New Jersey Court of Errors and Appeals.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, substituted Trustee, under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

BRIEF FOR APPELLANTS.

Mrs. Mary T. Martin, died in 1894, leaving a will with codicil under which her husband, *Archer M. Martin*, and her oldest son, *Aubrey H. Martin,* were made Executors and Trustees. Her husband, *Archer M. Martin,* was a private banker doing business in New York City, and at the time of the making of the will, his firm's affairs were in process of liquidation.

It is to be gathered from the contents of the will itself, that the main purpose of the trusts thereby created, was to prevent *Mrs. Martin's* property from being reached by the creditors of her husband's firm. It is provided that the Trustees shall pay the income to *Mr. Martin* during his life, and may at any time advance to him, in

their discretion, portions of the principal. If his creditors should ever attempt to reach his interest, the benefits of the trust are to shift at once to the children. In the sixth clause of the will there occurs the following language, "and in as much as I wish to confine and secure my bounty under this will to the use of my husband and children for their comfort, support and maintenance."

The fourth, sixth and seventh paragraphs of the will have become operative.

The fourth paragraph of the will leaves ten thousand dollars ($10,000) to be set up in a trust fund and to be invested and reinvested, and the income paid to *Elizabeth T. Brown,* during her life with power of disposition by will. This trust fund has never been separately set up.

Under the sixth paragraph of the will, the residue of the estate is left to the original Trustees, "To convert the same into cash and invest and reinvest the same from time to time at their discretion or at the discretion of the survivor or successor of them, in such manner and in such securities or investments, real or personal as to them or him may seem best, and to take, collect and receive the rents, issues, interest, income, dividends and profits thereof, and pay the same over to my said husband, for and during his natural life."

Under the seventh paragraph of the will, *Mr. Martin* is empowered to make any disposition he may see fit of the trust property by his will, and in the event of his not having done so, the surviving Trustees are directed to divide the estate at once into as many shares as there are children of the testatrix, and to hold one such share for each child paying over to him or her, all rents, income and profits therefrom during his or her

life, and then to give the share absolutely to his or her next of kin. The Trustees, however, are given power at any time to advance to any beneficiary any portion of the principal of his share, if they shall at the time deem it expedient so to do, "in view of the necessities, comfort or welfare of such person or persons."

Mr. Martin died shortly after his wife's decease, leaving a will which was wholly inoperative, as it left all his property to his wife, and did not exercise his power of appointment as to her property.

No division of the estate in accordance with the terms of *Mrs. Martin's* will has been made by any of the Trustees and the trust estate has ever since the inception of the trust continued to consist for the most part of unimproved property at Summit, New Jersey, the taxes, upkeep and other expenses of which eat up a large proportion of the income derived from the live assets which consist principally of loans on bond and mortgage.

Aubrey Martin, during the first few months of his incumbency as Trustee, took from the funds of the estate about $26,000, which, after being charged against him as a loan from the estate, has finally been decided to have been properly an advance under the seventh clause of the will.

Clarence Martin, about two years ago, received an advance of $7,500 to pay some debts and purchase a farm in Texas.

Aubrey Martin has two (2) children and is living separately from his wife.

Clarence has been married for three (3) years and has no children. He is 31 years of age.

Elizabeth T. Brown is married and has two (2) children. She resides in Baltimore. She has, for over a year, been living separate and apart from her husband, *George Brown, Jr.* She has

never had any advance of principal. She is 36 years of age.

Lawrence Martin resides in the City of New York. He is unmarried and has never had any advance of principal. He is 40 years of age.

At the time the testatrix made the will none of the children were married and none of them were of age.

Aubrey Martin was left as sole Trustee at his father's death, and continued as such for a little over a year when he resigned, and Mr. Frank A. Dillingham was appointed in his place. Mr. Dillingham in turn resigned in 1909, and was succeeded by Mr. Charles E. Kimball, the present Trustee.

Portions of the unimproved property have been sold from time to time by the various Trustees, and the total amounts of the purchase prices placed in the corpus of the estate; but there still remains unimproved property of the value of $283,000 as against income-bearing property amounting to approximately $180,000. Taxes on all of the unimproved property have been paid out of the income from the quick assets, and there has been spent in this way and in management of the unimproved property approximately $40,000 out of the income which the testatrix clearly directed should be paid to the life beneficiaries.

This Court is thoroughly familiar with the difficulties caused by mistakes in accounting with regard to the affairs of *Mr. Aubrey Smith.* This unfortunate situation arose entirely through the failure of the Trustee to divide the estate into shares as directed by the will. The Trustee and his counsel have taken the position which the petitioners do not dispute that the discretionary power to make advances conferred in the seventh

clause of the will does not reside in him as substituted Trustee; but resides in this Court.

It is manifest that the Trustees have construed the will, and acted in accordance with such construction in a way that has totally defeated the intentions of the testatrix to confine her bounty to her children.

The life beneficiaries ask by this bill for various forms of relief, chief among which are (1) that they may recover back the income of which they have been deprived for the taxes and upkeep of the unimproved property. (2) That an apportionment may be made of all money heretofore realized by sales of unimproved property between the life beneficiaries and the corpus of the estate, in accordance with settled principles of law, and (3) that the Trustee may be directed to make the division into shares in accordance with the terms of the will; the unimproved property to be divided by placing the title in a corporation and dividing the stock.

POINT I.

Life tenants are entitled to recover back the money which has been spent for taxes on and management of the unimproved property.

The money so spent has been actually taken out of the income from the live assets of the estate, so that as far as present income is concerned, the life tenants would be about $2,000 a year better off if the unimproved property were given away. No such result could have been in contemplation of the testatrix. The holding of this property and selling of it long after the death of the testatrix, of course, builds up the corpus of the estate which is that portion in which the remainder-

men are interested. The testatrix, however, shows no solicitude for remaindermen. She had no grandchildren at the time the will was made, and sought to provide only that her children should enjoy the fullest possible benefits from the estate.

In Pennington against the Metropolitan Museum, 20th Dickinson, 11, there is an elaborate discussion by the Chancellor as to whether a court of equity can vary prescribed terms of a trust when it will actually carry out the intent of the creator. This case has been cited with approval by the Court of Errors in the case of Mackenzie against the Presbytery of New Jersey, 1 Robbins, 652, at 676. The following paragraph is quoted therefrom:

> "If Trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate wholly to prevent the benefits intended by its creator, and they seek instructions and directions as to their duty, I think that instructions and directions for a course of conduct which, though different from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are the main subjects of consideration. The modes in which those benefits may be attained are incidental, and necessity may require a change of mode in order to produce the intended effect."

A New York case directly in point is

Matter of Martens, 16 Misc., 245.

In this case it was held that where it appears that unproductive and unimproved real estate, having a prospective value, is carried by Trustees in the exercise of a sound discretion for the bene-

fit of the remaindermen, the expense of carrying it, including the annual taxes, is chargeable to the principal of the trust estate, and not to income.

The Court (Surrogate Silkman) says, at pages 248-9:

> "It must be borne in mind that the intention of the testator in such a case as this is to benefit his children, the life tenants, who are his first consideration, and the fact that he leaves the estate in trust, and gives to his children only the income, is not so much because he desires their issue, in whom he may have no particular interest, to be benefited, but that his children shall always have support and maintenance and something to constantly remind them of a provident parent. It never could be that a father should intend that his children should live in discomfort and distress in order that unproductive and speculative real estate may be held to appreciate for the benefit of a third or fourth generation, and yet such might well happen if the general rule stated above is without exception. The Surrogate's Court being a court of equity, it must see that equity is done and that the clear intentions of a testator are fulfilled, and where it appears that unproductive and unimproved real estate having a prospective value is carried by Trustees in the exercise of a sound discretion for the benefit of the remaindermen, the expense of carrying it is to be charged to the body of the trust estate, and not to the income of the productive property or securities. In this case the Trustees are directed to invest in productive real and personal property, a clear intention that the unproductive property shall not be held. If, however, it is held for a reasonable time in the exercise of a sound discretion which the law gives to Trustees in order to obtain better prices, it is for the benefit of the remaindermen, who

> will receive the larger benefit from the enhanced value, and they must, therefore, bear the expense of carrying it, including the annual taxes, the life tenants suffering only the loss of income upon the principal so used."

Matter of Tracy, 179 N. Y., 501.

In this case it was held that although the general rule is that taxes on real estate should be paid out of income, nevertheless, the Trustee should pay them out of the corpus where the language of the will shows that such was the intention of the testator.

The will in question provided:

> "During the time my said daughter Jessie B. shall occupy my dwelling house as hereinbefore provided, I direct my said Executors to pay all taxes which for any purpose may be levied thereon, and that they also keep the premises in repair at the cost of and from my estate, as well also that they pay any insurance thereon."

The Court says, at page 511:

> "The estate that the testator referred to, in view of the other provisions of his will, is the residuary fund.
>
> "We are of opinion that these disbursements from time to time are payable out of the corpus of that estate."

It is clearly within the power of the Court in the case at bar to work equity by reimbursing the life beneficiaries, for in addition to the principles of law above cited, the Court may exercise the discretionary power under the seventh paragraph of the will and direct the Trustee to make advances to each of the life beneficiaries of amounts equal to the sums of which they have been deprived by the payment of taxes on and upkeep of unimproved property out of income.

POINT II.

The life tenants are entitled to an apportionment of the purchase price of all real estate already sold and hereafter to be sold.

As before stated, there is at present about $180,000 of quick assets in the estate, a large proportion of which has been produced by the sale of unimproved property since the death of the testatrix.

Heretofore whenever unimproved real estate has been sold, the whole amount of the purchase price has been at once credited to the corpus of the estate and no distribution has been made to the life beneficiaries on account of past due income. This method is in direct contravention of the well-established rule of equity applicable to such situation.

That the provisions of Mrs. Martin's will effects an equitable conversion of the real estate of which she died seized into personalty as of the date of her death, has already been decided by this Court in the case of Dillingham *v.* Martin, 16 Dickinson, 276. In that case Frank A. Dillingham, the first substitute and Trustee, sought instructions from the Court as to his powers under the will, especially in regard to making advances out of corpus and spending money for the erection of houses and the making of other improvements on the unoccupied land.

The Chancellor, Magie, says, at page 283:

> "The bill discloses no ground upon which complainant, as substituted Trustee, is called upon to act in the exercise of any power to improve the devised real estate by buildings, except that he declared his opinion to be that it would be judicious to do so. As the bill also discloses that there are yet ten

dwelling houses upon the real estate devised by testatrix which have not been converted into cash according to the express directions of the will, it seems that such improvement may not aid in the performance of the duty to convert.

"It is further observable that since the death of the husband of testatrix, without having made a disposition of the estate, another duty was, by the will, expressly imposed upon the surviving Trustee, which duty now devolves upon the substituted Trustee. He is required to divide the trust fund into certain shares and designate and set apart one share to each of certain persons. If the fund has been converted into cash and invested as directed, the complainant, as substituted Trustee, may perform the duty of division and designation.

"The authority given to the Trustees by the will to improve the real estate may be construed to be given in aid of the conversion thereof into cash."

The English Cases Sustain This Doctrine.

It is settled in England that where there is a delay in selling and investing for the benefit of the life beneficiaries, the sum realized when the sale is actually made includes income, at some proper rate, for the life beneficiaries as well as principal for the remainder interests.

Sitwell *v.* Barnard, 6 Ves., 520 (1801).
Gibson *v.* Bott, 7 Ves., 89 (1802).
Kilvington *v.* Gray, 2 Sim. & Stu., 396 (1825).
Taylor *v.* Clark, 1 Hare, 161 (1841).
Wilkinson *v.* Duncan, 23 Beav., 469 (1857).
Yates *v.* Yates, 28 Beav., 637 (1860).
Cox *v.* Cox, L. R., 8 Eq. Cas., 343 (1869).
In re Tinkler's Estate, L. R., 20 Eq. Cas., 456 (1875).

In re Moore, 54 L. J. Ch., 432.
Searle *v.* Baker, 2 Ch. Div., 829 (1900).
In re Atkinson, 2 Ch. C. A., 160 (1904).
Sitwell *v.* Barnard, 6 Vesey 520 (1801).

This case was decided by Lord Eldon, and the headnote sufficiently states the material parts of the opinion:

> "Testator directed the residue of his personal estate subject to the payment of the legacies, annuities, debts and funeral expenses, with all convenient speed to be laid out in real estates, to be settled in strict settlement; and that the interest of such residue should accumulate, and be laid out in lands to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of the testator."

In Gibson *v.* Bott, 7 Vesey, 89 (1802), the testator bequeathed to his Executors, his general residuary estate, including leasehold interests, upon trust, as soon as convenient after his death, to convert into money and invest the same and pay the income to his daughters in certain proportions. The leaseholds could not be sold for some time on account of defects in title.

Lord Eldon held that the proceeds constituted a fund for the benefit of the life tenants in trust, as well as for the remaindermen and should be apportioned between them. He said (p. 97):

> "As to the leasehold premises that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain in specie; upon that, I think the plaintiffs may have interest upon the value from the death for there is a consideration for that. The best decree in this cause will be to declare that

> the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at four per cent. upon that value from the death of the testator."
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> Kilvington *v.* Gray, 2 Sim. & Stu., 396 (1825).

The headnote correctly states the case as follows:

> *Headnote:* "Testator directed his residuary estate to be laid out in the purchase of the land as soon as a convenient purchase could be found in the County of York, which upon a fair letting would produce a yearly rent equal to three and one-half per cent. upon the amount of the purchase money, and in the meantime, the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate from the end of one year after the testator's death until it is laid out as directed."

Sir John Leach, V. C., decided that the will did not give the Trustees an indefinite time to convert the personalty and invest the proceeds in realty as directed by the will. He stated that "The case becomes the same as Sitwell *v.* Bernard," and therefore that the life tenant was entitled to interest on the testator's residuary personal estate from the end of one year after the testator's death.

In Taylor *v.* Clark, 1 Hare, 161 (1841), S. C., 66, Eng. Rep., 990, there was a contest between a beneficiary for life and the remaindermen. Among his assets, the testator owned an interest in a partnership in Portugal, which the Execu-

tors were able to sell only after a lapse of some years. After giving certain specific legacies, the testator by his will, gave the residue of his property to his Executors to convert into money and invest in certain securities, and pay the income to his wife for life, and after her death, upon trust for benefit of certain other persons with remainder over.

The life tenants in trust contended, as the complainant at bar does, that when the property was sold, the proceeds of the sale included principal and income and that they were entitled to an apportionment as between themselves and the remaindermen, and the Court so held. Vice-Chancellor Wigram in deciding the case said, page 167:

> "To the argument of the parties interested in remainder, after the plaintiff's death, so far as it denies her right to any income in respect of the property in Portugal, until that property is gotten in and actually invested, I cannot accede. It is true, indeed, that the testator has not, in terms, given the tenant for life any benefit from his residuary bequest, except out of his property when converted into particular investments, and not until the property is so converted; but I cannot consider this alone to be an answer to the plaintiff's claim to have some income out of the property in Portugal, before it is gotten in and invested in the manner which the will directs."

(Page 168):

> "* * * The Court, in such cases, considers the interest of the legatees as the general and primary object of the testator, and treats his direction to convert and invest the property as a particular and secondary object—a mode, in fact, of carrying the primary object into effect, and nothing more. In many cases it would be impossible to get in the property

> within a reasonable time. In some it could only be done at a ruinous loss to the estate. In others the different degrees of diligence used by Trustees and Executors would materially affect the interests of a legatee for life, and might (as Lord Eldon observed in Sitwell *v.* Bernard), equally affect the interest of those in remainder. To obviate these and other inconveniences, and to give effect, as near as may be to the testator's intention, the Court, acting upon a general rule (Gibson *v.* Bott, 7 Ves., 94; Walker *v.* Shore, 19 Ves., 387), feigns the property to be converted, as directed by the testator, at the end of one year from his death, and, at least from that time, gives to the tenant for life the precise income which would be produced if the property were actually so converted, and in its proper state of investment. By doing this the Court gives the tenant for life as large an amount of income as the testator intended, and nothing more. This rule must apply here, unless the language of the will be clearly incompatible with it." * * *

The basis of Vice-Chancellor Wigram's decision is that the "property in Portugal must be considered as converted and placed in a proper state of investment at that time," *i. e.*, "a year after the testator's death."

Vice-Chancellor Wigram said that the life tenant is entitled "to the precise income which would be produced if the property were actually so converted, and in its proper state of investment."

Income was directed to be paid on a fund based on the appraised value of the property the conversion of which was delayed. And the apportionment was granted irrespective of whether there should eventually actually be a gain or a loss by reason of the delay.

> Wilkinson *v.* Duncan, 23 Beav., 469 (1857).

The testator was entitled to one-sixth of about £23,000 in the funds, in reversion expectant on the deaths of two others. The Trustees under the testator's will having a discretion allowed the reversionary interest to remain unsold for nineteen years, when it fell into possession.

Romilly, J., in decreeing an apportionment of the fund in favor of the life tenant, said at page 472:

> "The Trustees delayed to sell the reversion until it had fallen into possession, because they were of opinion, that by so doing, they would, in the end, produce a larger amount to the estate of the testator. They acted properly in so doing, but they ought not thereby to injure one of the legatees of that trust fund for the benefit of others, and it is to be presumed that they in no way intended to do so. The tenant for life has received nothing for interest down to the present time; but if the reversion had been sold he would then have received the interest on the amount of the purchase money; and if the period when the reversion fell in could have been foreseen, and the reversion could have been sold at a fair price, it ought, with the accumulated interest upon it, to have realized the full amount of the fund as it stands at present.
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> "I am of opinion that the tenant for life is entitled to have paid to him, in respect of interest, out of the capital of the fund now realized, the amount which he would have so received."

In Cox *v.* Cox, L. R., 8 Eq. Cas., 343 (1869), a decedent had bound himself by a marriage settlement to pay the sum of £6,000 to certain Trustees three months after his death, with interest from the time of his death, which fund, by the terms of the obligation, was to be held by the Trustees for the benefit of his widow for life, with remainder to

the children of the marriage. At his death his estate was so involved that nothing was realized from it for several years; and finally not enough to pay the principal sum. The question arose, whether the amount so realized was to be appropriated *in solido* to the establishment of the principal sum, or whether it was to be apportioned between the tenant for life and the children of the marriage, and if so, how.

Sir W. M. James, V. S.:

> "The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession of the fund."
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> "If these sums had been realized three months after the obligor's death (on the 14th of October, 1862), they would have all gone in satisfaction of this £6,000 debt. They would have been then invested, and the income paid to the tenant for life. The mode in which the apportionment must be made is this: Assuming that £5,500 is the sum that will be recovered—or whatever it may be—a calculation must be made back of what principal if invested on the day of the obligor's death (the date from which interest was to run), at 4 per cent. interest, would amount with interest to the sum so recovered. Interest at 4 per cent. on this principal—in other words, the difference between the principal and the amount—will then go to the tenant for life; and the rest will be treated as principal."

It should be noted that in this case the fund was

apportioned although the corpus of the fund had been diminished:

> "*In re* Tinkler's Estate, L. R., 20 Eq. Cas., 456, there was a bequest of £10,000 with interest from death, to Trustees upon trust to pay the income to certain persons during life, and after death to other persons. There was a deficiency of the estate to pay all the legacies, and the realization of assets occupied several years. It was held that moneys from time to time received by the Trustees, and applicable to the legacies, were divisible ratably between capital and income, so as to attribute to income four per cent. from testator's death on the amount attributed to capital."

In that case, no income was actually received during a long period; in fact not enough was finally received on account of principal to pay the legacy in full; yet, notwithstanding the fact that no income had actually been received, the Trustees were required to pay the life beneficiaries interest from the death of the testator, in lieu of income, just as though the fund, as its value was afterwards ascertained, had been in existence at the time of the testator's death.

In re Moore, 54 L. J. Ch., 432, the testator bequeathed the residuary of his real and personal property to his Trustees to pay the income to certain life beneficiaries and the remainder absolutely to others. Some money which the testator had left was invested by his Trustees on a mortgage on which there were arrears of interest after which the property was sold for less than the sum invested. The question arose whether or not the loss should be apportioned between the life tenants and the remaindermen. The Court had no difficulty whatever in coming to the conclusion that such a loss must be apportioned and he did apportion the money collected in as the result of the sale

in the proportion in which the face value of the mortgage and the loss to the life tenant bore to one another.

