to be by a gift for the pleasure of God and the benefit of his fellow man. There is nothing in the language of the will or in the circumstances surrounding the testator at the time he made the will which affords the slightest support for the view that he intended other than a free gift of his residuary estate for the great public purpose of maintaining the integrity and preserving the natural beauty of the Palisades. Had the testator had in mind the development of the Palisades for profit, he would not have said that he desired and intended to dispose of his estate by gift for the pleasure of God and the benefit of his fellow man.

In this connection the language of Judge (now Chief Judge) Cardozo in *Butterworth, et al. v. Keeler, et al.*, 219 N. Y. 446, 114 N. E. 803, is applicable:

“If profit was the purpose the will would have told us to whom the profits were to go. The trustees are certainly not to use the surplus revenue for themselves. They are not to apply it to the use of other legatees, for the subject of the gift is half of the residuary estate, and no other legatees are named. The testatrix did not intend to die intestate and establish a trust for the benefit of her next of kin.”

The learned Vice Chancellor further says (Case, p. 107, l. 22):

“It will be remembered that the eleventh paragraph is silent as to the purpose or for whose benefit he desired the Palisades developed and maintained and the first paragraph does not say that it was his desire to benefit his fellow man *by* the development and maintenance of the Palisades.”

To construe the will in this fashion, we submit, would be to frustrate rather than to give effect to the intention of the testator. It is plain that the testator intended that the residue of his estate should be devoted to the maintenance and development of the Palisades. It is also plain that he intended by so doing to please God and to benefit his fellow man. To say that this purpose cannot be accomplished simply because he did not specifically say that he intended to please God and benefit his fellow man *by* developing and maintaining the Palisades is to sacrifice substance to form and to ignore the testator's intention simply because he did not employ the most precise and accurate language. To do so would violate the most fundamental rule governing the interpretation of wills.

In *Kanouse v. Central R. R. Co.*, 97 N. J. L. 185 this court, speaking by Justice Swayze, said:

“The intention of a testator is not to be determined in a mechanical way by hard and fast rules; it must be determined by a consideration of the whole document and the facts of the case.”

In *Coffin v. Watson*, 78 N. J. Eq. 307, affirmed on opinion below, 79 N. J. Eq. 643, Vice Chancellor Emery said, at page 312:

“The question in each will is the intention of the testator as gathered from the whole

document, as applied to the situation of the testator, whose use of the words is in question.”

See also:

Bruce v. Bruce, 90 N. J. Eq. 118.

Rogers v. Rogers, 49 N. J. Eq. 98.

We submit that the cases cited by the learned Vice Chancellor in support of his ruling on this point are readily distinguishable.

In *Goodell v. Union Association, etc. of Burlington County*, 29 N. J. Eq. 32, the direction of the testator to apply the interest of a part of his estate to make Christmas presents to the scholars of a Sunday school could have been satisfied by the arbitrary selection of two scholars for gifts. It plainly was not a gift for the public benefit.

In *Livesey v. Jones*, 55 N. J. Eq. 204, affirmed on the opinion below by a divided court, 56 N. J. Eq. 453, cited by the Vice Chancellor, the gift was made to an individual who is described as “humanity’s friend” to be used for the promotion of the religious, moral and social welfare of the people in any locality whenever and wherever he may think most needful and necessary. The court held that a gift to promote the social welfare was not necessarily a charity. Such a gift differs widely from a gift made for the purpose of preserving the marvelous scenery of the Palisades for the public benefit.

In *Hyde’s Executors v. Hyde*, 64 N. J. Eq. 6, the bequest was to be distributed by the trustees for such “religious, charitable and educational or other purposes” as they may deem advisable. By the very terms of the will in this case the testator authorized the use of the gift for purposes other than charitable ones.

In *Thomas v. Scheible*, 91 N. J. Eq. 451, the language of the gift was to hospital or other equally desirable purposes, leaving it to the trustee to select any purpose which he might consider of equal desirability with a hospital.

The decision in *Norris v. Thomson*, 19 N. J. Eq. 307 (affirmed 20 N. J. Eq. 489), turned upon the fact that the word "benevolent" had been held to include purposes not charitable, and therefore in contemplation of law the testator was held to have intended other than charitable purposes when he used the word in his will.

In *Van Syckle v. Johnson*, 80 N. J. Eq. 117, a part of the gift was required to be expended in keeping in good repair the family plot in a graveyard. This was a private and not a public purpose and since the court could not determine which part of the gift was intended to be devoted to this purpose and which to a charity, the gift necessarily failed.

We submit that none of these cases support the determination of the Court of Chancery that the gift in the case at bar is not a valid charity. It is within everyone of the definitions above recited, including the one quoted by the Vice Chancellor from the decision of this court in *MacKenzie v. Trustees, etc.*, 67 N. J. Eq. 652.

This court may take judicial notice of the fact, to which reference has above been made, that the legislatures of this State and of the State of New York have passed acts and devoted public money for the maintainence and preservation of the scenery of the Palisades, and that a part of these public funds have been expended in the Borough of Englewood Cliffs and vicinity, which is the locality referred to by the testator.

In fact, the preservation in their natural state of places of beauty is a subject which has fre-

quently engaged the attention of the Congress of the United States. Reference may here be made to the various Acts of Congress passed for the preservation of such spots of natural beauty as Yellowstone National Park (5 U. S. Comp. Stat. 1916, p. 6109); Yosemite National Park, *ibid.* p. 6117; Mount Rainier National Park, *ibid.*, p. 6127; Glacier National Park, *ibid.*, p. 6144; Rocky Mountain National Park, *ibid.*, p. 6149. and many others too numerous to mention. An examination of these statutes shows that the Congress, like the legislatures of New Jersey and New York, were actuated in passing the acts by a desire to preserve the beauties of nature for the benefit of the public.

The testator by his gift to the public has therefore performed a function which might well have been performed by the government of this state or nation or by the Borough of Englewood Cliffs at the expense of the public. This brings the gift within the last part of the definition of a charity recited in the Vice Chancellor's opinion.

In *In re Centennial and Memorial Association of Valley Forge* (83 Atl. 683), the Supreme Court of Pennsylvania, speaking of the object of the Centennial and Memorial Association of Valley Forge, which was organized for the purpose of perpetuating and preserving the site on which the Continental Army under General George Washington was encamped in winter quarters at Valley Forge, said (*italics ours*):

“We feel that the Centennial and Memorial Association of Valley Forge was engaged in a public work, and that the moneys given to it *were in relief of a burden that might properly have been assumed by the public.* Its charter purpose comprehended a public charity, and the formal public notice of the application for such charter declared the purpose of the Association to be ‘to purchase,

hold and improve the Washington Headquarters at Valley Forge and the lands adjacent thereto and appropriate them to historical and humane purposes.' ”

In *In re Graves' Estate*, 89 N. E. 672, the Supreme Court of Illinois, speaking of a testamentary gift of money to park commissioners for the erection in a public park of a drinking fountain for horses and the bronze statue of a horse, said (italics ours):

“It would clearly be within the province of the park commissioners to erect drinking fountains or basins for horses within the park. It is also proper that they should supply ornaments and in other ways beautify and adorn the parks under their control. The funds for this purpose can only be derived from taxation or from charitable bequests such as is here provided for; and thus again it will be seen that this bequest is within the meaning of the definition of ‘charity’ above given, *in that it may reduce taxation and thereby lessen the burdens of government.*”

We respectfully submit that the testator’s generous gift to the public which expresses his love for the natural beauty of the place where he spent his entire life is not only a public charity but one which is peculiarly in accord with the policy of this State and the public sentiment of its citizens; that it is a generous response on his part to the same public sentiment which led this State and the State of New York for the last quarter of a century to appropriate large sums of money for the preservation of the Palisades, and that his desire to benefit his fellow man by supplementing the efforts of the State for the preservation of the Palisades should receive the sanction of this court.

We urge this view with confidence not only because of the interest of the public in this munificent gift which if not invalidated will be a public heritage for all time, but because its validity is, we submit, supported by the precedents above recited. If any doubt may be said to arise we wish to refer to the well settled rule which has received the approval of this court, that as to matters of construction courts are bound to lean in favor of charity rather than against it.

In *Hesketh v. Murphy*, 36 N. J. Eq. 304, this court, speaking by Chief Justice Beasley, said:

“And it is to be remembered that it is the acknowledged doctrine that in all matters of construction courts are bound to lean in favor of charity rather than against it. And, indeed, so far has this legal favoritism been carried that it has been for ages the settled rule in the English law, and has been in this country often regarded as the true principle, that when a gift has been placed in the hands of a trustee to promote a charity, and which, from the mutation of circumstances, had become incapable of fulfillment, such gift was to be applied by the courts, exercising a purely judicial authority, to some cognat object, *on the ground that it was the presumed intent of the testator that the fund so set apart as a benefaction should not, in any event, return to his estate.*”

This rule is expressed in 2 *Perry on Trusts* (5th Ed.) Sec. 709, at page 342 as follows (italics ours):

“If the words of a gift are ambiguous or contradictory, they are so construed as to support the charity, if possible. It is an established maxim of interpretation, that the court is bound to carry the gift into effect, if it can see a general charitable intention consistent with the rules of law, even if the par-

particular manner indicated by the donor is illegal or impracticable; or, as Lord Hardwicke said: '*The bequest is not void, and there is no authority to construe it to be void if by law it can possibly be made good;*' or, in other words, '*There is no authority to construe it to be void by law if it can possibly be made good.*' "

See also:

Ibid., Sec. 723, at p. 369;

1 *Story's Eq. Jr.*, Sec. 1165;

Jackson v. Phillips, 14 Allen 539, at p. 550.

Sanderson v. White, 18 Pick. 333.

II

The gift to maintain and develop the Palisades for the benefit of the public is not void for indefiniteness.

The learned Vice Chancellor decided that one of the difficulties with the will is that it is indefinite. While we concede that the will is indefinite concerning the plan which should be followed by the trustees in maintaining and developing the Palisades, we submit that as will be hereinafter more particularly argued, this was a detail which was left to the trustees.

The gift is definite in essential respects. First, there is no question but that it was a free gift and not intended to serve any selfish purpose or to benefit any particular individual or group. Its purpose was the pleasure of Almighty God and the benefit of the public. It was definite in that its expenditure was confined to the maintenance and development of the Palisades in a reasonably definite locality, which was in the neighbor-

hood of the testator's home. The fact that the details were not prescribed is, we submit, immaterial.

In 2 *Perry on Trusts*, 5th Ed., Sec. 687, p. 315, the learned author says:

“But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins.”

It is well settled that if the charitable purpose be indicated and trustees be selected to carry such purpose into effect, this is sufficient although no plan at all be outlined in the will.

In *Attorney General v. Haberdashers Company*, 1 Mylne & Keen, 421, the Lord Chancellor said:

“If the intention be charity the court will execute it however vaguely the donor may have indicated his purpose.”

In *Soresby v. Collins*, 9 Mod. 221, a gift of £50 annually to be distributed by testator's executors among the poor and indigent people of Leke in such manner as they should think fit was held good.

In *Mills v. Farmer*, 1 Merivale's Rep. 55, the testator directed his residuary estate to be devoted to certain charitable purposes mentioned by him “and other charitable purposes as I do intend to name hereafter.” He afterwards made a codicil and named no charitable purposes. It was held that his will made a valid gift in favor of charity and that it would be carried into execution by the court having regard to the objects particularly pointed out by the testator.

In *Pocock v. Attorney General*, 3 Chancery Division 342, the testator provided that the residue of his estate should be given by his executors to the charitable institutions to which he should by any future codicil give the same and in default of any such gift then to be distributed by his executors at their discretion. He made no subsequent codicil. The court, following *Mills v. Farmer, supra*, sustained the gift as a valid charitable trust, saying that

“a gift to such charitable institutions as the testator shall by codicil appoint, is, without more, a clear gift to charity, though no codicil is made.”

In *Commissioners of Charitable Donations & Bequests v. Cotter, Drury & Warren* Irish Chancery Reports, 501, the testatrix by her will bequeathed unto W. Y. and A. O. such sum of stock as she might be in the possession of at her decease to be by them applied to charitable purposes according to her instructions deposited with A. O. It appeared in the cause that the instructions to A. O. were oral and that the application of the fund was left to his own discretion. It was held that it was a good charitable bequest.

In *Moggridge v. Thackwell*, 3 Brown 517, the testatrix gave the residue of her estate to James Vaston, his executors and administrators, desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who have large families and good characters. James Vaston died nine years before the testatrix. The Lord Chancellor held that the gift of the residue was a valid gift to charity and that it should be given effect notwithstanding the death of the trustee in the lifetime of the testatrix. He said in part:

“Then can I say, that this legacy is not sufficiently distinct to bind the property? The most general gift *to charitable purposes* has been decreed to be carried into execution, *and the trustee's not being alive to administer the charity, cannot defeat the intention.* (7) Here she has pointed out clergymen, as the objects (*) of bounty, which is sufficiently distinct; but it must be referred to the Master, to whom a scheme must be proposed for the execution of the charity.”

On rehearing, Lord Eldon reached the same conclusions (7 Vesey 36). After citing a large number of cases, he said in part at page 81:

“Those cases call upon me to say, the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according to these precedents Vaston was only the means and instrument, by which that general intention was to be executed; and therefore this Court will carry that general intention into effect.”

He held that the court would undertake the administration of the trust under its judicial power and that it was not a case for disposition by the King under his sign manual.

In *Gill v. Attorney General* (Supreme Court of Massachusetts), 83 N. E. 676, testator made a gift to his executors in trust to “distribute the same among such charitable institutions or persons * * * in such amounts, upon such terms and for such purposes as they decide to be the most worthy, having regard but in their sole discretion to such as I have been interested in during my life.” The court sustained this as a charitable bequest, saying:

“The result is that the executors are themselves to apply the residue to objects of char-

ity, or they are to transfer it over to institutions or individuals to be held by them in trust to be applied by them to objects of charity.”

In *Chase et al. v. Dickey, et al.*, 99 N. E. 410, the trust established by the will of Mrs. Mary Baker Eddy “for the promotion of Christian Science as taught by me” was held a valid trust, although it was contended that the execution of the trust would involve an inquiry into the oral teachings of the testatrix and that the trust was, therefore, void for uncertainty.

In *Wells, Executor v. Doane & Others*, 3 Gray 201, a devise in remainder to such charities as shall be deemed most useful by the executor or administrator of the person to whom the property was given for life was sustained as valid. The court said:

“We have no doubt that the bequest to charities is valid. In *Chapman v. Brown*, 6 Ves. 410, Sir William Grant said: ‘A bequest to such charitable purposes as the executors shall think proper is a good bequest.’”

The principle which underlies the cases above cited has been adopted and applied by the courts of this State in numerous decisions.

In *Trustees v. Wilkinson*, 36 N. J. Eq. 141, affirmed 38 N. J. Eq. 514, a trust was created, the interest of which was to be strictly applied and distributed to the poor members of the Broadway and Fifth Street M. E. Churches in the City of Camden. Chancellor Runyon held that this was a valid charity.

In *George v. Braddock*, 45 N. J. Eq. 757, this court, reversing the Court of Chancery, held that a trust for “the gratuitous, wise, efficient and economically conducted distribution all over the land” of Henry George’s publication on the land

question and cognate subjects, was a good charity.

In *Jones v. Watford*, 62 N. J. Eq. 339, a bequest "for the purchase of books upon the Philosophy of Spiritualism, not sectarian, or of any creed, Church or Dogma, but of free, liberal bearing, said books to be placed by my executors where they can be free to all who desire to think for themselves and who are seeking for the truth from the true and living God," was upheld by the Court of Chancery as a valid charitable bequest. Vice Chancellor Grey said in part:

"To the objection that no definite plan is formulated for the use of the books in the will, it is well answered that the general object is fully expressed, and there is no indication on the face of the will that the testator had in his mind any particular plan as to the mode in which his bequest should be carried into effect."

In *Hilliard v. Parker*, 76 N. J. Eq. 447, a trust, the income of which was to be expended by the executor to purchase fuel for the most needy women in the Borough of W, to be selected by the executor, excluding women living with their husbands, was sustained by the Court of Chancery as a charitable bequest. Vice Chancellor Leaming said in part:

"I think it must also be said to be settled in this state that a trust of this nature is not void for uncertainty. In *Goodell v. Union Association, supra*, the trust was that the income 'be applied to alleviating the wants and sufferings of the deserving poor of the town of Mount Holly,' and the trust was sustained. In *Hesketh v. Murphy*, 35 N. J. Eq. (8 Stew.) 23, the trust was to employ certain income 'for the relief of the most deserving poor of the City of Paterson aforesaid forever, without regard to color or sex; but no

person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from said fund.' This gift was held to be a valid charity as against the objections that it was too indefinite, and that it failed to provide a power of selection of its objects. This decision was affirmed in 36 N. J. Eq. (9 Stew.) 304. The principles defined by the cases already cited fully support the gift now in question."

In *Vineland Trust Co. v. Westendorf*, 86 N. J. Eq. 343, Vice Chancellor Backes sustained a trust for "the furtherance of the broadest interpretation of metaphysical thought." He said in part:

"The infinitude of the subject, and, consequently, the great latitude given to the trustees in executing the trust, creates no legal infirmity. The field of contemplative research is well defined, and whether the investigation is to be pursued on the lines of materialism, idealism or realism, and whether according to the conception of the ancient philosophers, or of the more recent Kant, Wolf, or of Herbert Spencer, or within the narrower sphere of spiritualism or of Christian Science, was left to the judgment of the trustees."

In *White v. Newark*, 89 N. J. Eq. 5, the testator gave the interest of \$5,000. "to the fresh air fund of Newark to be used every summer for special needy cases that need to be sent right away not to go in the general fund. * * * The money I give to the fresh air fund of Newark, New Jersey, to be put out at interest if not already invested." It was contended that the gift failed because there was in Newark neither an incorporated nor an unincorporated body called "the fresh air fund" and the evidence failed to show the existence of any permanent fund of that description. Vice Chancellor Stevens held that although no trustee

was appointed, the objects of the testator's bounty had been sufficiently defined and that the court would appoint a trustee.

In *N. J. Title Guar. and Trust Co. v. Smith*, 90 N. J. Eq. 386, a bequest was made of \$15,000. upon the trust to erect and maintain a building in Forked River to be used for the benefit of the inhabitants thereof. Vice Chancellor Lewis sustained the gift, although the character of the building was not specified.

In *King v. Rockwell*, 93 N. J. Eq. 46, the testator gave the residue of his estate to his executors in trust to pay the same over to such charitable organizations, associations or institutions as said executors might deem worthy. A bill was filed for the purpose of having the bequest declared invalid and void. Vice Chancellor Lewis decided that it was a valid charitable bequest. He said in part:

“Under the adjudged cases in this state and in England the principle is well recognized that ‘a gift to a charitable use will not fail of effect because the donor has not pointed out the particular beneficiaries to whom he designs his bounty to go, provided he has endowed some person with express or implied power to select such beneficiaries.’ ”

In *Hesketh v. Murphy*, 36 N. J. Eq. 304, this court sustained a gift to trustees to employ the annual income for the relief of the most deserving poor of the City of Paterson without regard to color or sex and no person who was known to be intemperate, lazy, immoral or undeserving was to receive any benefit from the fund. Chief Justice Beasley, after citing a large number of cases, said at page 313:

“The principle adopted by these great judges if applied to the case now before the

court, must obviously lead to an affirmance of the decree appealed from; for if we assume, as was done in the decisions just referred to that the power to employ this charity involves the power of selecting the beneficiaries, the case is divested of every element of uncertainty. In view of the recognition of such an hypothesis, the case will then present these simple characteristics: A bequest in trust to a charitable use, for distribution among a class of undesigned persons, with a power in the trustees to designate such persons. It is presumed that in such a posture of things no one will assert that the bequest is not to be sustained."

One of the cases cited by the learned Chief Justice in the case last cited was *Mahon v. Savage*, 1 Sch. & Lef. 111, in which the testator bequeathed £1,000. "to be distributed amongst his poor relations, or such other objects of charity as should be mentioned in his private instructions to his executors." In this case Lord Redesdale, Chancellor, after remarking that the bequest was a charitable one and that the objects meant was the testator's own relations, said:

" 'Here, the testator's design was to give them as objects of charity and not merely as relations, and I take it, the executors have a discretionary power of distribution, and need not include all the testator's poor relations.' "

The cases above cited illustrate not only the principle to which reference has been made under Point I that gifts for charity are favored by a Court of Equity but also show that if the purpose of the gift is charity its terms may be indefinite and the application of the fund may be left to the discretion of the trustees.

In the will under consideration the testator,

First, clearly expressed his charitable purpose, which was to make a gift for the benefit of the public generally and thus to please Almighty God.

Second, he provided that this purpose should be accomplished by the maintenance and development of the Palisades in a designated locality. As has been above shown, his purpose to preserve the Palisades was similar to that which led the legislatures of this State and of New York to pass the act for the establishment of the Palisades Interstate Park and to annually thereafter make large appropriations for its support.

Third, the testator gave the residue of his estate to his trustees in trust and vested in them discretion to devise the means or method of accomplishing his purpose.

That he could lawfully vest such discretion in his trustees is, we submit, clearly established by the decisions above cited.

III.

The gift to maintain and develop the Palisades for the benefit of the public is not void because of the testator's reference in Paragraph XI to his wishes.

The references in the will to the testator's wishes are as follows:

In paragraph I he says: "It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose," etc. (Case, p. 93, l. 35).

In paragraph XI he says (*italics ours*):

"I give and devise and bequeath unto my said Trustées, in trust nevertheless, to maintain and develop in accordance with my *known*

wishes * * * . If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them." (Case, p. 95, l. 21 *et seq.*).

