



THE WAITE FUNDS

Ira Brad Matetsky

SOME THINGS NEVER CHANGE, and one of these is that judges' compensation does not keep pace with that of their peers in private practice. When William Hughes Mulligan resigned from the United States Court of Appeals for the Second Circuit to become a law firm partner in 1981, he declared that he was leaving the bench because his judicial salary and benefits were not enough to take care of his family. He repeatedly said of a circuit judge's pay, "you can live on it, but you can't die on it."¹

Over the years, several justices of the United States Supreme Court were also able to live on a judicial salary but not to die on it. That is to say, when these justices did die, they did not leave enough assets behind them to support their dependent family members in reasonable comfort. For example, this journal has reported that after

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¹ Arnold H. Lubasch, "U.S. Appellate Judge Quits Over His Salary and Benefits," N.Y. Times, Feb. 5, 1981 at B1; *see also* William Hughes Mulligan, Jr., ed., *Mulligan's Law: The Wit and Wisdom of William Hughes Mulligan* 129-31 (1997) (speech by Judge Mulligan discussing "the grossly inadequate salaries and survivors' benefits which in my case made my demise as a federal judge inevitable" and providing specifics). There is a substantial literature, older and current, on inadequate judicial compensation at the federal level. *See, e.g.*, John G. Roberts, 2006 Annual Report on the Federal Judiciary; Edwin Surrency, *History of the Federal Courts* 410-15 (2d ed. 2002). Similar citations could be offered regarding the judiciaries of virtually all states and many other countries.

Chief Justice Roger Brooke Taney died in 1864, leaving almost no assets behind him, members of the Supreme Court Bar were moved to establish a fund for the financial relief of Taney's two surviving dependent daughters.² Thirty-seven years later, bar members established a similar fund for the benefit of Malvina Shanklin Harlan, the widow of the first Justice John Marshall Harlan, and their two unmarried daughters.³ Yet despite this and other evidence that a pension system for the justices' survivors was needed, none was created for several more decades.⁴

At least one more Supreme Court Justice died in office leaving an estate so lacking in assets for his survivors that prominent attorneys took up a voluntary collection for their benefit. In fact, they took up two of them.



² See "Proceedings of the Bar of the Supreme Court of the United States, February 1871," reprinted in 11 Green Bag 2d 373 (2008); Ross E. Davies, *The Judiciary Fund: A Modest Proposal that the Bar Give to Judges What Congress Will Not Let Them Earn*, 11 Green Bag 2d 357, 358-66 (2008); Ross E. Davies, *The Judiciary Funded: The Generosity of David Dudley Field*, 14 Green Bag 2d 435 (2011).

³ See Ira Brad Matetsky, *The Harlan Fund*, 16 Green Bag 2d 23 (2012).

⁴ Legislation adopted in 1954 provided the widows of deceased Supreme Court justices with a pension of \$5,000 per year. Pub. L. 83-702, 68 Stat. 98 (1954), formerly codified at 28 U.S.C. § 375. In 1972, the pension was raised to \$10,000 per year, and the justices and their survivors were included for the first time in the federal judicial retirement and survivors' benefits system. Pub. L. 92-397, 86 Stat. 579, codified as amended at 28 U.S.C. § 376; see "The Justices' Widows," 58 ABA J. 1069 (1972). The impetus for Congress to enact the long-proposed 1972 legislation was a series of reports that Marion Denman Frankfurter, the 82-year-old widow of Justice Felix Frankfurter, was exhausting her assets and would soon become a "charity patient" at the nursing home where she spent her final years. See, e.g., Fred R. Graham, "Ill Widow of Frankfurter Near Charity on Pension," N.Y. Times, May 26, 1972, at 1; see also "Mrs. Felix Frankfurter Is Dead; High Court Justice's Widow, 84," N.Y. Times, June 11, 1974, at 1. That it took so long to enact this legislation is surprising, given that it was strongly supported by President Lyndon Johnson as early as 1964. See David Shreve, *Lyndon B. Johnson: Towards the Great Society* 554-58 (2007) (transcripts of two taped presidential conversations on May 11, 1964 in which Johnson lobbies Senate and House leaders on this issue).