In re Atkinson, 2 Chancery, C. A., 160 (1904):

Atkinson left a sum in trust to pay income to certain nieces for life, remainder to B. In 1864, part of this sum was invested by the Trustees in a mortgage bearing interest at 5 per cent. In 1889, interest was not paid. The Trustees went into possession and paid the rents to the beneficiaries. These were not sufficient to equal the 5 per cent. interest. In 1898, part of premises sold for less than proportionate share of the whole as compared with the capital invested. In 1903, the life tenants brought this action to compel sale of the balance of the land and an apportionment of the sum realized, between the life beneficiary and remainderman B. (There was a large sum due for back interest.)

Held, the property be sold and that the entire sum realized should be apportioned "in the proportions which the amount due for capital and the amount due to the tenant for life for arrears of interest bear to one another."

The American decisions are based on the English cases, and are in accord therewith.

Edwards *v.* Edwards, 183 Mass., 581, is exactly like the case at bar. There the testator gave his property to Trustees, with power "to invest and reinvest the same in their discretion, in such securities as the laws of this Commonwealth allow saving banks to invest in," and then provided that the net income, etc., should be paid to his wife, for life with remainder over, except that $100 a month should be paid to the testator's son and daughter-in-law for life.

The most valuable part of the real estate was unproductive land on Huntington Avenue, Boston. This property did not produce sufficient income to pay the taxes and expenses, and was not sold until more than three years after testator's death.

The delay in selling was not due to the fault of anybody.

The life beneficiary claimed that the fund produced by the sale of the Huntington Avenue real estate should be apportioned.

Held, that the fund as actually received by the Trustees should be apportioned by ascertaining what sum would have been sufficient if invested by the Trustees immediately after the death of the testator, to produce, with the income which they reasonably could have obtained from it, the sum in the hands of the Trustees as the net proceeds of the lands on Huntington Avenue after deducting their disbursements on account of the property. That sum was to be held as principal, and the remainder was to be paid over as income.

Knowlton, C. J .(pp. 582-3) :

> "This is a bill for instructions by Trustees appointed under the will of James Edwards. By the will he gave all his property to these Trustees, stating the trust as follows: 'To invest and reinvest the same at their discretion, in such securities as the laws of this Commonwealth allow savings banks to invest their funds in, and the whole net income therefrom shall be paid to my said wife as long as she shall live, for her own use and disposal with the exception that I direct that from said income there shall be paid monthly to my son, William Edwards, and his wife, Alice J. Edwards, in equal shares, the sum of one hundred dollars as long as my said wife shall live.' At the death of his wife the Trustees are to pay the income to his children and to the wife of one of them, and

at the termination of the trust, to pay over the remainder to his grandchildren or to his heirs at law. The value of the personal property that came into the hands of the Trustees was nearly $70,000, and the value of the real estate was more than $200,000. Much of the personal property that he left was stock carried by brokers on margins, and the most valuable part of the real estate was unproductive land on Huntington Avenue which was appraised in the Executor's inventory, filed November 11, 1896, at $150,000, and in the Trustees' inventory, filed December 31, 1898, at $155,000, and was sold by the Trustees on September 1, 1899, for $196,500. The question relates to the apportionment of income and principal between the life tenant and the remaindermen, from the proceeds of the sale of the land on Huntington Avenue. It is agreed that the value of this land at the time of the testator's death was the same at which it was appraised in the Executor's inventory, and that the Trustees used every reasonable effort to sell it and in view of the improvements in that vicinity, exercised a sound judgment in holding it until the time of the sale. It did not produce sufficient income to pay the taxes and expenses upon it."

Pages 583-4:

"Under language like that of this will, which gives the Trustee all the property, real and personal, and does not indicate an intention that the time for establishing the fund shall be postponed, and which gives to a life tenant the annual income, it is well settled law in this Commonwealth, that the income is to be computed from the time of the testator's death (Sargent *v.* Sargent, 103 Mass., 297, 299; Westcott *v.* Nickerson, 120 Mass., 410. In the present case the testator obviously intended that the entire property should be converted into one fund, and that the unproductive and speculative invest-

ments which he had at the time of his death should be changed without unreasonable delay. Much of the property held on margins was not of such a kind 'as the laws of this Commonwealth allow savings banks to invest their funds in,' and the land on Huntington Avenue was not in a condition to be held as a permanent investment. It was, therefore, the duty of the Trustees to convert this property into an income-producing fund, and this they did according to their best judgment and discretion. The testator is presumed to have expected that some time would be required to accomplish this. At the same time he is presumed to have intended that the rights of the life tenant to income should be ascertained on the creation of the fund, as if the fund had come into existence immediately after his death. This is in accordance with the rule repeatedly stated by this Court (Kinmouth *v.* Brigham, 5 Allen, 270, 278; Sargent *v.* Sargent, 103 Mass., 297; Westcott *v.* Nickerson, 120 Mass., 410; Mudge *v.* Parker, 139 Mass., 153). The rule is applicable as well when the delay in converting the property is necessary as when it is caused by the voluntary act or default of the Trustees (Loring *v.* Massachusetts Horticultural Society, 171 Mass., 401, 404). In Westcott *v.* Nickerson, *ubi supra,* Chief Justice Gray says of the property in such cases, 'The necessary inference and the established rule, are that it must be invested as a permanent fund, and the value thereof fixed at the time when the right of the first taker begins, that is to say, at the death of the testator.' In Sargent *v.* Sargent, *ubi supra,* the same Justice says, 'The general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death' "
* * *.

Pages 585-6:

"We are to deal with the income which

could have been obtained by the Trustees if the fund had been ready for investment and had been invested immediately after the death of the testator. The failure to invest it then was not the fault of anybody, and we are not called upon to allow interest as interest, but only to ascertain the probable income. * * *

"But we are to ascertain as between tenant for life and remainderman, what part of a gross sum now in hand shall be treated as capital, and what part as income, and when we are called upon to find out what sum at an earlier date, if invested by Trustees, would have been sufficient to produce, with its income, the gross sum now in hand, we must look to the actual income that can be obtained from investments, and not to the rate of interest established by law.

"In Westcott *v.* Nickerson, *ubi supra,* it is said that the amount obtained 'is to be distributed between the tenant for life and the remainderman, by computing what sum, if received at the death of the testator, adding interest at six per cent. with annual rents, would produce the amount afterwards actually received * * * and by investing the original sum, so computed, as principal, and distributing the residue as income.' In Kinmouth *v.* Brigham, *ubi supra,* a direction is given in similar language. * * *

"We are of opinion that the case should be referred to a Master to ascertain what sum would have been sufficient, if invested by the Trustees immediately after the death of the testator to produce, with the income which they reasonably could have obtained from it, the sum in the hands of the Trustees as the net proceeds of the land on Huntington Avenue, after deducting their disbursements on account of the property. That sum is to be held as principal and the remainder is to be paid over as income."

In Ayer *v.* Ayer, Morton, J., delivering the opinion of the Court, said on page 577:

> "This being so, he was entitled to the income of the fund from the time of the death of the testator. The general rule of law is well established that a tenant for life is entitled to the income of a fund set apart for his benefit from the time of the testator's death. Sargent *v.* Sargent, 103 Mass., 297. Pollock *v.* Learned, 102 Mass., 49. And this rule is in harmony with the provisions of the Gen. Sts., C. 97, Sec. 23, which declare that when, by a will, an annuity, or the rent, use, income or interest of any property, or the income of any fund, is given to, or in trust for the benefit of, a person for life, he shall be entitled to receive the same from and after the decease of the testator."

In Wescott *v.* Nickerson *et al.*, 120 Mass., 410 (1876), a testator at his death was a member of a firm engaged in the leather business.

By his will he had bequeathed the residue of his property to Trustees in trust safely to invest the same, and to pay the income in certain proportions to his children for life, and the remainder absolutely to his grandchildren. He directed that the business should be continued until the first day of March following his decease, and thereafter settled up as soon as it could be prudently done. The testator's interest, when the business was wound up, amounted to more than it was at the time of his death. The question was whether the life tenants were entitled to the difference as income, or whether the whole or any part of it was to be regarded as principal.

The Court held that as the testator had not indicated an intention that his property should be enjoyed in *specie,* but that the principal fund should be successively enjoyed by life tenants and re-

maindermen, his property was to be invested as a permanent fund with its value fixed at the time of his death, that the fund as then valued included both the corpus to be held in trust as well as income payable from the time of his death to the life tenant.

Greene *v.* Greene, 19 Rhode Island, 619, is a direct authority in favor of the complainant's position.

In that case the testator directed that $100,000 of his interest in the firm of Greene & Cranston, bankers, should be allowed by the Trustees to remain in the firm, the income going to certain life beneficiaries. The firm became embarrassed and the Trustees not only received no income or interest on this $100,000 for the period of three years, during which the liquidation of the firm continued, but, in the end, received only $61,692.45 on account of the original investment of $100,000. This sum they credited to the corpus of the estate. The life beneficiaries claim that they were entitled to income during this period of three years, notwithstanding the fact that no income had actually been received, and that the fund of $61,692.45 should be treated as including their income during those three years, and the Court sustained this claim.

Chief Justice Matteson, in delivering the opinion of that Court, said (p. 621):

> "The like tenants claim that * * * an allowance should have been made to them from the sum received for the loss of income suffered by them between the date of the assignment, December 17, 1875, and the date when the sum was received, December 8, 1878.
>
> "We are of the opinion that this claim is well founded. The authorities hold that when a fund is held in trust for the benefit of one person for life, and another in remainder, and

a part of the fund is lost because of the insecurity of the investment, the loss is to be apportioned between the life tenants and remaidermen (Cox *v.* Cox, L. R., 8 Eq. Cas., 343; Maclaren *v.* Stainton, L. R., 4 Eq. Cas., 448; Roosevelt *v.* Roosevelt, 5 Refd., 264; Veazie *v.* Forsaith, 76 Me., 172, 190; Parsons *v.* Winslow, 16 Mass., 361; Turner *v.* Newport, 2 Phil., 14; *Re* Tinkler's Estate, L. R., 20 Eq. Cas., 456; Moore *v.* Johnson, 54 L. J., 432; 52 Law T., 510; *Re* Ancketell's Estate, 27 L. R., Ir., 331; Hagan *v.* Platt, 48 N. J. Eq., 206; Tuttle's Case, 49 N. J. Eq., 259). The only case which has come to our notice denying the right of apportionment is that cited by Mr. Spink representing contingent interests of remaindermen not in being, viz., *Re* Grabowski's Settlement, L. R., 6 Eq. Cas., 12. But this case was overruled by Cox *v.* Cox, L. R., 8 Eq. Cas., 343; 2 Lewin on Trusts, 914. We are of the opinion, therefore, that an apportionment of the amount received by the Trustees should have been made between the life tenants and remaindermen * * *."

NEW JERSEY.

In Hagan *v.* Platt, 48 N. J. Eq., 206 (21 Atl., 860), it was held that, where Trustees of a life beneficiary and remainderman invested funds in a mortgage security and later were compelled to buy it in on foreclosure and to sell it, the transaction resulting in a serious loss, the fund so realized should be apportioned between the life beneficiary and the remainder interests.

Vice-Chancellor Pitney, said (pp. 206-207):

"This is a bill by a Trustee under a voluntary settlement against his *cestui que* trust for a settlement of his accounts and for directions.

"The only question requiring consideration is as to the apportionment between tenant for life and remainderman of a loss arising upon

one of the investments of the fund. The investment was a mortgage of $1,200 upon real estate and there was a default of interest in July, 1872, a foreclosure resulted, and the property was purchased by the Trustee and finally sold in 1888, realizing only a trifle over the original investment, leaving a large deficiency. The question is, how this deficiency is to be apportioned between the tenant for life and remainderman.

"It is clearly not right that the whole principal fund should be first made good, and the tenant for life receive only what remains. 'Such a proposition,' said Lord Cottenham, in Turner *v.* Newport, 2 Phil., 14 (at p. 17) 'is contrary to the plainest principles of justice.'

"The cases collected by complainant's counsel seem to me to solve the problem."

Then Vice-Chancellor Pitney, after quoting from and approving Cox *v.* Cox, and *Re* Tinkler's estate (*supra*), and other English cases to which we have above referred, said:

"The amount of interest due when the mortgaged premises were finally realized upon was $1,252. The amount realized was $1,267.94. This must be so divided and apportioned that the amount set aside as principal shall bear the same proportion to the amount to be paid to the tenant for life that $1,200 bears to $1,252. The result is, that the principal sum is to be restored to the extent of $620.52, and the tenant for life will be paid $647.42."

Green *v.* Greene, 30 N. J. Eq. (3 Stew.), 451.

Chancellor Runyon (p. 457):

"The rule which gives the Executor one year for the payment of legacies was made to secure him from embarrassment in the settlement of the estate. If he has no reason for withholding the residium from the residuary

> legatees, he may, if he sees fit, pay or deliver it over at once, and then the life tenant will at once begin to receive the benefit of the interest. If the Executor sees fit to retain the estate in his hands until the end of the year that fact should not affect the rights of the life tenant. It should not subject him to the loss of the interest. * * * 'The result of the English cases appears to be,' said Chancellor Walworth in that case (Williamson *v.* Williamson), and I have not been able to find any in this country establishing a different principle, 'that in the bequest of a life estate in a residuary fund, where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator."

The case of Oberly *v.* Lerch, 3 C. E. Green, 346, at 349:

> "The general rule is, that property is transmitted as real or personal, according to the form in which it exists at the death of the owner. But courts of equity, by the doctrine of equitable conversion, now well established, hold that in certain cases, property actually existing in one form shall, for transmission, be held to be in the other. This doctrine of notional conversion, as it has been termed, is applied in cases where, by a will or marriage settlement, money is directed to be laid out in land, or land converted into money, to carry out the object of the will or settlement. In such case, it is considered in equity to be the kind of property into which it is directed to be converted, from the time the change should have taken place, whether such conversion is actually made or not; and this theoretical conversion is considered in equity to continue until the ownership vests in some

person who would have the right to convert it from one kind to the other, and who, when of legal capacity, accepts it, or does something to recognize it or give it character in the shape in which it exists. Until this is done, it must retain the character of real or personal impressed upon it by the last absolute owner who had such power over it. Fletcher *v.* Ashburner, 1 Lead. Cas. in Eq. (671); Wheldale *v.* Partridge, 8 Ves., 235; Craig *v.* Leslie, 3 Wheat., 563; Sweezy *v.* Frazer, 1 Duer., 301 and 306."

The case of Wurts' Executors *v.* Page, 4 C. E. Green, 365, at 375:

"The fourth question raised, is as to the conversion of the real estate unsold, into personalty. The doctrine of equitable or notional conversion is well established. Oberly *v.* Lerch, 3 C. E. Green, 346 and 575. Its application in this case is the question. Wherever a testator has positively directed his real estate to be sold and distributed as money, it will be considered for the purposes of succession as personal. But in this case, there is no such direction. The direction to sell is contained in the fourth item of the will, and simply authorizes and empowers his Executors to sell any part of his real estate in case they should at any time deem it advisable. This is not a direction to convert, but, on the contrary, it is a seeming direction to let it remain as real estate until it became advisable from time to time to sell it. If this were the only part of the will to guide us, the real property could not be considered as converted into personal property until actually sold. But the question of conversion is a question of intention; and the real question is, did the testator intend his lands should be converted into money at all events before distribution? In this case, it seems to me that the directions in other parts of the will show clearly that he did so intend. In the first

> place, in the first clause he says: 'I do hereby order and direct that my said Trustees shall invest the proceeds of my estate, after settlement and my just debts paid, as a joint and common fund for the benefit of my said heirs, or they may be separately invested for the benefit of each respectively, in their several proportions.' The spirit of this whole direction shows that conversion was intended. It would be difficult to invest unsold lands, or to invest each share separately, if in undivided lands; and no direction is given for division. And the subject to be invested is the proceeds of the estate, which implies a sale of the real estate. Again, in the limitation over, the expression is, shall 'be merged in the general fund.' And in the direction to loan to Charles Wurts, he says his object is to preserve the loan as part of the trust fund created by his will. Again, he directs the portions of his sons and his grandson, to be paid to them when they respectively arrive at the age of twenty-two. All these directions show that he intended that his estate should be converted into money before it was distributed by his Trustees; and they would be required to convert it into money before distribution, and to pay it over in that form. And the rule is well settled, that if the will requires the real estate to be converted into money at all events, notwithstanding the Executors may have a discretion as to the time, it must be considered as converted into money from the death of the testator."

This was affirmed 3 C. E. Green, 575.

Crane *v.* Bolles, 4 Dick., 373, cites 4 C. E. Green with approval.

The case of Ackerman *v.* Ackerman, 11 Buch., 437, at 442:

> "The next question to be decided is whether there was an equitable conversion of the realty.
>
> "If the spirit of the whole direction of a will

clearly exhibits that the testator intended that his real estate should, in all events, be converted into money, then, notwithstanding discretion may have been given to his children as to the time when the sale would take place the real estate must be considered as converted into money from the testator's death. Crane *v.* Bolles, 49 N. J. Eq. (4 Dick.), 373.

"Warren Ackerman left a large amount of real property in the State of New York, as well as in the State of New Jersey.

"I think that there was an equitable conversion of all the realty of which Warren Ackerman died seized, and that, as Theodore J. Ackerman did not execute the power, the Trustees should be advised and directed to pay to Caroline E. Ackerman the principal of the trust share which was or should have been set apart for her father, and any accumulated income thereon since his death, as well as one-eleventh of all moneys which may be realized in the future from unsold property, and one-eleventh of the net rents and profits thereof from her father's death, as well as any moneys or preperty, if any, that ought to have been held by them for the benefit of her father, and income accrued after his death."

The time from which the overdue income is to be calculated begins at death of testator (Green *v.* Green, 3 Stew., 451, and cases cited; also 4 Stew., 783).

A very recent case directly in point is Lawrence *v.* Littlefield *et al.*, decided by the New York Court of Appeals July 13th, 1915, 215 N. Y., 561. The opinion was written by Judge Hiscock and concurred in by Chief Judge Bartlett and all of the associate Judges. We subjoin a portion of the opinion which cites a large number of English and American authorities:

One Mary G. Pinkney died in 1908. She left her surviving as her only heirs at law and next of kin

a nephew, Thomas L. Watt, and two nieces, the defendant Grace Watt Thomas, and the plaintiff, formerly Julia Morris. She also left a will, which was duly admitted to probate, and which, after making certin specific bequests, all of which have been paid or have lapsed, contained the following material provisions:

> "Eighth. I direct that all the rest and residue of my estate, both real and personal, be divided into four equal parts. * * * I give, devise and bequeath one other equal undivided fourth part of my said estate both real and personal, to my Executors hereinafter named upon the following trust, to invest and reinvest the said one-fourth part and pay over the interest or income thereof during her natural life to Julia Morris * * * and upon her death to distribute the same among the children of said Julia Morris, share and share alike."

The remaining three equal parts of said residuary estate were devised and bequeathed respectively to two nephews and to and for the benefit of the defendant Grace Watt Thomas, one-half of the latter one-quarter in trust.

By a following clause, numbered ninth, said testatrix provided that in case either of said four beneficiaries should die before her leaving issue then surviving, the share of the one so dying should go to his or her children, share and share alike, and in case either of them should die before her without leaving issue, she did "give, devise and bequeath the share of the one so dying to the surviving brothers and sisters in equal parts or shares —the whole of such part or share as may then fall to the said Julia Morris, to be held in trust by my Executors as hereinbefore provided."

By another following clause, numbered tenth,

she gave to her Executors power and authority to sell either at public or private sale all her real estate or any part thereof, upon such terms as in their judgment they should deem proper, and to execute proper conveyances thereof, and "that they apply such portions of the proceeds as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof, and to pay over the surplus that may not be required in their judgment, for the above named purpose to (the other three beneficiaries above named and) the said Julia Morris * * * in the proportions mentioned in the eighth and night clauses (above quoted) * * * the whole or such part or share as may then fall to the said Julia Morris to be held in trust by my Executors as hereinbefore provided."

Said testatrix left personal property of the value of about $700,000, and real estate of the value of about $8,000,000. Practically all of the personal estate has been exhausted in the payment of expenses and of specific legacies, and said real property as a whole has been, and the portion still remaining unsold is, unproductive, producing less income than was and is necessary to pay the carrying charges.