It conclusively appears from the will itself as well as from the testimony to which reference has above been made that the testator at the time he executed his will had in mind no definite plan for preserving, maintaining and developing the Palisades for the benefit of the public. The learned Vice Chancellor, however, assumed from this fact that the testator in referring to his "wishes as expressed" to his trustees intended to refer to some plan which he might subsequently formulate, and communicate to them. He said:

"As he had not settled on a plan at the time he executed his will and was then casting about for one, his statement as to his wishes must have had reference to wishes he intended to express to his trustees at a time subsequent to the execution of his will. But if not and if his trustees were aware of his wishes, at or prior to the execution of his will, it was his plan, nebulous though it might be and not any plan of his trustees, which he desired carried out. * * * His plan, whether communicated to his trustees or not, was to form part of the purpose or object he had in mind. A plan was intended to be an essential part of the purpose of his gift." (Case, p. 104, l. 37, *et seq.*).

We submit that this construction of the will is not supported by a careful examination thereof. When the testator used the word "wishes" he did not refer to plans or schemes. In the first paragraph of his will he speaks of his desire and intention. This was an expression of his wishes.

Webster defines the word "desire" in part as follows:

- "1. A wish to obtain or enjoy.
2. An expressed wish."

In the portion of paragraph XI which has been above cited the testator says:

"I give and devise and bequeath unto my said trustees, in trust nevertheless, to maintain and develop in accordance with my *known wishes*, the Palisades along the Hudson," etc.

When the testator spoke of his known wishes, could he have intended to refer to an existing plan? Obviously not, for he had no plan. Neither could he have intended to refer to some plan to be formulated in the future, for that obviously could not then have been "*known*." He had, however, a wish or desire to devote his estate to the benefit of the public in the preservation of the Palisades, and this wish or desire he had expressed in the first paragraph of his will. His reference then to "my known wishes" in the 11th paragraph referred not to any plan or scheme for the accomplishment of his purpose, but to the wish expressed in the first paragraph of his will and which, as shown by the testimony, had been frequently expressed to at least one of his trustees. Having seen that the testator, when he referred to his wishes in the portion of his will last above recited referred not to a plan but to his charitable intent to benefit the public, is not the inference irresistible that when he used the same word in the last sentence of the same paragraph he intended the same thing? We have, therefore, this situation: In the first paragraph of his will the testator expresses his wishes. This expression

necessarily refers to the subject matter of the 11th paragraph. In the 11th paragraph he twice refers to his wishes and by this reference, we submit, he intended the desire expressed in the first paragraph of his will.

This view is supported not only by the fact that his reference in the last sentence of paragraph XI is a reference not to wishes to be expressed but to wishes expressed (in the past tense) to his trustees, and by the further fact that when the testator intended to refer to a plan or scheme as in the case of his reference to his request of Mr. Prosser and Mr. Morrow he used the word "plan." His purpose in adding the last sentence to the 11th paragraph of his will was to make certain that the residue of his estate should be disposed of in accordance with the wish which he expressed in the first paragraph even though he should die, as in fact he did, without having formulated or approved a plan.

This case differs widely from the case of *Smith v. Smith*, 54 N. J. Eq. 1, affirmed by a divided court at 55 N. J. Eq. 821. In the case cited the testator devised and bequeathed all of his property to a board of nine trustees to be composed of the persons named in his will, with the provision that in case of the resignation or death of any of such trustees the vacancy should be filled by a vote of the remaining board and preferably with shareholders of the H. B. Smith Machine Company so that "the mutual interests now established may continue." He provided that one Andrew J. Smith should be the president of the board of trustees; that he should receive a salary for services performed and that in case of his resignation or death his successor in office should be elected by the remaining members of the board. He also provided that the president would be expected to give

sufficient time to carry out the objects of the will and that he should receive his authority from a two-thirds majority of the board. The will also contained many other details regarding the performance by the Board of its functions thereunder. It further provided that the property should be held in trust by the board of trustees for the following object, namely:

“I desire that my entire estate with its accumulations shall be used in establishing and conducting a School for Apprentices and Young Mechanics on plans to be hereafter described by me; or in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the Board of Trustees herein named and who shall approve of final practical plans in keeping therewith.”

The testator died without prescribing perfected plans for the school but in conversations at various times with the several executors or trustees he indicated general ideas with reference to the school which were as follows:

“ ‘First. Admit hard-handed country boys, accustomed to labor. Let them work in the shops ten hours a day and attend school evenings for two years. Then give them one year of instruction in practical English branches, such as would be useful to mechanics. Give them an opportunity to devote their entire time to study during a third year. The expense of boarding and clothing the young men to be paid by the estate, the clothing being uniform. The school to be located in the village of Smithville, Burlington county, New Jersey, and to be operated in connection with the works of the H. B. Smith Machine Company.’ ”

The testator's heirs at law and next of kin contended that the trust was void because the plans which the testator directed the trustees to follow were not incorporated in the will. The question which was thus presented for the decision of the court is stated by Chancellor McGill on pages 5 and 6 as follows: (italics ours)

“It is apparent from this statement of the attitude of the parties, that the first question presented is, whether the intention of the testator was to qualify the character of the school by a restrictive scheme so that unless it should be established in compliance with such restriction, it should not exist at all, *or whether it was his broad purpose to create a school for apprentices and young mechanics, even though the plans he wished to prescribe for its control, should not be perfected or exist.*”

The court examined the whole will and having found therein convincing evidence that the testator did not intend that his gift should take effect unless the scheme which was not stated in the will should also be effective, determined that the trust was void. The court said in part: (italics ours)

“It is impossible to read that instrument without being impressed that the testator intended to prescribe the precise character of the school he meant to found. *His disposition to control details is evinced in the particularity of the provisions he makes for a perpetual board of trustees, for the first president of that body and succession to that office, for the compensation of the president and his duties and powers, and for restrictions upon the action of the board of trustees. It is after the exhibition of this disposition that the object of the trust is stated to be the establishment of a school on plans which he should thereafter perfectly describe, or had theretofore imperfectly described. It was to be a school*

on his plans. The trustees, so far as plans for the school were concerned, were limited in the exercise of their discretion to the approval of practical plans which should accord with the imperfect plans or scheme for a school which he had disclosed to them. He did not mean that they should originate plans—the ideas were to be his—they were merely to execute them.

It appears to me to be plain that though his plans or scheme were intended to have reference largely to matters of administrative detail, they were nevertheless meant by him to be an essential limitation of his gift.’

The crux of the decision in the Smith case is the finding that it was the testator’s purpose to qualify the character of the school “*by a restrictive scheme so that unless it should be established in accordance with such restriction it should not exist at all.*” The court did not base its finding that this was the testator’s purpose on the mere fact that he referred in his will to plans. Such finding was based upon unusual provisions in the will which disclosed a desire on the part of the testator to strictly regulate and control details. Had these peculiar provisions not been present in the will it may be assumed that the gift would have been sustained notwithstanding the testator’s reference to his plans.

The Smith case has been cited and distinguished on this ground in *Lawrence v. Prosser*, 89 N. J. Eq. 248, *Johnson v. Bowen*, 85 N. J. Eq. 76, and *Jones v. Watford*, 62 N. J. Eq. 339.

The learned Vice Chancellor relied upon the Smith case and found, as was found in that case, that: “A plan was intended to be an essential part of the purpose of his gift” (Case, p. 105, l. 17). In so finding, we submit, that he misconstrued the will.

First, he ignored the absence from the Allison will of any disposition to control details which was the basis of the construction placed upon the Smith will.

Second, he construed the word "wishes" as it occurs in the 11th paragraph as meaning "plans" when, as has above been shown, it appears from a reading of the whole will and as well from surrounding circumstances that such word referred to the testator's broad, general purpose and not to any restrictive plan or scheme.

Third, he ignored the general rule which will be hereinafter mentioned under Point IV that in a bequest to charity the gift is the dominant thing and the mode or scheme subordinate unless the testator has clearly otherwise provided.

The test which was applied in the Smith case was: Was it

"his (the testator's) broad purpose to create a school for apprentices and young mechanics, even though the plans he wished to prescribe for its control, should not be perfected or exist?"

Applying this test to Mr. Allison's will we submit that the will shows that it was his broad purpose to devote his residuary estate to the maintenance and development of the Palisades in the Borough of Englewood Cliffs and vicinity even though no plan should be provided for such development and maintenance during his lifetime. In fact, that was his purpose in adding the last sentence of paragraph XI. He contemplated that the plan which he had requested Mr. Morrow and Mr. Prosser to submit to him might not be submitted and in that event he provided that the trust should nevertheless be established, restricting his trustees only in the respect mentioned in the first

paragraph of his will to the end that the development and maintenance of the Palisades should be conducted for the pleasure of Almighty God and the benefit of his fellow man or, in other words, as a public charity.

We respectfully submit that in view of the essential difference between the Smith will and the Allison will the decision of the Court of Chancery is not supported by the Smith case. On the contrary, the principles applied in the decision of that case, when applied to the Allison will, sustain the trust.

IV.

A bequest to charity will not fail because of any failure in the plan unless it appears on the face of the will that the plan is an essential part of the gift.

This proposition we believe is supported by *Smith v. Smith, supra*, as has above been argued. It is also supported by numerous other cases. The doctrine of these cases is that in gifts to charity the dominant purpose is the gift and not the method or plan, and that unless the contrary appears on the face of the will it will be assumed that the testator intended the gift to take effect even though the method should fail.

In *Yates v. University College, London*, English Law Reports, 8 Chancery Appeals 454, the testator gave certain personal estate to a college for founding a professorship of archaeology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate

the bequest, together with a copy of the rules and regulations, to the college, and that within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations and in case the college should decline to accept them, the bequest should be void and the property should sink into his residuary estate. The testator died without preparing any rules and regulations for the professorship and it was contended that because of this the gift could not take effect. This contention was sustained by Vice Chancellor Bacon. Lord Selborne, Chancellor, however, reversed the decision of the Vice Chancellor. He said in part at page 460:

“Regulation, in the case of a charity, is one thing—foundation is another. A scheme, rules and regulations presuppose a foundation to be regulated. What the testator does is to create the substance of the foundation; and then he tells us that he contemplates and intends providing a code of regulations afterwards. The fact is that he does something now, and whether he shall do the rest which he contemplates hereafter or not depends upon himself. In the result he has not done it. Therefore I reject the suggestion that the future regulation of this professorship is a thing of the essence of the foundation itself.”

In *Inglis v. Sailor's Snug Harbour*, 3 Peters 99, Justice Thompson, referring to *Thellusson v. Woodford*, 4 Ves. Jr. 325, in which Buller, Justice, adopted the rule laid down by Lord Talbot in *Hopkins v. Hopkins*, said:

“The master of the rolls, in that case says (p. 329), he knows of only one general rule of construction, equally for courts of equity and courts of law, applicable to wills. The

intention of the testator is to be sought for, and the will carried into effect, provided it can be done, consistently with the rules of law. And he adds another rule, which has become an established rule of construction. That if the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect, in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail. 1 Peere Wms. 332; 2 Brown's Ch. 51."

In *Minot v. Baker*, (Supreme Court of Mass.) 17 N. E. 839, the testator gave the residue of his estate to his executor to be disposed of by him for such charitable purposes as he shall think proper. The executor died having disposed of only a small portion of the residuary estate in his hands. The question presented was whether the undisposed of balance could be applied to charity. The court, by Justice Holmes, said:

"The nature of the gift shows that an application of the funds to charity is the dominant object, and the selection by the trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails. There the specific object of bounty or end of the trust well may have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering; and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator, in such a case, says, in effect, 'I give the fund in trust for charitable purposes; and, to save application to the court, I authorize the trustee to determine the scheme.'"

The principle that the gift to charity is the dominant thing and that the means or method is subordinate unless the testator has otherwise provided in his will, is illustrated by the judicial *cy pres* doctrine as applied by the English courts and by the courts of this State.

See

Attorney General v. Downing, Ambler's Reports 550;
Biscoe v. Jackson, 35 Eng. Law Rep. Chancery Division 460;
Martin v. Maugham, 14 Simons 229;
Moggridge v. Thackwell, 7 Vesey 35.

In *Biscoe v. Jackson*, *supra*, the rule was stated by Kay, J., on page 484, as follows:

“Lord Eldon in *Mills v. Farmer* (2) says, ‘I consider it now established, that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee.’ ”

In affirming the judgment on appeal Lindley, L. J., on page 470, said:

“The object here is to establish a charity for the benefit of the poor with a particular mode of doing it; and if you cannot accomplish the object in that mode, then in some other mode in which you can. It appears to me that to give the next of kin this £10,000 would be quite contrary to the authorities.”

In *Martin v. Maugham*, *supra*, the Court said:

“Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet as there is confessedly a devotion of his personal estate to charitable purposes, my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode *which he may have pointed out for effecting those purposes has nothing to do with the question whether the devotion for charitable purposes shall take place or not*; and that, whatever the difficulty may be, the court, if it is compelled to yield to circumstances, will carry the charitable intention into effect through the medium of some other scheme.”

The rule that a charitable gift will be given effect even though the plan prescribed may fail has been repeatedly recognized by the courts of this State in the numerous decisions in which the *cy pres* doctrine has been applied to testamentary gifts.

See:

- MacKenzie v. Trustees*, 67 N. J. Eq. 652.
Larkin v. Wilkoff, 75 N. J. Eq. 476.
Nichols v. Newark Hospital, 71 N. J. Eq. 130.
Bliss v. Linden Cemetery Ass'n., 81 N. J. Eq. 394.
St. James Church v. Wilson, 82 N. J. Eq. 546, affirmed 83 N. J. Eq. 324.
Presbytery of Jersey City v. First Presb. Church, 80 N. J. L. 572.
Lakatong Lodge v. Franklin Bd. of Education, 84 N. J. Eq. 112.

Christian v. Catholic Church, 91 N. J. Eq. 374.

Imbrie v. Steen, 96 N. J. Eq. 190.

In Re Young Women's Christian Ass'n.,
96 N. J. Eq. 568.

In *St. James Church v. Wilson*, 82 N. J. Eq. 546, affirmed 83 N. J. Eq. 334, and *Christian v. Catholic Church*, 91 N. J. Eq. 374, the doctrine was applied to cases where the plan failed at the inception of the charitable trust before any attempt had been made to put it into effect.

The cases above mentioned which deal with the *cy pres* doctrine have not been cited because of any belief on the part of the Attorney General or the trustees that the facts of the case at bar call for an application of that doctrine. The testator gave discretion to his trustees as to the means or method which should be employed in carrying out his charitable intent for the maintenance and development of the Palisades and it is the duty of the trustees to carry out the charitable purpose of the will without resort to the court under the *cy pres* doctrine.

The cases have been cited, however, because they recognize and illustrate the rule applicable to all charitable bequests that the gift to charity is dominant; that the means or method provided are secondary and that unless the contrary clearly appears from the will it will be presumed that the testator intended that his gift should be effective whether or not the means or method which he has provided can be followed. If this principle leads the courts as it has for centuries in England and as it does in this State, to sustain a gift to charity where the method provided by the testator cannot, in the first instance, be followed or has subsequently failed it is, we believe, evident that the

application of the principle which underlies this doctrine would sustain the gift in the case at bar, even though the word "wishes" as it appears in the will could be construed, as we believe it cannot be, to mean "plans".

We submit that this conclusion follows from the opinion in the Smith case for the court in that case did not set aside the trust merely because the testator referred to a plan communicated to his trustees but not stated in the will. The trust was set aside because the court found, from unusual provisions in the will, that the testator intended that such plan should be an essential part of and inseparable from the gift. But for the presence in the will of these unusual provisions the application of the doctrine discussed under this Point would have led to a different conclusion.

V.

The oral testimony was admissible and should not have been disregarded by the Court of Chancery.

The testimony offered on behalf of the trustees was not introduced, as was supposed by the Vice Chancellor, for the purpose of showing that the testator intended by his will something which was not expressed therein. Its purpose was to place the court in the situation in which the testator was at the time the will was executed. While the construction which the appellants contend shall be given to the will is supported by the will itself regardless of oral testimony, we believe that the testimony offered was competent for the purpose stated and that it should not have been disregarded by the Vice Chancellor.

It has been uniformly decided in this State that testimony which shows the situation and circumstances of the testator at the time the will was made and any other extrinsic facts which tend to show the meaning of the language which he used without varying such language is admissible.

In *2 Perry on Trusts*, 5th Ed., Sec. 723, p. 369, the learned author says:

“In giving a construction to an instrument under such circumstances, courts consider the whole instrument in the light of all the circumstances, and conclude, from the will and all the facts, what was the *probable* intention of the testator.”

Vice Chancellor Wigram in his article on Extrinsic Evidence in aid of Interpretation of Wills, page 142, gives the following proposition as one of the rules to guide the court in the receipt of evidence in will cases:

“For the purpose of determining the object of a testator’s bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator’s words.”

He cites an illustration of the application of this principle at page 154:

“The following hypothetical case may, perhaps, be considered as illustrating the extreme point to which the legitimate use of extrinsic evidence could be carried in cases falling within the example now under consideration. Suppose a legacy ‘*to one of the children of A.*’ by her *late* husband B. Suppose, further, that A had only one son by B., and that the fact was known to the testator. The necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended. No principle or rule of law would, it is conceived, preclude a Court from acting upon the evidence of facts by which the meaning of an *apparently ambiguous* will would, in such a case, be reduced to certainty. It is the form of expression only, and not the intention which is ambiguous. It would be quite another question if A. had more sons than one, or if her husband were living.”

At page 172 he states the following:

“Thus, the Second Proposition (p. 66) asserts, that where the words of a will, strictly construed, *are sensible with reference to extrinsic circumstances*, their strict and primary meaning, and no other, shall prevail. It will follow that any fact, which, *according to the ordinary rules of evidence*, would prove or tend to prove that the *circumstances of a case* were such as to admit of the testator’s words being strictly construed, or that they were not capable of a strict construction, would be a *material fact*, within the meaning of the Fifth Proposition.”

In *German Pioneer Verein v. Meyer*, 70 N. J. Eq. 192, affirmed 72 N. J. Eq. 954, Vice Chancellor Pitney relied on the above rule formulated by Vice Chancellor Wigram. After referring to this rule, he said in part:

“Every claimant has a right to require that a court of construction, in the execution

of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare.' ”

In *DeCamp v. Dobbins*, 29 N. J. Eq. 37, affirmed 31 N. J. Eq. 670, the testatrix bequeathed the residue of her estate to the North Reformed Church of Newark in trust that they may use the same to promote the religious interests of the said church and to aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing. The question was raised whether this was a valid charitable bequest in view of the use of the word “benevolent” which, unexplained, would include purposes not necessarily charitable. The court received parol evidence in order to determine whether the various missionary, educational and benevolent enterprises to which the church was in the habit of contributing were, in fact, charitable purposes and found that they were and therefore sustained the bequest.

This case is an illustration of the proper use of parol evidence to determine what the testatrix meant by the language which she employed, which otherwise would be unascertainable.

In *Attorney General v. Moore's Executors*, 19 N. J. Eq. 503 (Court of Errors and Appeals), Justice Depue reviews a number of cases in which parol evidence has been admitted for the purpose of interpreting the language used by a testator. He quotes with approval the language of Lord Chief Justice Tindal in *Shore v. Wilson*, in which a gift was made for the relief of “poor and godly preachers of Christ's holy gospel,” and for educating young men designed for the ministry of Christ's holy gospel. In order to ascertain the persons who were entitled to enjoy the benefits of the charity the court had recourse to the sectarian

associations and connections of the founder for the purpose of ascertaining the meaning of the language used in defining the classes of persons who were to benefit, which was done as stated by Lord Chief Justice Tindal "for the purpose of making the written instrument speak for itself, which otherwise would be either a dead letter or would use a doubtful tongue."

See also:

Griscom v. Evans, 40 N. J. L. 402, affirmed 42 N. J. L. 579;

Congregational Home Missionary Society v. Van Arsdale, 58 N. J. Eq., affirmed on opinion below, 59 N. J. Eq. 658.

Bruere v. Cooke, 63 N. J. Eq. 624.

The parol evidence which was offered and received in the case at bar is well within the rule above referred to.

While, perhaps, it was entirely unnecessary to offer parol evidence concerning the wishes expressed by the testator to his trustees or to others, such evidence, we submit, was admissible under the circumstances of this case.

It was contended by counsel for the Respondents that the testator intended to obligate his trustees to follow in the development and maintenance of the Palisades, some plan disclosed to them but not contained in the will. While it is significant that the testator clearly distinguished in paragraph XI of his will between "wishes" and "plans" and the claim above suggested might have been met on this ground alone, we submit that it was clearly competent for the trustees to establish by proof the wishes which the testator had expressed so that the court might be assisted

thereby in determining whether the testator, when he referred to "wishes" meant "plan" or "method" or whether he merely meant to refer to his general purpose of making a charitable gift for the development and maintenance of the Palisades.

In this case evidence of the testator's wishes as expressed to his trustees, as well as to others, was offered, not for the purpose of supplementing the will or for the purpose of showing that the will means something that it does not say, but merely to confirm the view which, as above suggested, is supported by the language of the will itself, viz., that the testator did not intend by the language in question to limit the trustees to any plan or method previously expressed to them but that his intention was to require them to develop the Palisades for the benefit of the public which was in accordance with wishes which he had expressed to his trustees and which are also adequately expressed in the first paragraph of his will.

In this connection we wish again to refer to the language of Judge (now Chief Judge) Cardozo in *Butterworth, et al. v. Keeler, et al.*, *supra*, 219 N. Y. 446, 114 N. E. 803, at page 805, as follows:

"Extrinsic evidence is not needed to make this purpose clear. It may, however, reinforce the conclusion to which we should be led without it. The finding is that for many years the testatrix had evinced a charitable interest in the young men and women of the town of North Salem, where she resided, and in the public school facilities of the town, which she knew to be inadequate. The purpose perpetuated in her will is thus revealed as the same purpose cherished during life. It cannot be misread, and ought not to be nullified."

We submit, therefore, that the evidence offered was clearly admissible and should have been considered in the disposition of the case.