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Morrison R. Waite.

In 1874, President Ulysses Grant unexpectedly selected Morrison Remick Waite, a lawyer from Ohio, to be Chief Justice of the United States. Waite served as Chief Justice for 14 years. He was still

serving when he died in office on March 21, 1888, soon after having authored the lengthy opinion of the Court in *The Telephone Cases*.⁵

Although Waite, like any justice, was involved in controversies during his tenure, he was a popular figure in Washington at the time of his death. Waite's funeral service took place in the Chamber of the U.S. House of Representatives, with Speaker of the House Thomas B. Reed presiding,⁶ an honor never accorded to any other justice. Indeed, Waite is the only person other than a member of the House itself to be given such a funeral. All 31 other people whose services were held in the House Chamber were sitting representatives when they died.⁷

Congressional appropriators knew that Waite's death, and the desire to honor his memory, created financial needs for the government. Soon after Waite's death, the Fiftieth Congress appropriated "five thousand dollars, or so much thereof as may be necessary," to cover the funeral expenses.⁸ The same Congress also appropriated \$1,500 to procure a bust of Waite and place it in the courtroom,⁹

⁵ 126 U.S. 1 (1888). The opinions in *The Telephone Cases* took up the entire volume 126 of the *United States Reports*. Waite was present in court when the opinions came down on March 19, 1888, but was unable to read the Court's opinion aloud and asked one of his concurring colleagues, Samuel Blatchford, to do so in his place. See C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* 309-10 (1963). Waite died two days later. Waite's death also came just a few months after he led the Court's delegation to the Philadelphia observances marking the centennial of the Constitutional Convention, including the luxurious Breakfast to the Justices on September 15, 1887. See generally *The Green Bag* 2014 Almanac & Reader *passim*. No cause-and-effect relationship between the sumptuous breakfast and the Chief Justice's passing is suggested.

⁶ U.S. House of Representatives Historian's Office, "Historical Highlights: A House Chamber funeral for Supreme Court Chief Justice Morrison R. Waite," history.house.gov/Historical-Highlights/1851-1900/A-House-Chamber-funeral-for-Supreme-Court-Chief-Justice-Morrison-R-Waite/.

⁷ "Funerals in the House Chamber," history.house.gov/Institution/Funerals/Chamber-Funerals/.

⁸ Act of Mar. 26, 1888, 50th Cong., 1st sess., c. 42, 25 Stat. 46.

⁹ Act of Mar. 2, 1889, 50th Cong., 2d sess., c. 410, 25 Stat. 905, 927. The courtroom, of course, was then located inside the Capitol Building.

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and another \$1,500 for oil portraits of Chief Justices John Rutledge, Oliver Ellsworth, and Waite for the robing room.¹⁰

But Congress then grew parsimonious, or perhaps partisan. By 1888, there was a longstanding practice that whenever a representative or senator died in office, Congress would allocate in the next appropriations bill a death gratuity to the widow of the deceased member. This was usually in the amount of one year's salary, or at least the salary the deceased would have earned for the remainder of that congressional session.¹¹ The same custom was sometimes observed for the widows of congressional officers or employees, and also when the President or Vice President died in office, but it had not previously been applied for the benefit of the justices' widows.

Several members of both the House and Senate thought that the justices' widows should receive equal consideration with congressmen's widows, and that Chief Justice Waite's widow was a logical place to start. But there was also vigorous congressional resistance to this suggestion, which opponents decried as an unprecedented and impermissible giveaway of taxpayer funds.¹² One newspaper summarized a congressional debate over a proposal to grant a death benefit to Amelia Waite:

Whenever an employee of either house of Congress dies and leaves a widow a joint bill or resolution is invariably passed providing that the salary of the dead man for the balance of the year and often for an entire year, shall be paid to the widow. The Senate inserted in the General Deficiency

¹⁰ Act of Oct. 2, 1888, 50th Cong., 1st sess., c. 1069, 25 Stat. 505, 547.