From time to time down to October 21, 1912, sales aggregating $2,533,083.33 had been made and there was placed in the trust created for plaintiff's benefit between January 1, 1912, and June 15, 1912, the sum of $775,000, being part of the proceeds of these sales.

In an action heretofore brought in the Supreme Court for construction of the will and to which all of the present parties or their privies were parties, it was adjudged that the power of sale contained

in the will was an imperative one to sell all the real property of the testatrix except that specifically devised and that there was an equitable conversion of all her real property excepting that so specifically devised as of the time of her death.

Notwithstanding the provisions of the will and said judgment all of the amount paid into plaintiff's trust has been treated as principal, and although testatrix treated her in all respects as a daughter and frequently expressed her intention of providing for her in the most liberal manner, she received no income under the trust for several years, and then only such as accrued on the proceeds of sales of real estate treated wholly as principal.

On these facts, in connection with others not necessary here to recapitulate, plaintiff demands that proceeds heretofore or hereafter realized from the sale of real estate and belonging to the trust in her favor shall be apportioned between interest going to her and principal going to remaindermen by taking in the case of each sale as of the date of the testatrix's decease such a sum as at 6 per cent. interest with annual rests will produce the amount realized on said sale and that said principal sum so taken shall be treated as principal under the trust going to remaindermen and that the balance of the proceeds shall be regarded as income belonging to her.

The difference between what is thus demanded and the method of treating proceeds of sales, which thus far has been pursued, measures and defines the important issue between the parties.

Stated more definitely and completely, the legal question presented by the complaint and demurrer is whether under a will creating a trust of unproductive real estate, income payable to a life

beneficiary and remainder to others, with an imperative power of sale and equitable conversion of the real estate into personalty at the death of the testator, with actual sale and conversion accruing only after a considerable delay, the testator will be held to have intended that the proceeds thus and when realized should be apportioned between income payable from the time of her death to the life beneficiary and principal belonging to the remaindermen, or whether she is to be assumed to have intended that the proceeds thus realized should be treated wholly as principal with income payable thereon to the life beneficiary only from the date of actual conversion.

The basis of plaintiff's contention for an apportionment of proceeds between income for her and principal for the remaindermen is the argument that ordinarily the life tenant is an object of more immediate and greater solicitude to the testator than remaindermen who may not even be in existence, and that it is not to be assumed that a testator intends that a provision of income for a life beneficiary shall be rendered nugatory by delay, whether wilful or otherwise, in the creation of a trust fund which is to produce the income, and that therefore there ought to be such an apportionment of proceeds on a conversion when finally realized as will give the life tenant such income as the testator must have intended. Applying this general argument to the concrete facts of this case, it is urged that the plaintiff was the favorite niece of testatrix, treated by the latter as a daughter and promised liberal provision, and than whom there was no nearer next of kin; that the remaindermen are more remote relations; that the will imperatively required conversion of the real estate in order to make up the trust fund and worked

an equitable conversion as of the date of the testatrix's death; that while it may have been assumed that the Trustees or Executors would be compelled to exercise discretion as to the time and manner of sale, it ought not to be held by the Court that the testatrix intended that the first object of her bounty should be deprived of all benefit under the will to the advantage of the more remote remaindermen during the years that might necessarily be occupied in finding a market for $8,000,000 worth of unproductive real estate, and hence there should be apportionment of proceeds when finally realized.

The question thus presented is one of construction controlled by no statutory provision, and to be settled upon principles of law by the authorities. It seems to me that such authorities so settle the question in favor of plaintiff.

In the case quoted above, the rule of apportionment was held to be to ascertain what sum, with interest (at such rate as the Trustee could have obtained for a prudent investment of money), with annual rents from the date of the death of the testatrix to the present, would equal the amount of the purchase price. Such sum, when so ascertained, should be credited to corpus and the balance of purchase price at once paid to the life tenant as past due income.

It will be noted that the language of the will which was construed as affecting an equitable conversion of the unimproved realty into the cash necessary to set up the trust funds as of the date of the death of the testatrix, was not as strong as that in the will of Mrs. Martin, where the direction to convert into cash and invest is mandatory.

The plaintiffs are clearly entitled to an apportionment in accordance with the rule above

stated, of all money heretofore or hereafter realized by the sale of the unimproved property of this estate.

If the period during which the unimproved property is held by the Trustee is over a year, the interest contemplated in the rule laid down in the foregoing cases is compound interest with annual rests.

> "If the period covered is more than a year, compound interest with annual rests should be allowed to income * * * (Westcott *v.* Nickerson, 120 Mass., 410; Edwards *v.* Edwards, 183 Mass., 581, 584; Kinmouth *v.* Brigham, 5 Allen, 270)."
>
> Howes on Income and Principal, pages 56, 57.

POINT III.

The Trustee should be directed to comply with the mandates of the will as to the setting up of Mrs. Brown's separate trust fund and the division of the residue into shares.

The only excuse ever given by the Trustee for not complying with these mandates has been the impossibility of effecting a division on account of the large holdings of unimproved property. A method of obviating this difficulty is pointed out in the bill, to wit, the placing of the title to the unimproved property in a corporation and a division of the stock. If this were done it would not only enable the Trustee to obey the will, but it would further facilitate the development and sale of the remaining unimproved real estate. It is submitted that equity clearly requires that this should be done, in accordance with the

prayer of the bill, by securing, if possible, the co-operation of outside capital, so that taxes may be paid, houses built and property disposed of without further drain upon the income of the life tenants derived from the live assets.

It is, of course, not contemplated that the Trustee should be ordered to borrow money or to build houses, such matters calling peculiarly for the exercise of sound business judgment, but he has taken the position that he has no authority to do these things under the will, and an authorization from the Court is all that is sought.

The Court has already decided in Dillingham *v.* Martin that the Trustee's duty to divide into shares is mandatory and imperative.

POINT IV.

The remaindermen will all be benefited by the granting of the Relief sought in the bill.

The remainders are, in each instance, to the "next of kin."

As to the shares of Charles Lawrence Martin, who is unmarried, and Clarence Martin, who has no children, the remaindermen are, at present, Mrs. Brown and the brothers, all of whom are united in asking for this relief.

As to Mrs. Brown's share, the contingent remaindermen are her children, and as to Aubrey H. Martin's share, the contingent remaindermen are his children.

Mrs. Brown's testimony shows clearly that it will be much more to the advantage of her daughters that she be placed in a position where she can clothe and educate them in accordance with their station in life, and give them the ad-

vantages, which by reason of their birth and upbringing are open to them.

Mr. Aubrey Martin's testimony shows that he is able to do little or nothing at present for his children and it is surely to their advantage that he also be placed in a position where he can care for them and educate them during the formative period of their lives.

It is therefore submitted that any opposition by the Guardians *ad litem* is founded on an entire misconception of the true interest of the infants themselves.

POINT V.

There is no merit in the contentions made by the Guardian of the children of Aubrey H. Martin on the first day of the trial.

The contention that the decrees of the Orphans' Court, passing the various accounts filed by the Trustees, conclude this Court from passing on questions involving a construction of the will, has been rejected and disposed of by the Court at the last hearing. The contention that the power conferred by the will on the original Trustees to spend money in the erection of houses and the improvement of the unimproved property shows an intention that they may continue to hold said property indefinitely and never dispose of it, and that there is, therefore, no equitable conversion effected, is in direct contradiction of the well-reasoned decision of Chancellor Magie in Dillingham *v.* Martin, where this power is considered and held to be "in aid of conversion."

It is contended therefore that the decree of the Court of Chancery should be set aside except

so far as it allows appellants an advance to Mrs. Brown.

Respectfully submitted,
CHURCH & HARRISON,
Solicitors for Complainants.

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New Jersey Court of Errors and Appeals

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN AND ELIZABETH BROWN,

Complainants-Appellants,

and

CHARLES E. KIMBALL, as substituted Trustee under the Will of MARY T. MARTIN, deceased, *et als.*,

Defendants-Respondents.

BRIEF FOR RESPONDENTS, MARY T. MARTIN AND AUBREY H. MARTIN, JR.

STATEMENT.

Mary T. Martin, of Summit, New Jersey, died on October 5th, 1894. Her husband, Archer N. Martin, and four children, Aubrey H., Charles Lawrence, Elizabeth and Clarence C., survived her. She left a will dated April 25, 1892, of which the material clauses are the following:

"Sixth. All the rest, residue and remainder of "my estate of every name and nature and wher- "ever the same may be situate, of which I may "die seized or possessed, or which at my death I "may be entitled to, I give, devise and bequeath "to my husband, Archer N. Martin, and Charles "E. Kimball, to have and to hold the same, to "them or the survivor or successor of him or them "or their or his heirs forever, but in trust, never- "the-less, to and for the following uses and pur- "poses, to wit: To convert the same into cash

"and invest and reinvest the same from time to
"time at their discretion or at the discretion of
"the survivor or successor of them, in such man-
"ner and in such securities or investments, real
"or personal as to them or him may seem best,
"and to take, collect and receive the rents, issues,
"interest, income, dividends and profits thereof,
"and pay the same over to my said husband, for
"and during his natural life, to be used and em-
"ployed by him wholly at his discretion, for the
"benefit of himself and the comfort, education
"and support of my children. And inasmuch as
"I wish to confine and secure my bounty under
"this will to the use of my husband and children
"for their comfort, support and maintenance, it
"is my will and I hereby direct that in case any
"proceedings at law or in equity shall be insti-
"tuted or taken by any creditor or creditors of
"my husband to compel or obtain the application
"of said rents, issues, interest, dividends, income
"or profits or any part thereof, to the payment
"of any debt or debts, or satisfaction of any lia-
"bility or liabilities of my said husband, then
"upon an entry of a judgment or decree in such
"proceedings, the payment of the said rents, is-
"sues, interest, dividends, profits, and income to
"my said husband, shall thereupon be limited to
"such sum as by law then he may annually enjoy
"under this trust, as against his creditors and
"free and exempt from being taken by proceed-
"ings by them to apply the same to the payment
"of any claim, debt or liability of him to them,
"and the rest of the income, issues, interest, prof-
"its and dividends aforesaid, shall in such case
"go to my children in equal shares for their bene-
"fit until my said husband's death. And in case
"he shall by law then not be able so to enjoy any
"part of said rents, issues, profits, interest, divi-

"dends or income free and exempt as aforesaid, "then the whole of said rents, issues, interest, "profits, dividends and income is from the time "of such judgment or decree to go to my children "for their benefit.

"And I hereby grant to my said Trustees the "right and power to advance to my said husband "from time to time at his request, from the prin- "cipal of said Trust, such sum or sums as they "in the exercise of a liberal discretion may deem "proper to advance to him."

"Seventh. I hereby empower my said husband "to dispose of the trust fund mentioned and re- "ferred to in the foregoing sixth section, or so "much thereof as shall remain in the hands of "said Trustee at his death, by his last Will and "Testament in such manner as he shall deem best, "but in the event that he shall fail to exercise said "power of disposition, I direct that then said trust fund be divided into equal shares, one for "each of the children I shall leave, and one for "the child or children as the case may be, of any "and every of my children who may then have "died leaving child or children living at the time "of the death of my said husband; and I empower "the trustee who shall survive my said husband "to designate and set apart and invest and re- "invest one of said shares for each of my surviv- "ing children and one for the child or children "as the case may be, of any deceased child or "children of mine (a share for the child or chil- "dren of each deceased child) and to pay over "the rents, income, issues, and profits of each "share accordingly to the person or persons for "whom the same shall be so designated and set "apart for the natural life of said person or per- "sons and at the death of said person or persons "the share is to go to the next of kin of such per-

"son or persons and I give the same accordingly.

"And I hereby grant to said trustees and the "survivor of them the broadest discretion as to "the property or securities in which to make in- "vestment. And I hereby authorize and empower "them to advance a portion of the principal of the "share to the person or persons for whom the "same may be so set apart and designated when- "ever said trustees or the survivor of them, shall "deem it expedient in view of the necessities, com- "fort and welfare of such person or persons."

"Eleventh. I hereby grant to my executors and trustees hereunder, full power of sale of any "and all my estate upon credit or for cash, and "I hereby empower them to execute such proper "deeds, assignments or conveyances as shall be "necessary or proper to enable them to execute "such sale or sales, and I hereby further grant to "them full power, authority and discretion to use "any part of the principal of either or any of "the funds herein granted to them for the pur- "pose of improving real estate devised by me, or "for the purpose of maintaining the same in good "condition, and I hereby grant to my said trus- "tees, right, power and discretion to change in- "vestments which they shall make from time to "time, and invest the funds submitted to their "care in safe interest bearing or dividend paying "securities or on bond and mortgage or in im- "proved real estate."

By a codicil dated May 26, 1894, testatrix appointed her husband and her son, Aubrey, executors of and trustees under her will. Her husband survived her and died December 25th, 1894, without having exercised the power of appointment given to him by the seventh clause of the will. Aubrey H. Martin qualified as executor and trustee, and resigned on Decem-

ber 9th, 1896. Frank A. Dillingham was substituted as trustee in his stead by an order of the Orphan's Court of Union County made on December 16th, 1896. He resigned on October 6th, 1909, and the defendant Kimball was substituted in his stead.

The personal estate of Mary T. Martin was inventoried at $113,639.82, and after the payment of debts and expenses of administration, Frank A. Dillingham, as administrator with the will annexed of Mary T. Martin, paid to himself as substituted trustee under said will on account of principal the following sums as shown by the accounts: $4,300 (page 73), $4,000 (page 74), $1,600 (page 74), and $57,809.68 (page 75), making the total of principal so received the sum of $67,709.68.

The real estate of Mary T. Martin at the date of her death was worth $500,000 or more. It consisted of improved and unimproved real estate in the City of Summit. The bulk of the unimproved property lay in the Hillcrest section on the northwesterly slope facing the Morris Turnpike. The trustee estimated that more than fifty acres remained unsold at the time of the trial, valued at $280,000 (page 62). Three houses on this property also then remained unsold (page 63, lines 20-30). Between January 1, 1897, and October 6, 1909, sales of improved and unimproved real property aggregating $270,477.78 were made (pages 92, 93). From October 6, 1909, to July 1, 1915, sales of real property aggregated $53,178.70 (Defendant Kimball's Exhibit 1, page 72a). It does not appear what part of the proceeds of sales was received from the sale of unimproved property. It is not alleged that the trustee has abused his discretion by unjustifiably postponing the sale of unimproved property. The trustee testified that during his administration of the trust, which covers five years, "we have sold all the real estate that it was possible to sell at anywhere near a proper valuation" (page 60, line 30).

Short summaries of the accounts of Dillingham, trustee, covering the period from January 1, 1897, to October 6, 1909 (pages 75-89), and of Kimball, trustee, from October 6, 1909, to July 1, 1915 (pages 90, 91, and 72a-d), are printed in the record. These statements show the principal received, the charges to principal, the income received, and the charges to income. Moneys spent for improvements and assessments for benefit were charged wholly to principal, and not apportioned. Ordinary taxes and repairs were paid out of income. It was stipulated that the several accounts were judicially settled in the Orphan's Court of Union County, upon notice to all the parties in interest and decrees confirming them were duly entered (page 75, lines 20-30; page 91, lines 20-30).

The complainant, Aubrey H. Martin, is living apart from his wife and children. His youngest child, Archer N. Martin, died during the pendency of this action, and his two surviving children reside with their mother at Short Hills, New Jersey. Since May, 1913, he has contributed less than $150 to the support of his wife and children (page 67, lines 30-40; page 68, lines 30-40).

This action is brought for the purpose of having the taxes on the unimproved property heretofore paid and hereafter to be paid declared a charge against principal, and for the payment to the life tenants as income of a sum equivalent to the taxes heretofore paid; for advances to the life tenants of a corresponding sum on general equitable principles; and for other relief. It was stipulated that the complainants, under their prayer for general relief, might raise the question of apportionment between principal and income of all sales of unimproved real estate from the death of the testatrix, and that the defendants should have the benefit of all defenses to this application for relief (page 72). The Court of Chancery denied all of the

applications for relief, except an advance to the complainant, Elizabeth Brown (pages 107, 108). The complainants have appealed to this Court from the decree of the Chancellor in so far as it denied the applications of the other complainants for advances, and adjudged that the ordinary taxes on the improved and unimproved real property were properly paid out of income, and denied the application for apportionment of the proceeds of sales of real estate since the death of Mary T. Martin between the life tenants and remaindermen.

No case was made out for advances to the complainants other than Elizabeth Brown. No argument on this point is necessary.

POINT I.

After more than twenty years of acquiescence, it is too late to question the propriety of the payment of taxes out of income and the carrying to corpus of the net proceeds of sale of unimproved real property.

From the death of the testatrix until after the commencement of this action, it was thought by all the parties in interest and their attorneys that the power of sale in Mrs. Martin's will was discretionary and not mandatory. The beneficiaries have received the actual rents of the improved real property, without regard to whether they were more or less than the converted fund would have brought on a safe investment. Although many opportunities have been offered, not one of the life tenants has ever before claimed that the taxes on vacant real estate should be paid out of principal, or that the proceeds of the sale of unproductive real estate should be apportioned. The complainants are equitably estopped from now asserting a contrary rule. The practical construction of the will by the parties themselves for more than twenty years settles the law of this case.

POINT II.

The decrees of the Orphan's Court of Union County are res adjudicata as regards the matters set forth in the several accounts.

The Orphan's Court has jurisdiction to hear and determine all controversies respecting the allowance of the accounts of executors and trustees (P. L. 1898, page 715, section 2). Persons interested in the settlement of an executor's or trustee's account may except thereto, and the Court must then hear the proofs and allegations of the parties, and correct errors in the account, or refer the same (*Id.*, section 126). The decree of the Orphan's Court on the final settlement of the account of an executor or trustee is conclusive on all the parties, in the absence of fraud or mistake (*Id.*, section 127).

Decrees of the Orphan's Court in the exercise of its statutory jurisdiction over matters of accounting and distribution are as conclusive as those of Chancery.

Woolsey vs. *Woolsey*, 78 N. J. Eq., 517.

The decrees of the Orphan's Court of Union County not only established the fact of the payment of taxes out of income but also the propriety of such payments, and likewise they established both the fact and the propriety of carrying the net proceeds of sale of unimproved real estate to corpus.

In *Woolsey* vs. *Woolsey*, 68 N. J. Eq., 763, the testator, after two pecuniary legacies, bequeathed the residue of his estate in trust, first to set apart a fund of $20,000 and pay the income to his daughter during her life; second, out of the remaining income to pay annuities to his daughter and daughter-in-law, and to apply a sum to the use of his grandson during minority. There was not sufficient income to pay the annuities or the sum allowed for the grandson, but the executors paid money as annuities, and as allow-

ance for the grandson, and sought in their account to charge these payments against the corpus of the estate. The Court of Errors and Appeals held that the executors were estopped from denying they had received income from which to make these payments, and were not entitled to charge them against corpus.

The Orphan's Court entered a decree upon the mandate of the Court of Errors and Appeals. The executors then sought to enjoin the execution of the decree of the Orphan's Court upon the ground that the order of priority of the legacies and annuities had been changed by an agreement between the legatees and executors, which had not been offered in evidence in the Orphan's Court. Vice-Chancellor Bergen advised that the bill be dismissed as the matter was *res adjudicata*. *Woolsey* vs. *Woolsey*, 71 N. J. Eq., 609. The executors again appealed to the Court of Errors and Appeals, which affirmed the decree of the Chancellor. The Court said (72 N. J. Eq., 898):

> "Since the issues are identical, the only remaining question is whether the Orphan's Court had jurisdiction to pass upon the attempted justification by the executors of their payments of annuities out of corpus. By the statute, power is conferred on the Orphan's Court to hear and determine all controversies respecting the allowance of the accounts of executors, administrators, guardians and trustees (Sec. 2), and the section providing for exceptions (Sec. 126) authorizes the Court to examine the accountant touching the truth and fairness of the same. The broad language in which the jurisdiction is conferred, and the authority to examine as to the fairness of the account, *authorizes the Orphan's Court to deal with the account on equitable principles*, and we have held that the Orphan's Court on such accounting may ascertain the condition of

the estate as fully as can the Court of Chancery (Pyatt *vs.* Pyatt, 46 N. J. Eq., 285, 288.) That case decided that the powers of the Court are sufficiently broad to justify it in allowing a guardian credit for payments for the support of his ward after the latter's majority. This result was reached upon the consideration of the powers exercised by the English Chancery Court and the New York Courts under legislation similar to ours (citing Hyland *vs.* Baxter, 98 N. Y., 611)."