Conclusion.

We respectfully submit that the testator in this case expressed in his will his desire to devote a large part of his estate to the service of the public by preserving and maintaining the Palisades in Englewood Cliffs and vicinity. The will shows that he intended this gift to take effect whether or not plans for its use were formulated in his lifetime, and that the gift is therefore a valid charity and should be upheld not only in order that the testator's estate may be expended in the manner which he desired but in order that the interest of the public in this generous gift may be preserved for all time.

In this connection we desire to quote from the language of Judge Marshall, speaking for the Supreme Court of Wisconsin in *Harrington v. Pier*, 82 N. W. 345:

“Few things occur in the administration of justice more lamentable than the occasional strangling of some wise and noble purpose to devote the savings, or part of them, of a life of industry, to the upbuilding of the human race at some point or in some field, and the diversion of what was intended for some public benefit to private use, directly contrary to the will of him whose last days were solaced with the thought that his public benefactions would build an enduring monument to his memory in the hearts of a grateful people, and the hope of eternal rewards for such well-doing believed to be waiting for bestowal. That idea prevailed with the fathers of the common law so far back that neither the memory of man nor judicial records run to the contrary. It became crystalized as a part of the common law of England long prior to the statute of 43 Eliz. c. 4, to the effect that gifts to charitable uses should be highly

avored and construed by the most liberal judicial rules that the nature of each case, as presented, would admit of, rather than that the gift should fail, and the intent of the donor fail of accomplishment.”

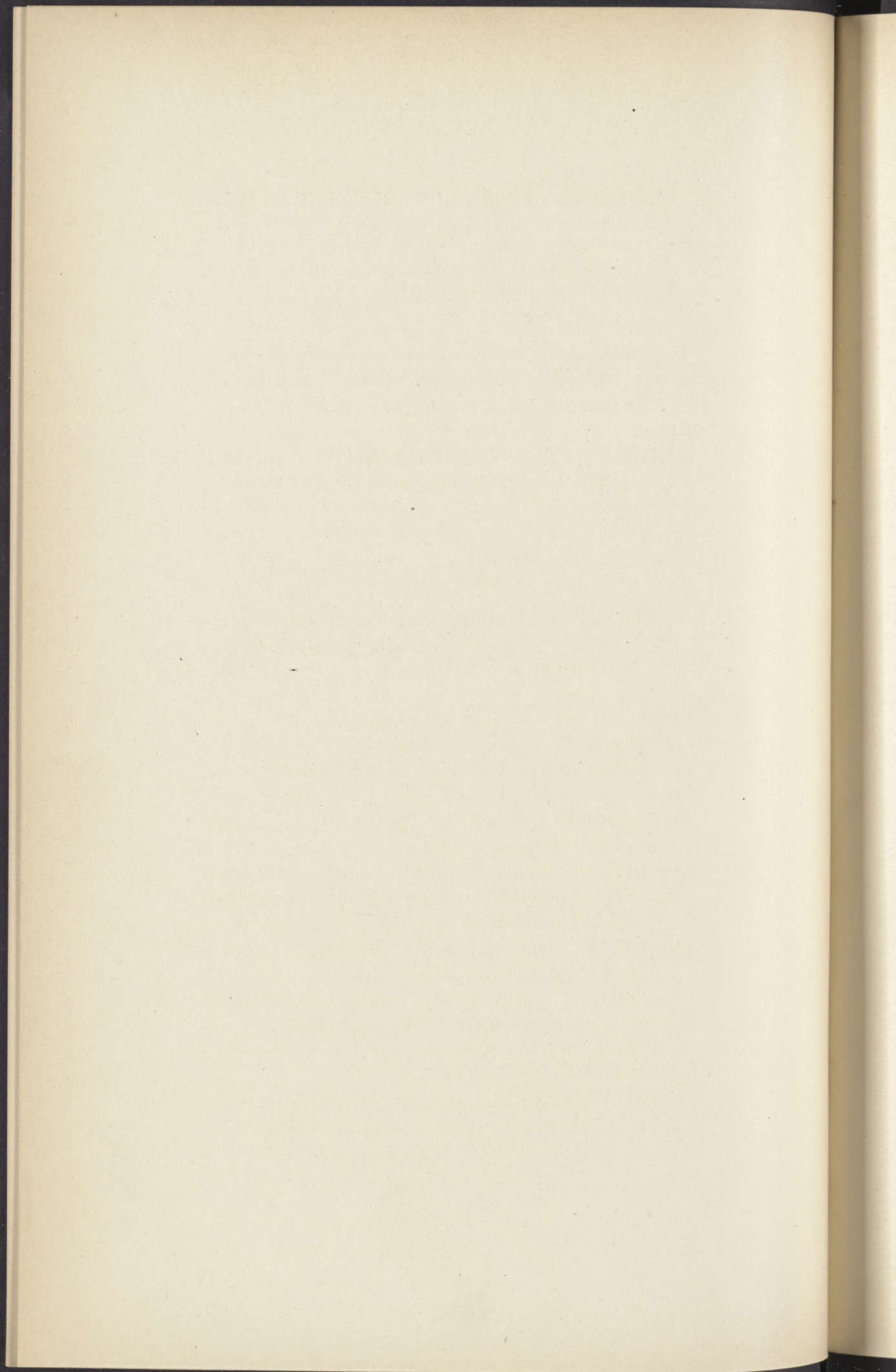
We respectfully submit that the decree of the Court of Chancery should be reversed and that the trust should be sustained as a valid gift to charity.

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Schnell and Frank V.
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NEW JERSEY COURT OF ERRORS AND APPEALS

FRANCES ALLISON NOICE,
Complainant-Respondent,

vs.

HARRY J. SCHNELL, *et als*,
Defendants-Appellants.

On Appeal.

BRIEF FOR COMPLAINANT-RESPONDENT, FRANCES ALLISON NOICE.

Statement.

The Attorney General and the Executors appeal from a decree that the eleventh clause of the last will and testament of William O. Allison, by which he attempted to dispose of his residuary estate, is null and void, and that his widow and children are entitled to the residuary estate.

In the Court below complainant-respondent contended that the disposition of the residuary estate attempted to be made by the will of her father, William O. Allison (Exhibit C 1, Case, p. 93) is invalid and that the residuary estate passes, therefore, to his heirs at law and next of kin. He left a widow, another daughter and a son (Case, p. 44, lines 19-30), who are joined as defendants and who made the same contention. By the agreement Exhibit C 2 (Case, p. 14), each takes one-fourth of the residuary estate. The executors, also defendants, and the Attorney General representing the State, sought to uphold the will.

The Allison will, quoting the parts thereof which are to be discussed in this brief, and indicating the others, is as follows:

I. "It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow men, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity."

II. Appoints appellants Baldwin and Schnell executors and trustees.

III. Directs payments of debts and funeral expenses.

IV. Bequest of \$20,000. to Jean Schnell

V. Bequest of \$5,000. to Louise Bogert

VI. Bequest of \$2,500. to Mabel Powers

VII. Bequest of \$1,000. to Harry J. Schnell Jr.

VIII. Bequest of \$250. to Tony Sciandra.

IX. Directs Trustees to establish trust to pay George D. Conklin \$25. per month for life. Fund to form part of residuary estate after his death.

X. "I have made no bequest in this my Will to my wife, children or grandchildren for the reason that I have already made adequate provision for them by conveying to the Allison Land Company certain securities particularly described in a Trust Agreement dated July 2nd, 1923. I hereby direct that all the rights reserved to me under said agreement shall be exercised by my Executors and Trustees herein named."

XI. "All the rest, residue and remainder of my property, real and personal, whatsoever and where-soever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust nevertheless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of

Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my Trustees to use this Trust Fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them."

XII. Power of sale of real estate given to executors.

I.

The eleventh clause of this will expresses three ways in which the testator directed his residuary estate to be used, two of which are contingent upon the happening of future events.

The purpose to which testator attempted to dedicate his residuary estate is clearly expressed: "to maintain and develop" "the Palisades along the Hudson in the Borough of Englewood Cliffs and vicinity" (Will, Case, p. 95, lines 23-26). Three ways in which this purpose was to be accomplished were clearly expressed.

The first is "in accordance with my known wishes" (Will. Case, p. 95, lines 24-25).

The second is: "I am now formulating more definitely, plans for the development and mainte-

nance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my trustees to use this trust fund for the purpose of carrying out such plan." (Will. Case, p. 96, lines 26-35).

The third is: "If, however, such plan does not receive my approval, then I order and direct my said trustees to use this trust fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them" (Will. Case, p. 95, lines 35-39).

The gift of this trust fund to "maintain and develop the Palisades in Englewood Cliffs and vicinity" "in accordance with my known wishes" is the testator's complete effort, as of the time the will was signed, to make a final disposition of his residuary estate.

The direction to his trustees that "If such plan is submitted and receives my approval, then I direct my trustees to use this trust fund for the purpose of carrying out such plan" is prospective and refers, not to anything he had known or made known before making this will, nor in this will, but to something he would make known at some future time when such a plan had been submitted and had received his approval. This direction was only to be operative in a certain contingency: if a plan were submitted and approved.

The remaining direction to his trustees is also prospective. It might be that the plan to be formulated for him would not meet his approval. He foresaw this and provided that if this happened, if a plan was submitted which failed to satisfy him, "then I order and direct my said trustees to use this trust fund for the development and mainte-

nance of said Palisades Section in accordance with my wishes as expressed to them". This direction does not become operative until after a plan has been submitted and disapproved, it does not speak as of the date of the will, but as of some future date after a plan, which he had requested others to formulate, had been submitted and "does not receive my approval". These two sentences cover the only two possibilities at such time, after the making of the will, as a plan proposed by others at his request should be before him for his approval, "If such plan is submitted and receives my approval" is one, and "If, however, such plan does not receive my approval" is the other. The latter is equivalent, in this context to "If such plan is submitted" and "does not receive my approval". It is for this contingency that he provides that "then" (and the force of this word "then" and its common indication of a specific time already mentioned can refer only to the time when the plan had been submitted and disapproved):—"then I order and direct my trustees to use this trust fund—in accordance with my wishes as expressed to them". This direction was only to be operative in a certain contingency: if a plan were submitted and disapproved.

It is respectfully submitted that the eleventh clause of this will expresses three ways in which the Testator directed his residuary estate to be used, and that two of these were contingent upon the happening of certain future events.

II.**Neither of the contingent dispositions ever became operative.**

No plan was ever submitted, neither the contingency "If such plan is submitted and receives my approval" nor the other contingency "If, however, such plan does not receive my approval" ever happened. The directions for the disposition of the residuary estate in the event that these contingencies did happen, are therefore inoperative.

It is respectfully submitted that the two contingent dispositions of the residuary estate never became operative.

III.**The disposition of the residuary estate "in accordance with my known wishes" is invalid.**

The testimony taken at the trial shows that the testator had at one time suggested to President Wilson endowing a university on the Palisades, (Case, p. 59, lines 25-42; p. 60, lines 1-20); that he had considered a park (Case, p. 60, lines 2-30); that he had asked Mr. Prosser and Mr. Morrow, who are the two "prominent residents of the City of Englewood" (Case, p. 64, lines 1-10), to make a recommendation for something that they believed would be the best thing that could be done with that property for the interest of the community and for the State of New Jersey (Case, p. 60, lines 25-30). At Mr. Prosser's request Mr. Lewis went to see Mr. Allison on May 27th, 1923 (Case, p. 60, lines 33-40; p. 61, lines 1-10), about a year before this will was made on July 11, 1924 (Case, p. 96, lines 10-12). Mr. Allison showed him a tract near

the testator's home and said that this was one of the largest tracts that were together, of the property he owned, and that was the property he wished to do something with (Case, p. 62, lines 34-40). Mr. Baldwin testified that the testator had talked to him about a project of building a hotel and cottages on the Palisades (Case, p. 68, lines 26-35).

Testimony of this kind is admissible "to place the court which expounds the will, in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he adopted."

Griscom v. Evans, 40 N. J. L., 402;
affirmed, 42 N. J. L., 579;
Burnet v. Burnet, 30 N. J. Eq., 595.

This testimony and the words of the will "my known wishes" and "I am now formulating more definitely, plans for the development and maintenance of said 'Palisades'" show that the testator had already formulated and made known his plan but meant to define and limit more exactly the use of his gift.

When the court, by reading this testimony, places itself in the situation of this testator and reads his will, the meaning and interpretation of the language he used in this will is clearly that he had directed the manner in which his money should be spent but looked forward to making his directions more definite. The present direction "in accordance with my known wishes"; the contingent future direction, in accordance with such plan as I approve; and the other contingent future direction "in accordance with my wishes as expressed by them," are all set forth in language which has but one meaning, and that is that he had already settled upon and made known the manner in which his money should be used.

Neither of the trustees knew what the testator in his will calls "my known wishes". No witness was called who did. It is clear from the words of the will that the testator himself did know and believed that others knew. Whether there are persons who do know, and who were not called as witnesses (Mr. Prosser and Mr. Morrow were not called), or whether testator was mistaken in his belief that his wishes were known, is of no consequence. The disposition made by this will is final and the residuary estate is given in trust to "maintain and develop the Palisades in Englewood Cliffs and vicinity" "in accordance with my known wishes," which is not a valid testamentary disposition because this will does not disclose what Mr. Allison's plans were, but refers to statements made by him before its execution which he designates as "my known wishes." He has disclosed in his will only the skeleton of his plan. He expresses clearly his intention that the details should be supplied by reference to what he designates as "my known wishes."

This is not a valid testamentary disposition. One of the Courts of Illinois has expressed the well recognized rule as follows:

"Nor can there be any doubt that in order for Sexton to have made a valid will he must at the time of the execution have had a definitely fixed purpose in his mind, and that purpose must be stated in the will itself. Parties are not permitted to make skeleton wills with the purposes of filling them out by future declarations".

In *Re Sexton*, 162 Ill. App., 222.

The same rule was stated by Sir George Parker in *Johnson v. Ball*, 5 Deg. & Sm., 85, 91, where he said:

“A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.”

(quoted from *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513, at 521)

In *Olliffe v. Wells*, 130 Mass. 221, a “skeleton will” which provided:

“I give the residue of my estate to said Trust Company to be disposed of to such persons and in such proportions as I may have instructed or shall hereafter instruct said Trust Company,”

was held void because “No amount of discussion or elaboration could make plainer the absolute destruction by such plan of the safeguarding provisions in the Statute of Wills”.

And this Court has held that a skeleton will cannot be filled out by reference to statements made by the testator but not expressed in the will. This principle was applied by Chancellor McGill in a case very similar to this; *Smith v. Smith*, 54 N. J. Eq. 1, in which the testator attempted to establish a trust to be used in establishing and conducting a school on plans “To be hereafter described by me, or in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the board of trustees herein named and who shall approve of final practical plans in keeping therewith.” “Plans which I have from time to time described” is fairly equivalent to “my known wishes”, and “plans to be hereafter described by me”.....
is prospective and similar to “if

such plan is submitted and receives my approval" or "if, however, such plan does not receive my approval, then—in accordance with my wishes as expressed to them," both indicating that the testator had made his plan, but might perhaps afterwards work it out in greater detail.

The Chancellor said, in the Smith case (at p. 9) :

"Here is a trust for a purpose which the testator has failed, legally at least to define. The Court cannot ascertain the purpose, and therefore cannot execute the trust. It will be decreed that the legal title is held for the heirs at law and next of kin of the testator."

His decree was affirmed by this Court (55 N. J. Eq. 821) "for the reasons given by the Chancellor," and for the same reasons, the decree in the case now before this Court should be affirmed.

This principle has been applied in many later cases. In *Magnus v. Magnus*, 80 N. J. Eq. 346, Vice Chancellor Stevens held that a bequest of property to one "to dispose of in accordance with my instructions to him", fails. In *Murray v. Lewis*, 94 N. J. Eq. 681, Vice Chancellor Fielder held that at writing, separate from a will and not attested as a will, cannot be incorporated into and as part of a will by reference, for the purpose of making a bequest not specified in the will. In *Condit v. Reynolds*, 66 N. J. L. 242, this Court held (opinion by Mr. Justice Dixon) that a bequest to a husband, to carry out by his will "such charge and instructions as I may, during my life, have expressed to him", was invalid because the testatrix could not lawfully give her instructions unless she did so by a writing executed in conformity with the requirements of the Statute of Wills, and this she never did.

Our Courts have firmly established the principle that, as by our Wills Act a writing, attested as re-

quired by the statute, is made indispensable to the existence of a will, what has been written in a will cannot be added to, detracted from or altered by extrinsic evidence or by reference to extrinsic matter. In *Farnum v. Pennsylvania Co. for Ins.*, 87 N. J. Eq., 108, Vice Chancellor Backes said (at p. 114); as had been said in many earlier cases there cited by him:

“This principle requires an inflexible adherence to it, even if the consequence should be a partial, or even total, failure of testator’s intention * * * A firm adherence to the rule is necessary to avoid the consequences of misapprehension of the witness and the danger of offering temptation to perjury.”

It is respectfully submitted that the disposition of the residuary estate “in accordance with my known wishes” is invalid.

IV.

There is nothing in the other parts of this will which remedies the defect in the eleventh clause.

The appellants contend that by reading the first paragraph of the will with the eleventh paragraph, a valid testamentary disposition of the residuary estate is disclosed.

The first paragraph reads as follows:

“It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow men, and as far as possible developing that section of the Palisades along

the Hudson, located in the Borough of Englewood Cliffs and vicinity.”

The cardinal rule in the construction and interpretation of wills is that the intention of the testator must be ascertained. 40 Cyc., Wills, page 1386. But the word “intention” has two well known meanings: one is a plan, purpose, desire or design to do a certain thing; the other is the meaning, explanation, interpretation or signification of words used in an instrument by which one attempts to provide for the accomplishment of such plan, purpose, desire or design.

This court in *Holt v. Akarman*, 84 N. J. L. 371 approved the definition “An intention is but a purpose a man forms in his own mind” as contrasted with the definition of a promise, “an express understanding or agreement to carry the purpose into effect”. And in *Stewart v. Reckless*, 24 N. J. L. 427 at page 430, from which this definition was quoted by Mr. Justice Kalish, Mr. Justice Potts added: “the intention may begin and end with the person who forms it.”

In *Hewitt v. Green*, 77 N. J. Eq. 345 at page 362 Vice Chancellor Stevens gives the other definition “the intentions of a testator,—the meaning of the language employed by him * * *”.

The distinction between the two meanings of the word “intention” was recognized by Chief Justice Whelpley, delivering the opinion of this court, in *Adams v. Ross*, 30 N. J. L. 505, in which he said (at page 510) :

“In the construction of a deed of conveyance the question is, not what did the grantor intend to pass, but what did he pass by apt and proper words.”

and by Vice Chancellor Van Fleet, in *Vanatta v. Brewer*, 32 N. J. Eq., 268, in which he said (at p. 269) :

“In the construction of a deed the question is, not what did the grantor intend to do, but what has he done by apt and proper words.”

While this rule for the construction of deeds has been modified by later decisions, and although the rule for construing deeds or contracts may differ from the rule for construing wills, yet the cases above cited demonstrate that our Courts have long recognized the difference between a man's “intention” (plan, purpose, desire or design) to do a certain thing, and his “intention”, the meaning, explanation, interpretation or signification of the words he uses in an instrument by which he attempts to provide for the accomplishment thereof.

And the effort of the court in construing a will is to find the “intention” of the testator; not his mere plan, purpose, desire or design, which “may begin and end with the person who forms it,” but the meaning, explanation, interpretation or significance of the words used by the testator by which he undertook to provide for the accomplishment thereof. A testator may say in his will that it is his “intention” (plan, purpose, desire or design) to do a thing, but unless he does it by making a bequest or devise by using words which express or may be construed to express an undertaking to accomplish that “intention” he has not made a testamentary disposition and the court will not make one for him.

In *Terry v. Smith*, 42 N. J. Eq., 504 (the decree in this case was reversed by this court, not on this point, however, but on an appeal from another part of the decree. 43 N. J. Eq., 659), Chancellor Runyon held that :

“If the language is not doubtful the mere fact that the reasons assigned by the testatrix for discriminating gifts to certain legatees is false in fact, cannot control the construction of her will, although such construction may fail to effectuate her purpose.”

Although in the cited case it was clear on the face of the will that the testatrix' intention (“purpose”) was to make larger gifts to the beneficiaries who were poor than to those who had ample means (See Chancellor Runyon's opinion at P. 510), yet because the meaning, explanation, interpretation or significance of the language used in making the bequests was not doubtful the proper construction was to give effect to the words by which she made the bequests “although such construction may fail to effectuate her purpose” (intention).

So, in the Allison will, the testator states in paragraph one, “It is my desire and intention * * *”. By paragraph eleven he undertook to accomplish it, or part of it. The meaning, explanation, interpretation or significance (intention) of the words used in paragraph eleven is not doubtful; what he undertook to do is clearly expressed, although not a valid testamentary disposition. His will must be construed, therefore, as not legally effective as to his residuary estate, “although such construction may fail to effectuate his purpose.”

At the time this will was made the testator desired, as shown by paragraph I, to dispose of “my remaining estate” primarily for the purpose of pleasing God and benefitting his fellow man, and secondarily (“as far as possible” as he expressed it) for developing a small part of the Palisades.

As to his primary purpose, he had theretofore “made adequate provision” for his wife, children and grandchildren by trusts which would continue

to benefit them after his death (Will, par. X, Case, p. 95, lines 9-17). In his will be made a number of bequests to the persons named in paragraphs 4 to 9. These gifts no doubt benefitted his fellow men and, we may trust, were pleasing to Almighty God. Whether this was as far as he cared to go to accomplish his primary desire, we can only guess. In this first paragraph he speaks of disposing of some of his estate "by gift". He may have planned to make other gifts in his lifetime, (he mentions one in Paragraph IV of his Will) (Case, p. 94, lines 15-20) and may have been robbed, by death, of the opportunity to do so.