¹¹ See, e.g., 17 *Deschler-Brown-Johnson Precedents of the House of Representatives* § 38.3 (rev. 2011). This practice is still observed today when a member of Congress dies in office. See, e.g., R. Eric Petersen & Jennifer E. Manning, *Members of Congress Who Die in Office: Historic and Current Practice* 12-14 (Cong. Research Serv. 2012); "Omnibus Pays \$174K to Rep. Young Widow," *The Hill*, Jan. 15, 2014; "Senate Custom Gives Inouye's Widow a Year's Salary," *The Hill*, Mar. 14, 2013; cf. 2 U.S.C. § 38b.

¹² For a sampling of the debates, see 19 Cong. Rec. 7852-53 (Aug. 22, 1888) (House); 19 Cong. Rec. 9312-16 (Oct. 9, 1888) (Senate); 20 Cong. Rec. 2050-54 (Feb. 19, 1889) (Senate).

Appropriation bill this year an item granting to the widow of Chief-Justice Waite the salary the Chief-Justice would have drawn had he lived out the year. To the surprise of Senators the House of Representatives declined to agree to this item, and when Mr. Hale presented the report of the conferees in the Senate to day he said that the Senators had been obliged to give up the item or lose the entire bill. The House conferees took the ground that there was no precedent for paying a Chief-Justice's salary to his widow. Mr. Edmunds was provoked at this attitude of the House and remarked that there could not very well be a precedent from the fact that neither Chief-Justice Marshall nor Chief-Justice Chase left a widow. Mr. Edmunds added that Mrs. Waite was left in such circumstances as made it both delicate and right for Congress to take recognition of them by paying her the sum her husband would have received during the balance of the year. He therefore introduced a separate bill providing for the payment to Mrs. Waite of \$8,745, and asked unanimous consent for its immediate consideration. Mr. Berry objected, on the ground that neither Mrs. Waite nor the widow of any other civil officer of the Government was entitled to a donation from Congress. Under this objection the measure was referred to the Judiciary Committee. "There will be a meeting of the Judiciary Committee in about three minutes," said Mr. Edmunds, as he jumped up and left the chamber. Not long afterward the Vermont Senator returned, and announced that he was authorized by the Judiciary Committee to report the Waite bill favorably, and to ask that it be acted on at once. Mr. Berry again objected, and the measure went to the calendar. . . .¹³

The Fiftieth Congress adjourned without taking up the bill. A similar measure was again blocked by the House in the next Congress:

At the instance of Senator Sherman the Senate inserted an amendment in the Sundry Civil Appropriation bill to pay Mrs. Waite, widow of Chief Justice Waite, \$8,745, the amount of his salary from the date of his death to the end of

¹³ "Our Perplexed Senators," N.Y. Times, Oct. 10, 1888, at 5.

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the year. The House refused to accept this amendment, and the conference committee agreed to strike the item from the bill. The item met with a similar fate during the Fiftieth Congress. Senator Sherman expressed his profound regret that the Senate conferees yielded to the demands of the House, and said he was in favor of a general rule giving to the families of officials who die in harness the balance of one year's salary. . . . The Senate refused to commit itself, and Mrs. Waite will be obliged to await the generosity of a future Congress.¹⁴

¹⁴ "Mrs. Waite Again Disappointed," N.Y. Times, Aug. 11, 1890, at 4.

Mrs. Waite may have awaited, but future Congresses were no more generous to her, and no appropriation for her relief was ever passed. Congress appears to have granted a death gratuity to a justice's widow for the first time in 1898, and to have regularized the practice around 1910, but that was too late to help the Waite family.¹⁵

That Congress could not be counted on to assist Mrs. Waite – and that it indeed refused to do so – was of more than symbolic importance to her, because her husband's passing left her with very limited means. The Chief Justice of the United States was (and is) not only a member of the Supreme Court, but also the head of one of the three co-equal constitutional branches of government. But in setting a salary for that high office, Congress had failed to grapple with the financial impact of holding it on someone who did not already happen to be wealthy.