"There is a further reason why in this case relief should be denied complainants. They * * * have caused this second litigation by their failure to prove the alleged agreement in the Orphan's Court. Having thus by their acts of omission and commission led to the results of which they complain, they ought not to be allowed to set it aside * * *. The principles upon which Courts of Equity intervene by way of injunction to restrain judgments of courts of law are applicable to a suit to restrain the enforcement of a decree of the Orphan's Court. These principles are thus stated in Mechanics' National Bank *vs.* Burnet Manufacturing Co., 33 N. J. Eq., 486 (at page 488) and affirmed on the Vice-Chancellor's opinion, 35 N. J. Eq., 344: 'Courts of Equity sometimes give relief against judgments at law, but only where it is shown that the defendant was ignorant of the facts on which his defense rests until after the time for making defense at law had passed, or that he was prevented from making defense by the artifice of his adversary, or by accident unmixed with negligence or fraud on his part, or that his defense is a matter of pure equity cognizance. But in cases where the grievance he attempts to urge is one that the Court which pronounced the judgment is competent to hear and determine, and he has either urged it there unsuc-

cessfully, or has negligently omitted to do so, this Court can give no relief.' "

The appellants seek to avoid the plea of *res adjudicata* because the propriety of the payment of taxes out of income and the carrying to corpus of the net proceeds of the sale of unimproved real property was not challenged by exceptions. But the propriety as well as the fact of these payments was in issue, and the failure to dispute either the one or the other does not prevent the conclusiveness of the decrees of the Orphan's Court. The Orphan's Court clearly had jurisdiction to determine these questions, and its decrees in these accounting proceedings are *res adjudicata* not only as to matters actually litigated, but also as to all matters within the issues which might have been litigated.

In *re Walsh's Estate,* 80 N. J. Eq., 565, 569.

The Surrogates' Court of New York has jurisdiction similar to our Orphan's Court.

Pyatt vs. *Pyatt,* 46 N. J. Eq., 285, 288.

Accounts passed in the New York Surrogates' Court without objections are *res adjudicata* as to all past transactions covered therein.

Matter of Bannin, 142 N. Y. App. Div., 436.

Matter of Leask, 159 N. Y. App. Div., 102.

POINT III.

The taxes on the unimproved real property are properly payable out of income.

As between life tenant and remainderman, ordinary taxes are payable out of income in the absence of an explicit direction to the contrary.

16 Cyc., 632.

Holcombe vs. *Holcombe,* 27 N. J. Eq., 473; affirmed, 29 N. J. Eq., 597.

Outcalt vs. *Appleby,* 36 N. J. Eq., 73, 80.

Brearley vs. *Molten,* 62 N. J. Eq., 345.
Brown vs. *Brown,* 72 N. J. Eq., 667.
In re Morton, 74 N. J. Eq., 797.
Cadmus vs. *Combes,* 37 N. J. Eq., 264.
Murch vs. *J. O. Smith M'f'g Co.,* 47 N. J. Eq., 193.

Assessments for benefit should be apportioned between principal and income in accordance with the rule laid down in *Jonas* vs. *Hunt,* 40 N. J. Eq., 660. In our case assessments have been charged wholly to principal.

There is nothing in the will of Mary T. Martin to take this case out of the general rule.

In re Morton, 74 N. J. Eq., 797.

The same rule obtains in New York.

Spencer vs. *Spencer,* 169 N. Y. App. Div., 54.

The principle to be drawn from the cases cited is that a trust of a residuary estate consisting of securities and improved and unimproved real estate is to be treated as a whole, unless the testator provides otherwise.

Chancellor Runyon in *Outcalt* vs. *Appleby,* 36 N. J. Eq., 73, says (page 80):

"Here by the trust all the residuary property, "improved and unimproved, is given for the bene- "fit of the life tenants, and on conversion they "will be entitled to the rents and profits, of "course, to the exclusion of the remaindermen. *"The trust estate must be dealt with in the re- "spect under consideration as a whole.* The trus- "tees, in view of the interest of the life tenants "(the obligations of the trust also prohibit them "from doing so) could not relinquish the unim- "proved property to the remainderman, but must "hold it for the benefit of both. Moreover it may "be remarked the testator, in speaking of the re- "siduary estate, treats it as a whole. He gives

"to the life tenants the net rents, issues and prof-
"its thereof, after payment of all necessary and
"proper charges and expenses. The delay in
"making the conversion is presumably in the in-
"terest of both parties, but should the trustees
"abuse the discretion given to them, this Court
"is open to the beneficiaries to hear their com-
"plaint and redress their grievances."

In her will Mary T. Martin did not separate her unimproved real property. She treated her residuary estate as a whole. The Court cannot do what the testatrix failed to do.

POINT IV.

The will of Mary T. Martin does not work an equitable or notional conversion of her real property.

The appellants contend that the testatrix by her will directed the conversion of her real property into money, and that they are entitled to have the proceeds of the sales of the unimproved real property apportioned between principal and income in accordance with the rule laid down in *Lawrence* vs. *Littlefield,* 215 N. Y., 561, and in *Edwards* vs. *Edwards,* 183 Mass., 581.

In order to work an equitable conversion of real into personal property, there must concur (1) a positive direction to sell the real property, or an absolute necessity to sell it in order to carry out the scheme of the will or trust, and (2) a direction to pay or divide the proceeds of sale, or to invest them in personal property. It is always a question of intention to be gathered from the words of the will or other instrument creating the trust, read in the light of the circumstances surrounding the testator or settlor at the time of making the will or trust instrument.

Cook vs. *Cook's Admin'r,* 20 N. J. Eq., 375, 377.
Wurt's Execr's vs. *Page,* 19 N. J. Eq., 365, 375.
Kouvalinka vs. *Geibel,* 40 N. J. Eq., 443.
Crane vs. *Bolles,* 49 N. J. Eq., 373.
Condit vs. *Bigalow,* 64 N. J. Eq., 504, 507.

While a discretion as to the time or manner of sale will not prevent an equitable conversion, a discretion whether to sell or not will postpone conversion until the property is actually sold. (See cases cited above.)

Land directed to be sold, and the proceeds to be invested in land, will devolve as land. The law regards the ultimate destination of the property.

2 *Jarman on Wills* (5th American Ed., Randolph & Talcott, Editors), p. 172.

Where the trustees have an option to invest the proceeds of sale of land either in land or in securities, there is no conversion before sale, and after sale the fund or land will devolve in the condition in which it actually exists.

2 *Jarman on Wills* (5th American Edition), page 173.
White vs. *Howard,* 46 N. Y., 144, 162.

Bearing in mind these general principles, and the rule that intention always governs where it can be ascertained, let us now examine the will, putting ourselves as nearly as possible in the situation of the testatrix when she made it.

In the first place her property consisted largely of unimproved real estate in an undeveloped portion of the City of Summit. She must have known that this property could not be sold immediately.

In the second place it is evident that her husband was financially embarrassed, or was likely to become so, for we observe in the sixth clause a direction that his equitable life estate should be divested upon proceedings being taken against him by his creditors, saving so much as he migh enjoy against them, and

should go to her children during his life. We think this provision of great importance, for it clearly indicates the intention to keep the estate intact until the death of her husband, subject only to diminution by the exercise of the power to advance so much of the corpus as the trustees deemed fit.

In the next place, it is quite evident that the testatrix was well aware that her children were not fitted to be stewards of money. This is shown by the direction to continue the trust during the lives of the children in the event that her husband should fail to exercise the power of appointment given in the seventh clause, and the ultimate gift to her children's next of kin. Here again clearly appears the intention to keep the estate intact. But lest any of her children should need more than the actual income, she authorized her trustees to advance part of the principal of the share set apart for such child. We think this power to advance shows that testatrix intended that her children should only enjoy the net income of her estate, and that the corpus should be kept intact for the remaindermen, save only as it might be diminished by the exercise of the discretionary power to advance.

Searching the will for the further expression of the intention of the testatrix, we find in the sixth clause a gift of the residuary estate, real and personal, to named trustees in trust to convert the same into cash, and to invest and reinvest the same from time to time in their discretion in investments *real or personal*, and to receive the *rents*, income and profits, and pay over the same to her husband during his life. And in the seventh clause she gives to her husband a power to appoint the remainder by will, and in default of appointment, she directs her trustees to divide the trust fund into shares, one share for each child, or the issue of a deceased child, and to pay over the *rents*, income and profits to such persons during their lives, and upon their deaths, the *share* of each is to go di-

rectly to his next of kin. In the same clause she grants to her trustees and the survivor of them, *the broadest discretion* as to the property or securities in which to make investment. The trustees may invest in real estate (See eleventh clause also.) As the trustees have an option to invest either in real or personal property, it cannot be said that there is an immediate conversion into personal property on the death of the testatrix. The same option occurs in the eighth clause, where the gift was upon a contingency which never occurred.

In the eleventh clause we find further enlightenment. After giving a power of sale to her executors and trustees, the testatrix uses the following language:

> "I hereby further grant to them full power, "authority and discretion to use any part of the "principal of either or any of the funds herein "granted to them *for the purpose of improving "real estate devised by me, or for the purpose of "maintaining the same in good condition."*

Then follows a further power to invest in securities or real estate.

It is clear from this language that the testatrix did not intend that her real estate was to be converted at all events, but only in the discretion of the trustees.

In *Story* vs. *Palmer,* 46 N. J. Eq., 1, Chancellor McGill held a power of sale to be discretionary where the testator gave his residuary estate to trustees in trust for the following purposes: "That they dispose of "and convey the same, at public or private sale, at "such times and on such terms as they in their discre- "tion think proper," followed by directions to divide the property or proceeds thereof into four shares, and to *convey,* pay and assign three of them, and apply the *rents* and income of the other to the use of his daughter, Emily, during her life, with remainder over.

The appellants contend that in *Dillingham* vs. *Martin*, 61 N. J. Eq., 276 (February Term, 1901), Chancellor Magie decided that the power of sale in Mrs. Martin's will was mandatory. No such question was decided in that case. That was a bill filed by the substituted trustee under Mrs. Martin's will for the direction of the Chancellor upon two points: first, whether the complainant as substituted trustee had power under the seventh clause of the will to advance a portion of the principal of the estate to one of the life tenants, if he deemed it expedient so to do; second, whether the complainant as such trustee had power under the eleventh clause to use any part of the principal of the estate for the purpose of erecting dwellings and other buildings or otherwise improving the real estate devised by the testatrix. Chancellor Magie held that the powers in the will invoked by the complainant involved the exercise of discretion which was personally confided by the testatrix to the trustees named in her will, and for that reason did not survive to the substituted trustee. He did say that these discretionary powers might be construed to be "in aid of conversion." But the question of equitable conversion dependent upon a mandatory power of sale was in no wise involved in that case. It cannot be said whether the Chancellor had in mind conversion dependent upon the exercise of a discretionary or a mandatory power of sale. However that may be, the remark was clearly *obiter*. None of the parties deemed it as even intimating that the power of sale was mandatory, and the administration of the trust estate went on after the decision precisely as it had done before. And although Chancellor Magie handed down his decision in the February Term, 1901, not until the day on which this cause was reached for trial, September 29th, 1915, was it ever contended by any one that this power of sale was mandatory. In view of the frequent litigation touching this will and

the administration of the trust estate, this fact is certainly significant.

A discretionary power of sale survives to a substituted trustee, for the reason that it is annexed to the trust office or estate, and is not personal to the trustees named in the will. In this respect it differs from the special powers to make advancements to the life tenants and to improve the real estate out of the corpus.

Dillingham vs. *Martin,* 61 N. J. Eq., 276.
Weimar vs. *Fath,* 43 N. J. L., 1.
Denton vs. *Clark,* 36 N. J. Eq., 534.
Lippincott vs. *Wikoff,* 54 N. J. Eq., 107.
Lane vs. *Debenham,* 11 Hare, 188.
Brassey vs. *Chalmers,* 16 Beav., 233.

POINT V.

Even if the power of sale be mandatory, the testatrix clearly intended that until conversion, the actual net income only should be paid to the life tenants.

Where the intention of the testator can be ascertained, it prevails. So when a testator directs a conversion of his real estate, and it appears that until conversion he intended that the actual net income only should be paid to the life tenant, his intention controls.

Mackie vs. *Mackie,* 5 Hare, 70.
Hope vs. *D'Hedouville,* 1893—2 Ch., 361.
Jordan vs. *Jordan,* 192 Mass., 337, 344.

In this case the testatrix clearly intended that until conversion the life tenants should enjoy the actual rents received from the property, less ordinary expenses. At the time of her death this was a substantial sum. In 1897 the rents received were nearly $8,700 (page 76). As the improved real property was sold, the rents diminished.

The testatrix gave the *rents* to the successive life tenants. This is strong indication of an intention that they should enjoy the income in specie.

Goodenough vs. *Tremamondo*, 2 Beav., 512.
Crowe vs. *Crisford*, 17 Beav., 507.

As Vice-Chancellor Stevens points out, the gift of rents is incompatible with a gift of notional income (page 102, lines 20-30). The power given to the trustees to use principal to improve the real property and to keep it in good condition, shows that she contemplated a means of increasing the rents.

The power given to the trustees to make advances to the life tenants is also incompatible with a gift of notional income. The grant of this power indicates that testatrix thought that the actual rents might be insufficient for the support of the life tenants. No such power would have been necessary had she contemplated the apportionment of the sales of her unimproved real property between principal and income. Her primary intention was that her estate should be kept intact for the remaindermen, except as it might be reduced by the exercise of the discretionary power to make advances.

POINT VI.

Where a conversion of productive and unproductive real property is directed, and the conversion is not improperly postponed, there is no ground for apportionment of the proceeds of sale between principal and income, but such proceeds go wholly to corpus.

It is not contended here that conversion has been improperly postponed. It appears affirmatively that the unproductive property has been sold as rapidly as the interests of all the parties would permit. Life tenants have no more right to insist upon an immediate improvident sale of unproductive real property,

directed to be sold, than the remaindermen have to insist on an unreasonable postponement of the sale in order to increase the corpus. A trustee holds such property for the benefit of all parties equally, and most do what is best for the interests of all.

Outcalt vs. *Appleby,* 36 N. J. Eq., 73.

Let us state briefly a few principles which are settled in this State.

As between life tenant and remainderman, the corpus of the estate as it existed when the estate or trust was created, should be held intact for the remainderman.

Van Doren vs. *Olden,* 19 N. J. Eq., 176.
Day vs. *Faulks,* 79 N. J. Eq., 66, 69.

Where there is a gain in the value of property held by the testator at the time of his death, or a loss for which the trustees are not responsible, the gain or loss goes to corpus.

Outcalt vs. *Appleby,* 36 N. J. Eq., 73, 78.

Where there is a gain in an investment made subsequent to the testator's death, or a loss for which the trustees are not responsible, the gain or loss is apportioned between principal and income.

Parker vs. *Seely,* 56 N. J. Eq., 110.
Hagan vs. *Platt,* 48 N. J. Eq., 206.
Tuttle's Case, 49 N. J. Eq., 262.

There is no case in New Jersey on the apportionment of the proceeds of unproductive real estate devised by a testator to A in trust to convert and pay the income of the converted fund to B for life, with remainder over. We concede that the trustee could not improperly postpone conversion to the prejudice of the life tenant. Where the trust estate consists entirely of unproductive real property, and conversion is delayed without fault of the trustee, there may be a strong equity for apportionment. That question

is not presented here, and it is unnecessary to discuss it. Where the trust consists of income producing real and personal property, and unproductive real property, with a direction to convert the real property and to invest the fund, and conversion of unproductive real property is postponed without fault on the part of the trustee, we believe that it is the well nigh universal opinion of the bar in such a case that the proceeds of sale, after deducting expenses ordinarily charged to principal, go to corpus. There must have been hundreds of such cases in this State, but we know of none in which the proceeds of sale were apportioned between principal and income. This Court should not overthrow the settled practice of the administration of trust estates involving the interests of life tenants and remaindermen.

It is now settled in England that while wasting personal assets, like annuities and leaseholds, and, conversely, increasing assets, like reversionary interests, yielding no income, must be converted or apportioned, unless a contrary intention can be gathered from the will, the rule of apportionment does not apply to real estate which, taken as a whole, is partly productive, notwithstanding a direction to convert.

Says Mr. Lewin in his book on Trusts (First American Edition, Vol. II, Star page 949) as to rents before conversion: "But it has been held as a rule of convenience that if a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A for life, with remainders over, the tenant for life is entitled to the *rents* only of the estate from the testator's decease."

The learned author cites, in support of this proposition, *Casamajor* vs. *Strode*, a decision by Sir Willian Grant *M. R.*, in 1809. Unfortunately this case, which is precisely in point, is only meagrely reported in a foot note to *Walker* vs. *Shore*, 19 Vesey, at page 390. The testator devised real estate to trustees in

trust to sell as soon as conveniently could be done, and to hold the proceeds in trust for certain persons for life, with remainders over. It was held that the life tenants were entitled to the *rents* from the date of testator's death until sale. Of course they could not receive notional income if they got the rents.

The modern English cases have followed *Casamajor* vs. *Strode,* whether the actual rents are more or less than the assumed income.

In re Oliver, 1908, 2 Ch., 74.
In re Darnley, 1907, 1 Ch., 159.
In re Searle, 1900, 2 Ch., 829.
Hope vs. *D'Hedouville,* 1893, 2 Ch., 361.

In *In re Searle, supra,* Mr. Justice Kekewich went into the matter with great care. *Of Yates* vs. *Yates,* 28 Beavan, 637, relied on by the appellants, he said, page 832: "In *Yates* vs. *Yates* the Master of the Rolls was not apparently distinguishing between real and personal estate. Whether he thought the same rule applied to both is not for me to say; but, having regard to other cases to which I am about to refer, if he did intend to lay down that the same rule was applicable to real and personal estate, I think that his decision is at variance with the later cases, and ought not to be followed." And he went on to say, page 834, "I thought at first that there was a little ambiguity in Lewin's statement (10th Ed., page 1161) 'If a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A for life, with remainders over, the tenant for life is entitled to the *rents* only of the estate from the testator's decease.' But now that I have threshed the matter out I think there is a good deal of truth in it; *for in the case of real estate, if the real estate produces nothing, the tenant for life can get nothing,* whereas in the case of personalty he could get something upon the principle laid down in *In re Chesterfield's Trusts* (24 Ch. Div., 643 (1883)."

The distinction between trusts to convert real and personal property is doubtless due to historical reasons. Thus prior to the Wills Act (1 Victoria, Chap. 26, Secs. 3, 24) enacted in 1837, a testator could not devise real property acquired after the execution of his will. Even a general devise was in a sense specific, as it necessarily referred to real property, owned when the will was made, not specifically devised. But a general bequest passed after acquired personal property (1 Jarman on Wills, Star pages 326, 327). Not until 1851 was similar legislation enacted in New Jersey (P. L. 1851, page 218; Rev. 1877, page 1248, sec. 24; C. S. 1910, page 5870, sec. 26). Prior to 1851 after acquired realty did not pass, even if sale was directed (*Fluke* vs. *Fluke,* 16 N. J. Eq., 478). Devises of real property upon trust to convert being specific, life tenants were entitled to actual rents only. (See *Howe* vs. *Lord Dartmouth,* 7 Vesey, 137.) For reasons of convenience the rule was not changed after the enactment of the Wills Act. It works in favor of the life tenant as well as against him. Thus life tenants are entitled to the income in specie of mines, quarries and sand pits opened in the lifetime of the testator, although this land is of a wasting nature.

Gaines vs. *Green Pond Mining Co.,* 33 N. J. Eq., 603.

Reed vs. *Reed,* 16 N. J. Eq., 248.

Sayers vs. *Hoskinson,* 111 Pa. St., 473.

The life tenant must take the property as a whole. He cannot separate the lean from the fat. The same principle applies here as in determining the liability of the life tenant to pay taxes. He must use the income from the estate as a whole to pay the taxes on all the land, productive and unproductive.

Outcalt vs. *Appleby,* 36 N. J. Eq., 73, 78.

The question of apportionment has been decided

adversely to the contention of the appellants in two American cases:

Hite vs. *Hite,* 20 S. W., 778 (Kentucky Court of Appeals).

Clifford vs. *Davis,* 22 Ill. App., 316.

It remains briefly to consider some of the cases cited by counsel for the appellants:

Lawrence vs. *Littlefield,* 215 N. Y., 561, and *Edwards* vs. *Edwards,* 183 Mass., 581, were cases where the power of sale was mandatory, and the real property wholly unproductive.