In Paragraph XI he gives his residuary estate to maintain and develop the Palisades. There is no reference in this paragraph to pleasing God or benefitting his fellow man. This is his attempt to accomplish his secondary desire, "as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity". This he directed to be done "in accordance with my known wishes". If he had meant that this should be done in accordance with his "intention and desire" as expressed in paragraph I, he would not have said "in accordance with my known wishes" but he would have said "in accordance with the intention and desire I have expressed in this will"—or "in paragraph I of this will". The meaning, explanation, interpretation or significance of the words "my known wishes" is his wishes which were already known when the will was made. "My known wishes" is equivalent to "my wishes which are already known" and is not equivalent to "my wishes which I now make known in this will".

The testator's meaning is plain, he had given or believed he had given, in some way other than in this will, his own directions as to the way in which

his fortune was to be spent. And although this construction makes this part of his will illegal (see Point III)—

“The rule that where two constructions of a will are possible, and one construction makes the will illegal, while the other makes it legal, the latter must be chosen, applies only when testator’s meaning is doubtful, and where it is reasonably plain that testator’s scheme is illegal, the court will not resort to a fanciful construction to uphold the will.”

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

The contention of the Attorney General and of counsel for the executors, may, we respectfully submit, be epitomized as follows: The Court should construe the Allison will to read: “I order and direct my said Trustee to use”*in such manner as they may think best*“this trust fund for the development and maintenance of said Palisade section in accordance with my wishes as expressed to them” *by paragraph I of this will, that is, “for the purpose of pleasing Almighty God, benefitting my fellowmen and as far as possible developing that section of the Palisades along the Hudson in the Borough of Englewood Cliffs and vicinity.”*

They seem to concede that the will, unless so construed, is insufficient to support the trust. They ask this court, while in form construing the will, in fact to interpolate in the will as written, the significant clause “by paragraph I of this will”. If the testator had meant this he could, and naturally would have written in this interpolated clause himself. He did not write it, and this court will not write it in for him and modify and change the clear meaning of his own words. They ask the court, while in form construing the will, in fact to inter-

polate after the words "use" in the will as written, the significant clause "in such manner as they think best". No such modification and alteration is permissible, for on the face of this will it is clearly apparent that the testator believed he had given, in some way other than in the will, his own directions to guide and limit the Trustees in spending his money and had emphatically negatived the notion that he had any idea of permitting anyone else to say, without first obtaining his approval, how his money should be used, (see argument under Points I and III).

"When by an artificial and technical course of reasoning the invalid gift which the testator intended to make is converted into an entirely different valid gift which the testator did not intend to make, the result is a very gross injustice and a violation of the rights involved in the testamentary disposition of property. It is one thing to deny the right of a testator to make an illegal disposition of his estate, or of a portion of his estate; it is a very different thing after denying that right, to distort the abortive illegal gift which the testator meant to make into a legal gift which he did not intend to make."

Vice Chancellor Stevenson in *Hewitt v. Green*, 77 N. J. Eq., 345 at page 352.

Appellants endeavor to make operative as referring to Par I, the direction to use the trust fund "in accordance with my wishes as expressed to them". But as shown by Point I this direction was to become operative, not as of the time the will was made, but only upon the happening of a contingent event thereafter:—if the plan which I "have requested two prominent residents of the

City of Englewood to submit to me" "does not receive my approval, then" this direction comes into effect. The contingency never happened; the direction never became effective and it cannot be used to spell out a valid testamentary disposition of the residuary estate.

"This is perhaps one of those quite numerous cases which tempt courts to work out and enforce wills which testators have not made, but which the courts think that the testators would have made if they had had the whole circumstances present in their minds." VICE CHANCELLOR STEVENSON in *Vrooman v. Virgil*, 81 N. J. Eq., 301, at page 311.

IT IS RESPECTFULLY SUBMITTED THAT THERE IS NOTHING IN THE OTHER PARTS OF THIS WILL WHICH REMEDIES THE INVALIDITY OF THE ELEVENTH CLAUSE.

V.

The disposition of the residuary estate is not limited to a charitable purpose and is, therefore, void.

Whether the testator's "known wishes" in accordance with which he directed his trustees to maintain and develop the Palisades, were charitable or otherwise, we can only guess. His desire to please Almighty God and benefit his fellowmen, while it may have been a desire to establish a charity, may equally well have been a desire to establish some benevolent scheme for the promotion of the religious, moral and social welfare of his fellowmen, or a desire to accomplish some other purpose

not necessarily charitable, which the testator had conceived would please God and benefit his fellow-men.

Men have vociferously expressed their desire to please God and have attempted to do so by methods which were far from charitable. History records many religious persecutions in which men have attempted, according to their convictions, to please God by torturing and killing all who did not believe as they did. Men conscientiously endeavoring to please God have to this day differed widely as to what course of conduct should be followed in order to do so. A desire to please God is not necessarily limited to the establishment of a charity.

Men desiring, honestly we may concede, to benefit their fellow men have brought about the passage of laws like the Volstead Act, which no one could say was a charity. Our statute books are filled with attempts to benefit mankind by narrow minded schemes which are far from charitable. A desire to benefit ones' fellow men is not necessarily limited to the establishment of a charity.

Nor is the development and maintenance of the Palisades necessarily limited to a charity. Such a development might be purely commercial or selfish in its character.

Where, as in this will, the terms are so broad as to include both charitable and other purposes, the whole gift fails for uncertainty. This principle is well established in this state.

This Court, (opinion by Chief Justice Beasley) in Thomson's Ex. v. Norris, 20 N. J. Eq. 489, held that:

"A bequest to 'benevolent, religious or charitable institutions' is void, as it embraces by force of the term benevolent, objects which are not in a legal sense, charities."

Discussing (at page 523) a case which he cited and followed, the Chief Justice said:

“The ground of the decision was, that as the bequest could, consistently with the will, be applied to other than strictly charitable purposes, the court could not execute the trust.”

In *Livesey v. Jones*, 55 N. J. Eq. 204 (affirmed by this court, *Chadwick v. Livesey*, 56 N. J. Eq. 453) Vice Chancellor Stevens held that:

“A bequest * * * for the promotion of the religious, moral and social welfare of the people in any locality * * * since it includes objects not charitable, must fail for indefiniteness.”

And in *Kitchen v. Pitney*, 94 N. J. Eq. 485, this Court unanimously affirmed a decree by Vice Chancellor Fielder in a case in which he applied the same principle in sustaining a trust because it was a strictly charitable gift.

Mr. Allison's gift of his residuary estate is not, like the gift in *Kitchen v. Pitney*, limited to a charitable purpose; but it is, like the gift in the case cited and followed by Chief Justice Beasley, one which could, consistently with the will, be applied to other than strictly charitable purposes, and must, therefore, fail for indefiniteness.

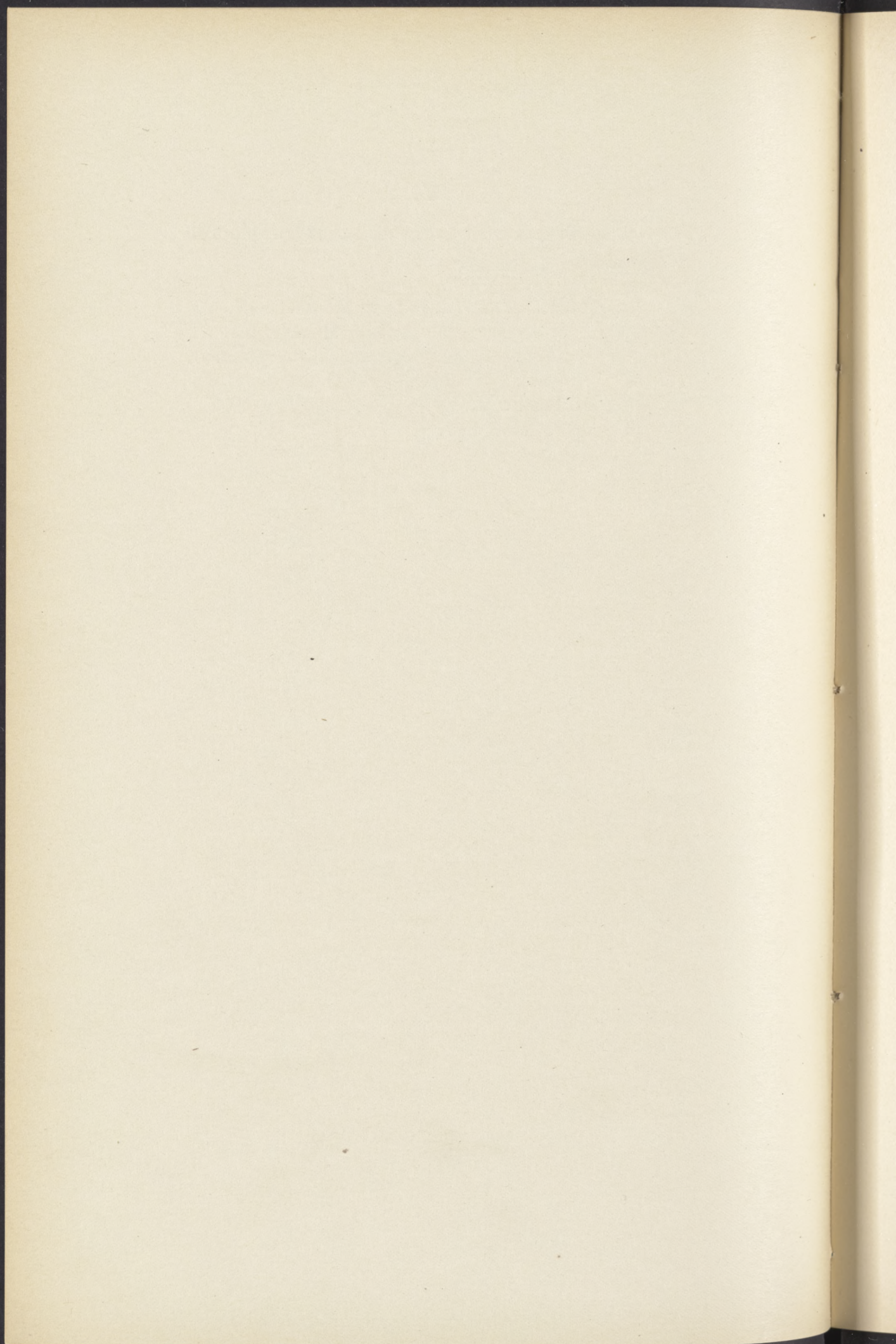
IT IS RESPECTFULLY SUBMITTED THAT THE DISPOSITION OF THE RESIDUARY ESTATE IS NOT LIMITED TO A CHARITABLE PURPOSE AND IS VOID.

VI.

**It is respectfully submitted that this decree
should be affirmed.**

MORRISON, LLOYD & MORRISON,
By **WILLIAM J. MORRISON, JR.,**
Of Counsel with complainant-respondent.

HENRY M. BRIGHAM,
of the New York Bar,
of Counsel.



New Jersey Court of Errors and Appeals

Between

FRANCES ALLISON NOICE,
Complainant-Respondent,

and

HARRY J. SCHNELL and FRANK V.
BALDWIN, Executors and Trustees
under the Will of William
O. Allison, deceased, and the
ATTORNEY GENERAL of the State
of New Jersey,
Defendants-Appellants,

and

CAROLINE A. ALLISON, JOHN ALLI-
SON and KATHERINE MACLEAN,
Defendants-Respondents.

REPLY BRIEF ON BEHALF OF THE ATTORNEY GENERAL AND OF HARRY J. SCHNELL AND FRANK V. BALDWIN AS EXECUTORS AND TRUSTEES OF WILLIAM O. ALLISON, DE- CEASED, DEFENDANTS-APPELLANTS.

The argument contained in the brief filed on behalf of Caroline A. Allison, John Allison and Katherine MacLean, Defendants-Respondents, is, we believe, met by our main brief. We will, however, reply briefly to some of the claims made by respondents' counsel in the brief above mentioned.

I.

The purpose of the trust is stated in the will and can be carried out in accordance with testator's wishes as expressed therein.

Defendants-Respondents seek to show that the testator did not express the purpose of the trust created by his will. They try to support this argument by their assertion that the testator placed no limit upon the character of the plan which he might actually approve. This argument is not sustained by a careful reading of Paragraph XI of the will. The first sentence of that paragraph, which contains the gift to the trustees, states that the gift is in trust, "to maintain and develop *in accordance with my known wishes*, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity." This shows that the plan which he had requested Mr. Morrow and Mr. Prosser to submit was to be a plan which should be in accordance with his charitable purpose as expressed in his will. This view is supported by the testimony of Mr. Schnell to the effect that the testator had frequently told him that it was his desire to give the bulk of his estate for the benefit of his fellow men and for the improvement of that section of the State of New Jersey where he was born and brought up and spent his lifetime (Case, p. 75, l. 13, *et seq.*), and also by the testimony of Mr. Schnell at p. 70, l. 30, *et seq.*

We are not concerned, however, with the situation which would have existed had a plan been submitted to and approved by the testator for that did not occur. We are concerned with the last sentence of Paragraph XI, which requires the trustees to carry out the purpose of the trust as

expressed in the will in case there should be no such plan.

Counsel cite and rely upon *Norcross v. Murphy*, 44 N. J. Eq. 552, but that case is readily distinguishable. In the case cited this court held that the testatrix made no gift but that, if in fact a gift was intended, it was void as it was general and no person was named in the will to select the objects of the benefaction or, in other words, no trustee was appointed. In the case at bar a gift was clearly made and trustees were appointed.

Smith v. Smith, 54 N. J. Eq. 1, affirmed by a divided court, 55 N. J. Eq. 821, has been discussed at length under Points III and IV of our main brief.

In *Brown v. Condit*, 70 N. J. Eq. 440, the question determined by the Court of Chancery was whether the testatrix had a charitable purpose relating to the sick sailors at the Brooklyn Navy Yard which was not essentially connected with the personal work of Mr. Wood, the bequest having been made "to the hospital fund for sick seamen at Navy Yard, Brooklyn, New York, care of Mr. John M. Wood, Chaplain." Mr. Wood was not Chaplain of the Navy Yard and there was no hospital fund for the sick seamen at such yard. He had, however, been in the habit of visiting the sailors in the hospital, and had on two or three occasions received small contributions from the testatrix to be used by him in his work. The testatrix had no connection whatever with any form of charitable work at the Brooklyn Navy Yard except through Mr. Wood. Mr. Wood predeceased the testatrix, and the court held not that the bequest was illegal, but that it lapsed by reason of his decease.

In *Hartwell v. Martin*, 71 N. J. Eq. 157, no charitable bequest was involved. Neither the

amounts of the legacies nor the names of the legatees were given in the will and the court held that reference could not be made to another paper for the purpose of ascertaining these facts.

In *Magnus v. Magnus*, 80 N. J. Eq. 346, nothing was disclosed in the will with regard to the purpose for which the legacy was to be expended, while in the case at bar the purpose is stated but the plan is left to the discretion of the trustees.

Murray v. Lewis, 94 N. J. Eq. 681, did not involve the question of a charitable gift. The will under consideration in that case did not name the legatee but referred to a sealed letter addressed to the executors which contained such name.

In *Olliffe v. Wells*, 130 Mass. 221, the disposition of the estate which was to be made by the trustee was to be entirely controlled by the wishes of the testatrix expressed at the time the will was made or to be subsequently expressed. Nothing was contained in the will showing the purpose to which the estate was to be devoted.

The same is true of *Wilcox v. Attorney General*, 207 Mass. 198, 93 N. E. 599. The court in that case stated that if the purpose of the trust had been disclosed "the phrase relating to her (the testatrix) previous oral instructions might be treated as merely descriptive as in *Wells v. Doane*, 3 Gray 201, 204, and a valid charity established", citing, among other cases, *Minot v. Baker*, 147 Mass. 348, cited on page 44 of our main brief, and *Gill v. Attorney General*, 197 Mass. 232, cited on page 28 of our main brief.

In the case at bar Mr. Allison left the residue of his estate to his trustees to be used for a purpose expressed in the will. Only the means of accomplishing that purpose were left to the discretion of the trustees.

Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513, did not involve a charitable trust. The bequest was set aside not only because it was necessary to resort to a paper dehors the will for the names of the legatees and the amounts of the legacies but also because both names of legatees and amounts of legacies were subject to change, without the compliance with the Statute of Wills, at any time prior to testator's death.

We submit that there is nothing in any of the decisions above cited which is inconsistent with the position of the appellants in the case at bar. We do not contend that resort may be had to a writing dehors the will or to parol evidence for the purpose of discovering any intention which is not expressed in the will. Our position is that the testator expressed his intention in his will; that he made a gift for the maintenance and development of the Palisades in the Borough of Englewood Cliffs and vicinity for the benefit of the public and gave to his trustees power to select the plan for the accomplishment of this purpose. We submit that there is an essential difference between a purpose and the manner of accomplishing a purpose; that the testator clearly expressed his wish and his purpose but left it to his trustees to provide the plan and the manner of accomplishing the purpose.

II.

The purpose stated in Paragraph I of the will is charitable.

Respondents' counsel refer under Point II to the definition of a charity given by Justice Gray in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539,

566, and quoted with approval by Judge Green in speaking for this court in *McKenzie v. Trustees, etc.*, 67 N. J. Eq. 652, and intimate that this is the only definition of a charity which this court is now free to sanction. They overlook, however, that this definition is not the only definition of a charitable trust which was quoted with approval by Judge Green in the case cited. At page 664 the learned judge gave two other definitions of a charity, in one of which he said that "*public trusts*" and "*charitable trusts*" may be considered, generally, as synonymous. These definitions are given in full on page 9 of our main brief.

It is apparent from a reading of the opinion in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, that Judge Gray did not by his much quoted definition intend to exclude a trust of the kind created by the will now under consideration, for just preceding that definition he cites with approval Lord Camden's definition of a charity given on page 10 of our main brief and Mr. Binney's definition, which appears on page 11 thereof. He says, at page 556:

"Mr. Binney in his great argument in the Girard Will Case, 41, defined a charitable or pious gift to be 'whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense * * * given from these motives and to these ends * * * free from the stain or taint of every consideration that is personal, private or selfish,' and this definition has been approved by the Supreme Court of Pennsylvania. *Price v. Maxwell*, 28 Penn. State, R. 35. A more concise and practical rule is that of Lord Camden adopted by Chancellor Kent, by Lord Lyndhurst and by the Supreme Court of the United States * * * 'A gift to a general public use which extends to the poor, as well as the

rich.' *Jones v. Williams*, Ambl. 652. *Coggeshall v. Pelton*, 7 Johns. ch. 294; *Mitford v. Reynolds*, 1 Phil. Ch. 191-192, *Perin v. Carey*, 24 How. 506."

We submit that there is nothing in the opinion in *McKenzie v. Trustees, etc.*, or the definitions of a charity therein contained which in any way supports the view that a gift for the maintenance and development of the Palisades for the pleasure of Almighty God and the benefits of the public made under the circumstances attending this gift is not a valid charity.

Counsel cite and quote at length from the opinions in *Morice v. The Bishop of Durham*, 10 Vesey, Jr., 521; *In re Macduff*, 74 L. T. R. 706; *Hunter v. Attorney General*, L. R. 1899 A. C. 309; *Blair v. Duncan*, 71 L. J. R. 22 (1902); *Houston v. Burns*, L. R. 1918 A. C. 337, *In re Davis*, 128 L. T. R. 735 (Chancery Division, 1923) and *In re Tetley*, 93 L. J. R. Chan. Div. 231, and argue that the opinions in those cases support their view that the bequest in the case at bar is not a valid charity.

The cases cited differ widely from the case at bar. In these cases the gift was for purposes of "benevolence and liberality" or for purposes of "charity or philanthropy", or for "charitable or public purposes", or for "charitable or public institutions", without in any way defining the purpose of the gift other than by the use of the words above mentioned. The decisions turned on the meaning of the words "benevolence" or "liberality", or "philanthropic" or "public" as the case may be as joined disjunctively with the word charitable.

In the case at bar the testator has not only expressed his purpose to please God and to benefit his fellow man, but has included in his expressed

purpose the maintenance and development of a particular section of the Palisades which is famous throughout the world for its natural beauty. This case much more nearly resembles *In Re Verall*, Eng. Law Rep. 1 Chan. Div. 1916, p. 100, cited on page 12 of our main brief. In that case, as in this, it was unsuccessfully contended that the preservation of places of natural beauty in England for the benefit of the public was not a public charity and the cases which counsel have cited in their brief were unsuccessfully cited in support of such contention.

In this connection reference is made to *Mitford v. Reynolds*, 19 Eng. Chancery 185, cited on pages 12 and 15 of our main brief. In the case cited the testator bequeathed the residue of his estate "to the government of Bengal, for the express purpose of that government applying the amount to charitable, beneficial, and public works at and in the city of Dacca in Bengal, the intent of such bequest and direction being, that the amount shall be applied exclusively to the benefit of the native inhabitants, in the manner they and the government may regard to be most conducive to that end." It was contended that the bequest was void. The Vice Chancellor sustained the bequest and an appeal was taken. The Chancellor in affirming the decision said in part, at pages 190 and 191:

"The first and main question is, whether this is a valid charitable bequest. The money is to be applied to charitable, beneficial, and public works at and in the city of Dacca in Bengal. If these words, as it is contended upon the authority of *Williams v. Kershaw*, 5 L. Journ. N. S. 84, are to be taken distributively and not conjunctively and any one of the purposes or of the alternatives would not

constitute a valid charitable bequest, the whole disposition will, of course, fail. Upon that point no doubt can be entertained. But this is not the whole of the bequest, because the testator goes on to say that it is his intent that the money shall be applied exclusively to the benefit of the native inhabitants of Dacca. Taking, therefore, the whole together, the meaning, as I understand it, is this, that the money shall be applied to works—by which I understand something to be constructed or established—for the benefit of the native inhabitants of Dacca—not for any particular class of the native inhabitants, but for all the native inhabitants in general, both rich and poor—and I think within all the authorities, this constitutes a valid charitable bequest.