As a result, throughout his service on the Court, Waite had suffered “the strain of living on a restricted income. Where his legal work in the early 1870's earned him about \$25,000 a year, as the nation's highest judicial officer his fee slipped to \$10,500.”¹⁶ Although \$10,500 was a substantial income during the 1870s and 1880s, a variety of factors outside the Waites' control stretched it thin as a salary for the Chief Justice. These included the higher cost of living in Washington as opposed to Toledo, Ohio;¹⁷ the unreimbursed expenses of living in the style a Chief Justice must¹⁸ and of entertaining

¹⁵ A review of indexes to the *Statutes at Large* suggests that the first death gratuity for a justice's widow was \$7,419 paid to the widow of Justice Samuel Miller. Although Miller died in 1890, this appropriation was not voted and paid until 1898. A few years later, the practice of appropriating one full year's salary as a gratuity when a justice died in office leaving a widow became regularized, and such appropriations were made for the widows of Justices David Brewer (1910), John Marshall Harlan (1911), Horace Lurton (1914), Joseph Lamar (1916), Edward Douglass White (1921), and Edward T. Sanford (1930).

¹⁶ Magrath, at 301.

¹⁷ *Id.* at 302.

¹⁸ For example, Waite wrote that “[t]he truth is that it is impossible for me to keep my expenses down and live as I must in a house.” Letter from Waite to S.M. Young, Oct. 5, 1879, quoted in Bruce R. Trimble, *Chief Justice Waite: Defender of the Public Interest* 285 (1935).

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in the manner expected of the Chief Justice and his wife;¹⁹ the also-unreimbursed expenses of riding circuit annually (in Waite's case, the Fourth Circuit, covering five states from Maryland to South Carolina);²⁰ and the medical bills occasioned by Amelia Waite's chronic illnesses.²¹ While serving as Chief Justice, Waite repeatedly found it necessary to borrow for living expenses from an old friend, and then sell off his few stock and real estate holdings to repay the loans.²² He continued to beg and borrow throughout his tenure, which must have been not only personally embarrassing, but also a distraction from the full-time attention that one would expect and want a member of the Supreme Court to give to judicial duties.



The result was predictable (particularly to readers of this journal): “When [Waite] died he was poor, and two funds were raised for his family, one by the bar of New York and the other by the bar of the country[,] which enabled Mrs. Waite to live in comfort after his death.”²³

There appears to have been some confusion at first as to whether the Waites were in need of such assistance. A Waite family confidant was quoted in a newspaper interview soon after Waite's death as denying that any assistance was necessary:

Civil service commissioner Edgerton is very indignant over the published report that the late Chief Justice Waite is [*sic*] in great financial distress. The Post publishes an interview with him on the subject in which he says that while reports are absurd, he fears that they may be believed by unthinking people. He says that Judge Waite's sons are well-to-do, and

¹⁹ Magrath, at 302; *see also* Trimble, at 279-80; Clare Cushman, *Court Watchers* 221 (2011).

²⁰ Magrath, at 302.

²¹ *Id.*; Cushman, at 221.

²² Trimble, at 279-85, 289-90; Magrath, at 302-03.

²³ Trimble, at 285; *see also* Magrath, at 302; Cushman, at 221.

whatever their father's estate may have been the family is not likely to want for anything.²⁴

But Edgerton was soon apprised that the family's need was real, and within a few days he was quoted around the country as stating that "since his interview in the *Post* he has received additional information concerning the condition of the estate of the late chief justice, and is now of the opinion that the proposed effort to raise a fund for Mrs. Waite is fully justified and should be successful."²⁵

It was. Within one month of Waite's death, more than \$10,000 had been raised in Washington:

The subscriptions to the fund for the benefit of the late Chief Justice Waite's family already amount to about \$10,000. Justices Blatchford and Stanley Matthews put down \$1,000 apiece. Among the other subscriptions are John Hay, Secretary Whitney, John R. McLean, of the Cincinnati *Enquirer*, and B.H. Warder, of Springfield, O. \$500 each; Secretary Fairchild, Riggs & Co. G.W.B. Davis and General N.S. Anderson, "of Cincinnati," \$250 each; Ex-Justice Strong, W.H. Phillips, W.S. Cox and G.F. Appleby, \$100 each.²⁶

The organizers of the fund declared that "[i]f the amount [raised] reaches \$100,000 it will be invested as a permanent fund, the interest to go to Mrs. Waite. If it should not reach that figure, the subscriptions will be collected and given to her in cash."²⁷ Ultimately, a significant sum was raised, although it did not approach \$100,000. This fund was placed under the trusteeship of one of Waite's former Supreme Court colleagues, Justice Blatchford.