The English cases cited in the appellants' brief are not in point.

Gibson vs. *Bott,* 7 Vesey, 89, decided by Lord Eldon in 1802. The testator bequeathed his residuary estate, including leaseholds, to his executors upon trust to convert into money and invest the same and pay the income to his daughters for life in certain proportions. The sale of the leaseholds was delayed because of defects in title. Lord Eldon held that as the leaseholds were wasting securities, whose conversion was postponed for the benefit of all, the life tenants were not entitled to the actual income, but only to four per cent. upon the value of the leaseholds from the death of the testator. This decision is in accordance with the great principle that the corpus of the estate shall be held intact for the remainderman. The life tenants received less, not more, than the actual rents of the leaseholds. It is authority for apportionment in favor of the remainderman, where the trust assets are wasting personal property. The same principle would apply to annuities and bonds at a premium when testator died.

Kilvington vs. *Gray,* 2 Sim. & Stu., 396. This was a decision of Sir John Leach, *V.-C.,* in 1825. The testator directed that his residuary personal estate be laid out in the purchase of rent producing land in

the County of York, and the interest to be accumulated until conversion. No time was fixed for the conversion. The Vice-Chancellor held that the trustees could not deprive the life tenant of income by postponing the conversion, and that the life tenant was entitled to interest on the residuary estate from the end of one year after testator's death until actual conversion. It will be observed that in this case the corpus of the estate was not diminished, but was increased by the first year's income. Any other decision would have enabled the trustees to deprive the life tenant of income for an indefinite time, which could not have been the intention of the testator.

Taylor vs. *Clark*, 1 Hare, 161, decided by Sir James Wigram, *V.-C.*, in 1841. Testator gave his residuary estate to his executors in trust to pay the income to his wife for life, with remainder over. Among his assets was an interest in a partnership in Portugal, which could not be sold for several years. The Vice-Chancellor held that the proceeds should be apportioned between principal and income. Here we have a total loss of income for a considerable period. The postponement was for the benefit of the estate. This is undoubtedly the rule in England as to personal property.

Wilkinson vs. *Duncan*, 23 Beav., 469, a decision of Sir John Romilly, *M. R.*, in 1857. The testator was entitled to a reversion in one-sixth of about £23,000, expectant upon the deaths of two other persons. The trustees under his will did not sell the reversionary interest, but waited for it to fall in, which it did in nineteen years. Meanwhile there was no income. The Master of Rolls correctly held that the proceeds should be apportioned between income and principal. There was set over to principal the precise sum which with the interest added, would have produced the sum received. The principal of the fund was kept intact, *i. e.* the value of the reversion at the testator's death.

This case is the converse of *Gibson* vs. *Bott, supra,* and relates to personal property.

Yates vs. *Yates,* 28 Beavan, 637, a decision of Sir John Romilly, *M. R.,* in 1860. The testator devised certain unimproved real estate to trustees, to whom he gave a discretionary power of sale. The Master of the Rolls held that the life tenant was entitled only to income after conversion, because the power of sale was discretionary. He did say that a different rule would apply if the power of sale had been mandatory. As we have seen, this dictum has been overruled in the later English cases as respects real property.

The other cases cited are so clearly not in point that discussion of them is unnecessary.

POINT VII.

The life tenants may obtain advances by application to the Court of Chancery in a proper case.

While the power to make advances out of corpus to the life tenants granted by the seventh clause of the will was held to be personal to the original trustees (*Dillingham* vs. *Martin,* 61 New Jersey Equity, 276), the Chancellor said at page 282: "It does not necessarily follow that such advances may not be made, for it may be that the Court may require the substituted trustee to execute the trust, under equitable rules prescribed by it, and upon its order or decree, upon the facts requiring action being exhibited to it." The Chancellor cited *Weiland* vs. *Townsend,* 33 N. J. Eq., 393, in which case it was held that where a trustee clothed by the will with extensive discretionary powers died, and there was no provision for succession to the trust, the Court of Chancery would execute the trust through a successor appointed by it, and by substituting equitable rules for arbitrary power.

In a proper case these life tenants can obtain advances, as the complainant Elizabeth Brown has done in this case. Each application can then be judged on its own merits. It is submitted that it is far more equitable to deal with the necessities of the life tenants by making reasonable advances, than by giving them a roving charter to consume the corpus of the estate by the payment of taxes out of corpus, or by apportioning sales of unimproved real property between them and the remaindermen. Where such sales are made twenty years after the death of testatrix, fifty per cent. of the proceeds or more would go to the life tenant on the apportionment, without regard to the value of the property at the time of her death. Moreover, every sale would require a judicial proceeding on notice to all parties to determine the apportionment. The share of the remaindermen would be eaten up in charges for accountants and counsel.

POINT VIII.

The decree of the Court of Chancery should be affirmed with costs.

June, 1916.

WILLIAM BYRD,

Solicitor pro se and Guardian ad litem for Infant Respondents, Mary T. Martin and Aubrey H. Martin, Jr.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the will of Mary T. Martin, deceased, *et als.*,
Defendants-Respondents.

Brief for Respondent.

STUART A. YOUNG, Guardian *ad litem* of infant respondents, Elizabeth L. Brown and Harriet DeForest Brown.

In this case, appellants appeal from the decree of the court below on the following grounds:

First. Because the applications of the complainants Aubrey H. Martin and Charles L. Martin for an allowance from the corpus of the estate under the provisions of the will of the testatrix, Mary T. Martin, were denied.

Second. Because the taxes upon the improved and unimproved lands belonging to the estate were decreed to have been properly paid out of the income of the estate.

Third. Because the application of the complainants that the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, here-

tofore treated as corpus, be equitably apportioned between the life tenants and remaindermen, was denied.

Point I.

THE APPLICATION OF THE COMPLAINANTS AUBREY H. MARTIN AND CHARLES L. MARTIN FOR AN ALLOWANCE FROM THE CORPUS OF THE ESTATE, UNDER THE PROVISIONS OF THE WILL, WERE PROPERLY DENIED.

Under the will in this case, the original executor and trustee had discretionary power to make advancements to the present life tenants from the corpus of the estate. The original executor and trustee had died, and a substituted executor and trustee is now acting.

A substituted trustee has not the power of the original trustee to make these discretionary advancements.

Dillingham v. *Martin,* 61 N. J. Eq., 276.

However, "it does not necessarily follow that such advances may not be made, for it may be that the Court may require the substituted trustee to execute the trust under equitable rules prescribed by it, and upon its order or decree, upon the facts requiring action being exhibited to it."

Weiland v. *Townsend,* 6 Stew. Eq., 393.

Dillingham v. *Martin, supra.*

Under its equitable authority, the Court below allowed the complainant, Elizabeth Brown, the sum of two thousand dollars ($2,000.) by way of advancement from corpus.

Complainant, Aubrey H. Martin, has already received from this estate by way of advancement under the seventh clause of the will, more than $26,000. The income from the estate to which he

would be entitled, is being applied by the trustee toward his indebtedness to the estate. He is married and has two children. He is not living with his family, and contributes practically nothing toward their support.

Complainant, Charles Lawrence Martin, is receiving as his share of the income from the estate, about $1,800. a year, is unmarried, and engaged in business in New York.

The discretion of the Court below in denying the application of Aubrey H. Martin and Charles Lawrence Martin for advancements from corpus, was properly exercised, and the decree should not be disturbed in this respect.

Point II.

THE TAXES UPON THE IMPROVED AND UNIMPROVED LANDS BELONGING TO THE ESTATE WERE PROPERLY PAID OUT OF THE INCOME OF SAID ESTATE, AND SHOULD NOT BE CHARGED AGAINST PRINCIPAL.

The general rule is that a life tenant enjoying the income of property must keep it free from incumbrance by paying the ordinary yearly taxes, and a trustee must pay such taxes out of income of the property taxed. Howes on American Law relating to income and principal, page 60.

Dufford v. *Smith,* 46 N. J. Eq., 216.

It is said in *Murch* v. *Smith Manufacturing Co.,* 47 N. J. Eq., 193, that "although the liability of a tenant for life to pay ordinary taxes is limited to the rental value of the property, rents for the whole term of his estate are answerable for the payment of taxes accruing during said term."

In *Dufford v. Smith, supra,* where the testator had created two funds, the income from which was to be paid to certain persons for life, the Court said: "He (the testator), did not provide means to pay the expenses incidental to the care and protection of those funds, hence, under familiar rules, the duty of providing such means fell upon those who, for the time being, were entitled to the income."

This rule is also followed in *Holcomb* v. *Holcomb,* 12 C. E. Green, 473, and in *Hill on Trustees,* at page 395, and *Perry on Trusts,* at page 554 and cases cited. Further, it is said by Chancellor McGill in *Tuttle's Case,* 4 Dick., Ch., p. 263, "It is settled in this State that a life tenant who has the use of a fund must pay the taxes assessed against that fund, his or her liability being limited to the income received. The reason of this rule lies in the fitness of the exaction of annual charges which go to the maintenance of the fund through him who has the produce of the fund, otherwise the principal would be exhausted in its self-support. I perceive no reason why the taker of the produce of the fund should be exempt from this duty."

The general rule being established under the cases above cited, the rule as to taxes on unproductive property is equally well established in this State under the authority of *Cadmus* v. *Combs,* Court of Errors and Appeals, 37 N. J. Eq., 264, and under *Brearley* v. *Molton,* 17 Dickinson, Ch. 345. In the Cadmus case, the testator gave the income of all his real and personal estate to his wife for her life, giving the executors a power in their discretion of selling any part of his real estate. Held that the taxes on the real estate were to be paid by the income from the personal estate, and that no part of the real estate could

be sold for that purpose. In this case, Beasley, *C. J.,* said:

> "As the lands are unproductive, the widow has been deprived of all income or benefit derived from her late husband's estate, except in the respect that she occupies the homestead. She now claims that the interest moneys arising from the personal estate cannot be appropriated to the payment of the taxes and necessary expenses of the real estate, and that she is entitled to the gross and not the net income. * * * It is undoubtedly true that the testator intended to provide a liberal income for his wife, but it is also true that he intended that such income should be such as would arise out of the interest of his personalty and the rents of his realty. By this will, therefore, a fixed annual sum is not given to this appellant, but a sum is given which is entirely contingent on the productiveness of the estate, and thus the husband subjected his wife to the hazard of such an uncertainty. The husband had the undoubted right to leave her in this situation, and consequently, the Court cannot interfere with the disposition of the property. The widow is the equitable tenant for life in the real estate, and the rule is unquestionable that as a condition of holding such title, she must keep down the taxes. No part of the lands can be sold for such a purpose."

The case of *Brearley* v. *Molton, supra,* is important in that the Court does not permit the productive part of the estate under consideration, to be separated from the non-productive. Nor will the Court permit taxes on such unproductive property of this estate to be paid from principal, when the income is sufficient to pay such taxes. In this

case, the testatrix directed her executrix to sell her property and divide the proceeds equally between herself and a trustee, who was to hold the share paid to him in trust, and to pay the income to testatrix's daughter-in-law, and grand-daughter during the life of the grand-daughter and upon her death to divide it among children. It further provided that until the disposition of testatrix's estate as directed, the executrix should receive the rents thereof and divide them equally between herself and the grand-daughter. It was held that the executrix was thereby required, pending the disposition directed, to use the rents received from all the property in keeping down the annual taxes and charges on every part of the property before dividing them. It was further held that the life tenants could not complain because the executrix thereafter applied some of the rents thereof to the payment of the annual taxes imposed on the farm, (which was part of the estate) the income from it being insufficient to discharge them. Likewise, in this case, the bill prayed, among other things, for a decree requiring the executrix to forthwith sell the farm at public sale, if need be, and out of the proceeds, to reimburse the complainants for so much as had been used of their share of the income of the stores to pay taxes on the farm, and to pay to the trustee one-half of the remaining proceeds of the sale. It was held that "no part of the taxes paid could be charged upon the principal of the fund." And Chancellor Magie said, in connection with this question, "In my judgment, the duty of the testatrix *is not severable.* The whole estate pending sale is one fund in her hands. The rents and profits derived from it is a special matter with which she is to deal, and her duty requires her out of such rents, to keep down the taxes on every part of such property."

Point III.

THE APPLICATION OF THE COMPLAINANTS THAT THE PROCEEDS OF SALES OF REAL ESTATE SINCE THE DEATH OF THE TESTATRIX, MARY T. MARTIN, HERETOFORE TREATED AS CORPUS, BE EQUITABLY APPORTIONED BETWEEN THE LIFE TENANTS AND REMAINDERMEN, WAS PROPERLY DENIED BY THE COURT BELOW.

This application is based upon the theory that under the will of the testatrix, there was an absolute conversion of the estate into personalty. Appellants rely upon the decision of the Court of Chancery in the case of *Dillingham* v. *Martin,* 16 Dick. 276, where Chancellor Magie says that the authority given to the trustees by the will to improve the real estate may be construed to be given in aid of the conversion thereof into cash. The question of equitable conversion of the estate was not considered by the Court in this case. What was said with reference to the conversion was merely dicta on the part of the Court. The question of an equitable conversion was considered for the first time by the Court below in the case at bar.

The case of *Lawrence* v. *Littlefield,* New York Court of Errors and Appeals, decided July 13, 1915, holds that where under a will creating a trust or unproductive real estate, income payable to a life beneficiary and remainder to others, with an *imperative* power of sale and equitable conversion of the real estate into personalty at the death of the testatrix, with actual sale and conversion accruing only after a considerable delay, the testatrix intended that the proceeds thus and when realized, should be apportioned between income payable from the time of her death to the life beneficiary and

principal belonging to the remaindermen. This apportionment was made by taking in the case of each sale as of the date of the testatrix's decease, such a sum as at six per cent. interest with annual rests would produce the amount realized on said sale, and that said principal sum so taken was treated as principal under the trust going to remaindermen and the balance of the proceeds was regarded as income.

This case was decided in this way because from the will itself, the Court determined that the life tenant should enjoy income from the death of the testatrix on the entire estate, and because the testatrix had imperatively directed a sale of the property upon her death. In effect, the testatrix said to her trustee "Sell my property at once, and pay the income from the investment of the proceeds of sale to my life tenant." Such a construction created in favor of the life tenant, as intended by the testatrix, an immediate enjoyment of income from the entire estate.

There is nothing in the will of Mrs. Martin however, to indicate such an intention on her part.

The law respecting equitable apportionment of the proceeds of sales of unproductive property, applies only where there is a clear imperative direction to trustees to sell forthwith and to pay income therefrom to life tenants. This doctrine is modified, however, by testator's intention. It is said in Howes on American Law relating to income and principal, "This doctrine is founded upon the presumed intention of the creator of the trust or life estate that income should begin at once, and that income should mean the income of the property in its converted state. When it appears that the creator of the trust intended that until the property was converted, the actual income, and that only, should belong to the life beneficiary, of course

his intention will control. It is considered a strong indication that the testator intended the entire net profits *or only the actual income of an investment,* to be paid to the life tenant if he has expressly given his trustees power to continue the investment indefinitely at their discretion."

The discretionary power of the trustees to continue the investment indefinitely in this particular case is clear and will be taken up later.

This rule is substantiated by the following cases: *Green* v. *Crapa,* 181 Mass. 55 (62 N. E. 956).

Opinion of Holmes, *C. J.:*

> "Turning to the will, we find the trustees directed to sell all portions of the estate which are unproductive 'and which in their judgment ought to be sold'. Thus the testatrix contemplated that it might be that in the trustees' judgment, some of the 31 parcels in which she was interested ought not to be sold. * * * She gave the residue to trustees and empowered them to manage and improve 'the whole of said estate and from the rents, profits and income from the said property' she directed them to pay all taxes, expenses, charges and commissions of whatever name or nature, * * * and the balance of said rents, profits and income shall be deemed to be the net income from the said estate.
>
> "Held, that the life tenant was only entitled to the net income, as defined by the will, and was not entitled, as against the remaindermen, to interest on the fair selling value of the unproductive realty retained by the trustees, nor to an apportionment of the proceeds of such as had been sold into income to be paid to her, and principal."

My contention is that the income which the testatrix, Mrs. Martin, intended should go to the life

tenants was the same as the net income referred to in the above case.

In the case of *Buckingham* v. *Morrison,* 136 Ill. 437, (27 N. E. 65), the trustees were empowered to convert the testator's property, included in which was a partnership business, and the Court held that if the intention of the testator as disclosed by his will, was to continue the partnership, not merely for the purpose of winding up the business, but as an investment of the property and funds therein embarked, such intentioon will prevail against the application of the rule respecting an immediate conversion and apportionment; and the Court held that the trustees had discretion to continue the business, and that the life tenants were entitled to the net income derived therefrom, and that the business itself formed part of the corpus of the estate. That there was no conversation operating from the death of the testator whereby an apportionment was contemplated.

Court of Appeals, 1892. *Hite's Devisees* v. *Hite's Executors,* 93 Ky. 257 (20 S. W. Rep. 778).

In this case, the will provided *inter alia.*

"After the payment of my funeral expenses, just debts, and the payment of and provision for the legacies and bequests as directed in this will, I desire and direct my trustees to manage, control, invest and dispose of the balance of my estate, of every kind and description, including after my wife's death that part of my wife's estate which has been set apart for her annuity, in their discretion, so as *to be safe and produce income.*"

The Court said:

> "It is contended for the life tenants that under these provisions, the unproductive real estate of the testator should be treated as converted as of the day of his death, and that, as the trustees sold it from time to time, the en-

tire purchase money realized should not be treated as a part of the principal of the trust fund, but such a sum only as, with six per cent. interest per annum from the time of his death, would amount to the purchase money; and that the difference between the two amounts should go to the life tenants. In other words, that under the doctrine of equitable conversion such a portion of the purchase money as would equal this interest must be regarded as income, and not as capital. The lower court, erroneously, as we think, accepted this view. The intention of the testator *must* govern. He undoubtedly intended that the trustees should so change and invest the estate as to make all of it productive of income. This is evident from the eighth clause of the will, which directs them to invest and dispose of it 'so as to be safe, and produce income.' He must have known, however, that this could not probably be done at once without sacrifice. This doubtless led to his giving them a broad discretion in the matter, and while he provided that the life tenants should have any net income, from the estate, yet he had no doubt in view income actually realized. Much of it, at his death was already productive, and it can not well be supposed he expected a part of the principal would be given to the life tenants to compensate for the delay which he knew must occur before the remainder of it could be made so. The doctrine of equitable conversion is at best an artificial, arbitrary one. It will not be applied unless it is made the duty of the trustee to sell. Conceding, as we think is true, that this is so in this instance, and that the discretion given relates only to the time when it shall be done, yet, in view of the character of the entire estate, and the will itself, which says the proceeds of the

sales are to be *reinvested,* it is clear to us the testator did not intend income to be paid to the life tenants on account of property from which none was realized. If it be said, if this be so, then the trustees could by delay enrich the remaindermen at the expense of the life tenants, yet the testator as is evident from the will, did not intend the condition of the latter to be better than his own, and if he had lived, no income might have come to him for years from this portion of his estate, or from some of his stocks; and nothing should be allowed the life tenants save actual income arising from the testator's estate, because this was his evident intention and expectation."

In the case of *In re Pitcairn, Brandreth* v. *Colvin,* p. 120; Chancery Division (England) 1895, this question was considered, opinion by Justice North. In this case the Court held that the rule in *Howe* v. *The Earl of Dartmouth* (17 Ves. 137), where under the will an immediate mandatory conversion had taken place, only applies where the testator has given no indication of his intention as to the time of conversion. A discretion given to trustees as to time of sale is an indication of intention that the property should not be immediately converted and prevents the application of the rule.

In this case P gave all his property to trustees upon trust to pay the income to his mother for life, and after her death to pay legacies and pay the residue to a charity. The will contained no express direction to convert, but contained a power for the trustees to sell if and when they should think fit. The bulk of the testator's estate consisted of reversionary interests expectant on his mother's death. The mother survived the testator for fourteen years. The reversionary interests were not realized during her life: Held that she was not entitled to have

the reversions realized on the testator's death; and that her estate had no claim against the trust fund in respect of the income she would have received if this had been done. The Court said, after citing several cases.

