

The testator made provision for many gifts, devises, and legacies to nephews and nieces and others, and then provided that "if there still be a balance in the hands of my executors" upon the death of his niece Eliza, for whose maintenance he had provided, his executors should distribute this "amongst those of the said legatees who are my nephews or nieces who may survive my niece Eliza in proportion to the legacies hereinbefore bequeathed said nephews and nieces."

The question now arose as to how a residuary fund, which had accumulated for a third of a century, and now amounted to \$4,400, was to be dealt with. Most of the nephews and nieces were still living, and there was no trouble in ascertaining the class; the difficulty lay in ascertaining which of the nephews and nieces were "legatees," and what were the "legacies" which were to determine the distribution.

By the will, the executors were "to pay the following legacies." Then followed a list of pecuniary legacies, "the said legacies to be paid after the expiration of one year from my decease." "All the above legacies I bequeath upon the condition that the said legatees make no claim upon my executors."

After all this, the testator "Willed and bequeathed" to his executors, his nephews Hugh Fulton and Henry Fulton, his live stock and farming implements, &c., share and share alike, for their absolute use, and "willed and devised" to them as tenants in common his farm said to be worth about \$9,000. These two nephews received no pecuniary legacies.

In the scheme of distribution propounded by these executors, they included themselves as legatees, each at \$4,500, on the theory that the farm was a "legacy" within the meaning of the will.

From the material and from the will itself there was no doubt that these nephews were intended to be preferred above the other nephews and nieces; but it was not to be inferred from this that the testator intended what he had not said, that land devised should be regarded as a legacy.

The will was prepared by a professional man, and in it from beginning to end there was no confusion in the terms used—all were used appropriately.

The intention was to give the farm and farm implements and live stock to these nephews, who had become to him almost sons, and to distribute the general estate among those whom he rightly called legatees; and, after some provision for abatement and priority among these legatees, there was the provision for the distribution of any surplus among them *pro rata*.

This clearly excluded the idea of the devisees being included in the distribution.

A second question arose as to the chattel property given,