At the same time the Washington, D.C. bar was raising money for the Waite family, the bar elsewhere was engaged in a parallel effort, organized from New York, that yielded \$21,000 in contributions.²⁸ The terms of subscription for this Waite Fund stated:

²⁴ Wichita Beacon, Apr. 2, 1888, at 1.

²⁵ "For Justice Waite's Family," N.Y. Times, Apr. 6, 1888, at 2.

²⁶ "The Waite Fund," Springfield Daily Republic (Springfield, Ohio), Apr. 16, 1888, at 1.

²⁷ "The Fund for Mrs. Waite," Somerset Herald (Somerset, Pa.), Apr. 18, 1888, at 2.

²⁸ See *Waite v. Larocque*, 12 App. D.C. 410, 412 (1899).

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Samuel Blatchford.

The undersigned out of regard for the late Chief Justice Morrison R. Waite subscribe the sums set opposite their respective names to be paid to Messrs. Joseph Larocque, George Hoadly, and Charles C. Beaman, all of the city of New York, to be held by them and their survivors and successors in trust to apply the income and principal, or any part thereof, in their absolute discretion to the use and benefit of the widow or family of the late Chief Justice Waite; and upon the death of his widow to pay over whatever balance may remain as she shall by her last will and testament direct; and in case of failure of such direction then to pay over and distribute such balance to and among such of the next of kin of said Chief Justice Waite, and in such amounts as the said trustees in their absolute discretion think proper.²⁹

²⁹ Quoted in Brief for Appellant at 1-2, *Waite v. Larocque*, R.G. 276, Records of the United States Courts of Appeals, Case File 750, Briefs, Box 60, National Archives,



Joseph Larocque.

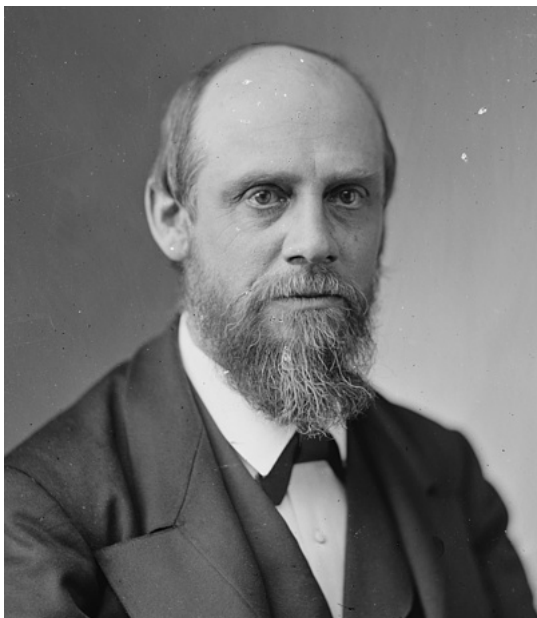
It might be an understatement to describe the three trustees named in this instrument as preeminent lawyers. Joseph Larocque (1831-1908) was for many years “one of the leaders of the New York bar.”³⁰ He had been a member of the Shipman, Larocque & Choate firm and served a term as President of the Association of the Bar of the City of New York. His *New York Times* obituary recites that he was a director at least ten major corporations and, perhaps as important in that age, “belonged to the University, Reform, Riding, Metropolitan, City, Delta Phi, Century, Columbia University, and Down Town Clubs.”³¹

Washington, D.C. (“*Waite* Court of Appeals file”); *Waite v. Larocque*, 12 App. D.C. at 412.

³⁰ “Joseph Larocque Dead: Noted Lawyer a Victim of Pneumonia at the Age of 78,” *N.Y. Times*, June 10, 1908, at 1.

³¹ *Id.*

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George Hoadly.