> "I take it that it is clear from those and numerous other cases that the question is what the testator intends; and his intention must be gathered from his will. He has a right to say what is to be done; and his intention as expressed or to be deduced from the terms of his will must be followed." And further on the Court says "I think that this power given by the testator to the trustees to sell if and when they think fit necessarily implies a power to do the other thing. If they have power to do it, if they think fit and when they think fit, they have necessarily the power not to do it unless they think fit. That is, therefore, in my opinion, an express power given to the trustees to convert the estate or not as they think fit. It seems to me upon the authorities that there are several cases which show that where a testator has intended that a conversion is to take place at some time other than that at which the rule of the Court would make conversion necessary, he has dealt with the question of conversion, and the rule of the Court has no application." And the Court continues,
>
> "Now in the present case, the testator has not fixed the period of conversion; but he has given the option of saying when the conversion is to take place to some other persons, which seems to me to be equally effective in negativing what is called the rule of the Court, which would require that conversion to take place immediately or as soon as possible, after the death of the testator." And further on the Court says "Then in Burton *v.* Mount, 2 De Gex, and

S 383, "There was a general gift of the testator's real and personal estate upon trust to pay the income to his son for life with the general power to the trustees 'at any time or from time to time at their discretion' to sell his freehold and leasehold estates. Vice Chancellor Knight-bruce held that this discretion given to the trustees *as to the time* at which they were to sell was inconsistent with the intention of the testator that the property should be sold under the rule of the Court immediately." And "I think these cases establish the rule that when the time of sale is fixed either by reference to a given number of years after the testator's death, or to the falling in of a life, or anything of that kind, or when it is left to the discretion of somebody else to say when the sale is to take place, the testator has by his will provided for that sale; and, therefore, there is no rule of the Court requiring the sale in a different way or under different circumstances than those indicated by the testator's will.

"I find here a direction that the trustees are to have full power if and when they consider it expedient to sell and dispose of all or any part of the testator's estate and effects; and it seems to me that that gives them a discretion in the exercise of that power, to regulate the time of sale which is inconsistent with, and negatives, any intention that the Court should realize the reversion in the way in which it would do if there had been no such direction. In my opinion, therefore, as the trustees, in fact, did allow the reversion to remain unsold, the tenant for life is not entitled to any part of the proceeds of sale."

A proper distinction between the law as applicable to an absolute conversion and the case at bar is

suggested by Knowlton, *C. J.*, in *Edwards* v. *Edwards,* 183 Mass., 581, where it is held that the rule as to apportionment in the case of an absolute conversion will apply unless the will does not "indicate an intention that the time for establishing the fund should be postponed."

The case at bar also resembles the case of *Yates* v. *Yates,* 28 Beav. 637, where Sir John Romilly as Master of the Rolls speaks as follows:

> "Here the proposition is this: A gentleman leaves his real and personal estates to his widow for her life, and he gives a power to his trustees to sell whenever they shall think fit. The widow gets the rent or whatever is produced by the real and personal estate until the sale, and upon the sale taking place, she gets the income of the produce of the estate so sold. It may frequently happen that the trustees do not at once think it right to sell; they are not bound to exercise their power to sell at all; they may think that the property, if retained, will produce a great deal more than before, or a loss sustained if sold. In one case it would be contended that the plaintiff is to have the increase, and in the other case, a reduction. There is no case, I will venture to say, to be found in the books which contains any such proposition, and it is wholly at variance with the principle on which the Court deals with cases of this description."

In the present case, the whole scheme of Mrs. Martin's will is inconsistent with an intention that the property should be converted at once.

In Mrs. Martin's will for example, the trustees are permitted to invest the money derived from the sale of the real estate into either *real* or personal property in their discretion. Had the trustees in-

vested in real estate, an equitable reconversion would have taken place.

Condit v. *Bigalow,* 64 N. J. Eq. 504.

Further, the will provides that the life tenants shall enjoy the rents, issues and profits of the property. It is clear that if the testatrix meant that the life tenants enjoy *rents,* she could not have intended that they enjoy income from the property in a converted state in which there could have been no rents. The testatrix provides not only that her husband, but that her children shall enjoy these rents.

The seventh section of the will provides, "I hereby grant to said trustees and the survivor of them the broadest discretion as to the property or securities in which to make investment." To exercise such a broad discretion in the interest of the estate, the trustees must necessarily determine as to the advisability of selling or holding the property. Certainly with real estate at a very low figure and no demand from the public, it would be folly for the trustees to dispose of it. A proper exercise of this broad discretion would be for the trustees to retain it, as a more valuable asset than an investment from the proceeds of its sale at a very low figure.

Section two of the will provides: "I hereby grant to my executors and trustees hereunder full power of sale of any and all my estate upon credit or for cash." The words "of any and all" indicate that the trustees could sell all if they desired, or only a part. The word "any" indicates such a discretionary power.

In *Condit* v. *Bigalow, supra,* where the words "all or any" were used, the Court said:

> "These words 'or any' necessarily imply as it seems to me, the power or option of selling or not selling some of their land in their discretion. If as to any of the real estate, the sale

need not be made, then plainly an option as to conversion exists."

In the same paragraph of the will, the trustees are given discretion to use any part of the principal granted to them for the purpose of improving the real estate, or for the purpose of *maintaining* the same in good condition. This power indicates that the testatrix left to the discretion of the trustees the advisability of selling or retaining the real estate. In the case of *Dillingham* v. *Martin,* 61 N. J. Eq. 276, where the will in question was before the Court, the Court said:

> "However that may be, it is clear that the trustee if he retained the authority to improve, could only exercise such authority when in his judgment it was judicious to do so. If retained, the power was one involving discretion."

Further, the seventh section of the will gives the husband of the testatrix power to dispose of the trust fund by will *or so much thereof* as shall remain in the hands of said trustee at his death. This indicates that the testatrix contemplated that the property would not be sold except at the discretion of the trustee.

These sections of the will indicate to my mind that it was the intention of the testatrix that the trusees sell real estate at the time and in the manner and for the sums that they deemed wisest in the exercise of their broad discretion. That it was not the intention of the testatrix that the property be treated as converted immediately at her death. It was her intention, however, that the property be sold at such times and for such sums as the trustees deemed wisest, and that the proceeds be invested, and the income derived from such investments, be paid thereafter to life tenants.

If it were an imperative obligation on the trustees to have converted the real estate immediately

on the death of the testatrix, under the theory of the Lawrence case, the life tenants would have been deprived of income from the death of the testatrix. There is nothing in the will of the testatrix, however, to indicate that such was her intention. On the other hand, it is clear that she meant the life tenants to enjoy income only when it was earned after sale and investment by the trustees in their discretion. It is necessary to determine the intention of the testatrix in deciding this question, and her intention prevails, and it must be clear from the will itself that she intended the life tenants to enjoy income from a converted estate immediately upon her death, if the life tenants prevail in their application. Such is not the case.

Point IV.

Assuming that the power of the trustees to sell was mandatory and enforceable by the life tenants, the right of the life tenants to compel a sale accrued immediately. There has been a delay of ten and even more years in the application to the Court for the enforcement of this right. If this very tardy application prevails, the effect, of course, will be very much against the interest of the corpus of the estate, and of the remaindermen. Had the life tenants asserted their rights in the beginning, and assuming that the property has not increased in value, the life tenants would have enjoyed the income derived from the same and the value of the corpus of the estate would be intact and unimpaired for the remaindermen. Applying the rule laid down in the case of *Lawrence* v. *Littlefield,* and assuming the unproductive real estate worth $125,000 were now sold for that sum, approximately $86,000, of this $125,000, would go to the life tenants as accumulated income withheld, and the balance of $39,000

would belong to the corpus of the estate. It is not equitable or just that life tenants after such laches and after acquiescence in the conduct of the estate by the trustees for so long a period of time, should prevail in their application for an equitable apportionment, with the result so manifestly detrimental to the interests of the remaindermen.

> "Equity is equally careful to avoid injustice to third persons as to parties, and, therefore, will deny for laches the claim of one who has slept on his rights until third persons have acquired rights which would be affected by granting him relief." 16 Cyc. 163.
>
> *Rabe* v. *Dunlap,* 51 N. J. Eq. 40.

In conclusion, the case of *Outcalt* v. *Appleby,* 36 N. J. Eq., page 73, is relevant. In this case, Chancellor Runyon says at page 78:

> "The third proposition is, that the appreciation in value of the unproductive property held by the trustees in the exercise of their discretion, with a view to getting a satisfactory price therefor, shall be regarded as income and not as part of the corpus of the trust estate. There is nothing in the will to authorize the making of such a decree, and sound principle forbids it. The unproductive property constitutes part of the trust estate to be managed, and the whole estate is to be husbanded for the benefit of all the beneficiaries, the remaindermen as well as the life tenants. The trustees are vested with a discretion as to the time when the conversion of the property, unproductive as well as productive, into money is to take place, and the life-tenants are no more entitled to have the appreciation in value of the one than of the

other description of property regarded as income. The appreciation in either case is part of the corpus."

Respectfully submitted,

YOUNG, BIGELOW & FAYERWEATHER,
Solicitors for Stuart A. Young, Guardian ad litem of Infant Respondents, Elizabeth L. Brown and Harriet DeForrest Brown.

STUART A. YOUNG,
Of Counsel.

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New Jersey Court of Errors and Appeals.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

State of the Case.

Church & Harrison, solicitors for and of counsel with appellants.

Corra N. Williams, solicitor for and of counsel with defendant, Charles E. Kimball, substituted trustee, etc.

William Byrd, solicitor for and of counsel with defendant, Julia K. Martin and Guardian *ad litem* of infant defendants Mary T. Martin and Aubrey H. Martin, Jr.

Young, Bigelow & Fayerweather, Solicitors for and of counsel with Stuart A. Young, Guardian *ad litem* of infant defendants, Elizabeth L. Brown and Harriet DeForest Brown.

Bill of Complaint.

(Filed, March 4, 1915.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In Chancery of New Jersey.

To His Honor, Edwin R. Walker, Chancellor of the State of New Jersey:

Humbly complaining, show unto your Honor, your orators Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown:

First. That Mary T. Martin, late of the City of Summit, County of Union and State of New Jersey, died on the fifth day of October eighteen hundred and ninety-four, leaving her last will and testament, which was duly probated, in the office of the Surrogate of the County of Union aforesaid; that in and by a codicil to said will, the said testatrix appointed her husband, Archer N. Martin, and her son Aubrey H. Martin, Executors and Trustees thereof, and thereafter the said Archer N. Martin and Aubrey H. Martin, having qualified, letters testamentary were duly issued to them on the twenty-fourth day of October, eighteen hundred and ninety-four; that thereafter the said Archer N. Martin departed this life, and the said Aubrey H. Martin, by an order of the Orphans' Court of the said County, made the ninth day of December, eighteen hundred and ninety-six, was relieved and discharged from his said office as Executor and Trustee under said will; and said Court, by an order made the sixteenth day of December, eighteen hundred and ninety-six, appointed one Frank A. Dillingham of the City of Summit aforesaid, Administrator with the will annexed of said Mary T. Martin, deceased,

and also as Trustee thereunder; that by an order of said Orphans' Court made the sixth day of October, nineteen hundred and nine, the said Frank A. Dillingham was relieved and discharged from his said offices and trusts, and one Charles E. Kimball, of the City of Summit aforesaid, by an order of said Court, was appointed Administrator with the will annexed of said Mary T. Martin, deceased, and Trustee thereunder, in the place and stead of the said Frank A. Dillingham; and that said Charles E. Kimball duly qualified under said appointment and has ever since acted in and about the performance of the duties and trusts imposed upon him by said will and said order.

A copy of the said will of Mary T. Martin is hereunto annexed, marked Exhibit "A" and by reference made a part hereof.

And your orators further show that said Mary T. Martin left her surviving as her only heirs-at-law and next of kin, her husband, Archer N. Martin, who died as hereinafter set forth, and the following children, to wit, your orator, Aubrey H. Martin, your orator, Charles Lawrence Martin, your oratrix, Elizabeth Brown, and Clarence C. Martin, who resides at Vinton, State of Texas; that all of said children are still living.

And your orators further show that Aubrey H. Martin has three children, to wit, Aubrey H. Martin, Jr., Archer N. Martin and Mary T. Martin, all infants, and Elizabeth Brown has two children, to wit, Elizabeth L. Brown and Harriet DeForest Brown, both infants, and that said infants are residuary devisees and legatees under said will.

Second. And your orators further show that neither the original Trustees under the said will

of Mary T. Martin nor the survivor of them or either of the successor Trustees hereinbefore mentioned have ever complied with the following express provisions and directions of the said will with respect to the trusts created as to the residuary estate of the testatrix.

In Paragraph "Sixth" of the said will:

> "To convert the same into cash and invest and re-invest the same from time to time their discretion or at the discretion of the survivor or successor of them, in such manner and in such securities or investments, real or personal as to them or him may seem best and to take, collect and receive the rents, issues, interest, income, dividends and profits thereof, and pay the same over to my said husband, for and during his natural life, to be used and employed by him wholly at his discretion, for the benefit of himself and the comfort, education and support of my children."

In Paragraph "Seventh" of the said will:

> "And I empower the Trustee who shall survive my said husband to designate and set apart and invest and re-invest one of said shares for each of my surviving children and one for the child or children as the case may be, of any deceased child or children of mine (a share for the child or children of each deceased child) and to pay over the rents, income, issues, and profits of each share accordingly to the person or persons for whom the same shall be so designated and set apart for the natural life of said person or persons."

Third. That upon the death of the said testa-

trix by far the larger proportion of her estate consisted of unimproved real estate situate in the City of Summit, Union County, New Jersey; that after the death of the testatrix and during the life of Archer N. Martin, her husband, and one of the original Trustees, no sale of the said unimproved real estate was made. After the death intestate, of the said Archer N. Martin, which occurred December 25, 1894, whereupon the "Seventh" paragraph of the will of the testatrix became effective, no division of the residuary estate into four equal shares was made by the surviving Trustee nor has any such division ever been made by him or either of the successor Trustees; that certain parcels of the aforesaid unimproved real estate have been sold from time to time and the proceeds of such sales invested and part of the income derived from such investments distributed to the life beneficiaries named in the will; that part of the estate of Mary T. Martin consists of improved real estate and a portion of the rents derived from such improved real estate when it has been under lease has been distributed to the four life beneficiaries named in the will; that there has, however, been regularly deducted by all of the Trustees from the income derived from the income bearing property of the estate, money to pay the taxes upon and the expenses of management of the unimproved real estate.

Fourth. And your orators further show that the total value of the income-bearing property now in the estate of Mary T. Martin is approximately one hundred eighty thousand dollars ($180,000) and that the total value of the unimproved real estate is at least the sum of two hundred eigthy-three thousand three hundred twenty-four dollars ($283,324); that the total gross income of the estate is at least the sum of ten thousand seven hun-

dred thirty-two dollars ($10,732); and that out of this income taxes are now being paid on the unimproved property in the sum of about two thousand dollars ($2,000) per year; that the total amount of money so paid for taxes on unimproved real estate and management thereof by the various Trustees since the death of the testatrix is, to the best of your orators' knowledge, information and belief, at least the sum of forty thousand ($40,000) dollars.

Fifth. And your orators further show that by reason of the aforesaid acts of the Trustees of the estate of Mary T. Martin your orators have been deprived of income to which they are entitled under the terms of the will in an aggregate amount of about the aforesaid sum of forty thousand dollars ($40,000).

Sixth. And your orators further show that your oratrix, Elizabeth Brown, is one of the four beneficiaries for each of whom a one-fourth part of the residuary estate of Mary T. Martin was directed to be set aside; that of the other beneficiaries your orator Aubrey H. Martin has had from the corpus of the estate by way of advances sums aggregating upwards of thirty-five thousand dollars ($35,000) and Clarence C. Martin has had out of the corpus of the estate by way of advancement seventy-five hundred dollars ($7,500); that your oratrix Elizabeth Brown has had nothing out of the corpus of the estate by way of advancement or otherwise except a nominal advance in the sum of four thousand four hundred and ninety-seven dollars and fifty-two cents ($4,497.52) made by the present Trustee as a matter of bookkeeping under an order of this Court to balance past overpayments of income occasioned by a mistake of law on the part of the former substituted Trustee.

Seventh. That on or about the fifth day of June, 1901, your said oratrix Elizabeth Brown, was married to George Brown, Jr., of Baltimore, Maryland, and has two children, both daughters, to wit, Harriet DeForrest Brown and Elizabeth L. Brown, aged thirteen years and nine years respectively; that your oratrix's said husband, George Brown, Jr., has engaged in various business ventures almost all of which proved unsuccessful and that he has been and now is in considerable financial difficulties; that since about the tweny-fourth day of May, 1914, your said oratrix and the said George Brown, Jr., have been living separate and apart and the said George Brown, Jr., has contributed nothing toward the support of your said oratrix and her two children since August, 1914; that your said oratrix and her two children went to Europe on or about the eighth day of June, 1914, and while abroad both your said oratrix and her said two children suffered from serious illness by reason of which your said oratrix was put to great and unforeseen expenses; that since returning to this country on or about the thirteenth day of September, 1914, your said oratrix has continued to be grievously and seriously ill; that she has been visiting with relatives at Media, Pennsylvania, and has been constantly under the care of physicians and trained nurses and is now staying at Atlantic City, under advice of her physicians in an effort to regain her health; that by reason of the aforesaid illnesses of herself and her two daughters and lack of support from her husband, your said oratrix has been obliged to expend large sums of money and to incur indebtedness in unforeseen amounts; that the entire extra expense to your said oratrix from June, 1914, to date has been about the sum of three thousand dollars ($3,000); that your oratrix's said

two children are her only next of kin and will become entitled upon her death to the share of the estate of Mary T. Martin which should have been designated and set apart for your said oratrix; that the said Harriet DeForrest Brown is now at boarding school at Glencoe, Maryland, and the said Elizabeth L. Brown is with your said oratrix at Atlantic City; that the education of both of them will have to be interrupted and they will be seriously and irreparably handicapped and injured unless your said oratrix obtains an advance from the corpus of the estate of Mary T. Martin; that it is absolutely requisite for the comfort, welfare and necessity of your said oratrix and her said two daughters that such an advance be made to your said oratrix; that before your said oratrix will be able to resume a normal way of living, her extra expenditures for medical attendance, nursing, and extra living expenses for herself, and extra expenditures for the support, maintenance and education of her said two daughters will be at least the sum of two thousand dollars ($2,000).

Eighth. And your orators further show that your orator Charles Lawrence Martin, is thirty-nine years of age and unmarried; so that if he should die, his next of kin who would be entitled to the immediate ownership of the share of the estate of Mary T. Martin which should have been designated and set apart for him, would be his sister and his two brothers, all of whom are of full age and each of whom was made equally with your orator a beneficiary for life of a one-fourth part of the residuary estate of Mary T. Martin; that your orator Aubrey H. Martin has had from the corpus of the estate by way of advances sums aggregating upwards of thirty-five thousand dollars ($35,000); that Clarence C. Martin has had

out of the corpus of the estate by way of advance seventy-five hundred dollars ($7500); that your orator Charles Lawrence Martin has had nothing out of the corpus of the estate by way of advance or otherwise, except a nominal advance in the sum of four thousand four hundred and ninety-seven dollars and fifty-two cents ($4,497.52) made by the present Trustee as a matter of bookkeeping under on order of the Court to balance past over-payments of income occasioned by a mistake of law on the part of the former substituted Trustee, that your said orator's income from the estate of Mary T. Martin for upwards of three (3) years last past has been at the rate of twelve hundred dollars ($1200) a year with occasional slight additions from accumulations of income; that your orator resides in the City of New York and his occupation is that of a dealer or broker in inactive securities; that owing to recent financial conditions and also to the fact that your said orator has no capital of his own and no interest in any firm or going business, he has been able to earn very little money; that he cannot afford to pay office rent and expenses and has been obliged to associate himself with a firm conducting the same line of business and to divide all of his personal earnings equally with said firm; that it is now impossible for your orator to pay his necessary living expenses out of his earnings and his income from the estate of Mary T. Martin.

Ninth. And your orators further show that Frank A. Dillingham, during his trusteeship, caused to be incorporated two corporations, to wit, Summit Land Company and Agate Land Company, and conveyed portions of the unimproved real estate then owned by the estate of Mary T. Martin to each of said corporations, and

that substantially all of the stock of both companies is now owned and held by the estate of Mary T. Martin.