In the case of *Jones v. Williams*, Amb. 651, which was before Lord Camden, there was a bequest of 1000£ to supply water to the town of Chepstow for the use of the inhabitants. That was considered a charitable bequest within the statute of Elizabeth; and Lord Camden, upon that occasion, stated that a gift for general or public use, for the poor as well as the rich, had always been considered within the statute of Elizabeth, as a good charitable bequest. Again in a case which was cited at the bar, of *Howe v. Chapman*, 4 Ves. 542, Lord Loughborough decided that a gift for the improvement of the city of Bath was, from its general nature, a good charitable bequest.”

In reply to the argument that the fund might be applied to idolatrous purposes the Chancellor said that the gift was for the benefit of the native inhabitants and that any application of the funds for idolatrous purposes would not be considered by the court as a proper application within the meaning of the testator and would be controlled, regulated and restrained.

III.

The testator authorized his trustees to provide a plan or means or method for carrying out the purpose of the trust as stated in his will.

Counsel insist that the trustees have no power to provide a means or method for carrying out the testator's expressed purpose because the testator did not specifically say in his will that this method was left to their discretion. They cite *Norcross v. Murphy, supra*, in which, as has above been stated, no trustee was appointed.

The respondents also cite *White v. City of Newark*, 89 N. J. E. 5, under this Point. In that case the testatrix gave the sum of \$5,000. to the Fresh Air Fund of Newark and appointed no trustee. There was no incorporated or unincorporated body called the Fresh Air Fund and the evidence failed to show the existence of any fund of that description. The court of Chancery (Vice Chancellor Stevens) held, however, that the charity was sufficiently specific to require the court to appoint a trustee so that the gift might not fail by reason of the failure of the testatrix to name one.

In the case at bar, as has above been stated, the testator not only indicated the purpose to which the trust fund should be applied but named trustees to select the plan or method.

The true rule is that stated by Chief Justice Beasley, speaking for this Court, in *Hesketh v. Murphy*, 36 N. J. Eq. 304, as follows:

“It is the ordinary doctrine that when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power.”

In the case last cited this court held that the power conferred upon the trustees to employ the annual income of the estate for the relief of the most deserving poor of the City of Paterson authorized the trustees to make the selection of the beneficiaries, although express authority to make such selection was not given in the will.

In *Jones v. Watford*, 62 N. J. Eq. 339, the power to provide a definite plan for the accomplishment of the testatrix's purpose, though not expressed, was implied from the direction given to the trustees.

When the testator directed the trustees to use his estate in the maintenance and development of the Palisades for the pleasure of Almighty God and the benefit of the public he by necessary implication conferred upon them authority to devise a means or method for the accomplishment of this purpose.

IV.

In reply to the brief filed on behalf of the complainant-respondent.

Counsel for the Complainant-Respondent insists that all of Paragraph XI subsequent to the first sentence which contains the gift, was contingent upon the submission of a plan to the testator by Messrs. Morrow and Prosser and his approval or rejection thereof.

While we believe that the construction suggested in our main brief is the true construction, the bequest would not be invalidated if the construction suggested by the Complainant were adopted. In the first sentence of Paragraph XI

the gift is made to trustees and the purpose of the gift, namely, the maintenance and development of the Palisades in the Borough of Englewood Cliffs and vicinity in accordance with the testator's known wishes is clearly stated. We believe that when the testator referred to his known wishes in this sentence he meant the same thing as when he referred in the last sentence of the paragraph to "my wishes as expressed to them", and that in both instances he referred not to a plan or means or method of accomplishing his purpose but to his purpose as expressed in the 1st paragraph of his will and as frequently expressed to Mr. Schnell, who is one of the trustees (Case, p. 74, l. 30, *et seq.*; 75, ls. 12-16; ls. 32-35; p. 76, ls. 1-10).

The fact referred to under Point III of Complainant's brief that the testator had not, at the time he made his will, determined upon any means or method for carrying out his charitable purpose is cogent evidence that when he referred to his well known wishes he referred not to a plan but to his general charitable purpose which is expressed in his will. He did not, therefore, make a skeleton will with intent to later vary it by parole. He made a gift of his residuary estate to trustees stating the purpose for which it should be used and leaving to them the discretion as to the means or method except only in the event that he should approve the plan submitted to him by Messrs. Morrow and Prosser, which event did not occur.

The cases cited by counsel for the Complainant under Point III have been discussed either in our main brief or in reply to the brief of the other respondents, except the case of *Condit v. Reynolds*, 66 N. J. L. 242. That case is similar to *Olliffe v. Wells*, 130 Mass. 221. The testatrix made a gift to her husband in trust "to carry into execution such charge and instruction as I may during my

life have expressed to him in regard thereto." There is no indication in the will as to the character of the charge and instruction * * * whether a charitable gift was intended or whether gifts to undesignated legatees was the intention of the testatrix. If, as was determined by the majority of this court, the testatrix intended to establish a trust, there was no indication at all as to the character of the trust or the beneficiaries, which, of course, distinguishes the case from the one at bar.

Counsel devotes Point IV of his brief to an effort to distinguish between the unexpressed intention of a testator and the intention as gathered from his will. This distinction, we submit, has no application to the case at bar as the testator stated his desire and intention and then provided for the fulfillment thereof by making a gift of the residue of his estate to named trustees with directions that they devote such residue to such purpose.

The case differs widely from *Terry v. Smith*, 42 N. J. E. 504, in which the testatrix provided for definite legacies to certain relatives and then explains what she had done in a manner which was inconsistent with the legacies for which she had provided. The court, of course, held that the language of the will provides definitely for the legacies controlled the expression of intention contained in the will.

In the case at bar there is no inconsistency but rather harmony between the testator's expressed purpose and the language of the will which makes the gift for effectuating such purpose.

The whole argument of counsel for the Complainant is based upon the assumption that although the testator clearly expressed his purpose his will must, nevertheless, fail because he did not

use the most meticulous accuracy possible in such expression. This, we submit, is not the law governing the construction of wills. If the intention of the testator can be gathered from the whole will and is not illegal we submit that it will be given effect even though the testator may have failed to use the most appropriate language.

Concerning the contention that the trust is not charitable.

Counsel for Complainant-Respondent seeks to show that the testator expressed three purposes in Section I of his will,

1. To please God,
2. To benefit his fellow men, and
3. To develop and maintain the Palisades,

and considers these purposes separately and insists that so considered they do not show that he intended to create a charitable trust.

It is, we submit, perfectly apparent that the so-called three purposes were actually but one purpose, namely, to devote his residuary estate (that being a large part of his estate which remained after caring for his family by the trust deeds mentioned in his will) to the development and maintenance of the Palisades in the Borough of Englewood Cliffs and vicinity for the pleasure of Almighty God and the benefit of his fellow men. This, we submit, is clearly a charitable purpose and if so, we are not concerned with the question as to whether any one of these so-called purposes would, standing by itself, be a charitable purpose.

Conclusion.

We respectfully submit that the arguments urged in both of the above mentioned briefs have failed to show either that the testator did not make a charitable gift or that he did not sufficiently define in his will the character and purpose of the gift to render it valid and enforceable and that none of the reasons alleged are sufficient to deprive the citizens of Englewood Cliffs and vicinity and the general public of the lasting benefit which the testator intended to confer.

We respectfully submit that the decree of the Court of Chancery should be reversed and that the trust should be sustained as a valid gift to charity.

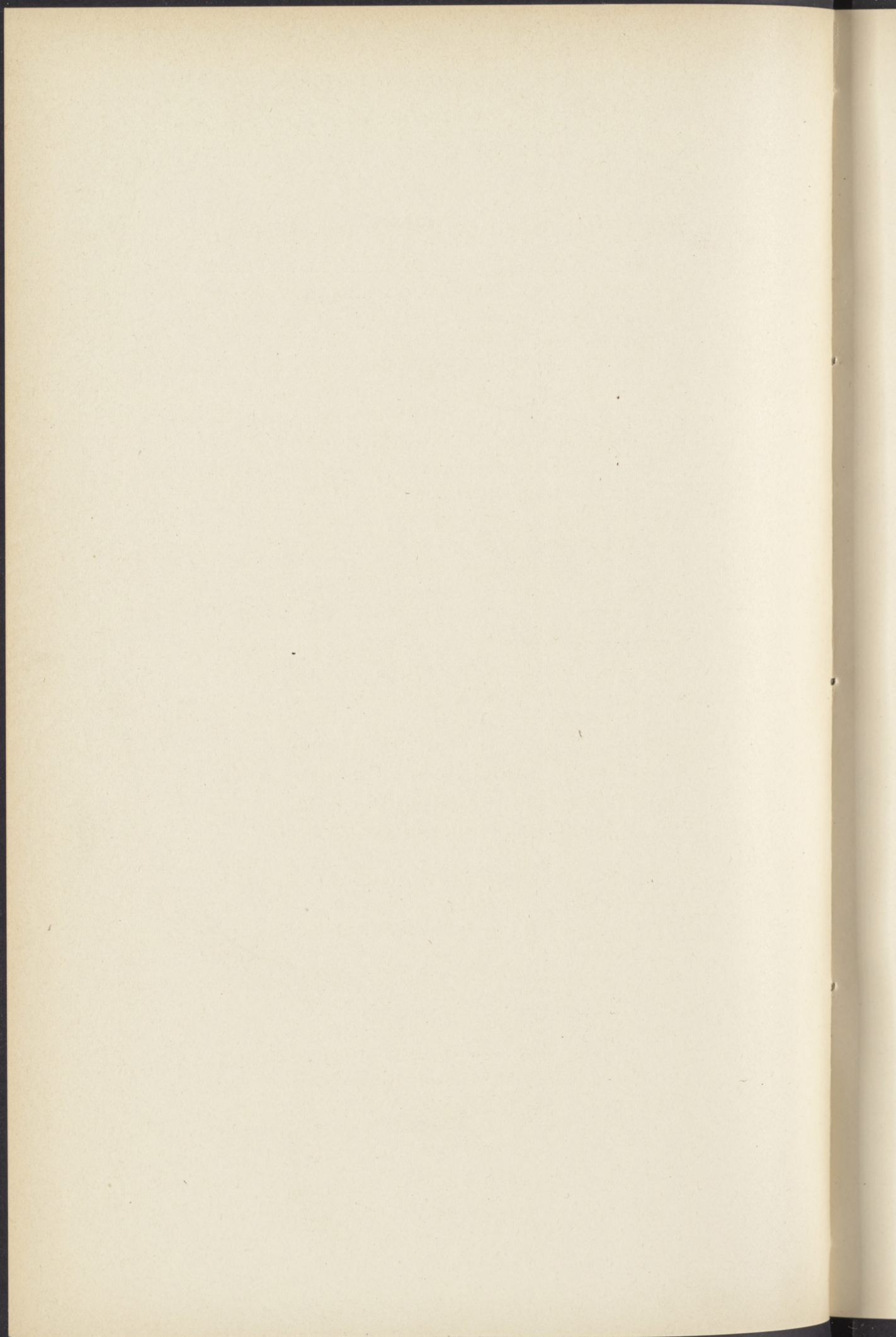
Respectfully submitted,

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Of Counsel.



New Jersey Court of Errors and Appeals.

Between—

FRANCES ALLISON NOICE,
Complainant-Respondent,

and

HARRY J. SCHNELL and FRANK V.
BALDWIN, Executors and Trustees
under the Will of William O. Allison,
deceased, and the ATTORNEY
GENERAL of the State of New Jersey,
Defendants-Appellants,

and

CAROLINE A. ALLISON, JOHN ALLISON
and KATHERINE MACLEAN,
Defendants-Respondents.

**BRIEF FOR CAROLINE A. ALLISON, JOHN
ALLISON AND KATHERINE MacLEAN,
DEFENDANTS-RESPONDENTS.**

This is an appeal by the Executors and Trustees under the Will of William O. Allison and the Attorney General of the State of New Jersey from a final decree of the Court of Chancery advised by Vice Chancellor Fielder, which adjudged and decreed that the clause of Mr. Allison's will which purported to dispose of the residue of his estate, was null and void, and that Caroline A. Allison, the widow, and John Allison, Katherine MacLean and Frances Allison Noice, the children of the testator, were entitled to and the beneficial owners of

the residue (Case, pp. 109 to 122). The widow and three children mentioned are the only heirs and next of kin of the testator, who died on December 18, 1924, a resident of the Borough of Englewood Cliffs, Bergen County, New Jersey. His will was dated July 11, 1924 and was admitted to probate by the Prerogative Court of New Jersey on December 29, 1924.

The will of William O. Allison as admitted to probate is printed in full at pages 93-9 of the Case.

By the opening paragraph of the will the testator revoked all other wills and codicils theretofore made by him. Paragraphs I and II of the will read as follows:

“I: It is my desire and intention to dispose by gift of a large part of my remaining estate for the purpose of pleasing Almighty God, benefitting my fellow man, and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity.

“II: I nominate, constitute and appoint Harry J. Schnell and Frank V. Baldwin, and the survivor of them, to be the executors of this my last Will and Testament and the Trustees of the Trusts hereinafter created.”

Paragraph III of the will directed the payment of debts and funeral expenses, and paragraphs IV to IX inclusive made certain bequests aggregating about \$30,000. Paragraph X of the will made reference to certain provisions previously made by a trust agreement for the benefit of the wife, children and grandchildren of the testator.

Paragraph XI of the will, which purports to dispose of the residue of the estate, reads as follows:

“XI: All the rest, residue and remainder of my property, real and personal, whatsoever and wheresoever situate not hereinbefore specifically bequeathed, I give and devise and bequeath unto my said Trustees, in trust never-

theless, to maintain and develop in accordance with my known wishes, the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity. I am now formulating more definitely, plans for the development and maintenance of said Palisades, and to that end have requested two prominent residents of the City of Englewood, to submit to me a plan for such development and maintenance. If such plan is submitted and receives my approval, then I direct my Trustees to use this Trust Fund for the purpose of carrying out such plan. If, however, such plan does not receive my approval, then I order and direct my said Trustees to use this Trust Fund for the development and maintenance of said Palisades Section in accordance with my wishes as expressed to them."

Paragraph XII of the will gave to the executors and trustees power to sell real property.

The Vice Chancellor held that the purpose of the trust mentioned in paragraph XI of the will was not stated in the will and, hence, it was not possible to determine whether or not it was charitable, that the testator intended that the Palisades should be maintained and developed in accordance with some plan approved by him or with wishes expressed by him to his Trustees, that it was the function of the Trustees merely to carry out the plan or wishes of the testator and not their function to originate a plan, that paragraph I of the will was in the nature of a preamble and did not purport to state the purposes of the proposed trust and that in any event the purposes mentioned in paragraph I were not limited to charitable purposes.

The appellants contend that the purpose of the proposed trust was to preserve the integrity, grandeur and scenic beauty of the Palisades on lands adjacent to the Palisades Interstate Park for the pleasure of Almighty God and the use and benefit of the public and that if no definite plan was ap-

proved by the testator and no definite wishes were expressed by the testator, the Trustees had authority to devise a plan appropriate to accomplish such purpose.

The appellants admit the elementary principle that oral statements made by a testator cannot change or amplify the provisions of a will and they profess to base their contentions upon the provisions of the will rather than upon evidence of oral statements made by Mr. Allison which the Vice Chancellor admitted tentatively over the respondents' objections but later held to be inadmissible. The appellants also admit that paragraph XI of the will is void unless it can be sustained as a charitable trust and that there is nothing in paragraph XI to show that the purpose of the proposed trust was charitable.

Their contentions in substance are (1) that the purposes of the proposed trust are stated in paragraph I of the will, although no reference to paragraph I is contained in paragraph XI, (2) that the purposes stated in paragraph I are charitable purposes, although admittedly vague and general, and (3) that the last sentence of paragraph XI authorized the Trustees to devise a plan for carrying out the purposes stated in paragraph I in case the testator failed to approve a plan or express definite wishes to the Trustees. The first and third contention are based upon the argument that the words "in accordance with my wishes as expressed to them", appearing at the end of paragraph XI, should be held to mean "in accordance with a plan to be devised by them for the purposes expressed in paragraph I of this will", and the second contention is based upon the argument that the words "the purpose of pleasing Almighty God, benefitting my fellow man and * * * developing * * * the Palisades along the Hudson" should be held to mean "the purpose of preserving the integrity, grandeur

and scenic beauty of the Palisades on lands adjacent to the Palisades Interstate Park for the pleasure of Almighty God and the use and benefit of the public”.

The respondents oppose each and every one of these contentions, claiming that paragraph I of the will does not in any way qualify or limit paragraph XI; that the testator intended to determine for himself the purpose and terms of the proposed trust by approving a plan or expressing wishes to the Trustees and did not authorize the Trustees under any circumstances to devise any plan of any kind; that in approving a plan or expressing wishes to his Trustees the testator was not restricted or limited to the purposes stated in paragraph I and in any case such purposes are not charitable purposes. The respondents contend that whether or not the testator approved a plan or expressed wishes to his Trustees with respect to the development and maintenance of the Palisades, paragraph XI does not make any complete or valid disposition of the residue and cannot be cured by any extrinsic evidence.

The evidence which was admitted tentatively over the objection of these respondents shows that the testator had stated that the two prominent residents of Englewood referred to in paragraph XI of the will were Messrs. Dwight Morrow and Seward Prosser, that neither of these gentlemen ever submitted to the testator any plan for the development and maintenance of the Palisades (Case, pp. 63-4), that the testator told Mr. Lewis in the summer of 1923, about a year before he made his will, of a plan he had in mind in 1916 for the endowment of a university, that this plan had not materialized, that he had considered a park, but had asked Mr. Prosser and Mr. Morrow to make a recommendation for something that they believed would be the best thing that could be done with his property for the

interest of the community and for the State of New Jersey (Case, pp. 59-60), that the testator had told Mr. Schnell, one of the executors and Trustees, in May, 1923, more than a year before he made his will, that he had asked Mr. Prosser and Mr. Morrow to submit a plan to him that would carry out his intention (Case, pp. 70-1), that the testator had told Mr. Schnell on several occasions before he made his will that it was his desire to give the bulk of his estate for the benefit of his fellowman and for the improvement of that section of the State of New Jersey where he was born and brought up and spent his lifetime (Case, pp. 74-5), that the testator did not express to Mr. Schnell any plan which he desired him to follow in the disposition of the bulk of his estate for the benefit of the public and of the section in which he lived (Case, p. 76) and that the testator did not communicate to Mr. Baldwin, the other Executor and Trustee, any plan which he wished to have carried out in the disposition of his residuary estate, and did not even tell Mr. Baldwin that he was to be named as an executor and trustee of his will (Case, pp. 66-7). The evidence further showed that the testator had talked with Mr. Baldwin about a project of building a hotel and cottages on the Palisades (Case, p. 68).

It should be noted that these oral statements made by the testator with respect to his desire and intention are materially different from the statements of his desire and intention contained in paragraph I of the will. In his oral statements he said nothing about pleasing Almighty God or developing the Palisades. In paragraph I of the will he did not speak of doing anything for the interest of the community or the State of New Jersey or for the improvement of any section of the State, unless it can be said that the purpose of developing the Palisades meant the purpose of improving that section of the State.

It should also be noted that there is nothing in the oral statements of the testator or in the will which tends to show that it was the purpose of the testator to preserve the integrity, grandeur or scenic beauty of the Palisades on lands adjacent to the Palisades Interstate Park for the use and benefit of the public.

The testator did not in his oral statements or in his will use the word "preserve" or the word "integrity" or the word "grandeur" or the word "beauty" or the word "use" or the word "public", and did not refer in his oral statements or in his will to the Palisades Interstate Park.

It should also be noted that if the testator had really intended to accomplish the purpose which the appellants now contend was the purpose of the proposed trust, it would have been easy for him to do so by giving the residue of his estate to the Palisades Interstate Park Commission which had ample authority to accept gifts, devises and bequests of land, money, securities and other property (see Sec. 5 of Ch. 87 of Laws of New Jersey of 1900, as amended by Ch. 54 of Laws of 1922).

Evidence which was admitted without objection shows that the testator at the time of his death owned personal property consisting of cash in bank, bonds and stocks which were appraised at \$3,107,426.26, including substantially all the stock of the Allison Land Company which was appraised at \$1,883,745.85 (Case, p. 92), and that the Allison Land Company owned twenty-six separate and unconnected tracts of land located in six different boroughs or cities, in Bergen County, N. J., which were appraised at \$877,752.50 (Case, p. 91). It thus appears that the value of the assets of the Allison Land Company, other than land, was \$1,005,993.35, and that the value of the personal property belonging to the estate, exclusive of the land owned by the Allison Land Company, was \$2,229,-

673.76, that the land owned by the Allison Land Company represented only about 28% of the entire estate and that the remaining 72% of the estate had no connection of any kind with the Palisades along the Hudson.

The evidence also shows that during the years 1900 to 1923, inclusive, the testator and the Allison Land Company made sales of twenty-nine separate tracts of land located in Bergen County, N. J., the dates of the deeds, the names of the grantees, the consideration received and the acreage of the land covered being as stated on Exhibit DC-2 (Case, pp. 92-3; 98-100). This exhibit shows that the acreages sold and the considerations received by the testator and the Allison Land Company were substantial in amount. Four of the sales were made to the Commissioners of the Palisades Interstate Park for substantial considerations. There was no donation of any land to the Park. Some sales were made at prices running as high as \$3,000 or \$5,000 an acre. These sales continued even after the testator had begun to think about plans for the disposition of his estate. There were nine sales after 1916 when the testator had under consideration the plan for endowing a university. There were two sales in September, 1923, one of 52 acres for \$38,170.50 and the other of 3-3/10ths acres for \$9,916.34, long after the testator had asked Messrs. Prosser and Morrow to submit a plan to him, and only nine months before the testator executed his will and only fifteen months before the testator died.

