

THE CHANCELLOR:

My opinion is, that according to the legal construction of the will of the testatrix, Hannah Benson, upon which the direction of the court is asked in this case, the child or children of Margaret Swornstedt and William Benson, born *since* the death of the testatrix, are to be excluded from the benefit of the bequest, but that all the children of these parties born prior to that period are entitled to participate equally therein with George Benson. That the children of the persons named, born before the death of the testatrix, and George Benson, take *per capita* and equally.

That the after born children are to be excluded from the distribution, and that the children living at the death of the testatrix are entitled to the fund bequeathed, seems to be settled by the cases referred to in 1 *Roper on Legacies*, 48, 49; and that the legatees take *per capita* is shown by the principles laid down in the same book, 126, 127, and *Maddox vs. State*, use of *Seann et al*, 4 H. & J., 539.

In this case, however, infants are concerned, and as the statements in the pleadings are not evidence against them, a final order directing the distribution cannot be passed until the number, names and ages of the children of Margaret Swornstedt and William Benson shall be shown by evidence, that the court may see which of them were born subsequently to the death of the testatrix, and which prior thereto. The period of the death of the testatrix must also be shown. The answer of an infant by his guardian is not evidence against him, and I have, upon several occasions, decided that the necessity of establishing the case, as stated in the pleadings, by proof, is not obviated by making the infant a plaintiff. *Kent's adm'rs vs. Taneyhill et al*, 6 G. & J., 1.

WM. J. WARD, for Complainant.