Wherefore your orators pray for a decree directing Charles E. Kimball, the Trustee, to make discovery of all records, books and papers in his possession having to do with the payment of taxes on unimproved real estate belonging to the estate of Mary T. Martin and for all expenses of management connected therewith, and that upon the amounts so expended being ascertained, the Trustee be directed to pay to each of the beneficiaries an amount equal to the income of which he has been deprived by reason of the payment of taxes on unimproved real estate out of income together with interest on such past due income from the date when it should have been paid, or that the Trustee may be directed, under the authority of the "Seventh" paragraph of the said will, to advance out of the principal of said estate, to each of your orators, a sum equal to the amount which he would have received had the aforesaid taxes not been paid from the income of said estate.

And your orators further pray, that the Trustee may be directed, in the future, to pay all taxes on the unimproved real estate from the corpus of said estate.

And your orators further pray, that the Trustee may be directed to comply with the terms of said will and make sale of the unimproved real estate as soon as it can be done without improper sacrifice of value.

And your orators further pray, that the said Trustee may be directed to comply with the direction of the will and divide said estate into four equal shares, the unimproved property to be divided either by conveying all of it to one of the

land companies, the shares of which are now owned by the estate, and by dividing the stock of such company into four parts and assigning one of such parts to each of the four shares of the estate, or in such manner as to the Court may seem appropriate.

And your orators further pray that the Trustee may be authorized to borrow money on the security of the unimproved property for its development and any expenses calculated to facilitate its early sale.

And your said oratrix, Elizabeth Brown, prays for a decree of this Court directing Charles E. Kimball as Trustee of the estate of Mary T. Martin, deceased, to pay to your said oratrix the sum of five thousand dollars ($5,000) as an advance from the corpus of said estate for her comfort, welfare and necessity and the support, maintenance and education of the said Harriet De Forrest Brown and Elizabeth L. Brown and for such other and further relief as to the Court may seem just.

And your orators further pray that they may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

To the end therefore that the said defendants Charles E. Kimball, substituted Trustee under the last will and testament of Mary T. Martin, deceased, Clarence C. Martin, Aubrey H. Martin, Jr., Archer N. Martin, Mary T. Martin, Elizabeth L. Brown and Harriet De Forrest Brown, to the best and utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, but without oath, the same being hereby waived pursuant to statute, and that as fully and particularly as if the same were here re-

peated, and they and every of them distinctly interrogated thereto; may it please your Honor, the premises considered, to grant unto your orators the State's writ or writs of subpœna, issuing out of and under the seal of this honorable Court, to be directed to the said Charles E. Kimball, substituted Trustee under the last will and testament of Mary T. Martin, Clarence C. Martin, Aubrey H. Martin, Jr., Archer N. Martin, Mary T. Martin, Elizabeth L. Brown and Harriet De Forrest Brown, defendants, commanding them and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

CHURCH & HARRISON,
Solicitors for and of Counsel
with Complainants.

Exhibit "A."

(COPY.)

Know all men by these Presents, That I, MARY T. MARTIN, of Summit, New Jersey, being of sound and disposing mind and memory, do hereby make publish and declare this to be my last Will and Testament, hereby revoking all former Wills and Testaments by me at any time made:

First: I hereby nominate and appoint my husband Archer N. Martin, as the executor of this

my last Will and Testament, and direct that he shall not be required to furnish bonds to enable him to qualify.

Second: I direct that my Executor shall promptly pay all my just debts and liabilities.

Third: I hereby give and bequeath to each of my sisters, Ann L. Martin, wife of Robert L. Martin and Harriet De Forest, wife of William H. De Forest, Jr., the sum of Twenty-five hundred dollars ($2,500.00).

I also give and bequeath the sum of one thousand dollars ($1,000.) to each of my following nephews and nieces: Mary Archer Martin, Archer Nevins Martin, Junior, Elizabeth Archer Daniels.

Fourth: I hereby give and bequeath to my husband, Archer N. Martin, the sum of ten thousand dollars ($10,000.) to have and to hold the same to him and his successor in this trust forever, but in trust nevertheless to and for the following uses and purposes to wit, to invest and re-invest the same in real estate or in safe, interest bearing or dividend paying securities or in bond and mortgage on improved real estate, and to pay the rents, issues, income and profits thereof to my daughter Elsie, during the term of her natural life. I hereby empower my said daughter Elsie to dispose of said fund after her death by her last Will and Testament. In the event, however, that she shall die without exercising said power of disposition, I direct my said Trustee or his successor in the trust, to pay over and distribute said principal sum in equal shares to and among my children who shall survive my said daughter, and the lawful issue of any of my children that may have died leaving such issue; such issue

however, in such distribution, if more than one, not to take *per capita* with my children, but to represent the deceased parent merely, and to take *per stirpes* according only to what the parent would have taken if living.

Fifth: I give and bequeath all my jewelry, wearing apparel, personal ornaments, all my household effects; also all my books, horses, carriages, sleighs, harnesses, farm utensils, tools and stock all my furniture, pictures, articles of vertu, and bric-a-brac, to my said husband.

Sixth: All the rest, residue and remainder of my estate of every name and nature and wherever the same may be situate, of which I may die seized or possessed, or which at my death I may be entitled to, I give, devise and bequeath to my husband Archer N. Martin, and Charles E. Kimball, to have and to hold the same, to them or the survivor or successor of him or them or their or his heirs forever, but in trust, nevertheless, to and for the following uses and purposes, to wit: To convert the same into cash and invest and reinvest the same from time to time at their discretion or at the discretion of the survivor or successor of them, in such manner and in such securities or investments, real or personal as to them or him may seem best, and to take, collect and receive the rents, issues, interest, income, dividends and profits thereof, and pay the same over to my said husband, for and during his natural life, to be used and employed by him wholly at his discretion, for the benefit of himself and the comfort, education and support of my children. And inasmuch as I wish to confine and secure my bounty under this will to the use of my husband and children for their comfort, support and maintenance, it is my will and I

hereby direct that in case any proceedings at law or in equity shall be instituted or taken by any creditor or creditors of my husband to compel or obtain the application of said rents, issues, interest, dividends, income or profits or any part thereof, to the payment of any debt or debts, or satisfaction of any liability or liabilities of my said husband, then upon an entry of a judgment or decree in such proceedings, the payment of the said rents, issues, interest, dividends, profits, and income to my said husband, shall thereupon be limited to such sum as by law then he may annually enjoy under this trust, as against his creditors and free and exempt from being taken by proceedings by them to apply the same to the payment of any claim, debt or liability of him to them, and the rest of the income, issues, interest, profits and dividends aforesaid, shall in such case go to my children in equal shares for their benefit until my said husband's death. And in case he shall by law then not be able so to enjoy any part of said rents, issues, profits interest, dividends or income free and exempt as aforesaid, then the whole of said rents, issues, interest, profits, dividends and income is from the time of such judgment or decree to go to my children for their benefit.

And I hereby grant to my said Trustees the right and power to advance to my said husband from time to time at his request, from the principal of said Trust, such sum or sums as they in the exercise of a liberal discretion may deem proper to advance to him.

Seventh: I hereby empower my said husband to dispose of the trust fund mentioned and referred to in the foregoing sixth section, or so much thereof as shall remain in the hands of

said Trustee at his death, by his last Will and Testament in such manner as he shall deem best, but in the event that he shall fail to exercise said power of disposition, I direct that then said trust fund be divided into equal shares, one for each of the children I shall leave, and one for the child or children as the case may be, of any and every of my children who may then have died leaving child or children living at the time of the death of my said husband; and I empower the trustee who shall survive my said husband to designate and set apart and invest and re-invest one of said shares for each of my surviving children and one for the child or children as the case may be, of any deceased child or children of mine (a share for the child or children of each deceased child) and to pay over the rents, income, issues, and profits of each share accordingly to the person or persons for whom the same shall be so designated and set apart for the natural life of said person or persons and at the death of said person or persons the share is to go to the next of kin of such person or persons and I give the same accordingly.

And I hereby grant to said trustees and the survivor of them the broadest discretion as to the property or securities in which to make investment. And I hereby authorize and empower them to advance a portion of the principal of the share to the person or persons for whom the same may be so set apart and designated whenever said Trustee or the survivor of them, shall deem it expedient in view of the necessities, comfort or welfare of such person or persons.

Eighth: In the event that my husband shall die either before or simultaneously with me, I give devise and bequeath all the rest, residue

and remainder of my estate to Charles E. Kimball and Doctor William H. Risk, to have and to hold the same to them and their successors and heirs forever; but in trust nevertheless to and for the following uses and purposes, to wit: To convert the same into cash and divide the same into equal shares, one for each of the children I shall leave, and one for the child or children as the case may be, of any and every of my children who may have died leaving child or children living at the happening of said contingency; and to set apart and designate, such shares accordingly to invest and re-invest the same in safe, interest bearing or dividend paying securities or in real estate, or in bonds or mortgages on improved real estate, and pay the rents, issues, income and profits thereof respectively to the person or persons respectively for whom such shares shall have been set apart as aforesaid, for and during his, her or their natural life or lives; and at the death of any person for whom any share may be so held the principal of the share is to go according to the directions of the last Will and Testament of such person, and if such person make no disposition thereof by will, then the same is to go to the next of kin of such person.

Ninth: In the event of the death of my husband before me, I hereby nominate and appoint Doctor William H. Risk and Charles E. Kimball, the Guardians of the persons and estates of each of my children.

Tenth: In the event that any calamity or disaster should happen which shall result in the simultaneous death of my family, I then give, devise and bequeath all my estate of every name and nature and wherever the same may be situ-

ate, to my sister Harriet De Forest, and the brothers and sisters of my husband, *per stirpes,* share and share alike.

Eleventh: I hereby grant to my executors and Trustees hereunder, full power of sale of any and all my estate upon credit or for cash, and I hereby empower them to execute such proper deeds, assignments or conveyances as shall be necessary or proper to enable them to execute such sale or sales, and I hereby further grant to them full power, authority and discretion to use any part of the principal of either or any of the funds herein granted to them for the purpose of improving real estate devised by me, or for the purpose of maintaining the same in good condition, and I hereby grant to my said Trustees, right, power and discretion to change investments which they shall make from time to time, and invest the funds submitted to their care in safe interest bearing or dividend paying securities or on bond and mortgage or in improved real estate.

In Witness Whereof I have hereunto set my hand and seal this 25th day of April, one thou sand eight hundred and ninety-two.

MARY T. MARTIN [SEAL.]

The foregoing instrument was published and declared by the said Mary T. Martin as and for her last will and Testament in the presence of us, who at her request, in her presence and in the presence of each other, executed the same as Witnesses this 25th day of April A. D. 1892, the said instrument being at the same time executed and sealed in our presence.

Chas. E. Kimball, Summit, N. J.
Cesarine Guerand, Summit, N. J.
W. J. Curtis, Summit, N. J.

I, MARY T. MARTIN, of Summit, Union County, New Jersey, do make and publish this codicil to my last Will and Testament, which will bears date the twenty-fifth day of April, one thousand eight hundred and ninety-two.

First: I hereby ratify and confirm my said Will in all respects save so far as any part thereof shall be revoked, or altered by this codicil.

Secondly: I hereby revoke so much of the first paragraph of my said Will as appoints my husband Archer N. Martin my sole executor and I do now appoint my said husband Archer N. Martin and my son, Aubrey H. Martin and the survivor of them, executors and executor of my said *last* last Will and Testament and of this codicil without bonds.

Thirdly: I hereby revoke the legacies to Ann L. Martin, Harriet De Forest, Mary Archer Martin, Archer Nevins Martin, Junior, and Elizabeth Archer Daniel, contained in the third paragraph of my said Will.

Fourthly: I hereby appoint my son, Aubrey H. Martin as and to be co-trustee with my said husband Acher N. Martin, to perform the trust in respect to the sum of Ten Thousand Dollars declared by the Fourth paragraph of my said Will and I direct them and the survivor of them to execute said trust.

Fifthly: I hereby revoke the fifth paragraph of my said Will and instead of the provision therein contained do give and bequeath all my jewelry, wearing apparel, personal ornaments, household effects, books, horses, carriages, sleighs, harnesses, farm utensils, tools and stock furniture, pictures, articles of vertu and bric-a-brac, to my husband,

Archer N. Martin and my son, Aubrey H. Martin and the survivor *of* successor of them, as trustees, with power of sale and re-investment of the proceeds of sale in other similar property, in trust, to hold and keep the same, and to allow to my said husband the use, during his lifetime of such part thereof as he shall desire to use, and to divide and distribute said personal property, including any uninvested proceeds of sale, among my children, and the descendant or descendants of a deceased child or children, at such time or times as said Trustees or the survivor or successor of them shall in their discretion see fit, having regard as far as possible to equality of division among my children; provided that the descendant or descendants of any deceased child shall stand in the place of said deceased child, and that if such division and distribution shall not be effected during my husband's life, it shall be made as soon as possible after his death.

Sixthly: I hereby revoke the appointment contained in the sixth paragraph of my said Will of Charles E. Kimball as co-trusteee with my said husband, Archer N. Martin, and I do now appoint my son Aubrey H. Martin as co-trustee with my said husband in the place and stead of said Charles E. Kimball, to execute the trust in said paragraph declared.

Seventhly: I hereby revoke the appointment contained in the eighth paragraph of my said Will of Charles E. Kimball as co-trustee with Doctor William H. Risk, and I do now appoint my son, Aubrey H. Martin as co-trustee with said William H. Risk, to execute the trust in said paragraph declared.

Eighthly: I hereby revoke the appointment con-

tained in the ninth paragraph of my said will of Charles E. Kimball as one of the guardians of the estate and interest of each of my children, and I do now appoint my son Aubrey H. Martin to act in said guardianship with Doctor William H. Risk in the place and stead of said Charles E. Kimball in the event of the death of my husband before me as in said paragraph mentioned.

In Witness Whereof I have hereto set my hand and seal this twenty-sixth day of May in the year of our Lord one thousand eight hundred and ninety-four, at Summit, aforesaid.

MARY T. MARTIN [SEAL.]

Signed, sealed, published and declared by said Mary T. Martin as and to be a codicil to her last Will and Testament, in the presence of us, who were present at the same time, and who at her request, and in her presence and in the presence of each other have hereto subscribed our names as witnesses at Summit, Union County, New Jersey, on this twenty-sixth day of May one thousand eight hundred and ninety-four.

Frederic Adams, Summit, N. J.

Frank Anderson, Summit, N. J.

Cesarine Guerand, Summit, N. J.

Amendment of Bill.

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,

Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,

Defendants.

On Bill, etc.

The bill heretofore filed in the above entitled cause is hereby amended as follows:

By inserting on page two, line twenty-eight, after the fourth paragraph, the following paragraph:

"And your orators further show that your oratrix Elizabeth Brown is a married woman and that her husband's name is George Brown; and that your orator Aubrey H. Martin is a married man and that his wife's name is Julia K. Martin; and that said Clarence C. Martin is a married man and that his wife's name is Lillian Martin; and your orators further show that by virtue of the provisions of the seventh paragraph of the last will and testament of said Mary T. Martin, said George Brown, Julia K. Martin and Lillian Martin may have or may in the future obtain some interest in or claim

upon some part of the estate of said Mary T. Martin."

And by inserting on page ten, line eleven, after the name Harriet DeForrest Brown, the following names:

"George Brown, Julia K. Martin and Lillian Martin."

And by inserting on page ten, line twenty-four, after the name Harriet DeForrest Brown, the following names:

"George Brown, Julia K. Martin and Lillian Martin."

CHURCH & HARRISON,
Solicitors of Complainants.

Petition and Order Appointing Guardian.

(Filed April 23, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN, Complainants, and CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased; Aubrey H. Martin, Jr., Archer N. Martin, and others, Defendants.	On Bill, etc.

To his Honor, Edward Robert Walker, Chancellor of the State of New Jersey:

The petition of Julia K. Martin respectfully shows that your petitioner is the mother of Aubrey H. Martin, Jr., and Archer N. Martin, minors under the age of fourteen years; that the said minors are two of the defendants named in the bill of complaint exhibited in this Honorable Court by Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown against Charles E. Kimball as substituted Trustee under the will of Mary J. Martin, deceased, and said minors, and others; that the said Aubrey H. Martin, Jr., was ten years of age on the twelfth day of March, 1915, and the said Archer N. Martin was eight years of age on the first day of March, 1915. And your petitioner respectfully prays that William Byrd, Esq., counsellor at law may be appointed Guardian

ad litem, to defend the said minors against the said bill of complaint.

JULIA K. MARTIN.

Signed in the presence of
Laurence Angel.

I, William Byrd, of the Township of Millburn, in the County of Essex, do hereby declare and express my willingness to accept the appointment of Guardian *ad litem,* above prayed for.

Dated April 19th, 1915.

WILLIAM BYRD.

Signed in the presence of
Laurance Angel.

New Jersey, ss.:

Julia K. Martin, the petitioner named in the foregoing petition, having been duly sworn according to law, on her oath saith. That the above petition truly expresses the several and respectives ages of Aubrey H. Martin, Jr., and Archer N. Martin, in the said petition named.

JULIA K. MARTIN.

Sworn to and subscribed before me
this 19th day of April, 1915.
Edward G. Layng,
[SEAL.] Notary Public.

New Jersey, ss.:

Laurance Angel, of Short Hills, in the County of Essex, and State of New Jersey, being duly sworn according to law, on his oath saith. That he was present and saw Julia K. Martin, the petitioner named in the foregoing petition, duly sign the same by subscribing her name thereto, and this deponent further saith that he was present and saw the said William Byrd sign his name to the con-

sent and agreement written at the foot of the above written petition.

LAURANCE ANGEL.

Sworn to and subscribed before me this 19th day of April, 1915.
Edward G. Layng,
Notary Public.

[SEAL.]

Order Appointing Guardian Ad Litem.

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased, AUBREY H. MARTIN, Jr., ARCHER N. MARTIN, and others,
Defendants.

Upon reading the petition filed in this cause by the defendant Julia K. Martin, setting forth that she is the mother of Aubrey H. Martin, Jr., and Archer N. Martin, two of the defendants in this cause, and that her said children are minors, under the age of fourteen years, and praying that William Byrd, Esq., may be appointed Guardian *ad litem* of the said minors; and upon read-

ing the written assent of the said William Byrd to the said appointment and the affidavit of Laurance Angel that the said petition and assent were duly signed, and the affidavit of said Julia K. Martin verifying the ages of her said children, it is on this 23rd day of April, 1915, ordered that the said William Byrd be appointed Guardian *ad litem* of the said Aubrey H. Martin, Jr., and Archer N. Martin, by whom they may appear, answer and defend this suit.

E. R. WALKER,
C.

Petition and Order Appointing Guardian.

(Filed June 23, 1915.)

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,

Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,

Defendants.

On Bill, etc.

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

The petition of George Brown respectfully showeth that your petitioner George Brown is the father of Elizabeth L. Brown and Harriet De Forrest Brown, infants under the age of fourteen years; that said infants are two of the defendants named in the bill of complaint exhibited in this honorable Court by Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown against Charles E. Kimball, substituted Trustee under the last will and testament of Mary T. Martin, deceased, and others; that the said Elizabeth L. Brown was eight years of age on the twenty-second day of July, 1914, and that the said Harriet De Forrest Brown was thirteen years of age on the twenty-fourth day of March, 1915. And your petitioner respectfully prays that Stuart A. Young,

a counsellor at law of the State of New Jersey, of the City of Newark, Essex County, New Jersey, may be appointed Guardian *ad litem* to defend the said minors Elizabeth L. Brown and Harriet DeForrest Brown against the said bill of complaint of the said Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown.

Dated April , 1915.

GEORGE BROWN, Jr.

Witness:

James Piper.

State of }
County of } ss.:

George Brown, the petitioner named in the foregoing petition, being duly sworn, according to law on his oath saith that the above petition truly expresses the several and respective ages of Elizabeth L. Brown and Harriet DeForrest Brown, infants, in the said petition named, according to the best of the recollection and belief of this deponent.

Sworn to and subscribed before me }
this 9th day of April, 1915. }
Emma L. Burke,
[L. S.] Notary Public.

State of Maryland, }
County of , } ss.:

James Piper, being of full age, duly sworn according to law on his oath saith that he was the person who saw George Brown, the petitioner

named in the foregoing petition, duly sign the same by subscribing his name thereto.

JAMES PIPER.

Sworn and subscribed to before me this 9th day of April, 1915.

Emma L. Burke,
Notary Public.

[SEAL.]