The location of the twenty-six tracts of land owned by the Allison Land Company at the time of the death of the testator is shown in red on the Government map which was admitted as Exhibit DC-3 and the location of twenty-four of the twenty-nine tracts of land which the testator and the Allison Land Company sold during the years 1900 to

1923, inclusive, is shown in blue on the Government map. This map is not printed in the Case but pursuant to a stipulation between counsel will be produced at the argument (Case, p. 91).

The twenty-six tracts of land which were owned by the Allison Land Company are scattered about in an area about six miles long, extending from the Borough of Fort Lee on the south to the Borough of Alpine on the north, and one and a half miles wide, extending westerly from the Hudson River. This area includes roughly nine square miles or 5,760 acres. These twenty-six tracts of land aggregated together only 822 acres, or less than 15% of the total area. The top of the Palisades is approximately level for a distance of about a half a mile westerly from the edge of the cliff, the westerly side of this level plateau being shown approximately on the Government map by a lead pencil line which was drawn by the witness Smollen at the trial (Case, pp. 84-5). Less than one-half of the area of these twenty-six tracts of land is upon the top of the Palisades or within half a mile of the edge of the cliff and only three of the twenty-six tracts are adjacent to the Palisades Interstate Park.

It is alleged in paragraphs 8 and 9 of the answers of the Executors and Trustees that the Palisades Interstate Park is located on the lands lying between the top or steep edge of the Palisades and the Hudson River, from the Borough of Fort Lee on the south to the New York State line on the north, and that the Palisades of the Hudson include not only the land lying between the Hudson River and the top of the cliffs, but also the land on top of the Palisades extending westerly approximately half a mile from the edge of the cliffs (Case, pp. 20, 25-6). It thus appears that less than one-half of the lands owned by the Allison Land Company were located upon what the appellants claim to be the Palisades of the Hudson.

We submit that the extrinsic evidence does not help in any way to sustain the contentions of the appellants but that, on the contrary, it shows conclusively that the testator never made any definite decision with respect to the disposition of the residue of his estate. It shows that while the testator had a vague general desire to do something with his property which would be of benefit to his fellow man, this desire never developed into a purpose or plan which was specific or definite enough for anybody to carry out. The testator was trying for some years prior to his death to formulate, or get somebody else to formulate, a plan for the disposition of his property which would meet his approval. He appealed to Messrs. Morrow and Prosser for help in the solution of his problem but never received it. He apparently was still waiting even at the time of his death for the plan which he had asked Messrs. Morrow and Prosser to submit. Whether or not the expectation of receiving a plan from them delayed the testator in forming a plan of his own, we cannot tell, but the undeniable fact is that the testator never approved or adopted any definite plan and never expressed any definite wishes to his Trustees and never made any definite decision with respect to the disposition of the residue of his estate.

I.

The purpose and terms of the proposed trust are not stated in the will and it is not possible to ascertain or carry out the wishes of the testator.

The fundamental difficulty with paragraph XI of the will is that it is not complete in itself but is dependent upon a plan to be approved by the testator *dehors* the will or wishes expressed or to be expressed by the testator *dehors* the will. It is not possible to ascertain the wishes of the testator without inquiring whether he approved such a plan or expressed such wishes and, if so, what they were, and even if they were ascertained no such plan or wishes could be made a part of the will. The will shows on its face that it is not complete and that the testator did not intend to state in it his final decision with respect to the disposition of the residue of his estate.

It does not make any difference whether the testator approved any plan or expressed any wishes to his trustees with respect to the maintenance and development of the Palisades. If he did approve such a plan or express such wishes they cannot be made a part of the will and hence cannot be carried out. If he did not approve any such plan or express any such wishes then he never completed his gift. In either case paragraph XI is null and void. The fundamental scheme of this paragraph is opposed to the Statute of Wills and if the Trustees were permitted to retain and use the residue of the estate for any purpose, the effect would be to nullify the Statute of Wills and remove the safeguards which that statute is intended to provide.

The appellants' contention that the purposes of the proposed trust are stated in paragraph I of the

will, although no reference to paragraph I is contained in paragraph XI, cannot possibly be sustained. This claim is based avowedly upon the argument that the words "in accordance with my wishes as expressed to them", appearing at the end of paragraph XI, should be held to mean "in accordance with a plan to be devised by them for the purposes expressed in paragraph I of this will". In making this contention the appellants are asking the Court to change the will rather than to interpret the will. If the testator had meant to refer to something expressed in paragraph I of the will, it would have been easy and natural for him to say so, and the fact that he referred specifically to his wishes as expressed to the Trustees shows conclusively that he did not intend to refer to anything expressed in the will.

Furthermore, it is obvious that the vague and general statement of his desire and intention which appears in paragraph I is merely a preamble or declaration of a state of mind which had no binding effect upon the testator, the Trustees or anybody else. Even if it referred to the disposition of the residue of his estate, it is obvious that it referred to the disposition thereof which the testator expected ultimately to make, by approving a plan or expressing wishes to his Trustees with respect to the development and maintenance of the Palisades, rather than to any disposition thereof which he attempted to make by paragraph XI. It did not, however, place any limitation upon the character of the plan which he might actually approve or the wishes which he might actually express to his Trustees. In spite of this declaration of his desire and intention, the testator was free to approve any kind of a plan or express any kind of wishes he chose. He had a right to change his desire and intention if he wished to do so, and even if he did not change his desire and intention, he had the right to judge absolutely

for himself whether any particular plan or any particular wishes were appropriate to accomplish his desire and intention, and neither the Court nor the Trustees nor anybody else would have been in a position to question any plan approved or any wishes expressed by him.

It is not conceivable that the testator intended or attempted to state in paragraph I the purposes of the trust which he proposed ultimately to create. It was obviously the intention of the testator to state and define the purposes of the trust more clearly and more definitely by approving a plan or expressing wishes to his Trustees.

The testator could not have intended to accomplish by paragraph XI alone the purposes which he mentioned in paragraph I, because he stated definitely in paragraph XI that he was formulating more definitely plans for the development and maintenance of the Palisades, and it is clear that he did not expect to accomplish anything until he had approved a definite plan or expressed definite wishes to his Trustees. The idea that the testator intended by his will to make a complete disposition of his residue and put the Trustees in a position to carry out his general desire and intention, even though the testator never approved a definite plan or expressed definite wishes, is inconsistent with the express language of the testator and the fundamental scheme of the will.

It is too clear for words that the testator did not intend to turn over to anybody else the matter of adopting a plan or determining a method by which his general desire and intention should be accomplished. Such a matter would involve questions of personal opinion and taste in the highest degree. No two men would be likely to determine it in the same manner and no one man would be likely to trust any other man to decide such a matter for him. If the testator had intended that the Trustees

should under any circumstances decide this question for him, it would have been easy for him to say so in his will. The fact that he did not say it in his will indicates clearly that he did not intend to confer any such authority upon his Trustees.

The will says in unmistakable words that the Trustees were to be governed either by a plan approved by the testator or by wishes expressed to them by the testator. If the plan received his approval, the testator *directed* his Trustees to use the fund for the purpose of carrying out such plan. If the plan did not receive his approval, the testator *ordered and directed* his Trustees to use the fund for the development and maintenance of the Palisades *in accordance with his wishes as expressed to them*. How could any words have been used which would have more forcibly expressed the intention that the plan or wishes to be followed were to be determined by the testator and that the Trustees were at all times to be governed by such plan or wishes. Why should not these words receive the natural and ordinary meaning which the English language gives them?

The will on its face shows that while the testator had a vague and general idea as to what he wanted to accomplish, he had no specific or definite idea as to how he would accomplish it. The purpose and terms of the proposed trust were not even settled in the mind of the testator at the time of the execution of the will, and it was the obvious intention of the testator to leave them open for determination at some subsequent date, either by approving a plan which might be submitted or by expressing wishes to the Trustees. The words "my wishes as expressed to them", appearing at the end of paragraph XI, are clearly broad enough to include wishes expressed after, as well as wishes expressed before, the execution of the will.

The fact that the testator did not express any wishes to his Trustees with respect to the maintenance and development of the Palisades before he executed his will shows conclusively that these words were intended to include wishes which he might express to his Trustees after the execution of his will. These words would include any wishes expressed to the Trustees by the testator prior to his death. The important and undeniable fact is that the purpose and terms of the trust were left open for subsequent determination *by the testator* and *not by the Trustees*.

The only power or authority which the testator undertook or intended to give to his Trustees was to carry out his plan or his wishes if he should approve a plan or express his wishes. The testator did not undertake or intend to give to the Trustees any power or authority to maintain or develop the Palisades in accordance with a plan to be approved by them or in accordance with their wishes and he restricted and limited the Trustees, by unmistakable language, to such plan as might be approved *by the testator* or to such wishes as might be expressed to the Trustees *by the testator*. These restrictions and limitations were an essential part of the gift.

The unavoidable conclusion is that the purpose and terms of the proposed trust are not determined or stated in the will and that the testator did not intend to determine or state them in his will. Under the scheme of the will the purpose and terms of the proposed trust were to be determined and stated only in one of two ways, (1) by a plan approved by the testator, or (2) by wishes expressed by the testator to the Trustees.

The authorities are uniform to the effect that the residuary clause is void, and that the heirs and next of kin are entitled to inherit the residue of the estate.

In *Norcross v. Murphy*, 44 N. J. Eq. 522 (Court of Errors and Appeals), the will gave certain bequests to two specified charities and then provided as follows:

“The residue of my estate to be kept in reserve for further consideration in the way of charitable purposes, in a liberal way, not to any particular creed or sect of religion.”

The will appointed executors but did not authorize anybody to select any particular charitable purposes. The Chancellor ruled that the will made a valid disposition of the residue but this Court unanimously held, first, that the clause did not make any actual disposition of the residue but merely showed the purpose of the testator to make such a disposition at some future time, and, second, that even if the clause showed an intention to make an actual disposition of the residue, it was void because the charitable purposes were general and the clause gave nobody any authority to select the particular objects of the gift. Beasley, *C. J.*, delivered the opinion of this Court and said, at pages 523-4:

“The first question embraced in the inquiry is, Has the testatrix manifested, to a reasonable certainty, her intention to dispose of this fund? She certainly has not, in terms, given it away. On the contrary, she says it is to be kept in reserve. Nor does she direct that it is to be *applied* to any purpose; but her declaration is ‘that it is to be kept in reserve for further *consideration* in the way of charitable purposes.’ This is not declaring, or indicating, that the money is to be distributed in the way of charity. The fact is, that more inapt language to express the idea of the appropriation of the fund to charitable uses to be selected by another could scarcely be imagined. I cannot find a single word in the clause that wears such an aspect. But, if, on the other hand, we assume that the clause has reference to the contemplated conduct in the future of the tes-

tatrix herself, each term in it becomes intelligible, and if not grammatical, at least appropriate. The phrases, 'to be kept', 'in reserve', 'for further consideration', are all germane to the purpose, upon the supposition that the testatrix is expressing her own contemplated purpose. The adjective 'further', as used in the sentence, is absolutely inapplicable to an act to be done by any person but herself.

* * * * *

But there is a second objection that also seems to me fatal to this decree.

If the concession were made that the testatrix has in fact devoted this fund to charitable purposes, still the bequest is void, as the gift is general, and there is no testamentary designation of a person to select the objects of the benefaction.

The legal rule that avoids a bequest of this general character, under the conditions mentioned, is too well established to admit of discussion. It is stated in all the text books. Thus Jarman formulates it: 'To constitute a charitable use there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. In case of a grant or demise, when there is no party or parties designated who can take the property, or where they are so uncertain that the court cannot direct intelligently the execution of the trust, the property remains undisposed of and falls to the heir or next of kin.'

In the present will, if there be a gift, it is 'in the way of charitable purposes in a liberal way'; and, therefore, unless we can say that some person has been indicated to make selection of the unnamed beneficiaries, the gift cannot be put in effect. The Chancellor inferred that the clause points to the executors as the agents of this function. But the will is absolutely silent on the subject, and unless it is to be inferred that the executors are meant because of such silence, there appears to be no reason for such conclusion. The fund is 'to be kept in reserve for further consideration in the way of charitable purposes'. But who is to

take the matter into 'further consideration?' This question the testatrix very plainly has not answered. It may be that she thought that the law, through the agency of the courts, would make the necessary selection of the objects of her bounty and distribute the moneys. It is not possible to hold that, as no trustee is designated for the purpose, therefor it is to be presumed that the executors were intended to act in that respect, for such a principle of construction would, in effect, be a revocation of the rule that, in cases of general bequests of this character, a trustee must be indicated, for such juncture is always present when such gifts exist in a testamentary form."

In *Smith v. Smith*, decided by Chancellor McGill, 54 N. J. Equity, 1, and affirmed by this Court for the reasons given by the Chancellor, 55 N. J. Equity, 821, the will gave property to a Board of Trustees to be composed of certain named persons to be held in trust for an object, which was specified as follows:

"I desire that my entire estate with its accumulations shall be used in establishing and conducting a School for Apprentices and Young Mechanics on plans to be hereafter described by me; or in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the Board of Trustees herein named and who shall approve of final practical plans in keeping therewith."

It appeared that the testator did not describe perfected plans for the School but that he had before the execution of his will described certain plans orally to the Trustees. It was held that the plans described or to be described by the testator were an essential limitation upon the gift; that the plans described orally to the Trustees were not a part of the will because not in writing, signed by the testator and attested by witnesses; that it did not make

any difference whether the purpose of the gift was charitable or not, that the purpose and terms of the trust were not fully defined in the will and consequently the gift was void and the heirs at law and next of kin were entitled to the property.

The Chancellor said at pages 5 to 6 :

“It is apparent from this statement of the attitude of the parties, that the first question presented, is, whether the intention of the testator was to qualify the character of the school by a restrictive scheme so that unless it should be established in compliance with such restriction, it should not exist at all, or whether it was his broad purpose to create a school for apprentices and young mechanics, even though the plans he wished to prescribe for its control, should not be perfected or exist.

This question must be determined from the language of the will. It is impossible to read that instrument without being impressed that the testator intended to prescribe the precise character of the school he meant to found. His disposition to control details is evinced in the particularity of the provisions he makes for a perpetual board of trustees, for the first president of that body and succession to that office, for the compensation of the president and his duties and powers, and for restrictions upon the action of the board of trustees. It is after the exhibition of this disposition that the object of the trust is stated to be the establishment of a school on plans which he should thereafter perfectly describe, or had theretofore imperfectly described. It was to be a school on his plans. The trustees, so far as plans for the school were concerned, were limited in the exercise of their discretion to the approval of practical plans which should accord with the imperfect plans or scheme for a school which he had disclosed to them. He did not mean that they should originate plans—the ideas were to be his—they were merely to execute them.

It appears to me to be plain that though his plans or schemes were intended to have refer-

ence largely to matters of administrative details, they were nevertheless meant by him to be an essential limitation of his gift.

The will itself does not disclose what the plans were to be, but refers to statements made by him before its execution which were susceptible of ascertainment."

and after referring to the New Jersey statute, which requires a will to be in writing, signed by the testator and attested by two witnesses, and referring with approval to *Olliffe v. Wells*, 130 Mass. 221, and the claim of the Trustees that a charitable purpose appeared from the language of the will, the Chancellor said, at page 9:

"But if we assume that the defendant's proposition is correct in fact, is it sound in law? Suppose a purpose to create a charity appears—not generally, but of a limited and special character—and the will fails to disclose the limitation, can this court, in defiance of the plain requirement of the statute that the will shall be in writing, add to it verbal expressions of the testator which will supply and define the limitation? And is the case made stronger by the testator's direction that the reference shall be had to these expressions?"

I do not perceive any reason which will justify such action. In favor of a charity clearly indicated, the court will so interpret general terms of description in the will creating it as to render the plain purpose capable of enforcement; but where the will fails to indicate what the purpose is, the court will not disregard a statute to supply that which the will omits.

My conclusions determine the case at this point, and it is unnecessary for me to deal with other questions elaborately and ably argued by counsel on both sides.

Here is a trust for a purpose which the testator has failed, legally at least, to define. The court cannot ascertain the purpose, and therefore it cannot execute the trust.

It will be decreed that the legal title is held for the heirs-at-law and next of kin of the testator."

We submit that this decision is controlling in the case at bar and that the laborious effort of the appellants to distinguish it must fail utterly. It does not make any difference whether a testator refers to "plans" or "wishes" so long as they are not contained in his will, and it is useless for anybody to contend that wishes expressed by a testator *to trustees* mean wishes expressed by the testator *in his will*. There is no basis for saying that Mr. Smith had any greater disposition to control details than Mr. Allison. The fact is that Mr. Smith went much further in the way of making a definite gift than Mr. Allison did, because he stated in his will that his purpose was to establish a school for apprentices and young mechanics. This was a more definite purpose and more like a charitable purpose than the purpose of maintaining and developing the Palisades. The language of Mr. Allison's will shows that he intended to determine the manner or method by which the Trustees were to maintain and develop the Palisades, just as clearly as the language of Mr. Smith's will shows that he intended to determine the details of the plan on which the Trustees were to establish and conduct the school. It is idle for the appellants to say that the wishes expressed by Mr. Allison to his Trustees were the same as the desire and intention which he expressed in paragraph I of his will, because they have not proved and cannot prove that such was the case. Evidence to show the wishes which Mr. Allison expressed to his Trustees would not be admissible and such wishes could not be made a part of the will.

There was a much better basis for sustaining the trust in the Smith case than there is for sustaining the trust in the case at bar, and it would have been easier for the Court or Trustees to execute the trust

in the Smith case without knowledge of the plans described orally by the testator than it would be to carry out the trust in the case at bar without knowledge of the plan approved or wishes expressed to the Trustees by the testator. There is, if anything, more reason in the case at bar for holding that the plan or wishes approved or expressed by the testator *dehors* the will were an essential limitation upon the gift than there was in the Smith case.

The cases of *Lawrence v. Prosser*, 89 N. J. Eq. 248, *Johnson v. Bowen*, 85 N. J. Eq. 76, and *Jones v. Watford*, 62 N. J. Eq. 339, to which the appellants refer, do not detract from the authority of *Smith v. Smith*, *supra*.

In *Brown v. Condit*, 70 N. J. Equity 440, decided by Vice Chancellor Stevenson the testatrix gave the residue of her estate "to the hospital fund for sick seamen at Navy Yard, Brooklyn, New York, care of Mr. John M. Wood, Chaplain." Mr. Wood died before the testatrix and it could not be found that there was any hospital fund for sick seamen. It appeared, however, that the testatrix had made several contributions to Mr. Wood who had administered to sick sailors at the Navy Yard. After Mr. Wood's death the Young Men's Christian Association carried on his work and after the death of the testatrix, it offered to take the residue of her estate and apply it according to her instructions. It was held that the gift failed because the wishes of the testatrix could not be carried out. The Vice Chancellor said at pages 452 and 453:

"It is true that in matters of construction courts lean in favor of charity. *Hesketh v. Murphy*, *supra*; *Hyde's Executors v. Hyde*, 64 N. J. Eq. (19 Dick.) 6, 10; *Jackson v. Phillips*, *supra*.

This has been said of old. It must, however, be borne in mind that our law of charitable uses has come down to us from rude and superstitious times—from times when estab-

lished charities were few. In these days almost every possible useful form of charity is established and organized and invites testamentary contributions. If an eccentric testator wants to establish some particular charity of his own he may do it in New Jersey, but there is certainly less reason now than there was formerly why courts of equity should be astute to aid the establishment of eccentric charities which donors have not clearly intended to establish. It may be that this court must enforce a charitable bequest in perpetuity for the distribution of the Book of Mormon, or even the works of Joanna Southcote—*George v. Braddock*, 45 N. J. Eq. (18 Stew.) 757 (1889)—but I do not see that there is any reason for straining the law or the declared intentions of testators in order to save such charitable bequests from becoming inoperative by a lapse. Mrs. Corson, having in her lifetime made four personal gifts to Missionary Wood for use in his personal charitable work among sick seamen, made what I think was intended as a similar testamentary gift and notwithstanding the rule of construction above referred to, I fail to see any reason why this court should infer that Mrs. Corson intended to dispense her charity through missionaries or agents of charitable associations whom she did not know.

The cases cited above indicate that the present trend is most distinctly towards maintaining the doctrine of lapse as against the exercise of a judicial *cy pres* power based upon intentions of charitable donors established by uncertain inferences which often amount to mere assumptions, if not fictions.

The testatrix having failed to make any disposition at the time of her death of the residue of her estate, the same will go to her next of kin. The costs of the complainants and of the answering defendants, including reasonable counsel fees, will be paid out of the fund."

In *Hartwell v. Martin*, 71 N. J. Equity, 157, decided by Vice-Chancellor Bergen, the will directed the Executors to make settlement with

certain creditors stating that a list of all debts, which the testator wished paid, would be found enclosed with the will. It was held that the list of debts was not, and could not be, made a part of the will, and the provision in question was void. The Vice-Chancellor said, at page 159:

“My conclusion on this branch of the case is that the bequest to the creditors of the testator now under consideration is void, because it is an attempt to bequeath property to a class of persons who can only be ascertained by reference to a non-testamentary paper, which the testator might change from day to day, and thus enlarge or diminish his testamentary gifts as often as he chose without observing the rules of law relating to the testamentary disposition of property. The effect, if it should be permitted, would be to allow a testator to declare the particular legatees to whom his estate should go without the formality required by law in such cases.”