The second trustee, George Hoadly, or Hoadley³² (1826-1902), had enjoyed a distinguished career in law practice (including a partnership with Salmon P. Chase) and on the bench in Ohio, Waite's home state, culminating in a term as Governor. When his gubernatorial term expired, Hoadly moved to New York City, where he returned to practicing law.³³ Hoadly was one of the speakers at the memorial proceedings for Waite before the Association of the Bar of the City of New York, where he recollected their service together at the Ohio Constitutional Convention of 1873 and a trip to Alaska that the two shared in 1886.³⁴

³² He was born with the name "Hoadley" but as an adult chose to drop the "e."

³³ See generally George Hoadly biography, www.ohiohistorycentral.org/w/George_Hoadly.

³⁴ "Chief-Justice Waite: Memorial before the Association of the Bar of the City of New-York: proceedings at the meeting held March 31, 1888" at 16-19.



Charles C. Beaman.

The third trustee, Charles Cotesworth Beaman (1840-1900) was the law partner (and son-in-law) of Attorney General and U.S. Senator William Evarts of New York, and shared Larocque's list of prestigious club memberships.³⁵ He too spoke at Waite's New York memorial service, where he discussed their work together before the claims tribunal in Geneva shortly before Waite became Chief Justice.³⁶

Under trustees Larocque, Hoadly, and Beaman, "the fund was invested and the income thereof was promptly and faithfully paid to Mrs. Amelia C. Waite, the widow of the Chief Justice, as long as she lived."³⁷ Amelia Waite died on February 21, 1896.³⁸ She left a will

³⁵ "Charles C. Beaman Dead: Partner in Law Firm of Evarts, Choate & Beaman", N.Y. Times, Dec. 16, 1900, at 13.

³⁶ "Chief-Justice Waite: Memorial before the Association of the Bar of the City of New-York," at 28-31.

³⁷ *Waite v. Larocque*, 12 App. D.C. at 413.

³⁸ "Obituary Record: Mrs. Amelia C. Waite," N.Y. Times, Feb. 23, 1896, at 2.

that bequeathed both of the Waite Funds to Chief Justice Waite's and her daughter, Mary Frances Waite. Mrs. Waite's will further provided that if Mary Frances died or married, the Funds would then go to the Waites' three daughters-in-law or their heirs.

At this point a disagreement arose. Mary Frances, who was unmarried when her mother died, asserted that she was entitled to receive the full amount of the Waite Funds. She demanded that the trustees of the New York-based fund terminate the trust and turn all the assets over to her. They declined, pointing out that the more remote beneficiaries of the trust might object to this course.

Mary Frances Waite then sued the three trustees in the Supreme Court of the District of Columbia (despite its name, the District's trial court at the time).³⁹ The lawsuit was described as "a friendly suit"⁴⁰ and was supposedly "understood to be entirely amicable,"⁴¹ but as will be seen it resulted in published *nisi prius* and appellate decisions on a procedural issue, so there must indeed have been some degree of adversity.

The trustees demurred to the bill of complaint, asserting that the litigation should not proceed unless the Waite's three daughters-in-law – who the trustees believed could assert competing claims to the

³⁹ *Waite v. Larocque*, 25 Wash. L.Q. 702 (D.C. Sup. Ct. 1897), *aff'd*, 12 App. D.C. 410 (1898). Miss Waite was represented by the firm of Phillips & McKenney, and the trustees by Washington lawyer J. Hubley Ashton. There was no similar suit involving the parallel Waite Fund that had been raised in Washington, D.C. Justice Blatchford, that fund's sole trustee, had died in 1893, and it is not known who took over management of the fund. It appears to have been understood that the outcome of the dispute over the New York-raised fund would control that of the D.C.-raised fund as well. The solvency of Blatchford's heirs – unlike Waite's, Taney's, or Harlan's – need not concern us: Blatchford came from a wealthy family, had been a successful patent lawyer and a founder of the firm now known as Cravath, Swaine & Moore, and may have been the richest person ever to have served on the Court. See generally "Justice Blatchford Dead: Passes Peacefully Away at His Home in Newport," N.Y. Times, July 8, 1893, at 1; Blatchford Family Papers, Newberry Library, Chicago, Ill., boxes 99-100, folders 1333-1343 (little-known collection of correspondence and press clippings relating to Blatchford, including materials concerning Blatchford's death and estate).

⁴⁰ Brief for Appellees at 1, *Waite* Court of Appeals file.