In *Magnus v. Magnus*, 80 N. J. Equity, 346, decided by Vice-Chancellor Stevens, the will attempted to dispose of the residue as follows: “I give the same to my niece, Clara Seidensticker, to dispose of in accordance with my instructions to her.” The testatrix left a paper addressed to Clara Seidensticker which contained instructions with respect to the disposition of the residue. This paper antedated the will and apparently was in existence at the time of the execution of the will. It was held, however, that the paper could not be made a part of the will, because the will did not refer to that particular paper as containing the instructions, that the reference to instructions in the will was not limited to written instructions or to instructions previously given and might have included oral instructions or instructions subsequently given, and that as the paper could not be made

a part of the will the bequest failed entirely and the next of kin were entitled to the residue.

In *Murray v. Lewis*, decided by Vice-Chancellor Fielder, 94 N. J. Equity, 681, the will gave to the Executors the sum of \$5,000, stating that it was not to be in lieu of commissions and that a sealed letter, addressed to the Executors, would be found with the will expressing the wishes of the testator as to said sum. The testator left a letter with the will, addressed to the Executors, in which he requested them to pay the sum in question to the complainant. It was held that the letter to the Executors was not, and could not be made, a part of the will; that the bequest to the Executors was not absolute but was in trust; that the Executors took no beneficial interest therein, and the object of the trust being incapable of ascertainment on the face of the will the bequest must lapse and fall into the residue of the estate.

There is nothing in the case of *Johnson v. Bowen*, 85 N. J. Equity 76, which is opposed to our contentions. In that case the testator gave the residue to the City of Logansport for a hospital "under such direction and arrangement as my executor may make with the Mayor and Aldermen of the City of Logansport." It was held that the gift was for a charitable purpose and valid. It should be noted that this gift was not conditional upon or limited by any act of the testator outside of the will. The purpose was definite and charitable. The executor was empowered to carry it out. The wishes of the testator were ascertainable from the face of the will. Vice-Chancellor Lewis distinguished, but of course recognized the authority of, *Smith v. Smith* (*supra*, p. 15).

In *Olliffe v. Wells*, 130 Mass. 221, which was cited with approval by Chancellor McGill in *Smith v. Smith* (*supra*), the residuary clause of a will was as follows: "To the Rev. Eleazar M. P. Wells, all

the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him." The court held that the clause was void and that the heirs at law or next of kin were entitled to the residue.

In *Wilcox v. Attorney General*, 207 Mass. 198 (1911), the will purported to dispose of the residue as follows:

"to Henry H. Earl * * * in trust, nevertheless, to carry out certain other purposes of mine mentioned to him and to Abbie C. Anthony * * * and relating to certain benevolent and charitable institutions and associations; to a clock tower and clock in memory of my sister Mary Amanda Borden; to the use of our old homestead estate as a memorial to my mother Eliphal Tucker Borden to be known as 'Eliphal Tucker Borden Park Play Grounds' et cetera."

The Court held that the trust was void and that the heirs at law or next of kin were entitled to the residue.

In *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513 (C. C. A., 1st Cir., 1921), the ninth clause of the will purported to give the residue

"to my said executors, or any duly appointed administrator of my estate, in trust nevertheless, to convert the whole of said property into cash as soon as reasonably possible, with power for this purpose to sell, the same or any part or parts thereof at either private or public sale, and the net proceeds of such sale or sales to pay over to the said Rhode Island Hospital Trust Company to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been de-

posited by me as a part of said trust estate and property; and the receipt of said trust company shall be a full discharge to my said executors or administrators relieving them from all further liability or accountability in respect thereof."

The will was executed after the testator had signed a deed of trust appointing Rhode Island Hospital Trust Company, trustee, and reserving the right to revoke or modify the trust during his lifetime. After the execution of the deed of trust and after the execution of the codicil confirming the will, he made certain changes in the deed of trust.

The Court held that the gift was void and that the heirs at law or next of kin were entitled to the residue, saying, at page 521:

"* * * we are clear that the plan disclosed in the will and the inter vivos trust together is obnoxious to the statute of wills, falling plainly within the condemnation of the rule pungently stated by Sir George Parker in *Johnson v. Ball*, 5 De G. & Sm. 85, 91, where he said:

'A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.'

This is exactly what Davis undertook to do as to the residue of his testamentary estate.

The case is on all fours with *Olliffe v. Wells*, 130 Mass. 221, and the other numerous cases to the same effect.

* * * * *

Manifestly, then, the real disposition of this residuary estate is made, not by the will, but by the shifting provisions in the trust instrument. No amount of discussion or elaboration could make plainer the absolute destruction by such plan of the safeguarding provisions in the statute of wills.

Learned counsel for the respondent Trust Company recognize that the case cannot be dis-

tinguished from *Olliffe v. Wells*, and attack *Olliffe v. Wells* as bad law. We do not so regard it. In our view, the decision in *Olliffe v. Wells* is sound in principle and supported by the overwhelming weight of authority. *Hammond v. Hammond*, 234 Mass. 554, 125 N. E. 686; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149; *Bailey v. Wood*, 211 Mass. 37, 43, 97 N. E. 902, Ann. Cas. 1913-A, 950; *Davison v. Wyman*, 214 Mass. 192, 195, 100 N. E. 1105; *Blunt v. Taylor*, 230 Mass. 303, 119 N. E. 954; *Payton v. Almy*, 17 R. I. 605, 24 Atl. 101; *Fitzsimmons v. Harmon*, 108 Me. 456, 81 Atl. 667, 37 L. R. A. (N. S.) 400; *Haskell v. Staples*, 116 Me. 103, 100 Atl. 148, L. R. A. 1917-D, 819; *Amherst College v. Ritch*, 151 N. Y. 282, 332, 45 N. E. 876, 37 L. R. A. 305; *Reynolds v. Reynolds*, 224 N. Y. 429, 434, 121 N. E. 61; *Condit v. Reynolds*, 66 N. J. Law, 242, 49 Atl. 540; *Magnus v. Magnus*, 80 N. J. Eq. 348, 84 Atl. 705; *Smith v. Smith*, 54 N. J. Eq. 1, 32 Atl. 1069; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29; *In re Davis* (D. C. 112 Fed. 129).

Our views are also confirmed by the recent decision of the Court of Appeals in the Eighth Circuit, Circuit Judges Sanborn and Hook, and District Judge Amidon, in *Thomas v. Anderson*, 245 Fed. 642, 158 C. C. A. 70, holding invalid a gift of a residue to the executor 'to * * * dispose of * * * following as nearly as may be possible for him to do, any instructions, directions or request that I may hereafter give, make or request.' That learned court held that this trust was 'too indefinite for enforcement', citing as the cases which presented the closest analogies, the following: *Christman v. Roesch*, 132 App. Div. 22, 116 N. Y. Supp. 348; *Ingram v. Fraley*, 29 Ga. 553; *McCurdy's Appeal*, 124 Pa. 99, 16 Atl. 626, 10 Am. St. Rep. 575; *Briggs v. Penny*, 3 De Gex & Sm. 525; *Schmucker's Estate v. Reel*, 61 Mo. 592; *Condit v. Reynolds*, 66 N. J. Law, 242, 49 Atl. 540; *Davison v. Wyman*, 214 Mass.

192, 100 N. E. 1105; *Gross v. Moore*, 68 Hun, 412, 22 N. Y. Supp. 1019; *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694.”

* * * * *

See also

Hadley v. Forsee, 203 Mo. 418;

Colbert v. Speer, 24 App. D. C. 187;

Moore v. O'Leary, 180 Mich. 261.

II.

The purposes stated in paragraph I of the will are not charitable purposes.

We have shown in the preceding point that the purpose and terms of the proposed trust are not stated in the will and we claim here that even if it were held that the purposes of the trust are stated in paragraph I of the will, nevertheless paragraph XI could not be sustained as a charitable trust.

Paragraph I of the will expresses only the purposes “of pleasing Almighty God, benefiting my fellowman and as far as possible developing that section of the Palisades along the Hudson, located in the Borough of Englewood Cliffs and vicinity”. No one of these purposes is charitable. One of them may be benevolent or philanthropic but a benevolent or philanthropic purpose is not necessarily a charitable purpose. No purpose is charitable unless it is beneficial in some way to human persons, but not every purpose, which is so beneficial, is charitable. The words “beneficial”, “benevolent”, “philanthropic” and “public” are each broader than the word “charitable”. A trust cannot be sustained as a charitable trust unless the purpose is limited by the will to a charitable purpose. If the trust has two purposes, one of them charitable and the other not, the trust is not a charitable trust.

In *Norris v. Thomson's Executors*, 19 N. J. Equity, 307; affirmed by this Court, 20 N. J. Equity, 489, the testator gave property to his widow with instructions "to give and devise the same among such benevolent, religious or charitable institutions as she may think proper". It was held that the word "benevolent" was broader than the word "charitable", that the gift was not limited to a charitable purpose and hence could not be sustained as a gift for a charitable purpose.

In *Livesey v. Jones*, 55 N. J. Equity, 204; affirmed by this Court *sub nomine Chadwick v. Livesey* for the reasons given by the Court of Chancery, 56 N. J. Equity, 453, the will gave the residue to B "to use and expend the same for the promotion of the religious, moral and social welfare of the people in any locality whenever and wherever he may think most needful and necessary". It was held that the gift was not limited to a charitable purpose and could not be sustained as a gift for a charitable purpose. Vice-Chancellor Stevens said, at page 205:

"Now, in the first place, it seems to be plain that the words 'religious, moral and social' are not used conjunctively in such manner that every object to which the bequest may be applied *must* conduce at one and the same time to the advancement of religion and morality and to the social welfare of the people. To so hold would be to make the charity a religious one, contrary to the plain intention of the testator. It would be, moreover, in direct conflict with the decision in *Williams v. Kershaw*, 5 Cl. & F. 111, where the devise was to 'such benevolent, charitable *and* religious purposes as the executors should in their discretion think most advantageous and beneficial,' and where it was held that this language authorized the application of the bequest to other than strictly charitable purposes. This case I regard as authoritative, because Chief-Justice Beasley, in *Norris v. Thomson*, 5 C. E. Gr. 523,

said that it rested on a proper foundation, and reiterated his opinion in *DeCamp v. Dobbins*, 4 Stew. Eq. 695, in the following vigorous language: 'Nor can I go with that process of reasoning that concludes that when the word "benevolent" is conjoined to the word "charitable", the two words become identical in meaning, as that implies that one of the terms is to be dispensed with or that the lesser term swallows up the larger. * * * In such a naked case as I have supposed, for the court to strike out the broader of the descriptive terms may indeed uphold, now and then, a testamentary limitation, but at the same time, one of the most important canons that the law has established for the construction of written instruments is impaired.'

"I must therefore assume that any use of the property which, in the estimation of Dr. Bellows, would promote either the religious welfare of the people, or the moral welfare of the people, or the social welfare of the people, would be fully justified by the language of the will.

"That a trust to promote the religious welfare of the people is charitable is admitted. Whether a trust to promote their moral welfare is so, I need not consider. I am clear that the trust to promote the social welfare of the people, in the manner declared in this will, is not. I think it may be said, without much fear of contradiction, that there are many ways of advancing the social welfare of the people which have nothing to do with charity. Money given to companies to build railways or canals, water or gas-works, where none exist; money given to companies or individuals to build steamship lines or otherwise to advance commerce or agriculture, would be money given to promote the social welfare of the people, certainly quite as much as money given to hospitals and almshouses, but would not be given for charitable purposes."

In *Hyde's Executors v. Hyde*, 64 N. J. Equity 6, the will gave the residue to the executors in trust

to give and distribute \$100,000 "for such religious, charitable or educational or other purposes as they may deem advisable, provided nevertheless, that no portion thereof shall be given to or distributed among my wife or children individually or collectively." It was held by Chancellor Magie that the gift was not limited to charitable purposes and hence could not be sustained, and that the widow and children were entitled to the \$100,000 as the next of kin of the testator.

In *Hegeman's Executors v. Roome*, 70 N. J. Equity 562, the will gave the residue to the husband of the testatrix "for the purpose of making such distribution among religious, benevolent or charitable objects as he may select." It was held by Vice-Chancellor Bergen that the gift was not limited to charitable purposes and hence could not be sustained, that the word "benevolent" was broader than the word "charitable" and included purposes which were not charitable, that the gift was void and the heirs at law and next of kin were entitled to the residue.

In *Kitchen v. Pitney*, 94 N. J. Eq. 485, decided by Vice-Chancellor Fielder and affirmed by this Court for the reasons stated in the opinion below, it was held that the gift of a fund for certain purposes was valid because the only purposes for which the fund could be used were charitable. The Vice-Chancellor said, however, at page 487:

"If the fund, in the discretion of the trustees under the will, or of the board of trustees who are to manage the home under its incorporation, can be used for purposes not strictly charitable, or partly for purposes charitable and partly for purposes not strictly charitable, the trust created is invalid. *Norris v. Thomson's Executors*, 19 N. J. Eq. 307; affirmed, 20 N. J. Eq. 489; *Hyde's Executors v. Hyde*, 64 N. J. Eq. 6; 53 Atl. Rep. 593; *Hegeman's Executors v. Roome*, 70 N. J. Eq. 562; 62 Atl.

Rep. 392; *Van Syckel v. Johnson*, 80 N. J. Eq. 117; 70 Atl. Rep. 657; *Thomas v. Scheible*, 91 N. J. Eq. 451; 111 Atl. Rep. 519."

In *McKenzie v. Trustees, etc.*, 67 N. J. Equity 652, this Court adopted a definition of a charity which seems never to have been subsequently questioned. Green, J., in delivering the opinion of the Court, said at page 665:

"In *Jackson v. Phillips et al.*, 96 Mass. 539, 566 (1867); Justice Gray says: 'A charity, in its legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature.' Of this definition Mr. Perry, in his work on *Trusts* (5th ed.) § 697, has said that it leaves nothing to be desired; and the editors of 5 Am. & Eng. Encycl. L. (2d ed.) 894, and of 6 Cyc. L. & P. 900, have accepted it as comprehensive and satisfactory. The decisions of the courts of Massachusetts and New Jersey are not always at one in cases of charities; but, for present purposes, we may give hearty assent to Justice Gray's definition."

This definition of a charity was quoted and applied by Vice-Chancellor Howell in *Morristown Trust Co. v. Morristown*, 82 N. J. Equity 521, and in *Case v. Hasse*, 83 N. J. Equity 170, 175; and by Vice-Chancellor Lewis in *N. J. Title, etc., Co. v. Smith*, 90 N. J. Equity 386, 390-1.

It requires no argument to show that this definition is not broad enough to include all gifts for

beneficial, benevolent, philanthropic or public purposes and that neither the purpose of pleasing Almighty God nor the purpose of benefitting my fellow man nor the purpose of developing the Palisades is a charitable purpose. There is no doubt that this definition is very carefully worded and that it gives to charities a special and limited meaning. As a matter of fact the history of the English law shows that the word "charity" has always had a special and limited meaning and that this is one of the reasons why gifts for charitable purposes generally were sustained and not held to be too indefinite and uncertain to be enforced. The English courts have uniformly held that gifts for benevolent, philanthropic or public purposes were void because the purposes were too indefinite and uncertain for any court or trustee to carry out, and there was no definite test for determining whether any particular purpose fell within or without the scope of the gift. On the other hand, they have always held that gifts for charitable purposes could be sustained because the word "charity" had a definite, limited and well-known meaning.

The appellants contend that there is no difference between the common law of England and the law of this State with respect to the legal definition of a charity and they quote the language of Lord MacNaughton taken from the case of *Income Tax Commissioners v. Pemsel* as if it were intended to be a definition of a charity, printing in italics the words "and trusts for other purposes beneficial to the community not falling under any of the preceding heads". It has been repeatedly held by subsequent English decisions that these words of Lord MacNaughton were not intended to be and should not be construed to be a definition of a charity, that they purported merely to state the four principal classes into which charities might be divided and that, as a matter of fact, gifts for the four pur-

poses mentioned were not by any means all charities. It has been held specifically that there might be trusts for purposes beneficial to the community which were not charities and that the words "beneficial", "benevolent", "philanthropic" and "public" were each broader than the word "charitable" and that gifts for beneficial, benevolent, philanthropic or public purposes were void because they were not limited to charitable purposes.

In *Morice v. The Bishop of Durham*, 10 Vesey Jr. 521 (1805), it was held that a gift for such objects of benevolence and liberality as the Trustee in his own discretion should most approve was void because not limited to charitable purposes. Lord Chancellor Eldon said:

"The question therefore resolves itself entirely into that; for I agree, there is no magic in words; and if the real meaning of these words is charity or charitable purposes, according to the technical sense, in which those words are used in this Court, all the consequences follow: if on the other hand the intention was to describe anything beyond that, then the testator meant to repose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more definite than those, to which we must look; considering them purposes, creating a trust; for if there is as much of indefinite nature in the purposes, intended to be expressed, as in the cases, to which I first alluded, where the objects are too uncertain to make recommendation amount to trust, by analogy, the trust is as ineffectual: the only difference being, that in the one case no trust is declared; and the recommendation fails; the objects being too indefinite: in the other the testator has expressly said, it is a trust; and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this Court. Upon these words much criticism may be used. But the question is, whether, according to the ordi-

nary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word 'charity' in the Christian religion, this testatrix meant by these words to confine the Defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think, that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed. The consequence of Law is, that the Bishop takes the property upon trust to dispose of it, as the Law will dispose of it: not for his own benefit, or any purpose this Court can effectuate. I think, therefore, this decree is right."

In re Macduff, 74 L. T. R. 706 (Court of Appeal, 1896) it was held that a gift for charitable or philanthropic purposes was void because not limited to charitable purposes.

Lindley, *L. J.*, said at page 707:

"* * * Now, I am bound to say that, having considered these words and attended to the arguments upon them, I cannot arrive at any definite idea at all of what this testator meant, or of the kind of trust which the court would have to execute. To show that that is the right principle I will refer to what I always consider the leading case on all these questions as to charities, I mean the case of *Mcrice v. The Bishop of Durham* (*ubi sup.*). In that case, which came first before Sir William Grant and subsequently before Lord Eldon (whose judgment is one of the most important upon all questions of charities), Lord Eldon incidentally remarks (10 Ves. 538) what unquestionably is true, that this court 'has taken strong liberties upon this subject of charity.' There is no doubt it has, but, notwithstanding the strong liberties it has taken, there are certain principles which have always guided the court. Lord Eldon said in that case (10 Ves. 539): 'As it is a maxim that the execution of a trust shall be under the

control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust, a trust, therefore, which in case of mal-administration could be reformed, and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided that the court can neither reform mal-administration nor direct a due administration.' That principle has been enunciated or repeated from time to time, as will be found on reference to the case of *James v. Allen* (*ubi sup.*) and *Ellis v. Selby* (*ubi sup.*)".

* * * * *

"Then reliance is placed, and very naturally placed, upon the judgment of Lord Macnaughten in the case of *The Commissioners for Special Purposes of the Income Tax v. Pemsel* (*ubi sup.*), but when we look at that I do not think it helps the Attorney-General in this case. What Lord Macnaughten did is tolerably plain. He took the classification of charities from the argument of Sir Samuel Romilly in *Morice v. The Bishop of Durham* (*ubi sup.*) and the passage in Sir Samuel Romilly's argument runs thus (10 Ves. 531): 'There are four objects, within one of which all charity to be administered in this Court must fall'; that is to say, within one of which they must come, but he does not say anything which comes within any one of them must be a charity; that may be so or may not be so, but they must all come within one of these four heads. Then he continues, 'First, relief of the indigent in various ways, money, provisions, education, medical assistance, &c.; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility.' Now, Sir Samuel Romilly did not mean, and I am certain Lord Macnaughten did not mean, in the passage I will read presently, to say anything that was an object of public gen-

eral utility must necessarily be a charity. Some may be and some may not be. That is the true view and true explanation of Lord Langdale's decision in the case of *Kendall v. Granger* (*ubi sup.*), where the gift was 'for encouraging undertakings of general utility,' and Lord Langdale came to the conclusion that this was not necessarily a charity, and I am not aware that *Kendall v. Granger* has ever been overruled, or questioned. Now, what Lord Macnaughten said in *The Commissioners for special purposes of Income Tax v. Pemsel* is obviously a paraphrase of what Sir Samuel Romilly said. Lord Macnaughten said 65 L. T. Rep. 637; (1891) A. C. 583, "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' He leaves out those somewhat significant words which Sir Samuel Romilly put in in dealing with the fourth head, 'which is the most difficult,' which showed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt but Lord Macnaughten saw also, there might be cases of public general utility which might be charitable and some which might not."

Rigby, J., said at page 710:

"* * * What principle do we find that is really applicable to a whole class of cases? First of all, a bequest must be sufficiently certain to enable the old Court of Chancery, or the High Court of Justice, or this court as succeeding the old Court of Chancery, to superintend and give effect to the trust according to its terms. So far we have nothing to do with charity. That is a general principle that applies to all bequests; they must be sufficiently definite to enable the court to draw the line, and say this matter is within and that matter is outside it. Then, how do charity cases differ from general cases? As it appears to me in this respect only, that when you get

the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble of the Statute of Elizabeth, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce other matters which are also to be treated as charitable. But before you can apply that rule at all you must have the idea of charity sufficiently expressed in the will, and it will not do if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is demised to them are to be charitable or something else. Directly there is an alternative the reference to the statute is of no service, and the general rule comes in that it is too indefinite for the court to give effect to it. * * *”

“There is the case of *Kendall v. Granger* (*ubi sup.*), which included purposes of ‘general utility,’ and Lord Langdale, a great authority in cases of this kind, thought that was not sufficient, and that there were purposes, or might be purposes, of general utility which were not charitable purposes. That was his view, and I see no reason to doubt that, and I do not know that that case has ever been doubted. I consider it an authority for that purpose. I will take the case which I think Mr. Hadley very properly referred us to, notwithstanding the doubts which have been thrown upon the application of the principle in that particular case, I mean the case of *Browne v. Yeall* (*ubi sup.*). That appears to be a case in which the question as considered by Lord Thurlow was whether a gift for the purchase and disposition of books for the happiness of mankind was sufficiently definite, and I consider that Lord Thurlow, as explained by Lord Eldon, came to the conclusion that a gift of that kind (and he treated it as a gift for the happiness of mankind) would not be so definite as to be capable of being administered as a charitable gift. It is true that in that will

there were words which I should have thought gave a limitation to the words 'happiness of mankind', and that is what I understand to have been the view taken by Lord Eldon. It was on the question whether the words 'happiness of mankind' were sufficiently definite that Lord Thurlow decided the case, and I do not gather that Lord Eldon or Sir William Grant would have differed if that case was really raised by the will. The promotion of the happiness of mankind no one would doubt to be a philanthropic purpose, and I think Mr. Hadley was right in saying, so far, at any rate, as the cases have been brought before us, that 'happiness of mankind' is nearer in its meaning to that of the word philanthropic than any other.

* * *

At page 711:

"* * * I have now only to deal with the supposed difficulty arising from the judgment of Lord Macnaughten in *The Commissioners for Special Purposes of the Income Tax v. Pemsel (ubi sup.)*, and I think it is altogether illogical to ascribe to Lord Macnaughten what is really ascribed to him. He says cases of charity may be divided into four classes, and one of them is benefit to the community. You find what they are, and you come to the conclusion that there is one miscellaneous set of charities which can be classed under that head; but to deduce from that the notion, or suggestion of a notion, or a limit of any kind, that every purpose of general use to the community must be a charity, is just about as logical as if an assurance society for the purposes of its reports says, 'Persons insured with us may be divided into men, women, and children.' Are you to deduce from that that every man, every woman and every child is insured in that society? * * * I think it is true when you say 'Gifts to the poor, trusts for the advancement of education, trusts for the advancement of religion,' that does not mean that in every conceivable case where you can bring a gift under those general words it is necessarily a charity.

It means nothing of the kind. It means, as in the case of 'for the general benefit of the community,' that these are heads or categories under which actual and valid charities may be implied. No one will suggest, for instance, to take only one illustration, that 'education' meant the education of pickpockets in a thieves' kitchen to make them fit for their profession."

In *Hunter v. Attorney-General*, L. R. 1899 A. C. 309 (House of Lords Scottish Appeals, 1899), Lord Davey said at page 321:

"You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it for more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission. It may be that *voluit sed non dixit*."

and at page 323:

"What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 321, decided by Sir William Grant and Lord Eldon, to *In re Macduff* (1896), 2 Ch. 451, decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In those cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent', or 'charitable or philanthropic', or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey v. Jamson*, 1 S. & S. 69, the trust was

to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir John Leach said: 'The testator has not fixed upon any part of this property a trust for a charitable use; I cannot therefore devote any part of it to charity. * * * The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed by this Court, they must fail altogether, and the next of kin become entitled to the property.'

In *Blair v. Duncan*, 71 L. J. R. 22 (1902) (decided by the House of Lords Scottish Appeals, 1901), it was held that a gift "for such charitable or public purposes as my Trustee thinks proper," was void because not limited to charitable purposes. The Earl of Halsbury, *L. C.*, said at page 23:

"Under those circumstances, it appears to me that it would be equally the law of England as it would be the law of Scotland that the discretion here given to A B, to determine what particular public purposes should be the objects of the trust, is too vague and uncertain for any Court either in England or Scotland to administer."

Lord Robertson said at page 26:

"Now, I have not heard any one say that this bequest is not vague and uncertain; what is said is merely that a gift to any charitable purpose, to be selected by a trustee, is equally vague, and that the law allows the validity of a gift to any charitable purpose to be selected by a trustee. The soundness of this argument must therefore be considered.

"First of all, I do not agree that 'charitable purposes' is as wide or nearly as wide as 'public purposes'. Even giving to the word 'charitable' the widest extension ever allowed to it,

there are, as I should believe, many public purposes completely outside it. Giving to the word 'charitable' its proper meaning as it occurs in a Scottish testament, its comprehensiveness still further falls short of the word 'public'."

In *Houston v. Burns*, L. R. 1918 A. C. 337 (House of Lords, Scottish Appeals, 1918), it was held that a gift to trustees "for such public, benevolent or charitable purposes in connection with the Parish of Lesmahagow or the neighborhood in such sums or under such conditions as they in their discretion shall think proper," was void, because not limited to charitable purposes. Viscount Haldane said at page 343:

"It is not necessary in this appeal to define the significance of the expression, for all that is necessary on this occasion is to point out that by other decisions of this House, such as *Blair v. Duncan* (2), it has been settled that the expression 'public purposes' has a wider meaning than 'charitable purposes,' and includes much that does not fall within the latter expression. To take the illustration given by Lord Robertson in advising this House in *Blair v. Duncan* (2), if a trustee handed over a sum of money to an election fund or a Yeomanry regiment, he would be giving it for a public but not for a charitable purpose. Trusts for charities have been regarded with favour as constituting a particular class recognized as sufficiently definite to enable a testator to leave his property on such a trust, and to empower a third person to determine the shares in which those falling within the class are to participate in his bounty. Trusts for public purposes have not been regarded by the Courts as constituting a class so particular and definite as to be capable of taking under an analogous disposition.

"In the case before us the direction to the trustees is to hold the testator's residue 'for such public, benevolent, or charitable purposes

in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper.' Notwithstanding the reference to Lesmahagow or its neighborhood, the purposes are not the less of the very general and indefinite character which is all that the word 'public' connotes. And I am of opinion that the word 'or,' especially as the commas which follow appear in the original will, shows what the testatrix intended was to make a disjunction."

Lord Atkinson said at page 344:

"No doubt in *Blair v. Duncan* (1) there was no indication of a defined area within which the public purposes were to be comprised. The testatrix, to use Lord Robertson's words (3), 'excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice'; but the vast extent of this 'ambit of choice' was not the only thing which, in the opinion of the House, rendered the bequest in that case void. It was rendered void, according to Lord Halsbury, because a disposition which left it to the trustee to determine what particular public purpose should be the object of the trust was too vague and uncertain for any Court, either in England or Scotland, to administer. And it was void, according to Lord Davey, because 'public purposes' were not so within the description of a particular class of objects as to satisfy the test which Lord Lyndhurst suggested. The purposes which would come within the description were, as he pointed out, vast in number, and were sometimes of a kind which would have reduced the gift in the case before him to an absurdity. It is the insufficiency of these words, 'public purposes,' because of their vagueness and uncertainty, to identify and fix the limits of the class of individuals or objects from which the trustees are to choose that renders void a bequest for 'public pur-

poses'. That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised. It may possibly be that the words 'public purposes' are more vague and uncertain where the trustees have the whole world as the ambit of choice than where the ambit is limited to a much smaller area, but they are sufficiently vague and uncertain, even if applied to parishes, to render them insufficient to define and fix the limits of the class or classes from which the trustees are to make their selection."

In re Davis, 128 L. T. R. 735 (Chancery Division, 1923) it was held that a gift to Trustees upon trust "to pay and apply the same for the benefit of one or more charitable or public institutions in Wales as they may deem advisable in their absolute discretion, and in such proportions and shares as they may deem fit," was void because not limited to charitable purposes. The court said at page 736:

"The phrase 'Public institutions in Wales' is an extraordinarily wide and indefinite one, and it will be impossible to identify all the associations or societies in Wales that might be comprehended within the phrase, or even to point out exhaustively the various heads of qualification or classification which would entitle these associations or societies to be brought within the phrase. Mr. Dighton Pollock sought to treat the alternative gift as equivalent to a gift for public purposes for or within the area of Wales. In my judgment this is not a sound construction. The gift is to institutions, that is, individual associations or societies of a public character, and is not a gift for public purposes. For even if the gift were to be treated as a gift for public purposes in Wales the decision in the recent case of *Houston v. Burns* (*sup.*) shows that the gift would be so indefinite as to be void. Indeed, whichever way the gift is construed, the testator had not suf-

ficiently defined the trusts within which his trustees are to have a right of selection, but on the contrary, has purported to give them powers so wide and indefinite as substantially to amount to a delegation of his testamentary capacity: (see the remarks of Lord Haldane in *Houston v. Burns*, *sup.*). I must, therefore, declare that the whole gift of residue, subject to the wife's annuity, is void, and that there is a resulting trust of the real estate for the testator's heir-at-law and of the personal estate for his next of kin according to the statutes of distribution."

In re Tetley, 93 L. J. R. Chan. Div. 231 (decided by the House of Lords, 1924), it was held that a gift "for such patriotic purposes or objects and such charitable institution or institutions or such charitable object or objects in the British Empire" as the trustees might in their absolute discretion select was void because the purposes were not limited to charitable purposes. The Lord Chancellor (Viscount Cave) said at page 233:

"The second point which was made is this: It is said that 'patriotic purposes' are necessarily charitable purposes, because they come within the fourth of the categories into which Lord Macnaughten, in the well-known case of *Income Tax Commissioners v. Pemsel*, divided charities. He said (61 L. J. Q. B. at p. 290: (1891) A. C., at p. 583): 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' It is said that 'patriotic purposes * * * in the British Empire' means purposes directed to the public welfare of the British Empire, and so the trust falls within the fourth division of 'trusts beneficial to the community, not falling under any other of the preceding heads.'

“It has been pointed out more than once, and particularly in *Macduff, In re: Macduff v. Macduff*, that Lord Macnaughten did not mean that all trusts for purposes beneficial to the community are charitable, but that there are certain charitable trusts which fall within that category; and, accordingly, to argue that because a trust is for a purpose beneficial to the community, it is therefore a charitable trust, is to turn his sentence round, and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community, or for the public welfare; you must also show that it is a charitable trust. I am not able to say that this is a charitable trust. The expression ‘patriotic purposes’ is vague and uncertain. Whether a purpose is patriotic or not is a matter of opinion; it depends to a great extent upon the state of mind of the person who uses the expression. An object which appears to some persons patriotic may legitimately appear to others not to fall within that description; and there is no fixed rule by which a Court can determine whether a particular purpose is or is not patriotic. Further, it is not difficult to conceive purposes which would appear patriotic to most persons, but are clearly not charitable within the legal meaning of that term. It seems to me, therefore, that the expression ‘patriotic purposes’ is one which cannot be said to bring the trust within the category of a charitable trust. The point is, I think, practically covered by two well-known decisions in this House. The first is *Blair v. Duncan*, in which the words were ‘charitable or public purposes’, and the second is *Housten v. Burns*, in which the words were ‘public, benevolent, or charitable purposes.’ In both those cases the trusts were held to be uncertain and void, and for the same reasons I hold the view that the trust in this case is also void. I move your Lordships that the appeal be dismissed.”

It accordingly appears that the extracts from text books and decisions which are printed on pages

nine to eleven of the appellants' brief cannot fairly be construed as definitions of a charity in the sense that all gifts included in the classes mentioned in these extracts are charitable gifts, and that under the law of England as well as the law of this State gifts for beneficial, benevolent, philanthropic or public purposes are not charitable gifts. It is significant that before this Court adopted in *McKenzie v. Trustees* the definition of a charity made by Justice Gray in *Jackson v. Phillips*, 96 Mass. 539, 566, it referred to some of the extracts quoted by the appellants and that the definition which it finally adopted was the narrow and limited definition made by Justice Gray. It is also significant that Mr. Perry in his work on trusts, 5th Edition, at sec. 697, has said that this definition leaves nothing to be desired.

It is too obvious for words that neither the purpose of pleasing Almighty God nor the purpose of benefiting my fellowmen nor the purpose of developing the Palisades is a charitable purpose and that there is no language in the will which limited the purposes of the proposed trust to charitable purposes. The testator might well have approved a plan or expressed to his Trustees wishes with respect to the development and maintenance of the Palisades which would have been appropriate in his judgment for the purpose of pleasing Almighty God and benefiting his fellowman without including any purpose which is recognized by law as a charitable purpose.

It is also obvious that the purpose of pleasing Almighty God and benefitting my fellow man is too indefinite and uncertain for any Trustee or any Court to carry out. There is no test or standard for determining whether any particular plan for the development and maintenance of the Palisades would fall within or without this purpose. It might well be argued that any plan which tended in any

way to benefit mankind or any class of mankind, directly or indirectly, was within the scope of this purpose, and it is obvious that there are innumerable plans which would fall within the scope of this purpose but would not be charitable in the legal sense.

III.

The testator did not authorize his trustees to devise a plan for carrying out the purposes stated in paragraph I of the will.

We have shown in the preceding points that the purpose and terms of the proposed trust are not stated in the will, that paragraph XI is void irrespective of whether the purpose of the trust was charitable or not, and that the purposes stated in paragraph I are not charitable purposes. We claim here that even if it were held that the purposes of the proposed trust are stated in paragraph I of the will and that such purposes are charitable purposes, nevertheless paragraph XI would be void because the testator did not authorize his Trustees to devise a plan for carrying out the purposes stated in paragraph I.

It is well settled in this state and generally in America that gifts for charitable purposes generally are void unless the testator authorizes somebody to select some particular charity to be benefited and thus determine the method of carrying out the gift.

Norcross v. Murphy, 44 N. J. Eq. 522;
supra, p. 16;

White v. City of Newark, 89 N. J. Eq. 5;

Wilcox v. Attorney General, 207 Mass.
198; *supra*, p. 26.

In *White v. City of Newark, supra*, Vice Chancellor Stevens stated the rule as follows at pages 6-7:

“In the cases on this subject there is a clear distinction between gifts to charity generally and gifts to a charitable object definitely indicated. Where a testator gives to charity generally he must, according to American law, constitute a trustee to select the objects. Having no prerogative powers, the courts will not give effect to such a bequest, either by appointing a trustee to make the selection or by making it themselves. *Perry Trust*, § 719; *Hesketh v. Murphy*, 36 N. J. Eq. 304. In *Norcross v. Murphy*, 44 N. J. Eq. 522, there was a bequest of the residue ‘for further consideration in the way of charitable purposes,’ and Chief-Justice Beasley said: ‘The bequest is void, as the gift is general, and there is no testamentary designation of a person to select the object of the benefaction.’

On the other hand, if the bequest be for a specific object and no trustee be appointed, the court will nominate one.”

In England the Courts are more liberal in sustaining gifts for charitable purposes generally, assuming the power either to select a particular charity or authorize a Trustee to do so, but there is no case in which an English Court has assumed such a power unless the purposes of the gift were limited to charitable purposes, and no case whatever in which an American Court has assumed such a power.

As the statement of purposes contained in paragraph I of the will is as broad and general as could well be imagined, it is clear that even if such purposes were held to be charitable the proposed trust would be void unless the testator authorized the Trustees to select a particular charitable purpose and thus determine the method of carrying out the gift. It is to avoid this result that the appellants

claim that the testator authorized his Trustees to devise a plan for the purpose of pleasing Almighty God and benefiting his fellowman. That the testator never gave or intended to give his Trustees any such authority is, we think, conclusively shown in the first point of this brief. Everything in the will points to the conclusion that the testator intended that he, and he alone, should determine the plan or method by which the Trustees should maintain and develop the Palisades, and that he, and he alone, should be the judge as to whether any particular plan or method was appropriate for the purpose of pleasing Almighty God and benefiting his fellowmen.

We admit, of course, that when a gift is made for charitable purposes generally and the testator authorizes somebody to select the particular charity and determine the method of carrying out the gift, there is no doubt about its validity, for in such cases the testator provides a method for making the gift sufficiently definite for a Trustee or the Court to carry out and, as was stated in *Hesketh v. Murphy*, 36 N. J. Eq. 304, 313: "The case is divested of every element of uncertainty". Many of the cases cited by the appellants fall within this principle.

There is, of course, no basis in this case for invoking the *cy pres* doctrine, because that applies only in a case where the gift to charity is valid on the face of the will.

IV.

The evidence of oral statements made by the testator with respect to his desire and intention was not admissible and should be disregarded.

When there is doubt as to the meaning or application of the language of a will extrinsic evidence is admissible to show the circumstances, situation and surroundings of the testator and his property at the time of the execution of the will and thus place the Court in the situation of the testator. In the case of a latent ambiguity, where the language of the will might be applied to two or more persons or things and it is impossible to determine from the face of the will which person or thing the testator intended to designate, declarations of the testator are admissible to show which person or thing he intended to designate. It is clear, however, that even in these cases extrinsic evidence is not admissible for the purpose of changing, adding to or detracting from the language of the will. It is fundamental that the will must be in writing, signed and published by the testator and attested by at least two witnesses, and that no purposes, intentions or wishes of the testator can operate as a disposition of property unless they are expressed in a properly executed will. Extrinsic evidence is never admissible to show purposes, intentions or wishes of the testator different from those expressed in the will.

Leigh v. Savidge, 14 N. J. Equity, 124;
Zabriskie v. Huyler, 62 N. J. Equity, 697;
aff'd, 64 N. J. Equity, 794;
German Pioneer Verein v. Meyers, 70 N. J.
Equity, 192, aff'd, 72 N. J. Equity, 954;

- Farnum v. Pennsylvania Company*, 87 N. J. Equity, 108; aff'd, 87 N. J. Equity, 652;
Murray v. Lewis, 94 N. J. Equity, 681;
Hand v. Hoffman, 8 N. J. Law, 71;
Den v. Cubberly, 12 N. J. Law, 308;
Griscom v. Evens, 40 N. J. Law, 402; aff'd 42 N. J. Law, 579;
L'Hommedieu v. L'Hommedieu, 131 Atlantic Rep. 302 (1925).

In *Farnum v. Pennsylvania Company*, this Court affirmed unanimously the decree appealed from for the reasons stated in the opinion of Vice-Chancellor Backes, who said, at page 114 of 87 N. J. Eq.:

“* * * By law, wills must be in writing, signed and published by the testator in the presence of witnesses; and it would be inconsistent with that law to permit parol proof to be introduced to contradict, add to, or explain their contents. This principle requires an inflexible adherence to it, even if the consequence should be a partial, or even total, failure of the testator's intention. The formalities so carefully provided would be of no value; the statute itself would be virtually repealed, if when the written instrument is supposed not to express the clear intention of the testator, the deficiency may be supplied, and its mistakes corrected by extrinsic evidence. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by judges, of early and of later times as well with a cordiality and steadiness, which shows how entirely it coincided with their own views. A firm adherence to the rule is necessary to avoid the consequences of the misapprehension of the witness, and the danger of offering temptation to perjury. *Nevius v. Martin*, 30 N. J. Law, 465. See also, *Cleveland v. Havens*, 13 N. J. Eq. 101; *Heater v. Hockenbery*, 14 N. J. Eq. 159; *Leigh v. Savidge*, 14 N. J. Eq.

124; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Griscom v. Evens*, 40 N. J. Law, 402; *Archer v. Morris*, 61 N. J. Eq. 152; *Zabriskie v. Huyler*, 62 N. J. Eq. 697; affirmed, 64 N. J. Eq. 794; *Hammel v. Barrett*, 79 N. J. Eq. 96; *Vrooman v. Virgil*, 81 N. J. Eq. 301."

In *L'Hommedieu v. L'Hommedieu*, 131 Atlantic Reporter, 302 (December 19, 1925), it was claimed that a trust created for the benefit of the testator's son during his life was a spendthrift trust and not assignable, and evidence was offered to show that the son had been unsuccessful as a business man and became involved in troubles, that he was largely indebted to the testator to whom he had been obliged to turn frequently for financial assistance, and that the testator had indicated that he was much concerned about the future of his son where dominion over money was involved. It was held that the evidence offered was incompetent to show the purpose or intention of the testator or affect the interpretation of the will, and that the nature of the trust must be determined from the language of the will. Vice-Chancellor Bentley quoted with approval the following language from the opinion of Mr. Justice Depue in *Griscom v. Evens*, 40 N. J. Law, 406; affirmed, 42 N. J. Law, 579, pointing out that the language quoted was not questioned in the Court of Errors and Appeals:

"By the statute, a writing is made indispensable to the existence of a will, and what has been written cannot be added to, detracted from, or altered by extrinsic evidence. The functions of the court are to ascertain the intention of the testator from the language of the will. Extrinsic evidence may be resorted to, which, in its nature and effect, is simply explanatory of what the testator has written, but no evidence can be received for the purpose of showing what he intended to have written. Wigram on Wills, § 9. In every case of a controverted construction, the sole question is *non*

quod voluit sed quod dixit. Extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is legitimate to place the court which expounds the will, in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he has adopted; but the testator's intention must ultimately be determined from the language of the instrument, as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. 2 Taylor on Ev., § 1082. No difficulty, however great, in deciphering the obscure language of the devise, or in unraveling the intricacies in the testator's descriptions of the person or property to which his testamentary disposition should apply, will justify resort to such evidence. With the assistance of such explanatory evidence as has been mentioned, the court may be called upon to harmonize the conflicting provisions of the will, and to reject such descriptive parts as are only false demonstrations; but if, with the aid of such evidence, the testator's meaning cannot be ascertained, the will will be simply void for uncertainty. Wigram on Wills, Prop. VI.

"The only exception to this legal rule is that the declarations of the testator may be resorted to in cases of a latent ambiguity, which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event, parol evidence of what the testator said may be lawfully adduced to show which of them he intended; but such evidence will not be allowed to show that he meant a thing different from that disclosed in the will. *Den v. Cubberly* (12 N. J. Law), 7 Halst. 308; 2 Taylor on Ev. §§ 1092, 1093; Hawkins on Wills, 9."

We submit that there was no basis for the admission in evidence of the oral statements made by Mr. Allison with respect to his desire and inten-

tion. There is no latent ambiguity in the will and no doubt or uncertainty as to the meaning or application of any language in the will. There is no question of interpretation and no occasion for admitting any kind of extrinsic evidence.

Even if it were clearly established by extrinsic evidence that it was the purpose and intention of the testator to leave his property for some particular charity, it would not be possible to give effect to any such purpose or intention, because it was not expressed in any properly executed will.

V.

The decree of the Court of Chancery should be affirmed.

Respectfully submitted,

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erine MacLean.

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