⁴¹ *Waite v. Larocque*, 12 App. D.C. at 416.

Waite Fund – were joined as parties. Justice Alexander Hagner of the D.C. Supreme Court agreed that the daughters-in-law were necessary parties. “This [was] not to be considered as an intimation on my part that the dispositions of the fund made by Mrs. Waite were proper, or the reverse,” he stated. “But I think these gentlemen who have consented to serve as trustees, are not making an unreasonable request when they ask that all of the family of the Chief Justice should be brought into this suit, that they may be bound by the adjudication when made.”⁴²

Despite the ruling, Mary Frances Waite and her counsel declined to join the daughters-in-law as parties. Justice Hagner therefore dismissed the bill, but allowed an appeal to the District of Columbia Court of Appeals.⁴³ By a two-to-one vote, that court affirmed. The Court of Appeals’ opinion, authored by Associate Justice Martin F. Morris, agreed that the Waites’ daughters-in-law were necessary parties who should have been joined as defendants and without whom the litigation should not proceed:

Why the complainant should not have made the proper parties in the first instance, when it was so very obvious that there were other parties proper to be introduced into the case for the protection of their own interests; or why, when the demurrer based upon the omission of such parties was sustained, she still refused to give those parties the opportunity of being heard in the cause, is not quite apparent to us. That the daughters-in-law and grandchildren of the testatrix, Amelia C. Waite, to whom that lady in her will attempted to convey a residuary interest in the fund in question, were at least proper parties to the suit as defendants, if not absolutely necessary parties, is beyond question; and the trustees for their own protection were entitled to have them brought in.⁴⁴

⁴² *Id.* at 704.

⁴³ *Waite v. Larocque*, Decree of Oct. 21, 1898, R.G. 21, Records of the District Courts of the United States, District of Columbia, Equity Case File 18334, Box 1263, National Archives, Washington, D.C. (“*Waite* Supreme Court file”).

⁴⁴ *Waite v. Larocque*, 12 App. D.C. at 417.

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Although insisting that only the lack of proper parties, and not the merits, was before the court, Morris made clear that he thought little of Mary Frances Waite's claim to turnover of the entire Waite Funds.⁴⁵ However, he allowed her ten days within which to return to the Supreme Court and move to reopen the decree and add the proper parties.⁴⁶

The Chief Justice of the Court of Appeals, Richard Henry Alvey, dissented and voted to reverse. He agreed that joining the daughters-in-law would have been appropriate if they resided in the District of Columbia, but opined that they should not be regarded as indispensable parties given that they lived outside the District and hence outside the court's jurisdiction.⁴⁷ Like the majority opinion, the dissent made clear its view on the merits of the case. Examining the instruments before the court in detail, Alvey concluded that "[t]here would seem to be no ground for reasonable doubt that Mrs. Waite intended that her daughter should have the possession, control and full enjoyment of the fund during her life, or until she should marry, and that the trustees should pay over to her the fund."⁴⁸

Upon receiving the Court of Appeals' decision, Mary Frances Waite's lawyers notified the Supreme Court that they were prepared to summon the absent family members as additional parties after all. The trustees' counsel consented to this, and the Supreme Court allowed it.⁴⁹

The litigation file ends at that point, so how the corpuses of the Waite Funds were ultimately allocated among the Waite family members is not known.⁵⁰ But we do know that the funds were

⁴⁵ See *id.* at 419 ("The complainant's claim evidently contravenes the manifest purpose and plain intention of the testatrix, as expressed in her will.").

⁴⁶ *Id.* at 422.

⁴⁷ *Id.* at 422, 422-23 (Alvey, C.J., dissenting).

⁴⁸ *Id.* at 425.

⁴⁹ See motion dated Apr. 29, 1899 and order of May 4, 1899, *Waite* Supreme Court file.

⁵⁰ The litigation was short-lived enough that one can hope it did not, in Jarndycian fashion, consume the bulk of the trust funds in legal fees. Cf. Charles Dickens, *Bleak House* (1852-53).

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“faithfully invested and paid over” to support Amelia Waite, the first-named and most pressing of their beneficiaries, during the eight years of her widowhood, and for that the Chief Justice’s family must have been grateful to the Bar.

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