I, Stuart A. Young, in the City of Newark, County of Essex and State of New Jersey, do hereby declare and express my assent and willingness to accept of the appointment of the Guardian *ad litem* above prayed for.

Dated June 18th, 1915.

STUART A. YOUNG.

Winess:
John O. Bigelow.

State of New Jersey, } ss.:
County of Essex, }

John O. Bigelow, of full age being duly sworn deposes and says that he was present and saw the said Stuart A. Young subscribe his name to the consent and agreement to become the Guardian *ad litem* of the infants Elizabeth L. Brown and Harriet DeForrest Brown prayed for in the petition hereto annexed.

JOHN O. BIGELOW.

Sworn and subscribed to before me this 18th day of June, 1915.

Mary Etta Wilcox,
Notary Public of
New Jersey.

(L. S.)

Order Appointing Guardian Ad Litem.

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,

Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,

Defendants.

On Bill, Etc.

Upon reading the petition filed in this cause by the defendant George Brown, setting forth that said George Brown is the father of Elizabeth L. Brown and Harriet DeForrest Brown, two of the defendants in this cause, and that his said children are minors under the age of fourteen years, and praying that Stuart A. Young may be appointed Guardian *ad litem* of the said minors; and upon reading the written assent of the said Stuart A. Young to said appointment, and the affidavit of James Piper that said petition was duly signed, and the affidavit of John O. Bigelow that said assent was duly signed, and the affidavit of the said George Brown verifying the age of his said children:

It is, on this 23rd day of June, nineteen hundred and fifteen, Ordered that the said Stuart A. Young be appointed Guardian *ad litem* of the said Elizabeth L. Brown and Harriet DeForrest Brown,

by whom they may appear and answer and defend this suit.

E. R. WALKER,
Clerk.

A true copy.

Answer of Defendant Charles E. Kimball.

(Filed May 19, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN *et al.*, Complainants, and CHARLES E. KIMBALL, Substituted Trustee, etc., *et al.*, Defendants.	On Bill, etc.

Answer of the defendant, Charles E. Kimball, Substituted Trustee Under the Last Will and Testament of Mary T. Martin, Deceased:

The defendant, Charles E. Kimball, substituted Trustee, under the last will and testament of Mary T. Martin, deceased, for answer to the bill of complaint of the above named complainants, or to such parts thereof as he is advised it is material for him to make answer, says:

1. This defendant admits the allegations of the first paragraph of the said will, but requires that the will of the said Mary T. Martin mentioned in

said paragraph shall be proved by a certified copy thereof.

2. This defendant denies the allegations of the second paragraph of the said bill with reference to carrying out the directions of the sixth paragraph of the said will as set forth in said bill, and says that he has been engaged while acting as such Trustee in diligent efforts to sell and convert the residuary estate into cash and is investing and reinvesting the same from time to time at his discretion in personal securities or investments, as required by the terms of the said will, and is collecting and receiving the rents, issues, interest, income, dividends and profits thereof and paying the same to the surviving children of the said Mary T. Martin for their comfort and support, and this defendant believes that the said former Trustees pursued the same course. This defendant says that the said Archer N. Martin, husband of the said Mary T. Martin, to whom the said rents, issues, interest, income, dividends and profits of the said residuary estate were to be paid during his lifetime, is deceased, and was so deceased prior to the appointment of the said Frank A. Dillingham as Trustee and this defendant, who succeeded the said Frank A. Dillingham. This defendant admits that the provisions of the seventh paragraph of said will have not been complied with, and says that such provisions are not mandatory upon the Trustee under said will; and this defendant further says that if the said provisions were mandatory it has not been possible or practicable at any time since the death of said Mary T. Martin to carry out the provisions of said seventh paragraph by dividing said residuary estate into four parts.

3. And this defendant further answering admits that the larger portion of the estate of said

Mary T. Martin consists of unimproved real estate in Summit, New Jersey, but denies, upon information and belief, that after the death of said Mary T. Martin and during the life of her said husband no sale of said unimproved real estate was made. This defendant admits that said Archer N. Martin died on December 25th, 1894, intestate, and that no division of the residuary estate into four equal parts was made by said Aubrey H. Martin as surviving Trustee, nor has any such provision ever been made by said Frank A. Dillingham or this defendant. This defendant says that many parcels of said unimproved real estate have been sold from time to time to various purchasers and the proceeds of said sales invested and one-fourth of the income therefrom distributed to the life beneficiaries named in the will, after paying from the income so derived the taxes upon said unimproved real estate and such part of the necessary expenses connected with said real estate as was properly chargeable to the same, and this defendant says that under the laws of this State the said life tenants are required to pay all taxes and expenses connected with the improved and unimproved property from the income of said estate, and that said income has been amply sufficient for that purpose; that it is the duty of this defendant as such Trustee to preserve and protect the said residuary estate for the remaindermen by paying said taxes and fixed charges from the income derived from the residuary estate. This defendant further says that the payments so made of the taxes and the expenses of management of the improved and unimproved real estate have been regularly included in the various accounts of said Trustee filed in the Orphans' Court of the County of Union, and have been audited and passed by said Court upon due notice to said com-

plainants and to the defendant, Clarence C. Martin, and the children interested in said remainder.

4. This defendant further answering admits that the total value of the income-bearing property, composed of securities and improved and unimproved real estate, is approximately the sum of one hundred and eighty thousand dollars, and that the appraised value of the unimproved real estate is approximately the sum of two hundred and eighty-three thousand three hundred twenty-four dollars, and that the total gross income of the estate from the improved and unimproved property and the securities is about the sum of eleven thousand dollars, and that the taxes on the improved and unimproved property amount to about the sum of two thousand dollars; that this defendant says he is unable to state what is the total amount paid for taxes on the unimproved real estate by the former Trustees and this defendant since the death of said testatrix, but believes it to be approximately the sum of forty thousand dollars, and this defendant says that said sum of forty thousand dollars has been paid out of income derived from said residuary estate. This defendant further says that a portion of the income-bearing property, namely, about one hundred and forty thousand dollars, is the proceeds of the development and sale by the former Trustees and this defendant, of the unimproved property of said Mary T. Martin, and that the greater part of the income of said estate is derived from the investment of such proceeds.

5. This defendant further answering denies the allegations of the fifth paragraph of said bill of complaint.

6. This defendant, further answering, admits

that Elizabeth Brown is one of the four beneficiaries mentioned in said will of Mary T. Martin, and that said complainant, Aubrey H. Martin, has had from the corpus of the estate, the sum of thirty-five thousand dollars or thereabouts, and says that by a final decree in a suit in this Court in which it was sought to adjust the account of said Aubrey H. Martin of fifty-five thousand eight hundred and eleven dollars and thirty-four cents with the estate, it was decreed that the account of said Aubrey H. Martin with the estate should be credited with the amount of twenty-six thousand five hundred and forty-nine dollars and twenty-five cents, being the sum advanced to himself while acting as Trustee of said estate, and which should have been charged against the corpus or share of the estate of himself and his children. This defendant says that the sum of three thousand three hundred and fifty dollars was, in and by said final decree, directed to be charged against the interest of said Aubrey H. Martin and his children in said estate, and should be regarded and treated as having been advanced by this defendant as Trustee to the said Aubrey H. Martin from the corpus of said estate under the seventh clause of the will of said Mary T. Martin, authorizing advances to be made to any of said children of said Mary T. Martin for his or her comfort or welfare. This defendant admits that the said Clarence C. Martin has received by way of advancement from the corpus of the estate under said seventh clause, the sum of seventy-five hundred dollars, pursuant to the decree of the Court of Chancery in the proceedings last above referred to; that the defendant, Elizabeth Brown, has had nothing from the corpus of the estate by way of advancement. This defendant denies that

the sum of four thousand four hundred ninety-seven dollars and fifty-two cents was paid to said Elizabeth Brown as an advance from the corpus of said estate, but says that said sum represents the amount of fictitious income paid to said Elizabeth Brown by the former Trustee and decreed by said Court in said proceedings to be repaid by said Elizabeth Brown from the income due her from said estate, and which by subsequent order and decree was directed to be charged against her interest in the corpus of the estate for the reason that she was dependent upon said income for her support and unable to pay out of said income the amount of income so decreed to be repaid. And this defendant admits that a like sum of four thousand four hundred ninety-seven dollars and fifty-two cents was under the like circumstances directed to be charged against the interest of the said complainant, Charles Lawrence Martin, in the corpus of said estate.

7. This defendant admits that the complainant, Elizabeth Brown, is married to George Brown, Jr., of Baltimore, Maryland, and that she has two children, Harriet DeForest Brown and Elizabeth L. Brown, aged respectively thirteen and nine years; that this defendant is informed and believes that said George Brown has contributed nothing toward the support of said Elizabeth Brown and her two children for a long time past, and that the said Elizabeth Brown is living separate and apart from her said husband. This defendant says that he believes that the said complainant, Elizabeth Brown, is ill and in need of financial assistance; that he has recently advanced to her the sum of one thousand dollars owing to her pressing need thereof, and is willing and anxious to make any further advance from the

interest of said Elizabeth Brown and her said children in the corpus of said estate as may be warranted by their needs and condition, and as may seem proper and just to this Court, at such times and upon such terms as to payment out of corpus as may be directed by the decree of this Court.

8. This defendant admits that the complainant, Charles Lawrence Martin, is about thirty-nine years of age and unmarried, and that in the event of the death of said Charles Lawrence Martin his interest in said estate of Mary T. Martin would go to his next of kin; and this defendant admits that said Charles Lawrence Martin has had nothing out of the corpus of said estate by way of advances excepting the sum of four thousand four hundred ninety-seven dollars and fifty-two cents, which was directed by the decree of this Court to be charged against the interest of said Charles Lawrence Martin in the corpus of said estate under the circumstances hereinabove stated. This defendant admits that the said Charles Lawrence Martin has been receiving income from the estate for the past three years, but says that the amount has aggregated over twelve hundred dollars a year, and this defendant says that he believes that the income of said Charles Lawrence Martin for the present year will aggregate the sum of about eighteen hundred dollars.

9. This defendant denies the allegations of the ninth paragraph of said bill with reference to the incorporation of the Agate Land Company and the Summit Land Company by said Frank A. Dillingham, Trustee, and says that said Agate Land Company was incorporated by Archer N. Martin, Charles E. Kimball and William J. Curtis by certificate filed in the office of the

Secretary of the State of New Jersey on November 18th, 1890, with a capital stock of five thousand dollars, divided into fifty shares of the par value of one hundred dollars each, and that the Summit Land Company was incorporated by Archer N. Martin, Charles E. Kimball and Albert W. Newell by certificate filed in said office of the Secretary of State on November 29th, 1890; that the capital stock of said company is six thousand dollars, divided into sixty shares of the par value of one hundred dollars each; that the said companies owned considerable real estate in the said City of Summit at the time of the death of the said Mary T. Martin. This defendant further denies that any conveyance of real estate was made to the said two land companies by Frank A. Dillingham, Trustee, or by any other Trustee, but admits that this defendant as Trustee of said estate is the owner of substantially all the stock of said two land companies.

10. This defendant further answering says, that owing to the depressed condition of the market with respect to the sale of land, the unimproved real estate of said Mary T. Martin cannot be sold at the present time without great sacrifice and prejudice to the interests of the remaindermen in said estate, and this defendant says that it is necessary to continue the course heretofore pursued by him and the other Trustees in the sale and disposition of said unimproved property in parcels; that this defendant since his appointment as Trustee has made sales of said improved and unimproved property which have increased the principal of the estate by over fifty thousand dollars.

And this defendant further answering says, that this Court is without authority either in law

or in equity or by the terms of the will of said Mary T. Martin to decree that the unimproved lands of said estate shall be conveyed by this defendant to said two land companies mentioned in the bill of complaint, and this defendant says that he is empowered by said will to sell and convey lands only to purchasers upon such terms of credit or for cash as this defendant may in his discretion deem proper.

And this defendant further says that he has no desire to borrow money, nor is it necessary to do so, upon the security of the unimproved property for its development and for an expense to facilitate its sale, but that the said unimproved property at the present time is sufficiently developed for all the purposes of sale thereof.

All which matters and things this defendant is ready and willing to maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

CORRA N. WILLIAMS,
Solicitor for Defendant,
Charles E. Kimball, Trustee, etc.

Answer of Defendant Julia K. Martin and Infant Defendants Mary T. Martin, Aubrey H. Martin, Jr., and Archer N. Martin.

(Filed May 22, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN, *et al.*, Complainants, and CHARLES E. KIMBALL, as Substituted Trustee under the Will of Mary T. Martin, deceased, impleaded with Julia K. Martin, Aubrey H. Martin, Jr., Archer N. Martin *et al.*, Defendants.	On Bill, etc.

The joint and several answer of the defendant Julia K. Martin and of the infant defendants, Mary T. Martin, Aubrey H. Martin, Jr., and Archer N. Martin, by William Byrd, their Guardian *ad litem*, to the bill of complaint exhibited by Aubrey H. Martin, Charles Lawrence Martin, and Elizabeth Brown, complainants.

These defendants for answer to the bill of complaint of the above named complainants, or to so much thereof as is material for them to answer, say:

1. They deny the allegations of the second paragraph of the said bill in respect to the failure of the defendant Kimball and his predecessor Trustees to carry out the provisions of the sixth

paragraph of the will of Mary T. Martin, deceased, in regard to the conversion into cash of the real estate, whereof the said testatrix died seized, and they say that on the contrary, the said real estate has been sold from time to time as rapidly as was expedient, with due regard to the several interests of the life tenants and remaindermen. And they say further that the said power of sale granted by said testatrix in and by the sixth paragraph of her will is discretionary and not mandatory, and that this Court in the absence of special circumstances cannot compel the discretion of the defendant Trustee, which by said testatrix was especially confided to him and his predecessor Trustees. And they say further that the defendant Trustee and his predecessors have from time to time accounted in this Court, upon due notice to all the parties in interest, and that their several accounts have been judicially settled, so that there has been a practical construction by this Court that the said power of sale is not imperative.

In respect to the seventh paragraph of the said will, these defendants say that the direction therein contained to divide the corpus of the estate of said testatrix into four equal shares is dependent upon the exercise of the power of sale granted in the sixth paragraph of said will, and for that reason is not mandatory; and they say further that it is neither practicable nor expedient to make such division as regards the unsold real property of said trust.

2. These defendants further answering, deny the allegations in the fifth paragraph of the bill of complaint that the complainants have been deprived of income to which they are entitled by reason of the payment of taxes upon unimproved property so held in trust aggregating some forty

thousand dollars ($40,000). These defendants say that at all times since the death of said testatrix the income of said trust has been ample to pay current taxes on all the real property, both improved and unimproved, and that as between the life tenants and the remaindermen such taxes are properly chargeable to income. And these defendants further say that the accounts of the defendant Trustee, and his predecessor Trustees, from time to time have been judicially settled upon due notice to all of the parties to this action then entitled to notice, and that the payment of such taxes has been audited and passed. And these defendants hope they may have the same benefit as if they had demurred to so much of the complainants' bill as prays relief in respect to the taxes heretofore paid and hereafter to be paid upon the unimproved real property of said trust.

3. And these defendants further say that the development and sale of her unimproved real property was especially confided by said testatrix to the Trustees named in her will and their successors, and that this Court is without authority to compel the defendant Trustee to borrow money, and they further say that it is neither wise nor necessary at this time to borrow money on the security of such unimproved property.

All of which matters and things these defendants are ready and willing to prove as this honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

WILLIAM BYRD,
Guardian *ad litem* for infant
Defendants, and Solicitor for
Defendant, Julia K. Martin.

Answer of Defendant, Lillian Martin.

(Filed June 28th, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,

Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased, CLARENCE C. MARTIN *et al.*,

Defendants.

The defendant Lillian Martin, answering the bill of complaint of the complainants herein, submits herself to such decree as the Court shall make in this suit, and prays that she may have the benefit of any direction which may be made by any such decree concerning the administration of the trusts under the will of Mary T. Martin, deceased, to the extent of her interest.

JAMES F. MOONEY,
Solicitor for Defendant,
Lillian Martin.

Answer of Infant Defendants, Elizabeth L. Brown and Harriet DeForrest Brown.

(Filed July 9th, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN and others, Complainants, and CHARLES E. KIMBALL, Substituted Trustee, etc., and others, Defendants.	On Bill, etc.

The answer of Elizabeth L. Brown and Harriet DeForrest Brown, infants, under the age of twenty-one years, by Stuart A. Young, their Guardian *ad litem,* to the amended bill of complaint of Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown, complainants.

These defendants, answering by their said Guardian, say that they are informed and believe that the matters and things set forth in the said bill of complaint are true, but being infants, they leave the complainants to make such proof thereof as they may deem advisable.

These defendants further answering as aforesaid, say that they are advised that all taxes assessed on the unimproved property in the hands of the defendant, Charles E. Kimball, as Trustee under the will of Mary T. Martin, deceased, or on other property in his hands and part of the trust estate, should have been paid properly and should hereafter be paid out of income and not out of the corpus of the estate, and they pray that this Honorable Court may so decree.

These defendants fruther say that they believe that the Trustee should be directed to comply with the terms of said will and make sale of the unimproved real estate as soon as it can be done without improper sacrifice of value; and that the said Trustee should be directed to comply with the direction of the will and divide said estate into four equal shares, the unimproved property to be divided either by conveying all of it to one of the land companies, the shares of which are now owned by the estate, and by dividing the stock of such company into four parts and assigning one of such parts to each of the four shares of the estate, or in such manner as to the Court may seem appropriate.

These defendants further say that it would be very hazardous to authorize the Trustee to borrow money on the security of the unimproved property for its development in accordance with the prayer of the said bill, and that if such authority were given, the said estate might be dissipated and lost to these defendants and others ultimately entitled to it.

These defendants further say that they doubt the advisability and the legality of a decree of this Court directing Charles E. Kimball as Trustee of the estate of Mary T. Martin, deceased, to pay to the oratrix, Elizabeth Brown, the sum of five thousand dollars as an advance from the corpus of said estate for her comfort, welfare and necessity, and the support, maintenance and education of the said Harriet DeForrest Brown and Elizabeth L. Brown.

And these defendants submit themselves to the judgment of this Honorable Court, and pray

that their interest may be protected and saved to them.

STUART A. YOUNG,
Guardian *ad litem.*
YOUNG & BIGELOW,
Solicitors for Stuart A. Young,
Guardian *ad litem* of the Defendants,
Elizabeth L. Brown and
Harriet DeForrest Brown.

Order of Reference.

(Filed August 11, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN, Complainants, and CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*, Defendants.	On Bill, etc.

It is, on this 10th day of August, nineteen hundred and fifteen, on motion of Church and Harrison, solicitors of the complainants, ordered that the above stated cause be referred to Hon. Frederic W. Stevens, one of the Vice-Chancellors, to hear the same for the Chancellor and to report

thereon for him and advise what order or decree should be made therein.

E. R. WALKER,
C.

We hereby consent to the making and entry of the foregoing order.

CORRA N. WILLIAMS,
Solicitor of Defendant Charles E. Kimball,
Substituted Trustee
under the Will of Mary T. Martin.

WILLIAM BYRD,
Solicitor of Defendant,
Julia K. Martin.

WILLIAM BYRD,
Guardian *ad litem* of infant Defendants,
Mary T. Martin, Aubrey H. Martin, Jr., and
Archer M. Martin (now deceased).

JAMES F. MOONEY,
Solicitor for Defendants,
Clarence C. Martin and
Lillian Martin.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown.

STUART A. YOUNG,
Guardian *ad litem* of infant Defendants,
Elizabeth L. Brown and
Harriet DeForrest Brown.

A true copy.

ROBERT H. McADAMS,
Clerk.

Designation.

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN *et al.*, Complainants, and CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*, Defendants.	On Bill, etc.

It is ordered on motion of Church and Harrison, solicitors for and of counsel with the complainants, that this cause be set down for hearing on the 29th day of September, nineteen hundred and fifteen, at the Chancery Chambers, in the City of Newark, at the hour of 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard thereon.

Respectfully advised,

FREDERIC W. STEVENS,

V. C.

We hereby consent to the making and entry of the foregoing order and waive the five days' notice of this application prescribed by the 195th Rule.

CORRA N. WILLIAMS,
Solicitor of Defendant,
Charles E. Kimball, substituted Trustee
under the will of Mary T. Martin.

WILLIAM BYRD,
Solicitor of Defendant,
Julia K. Martin.

WILLIAM BYRD,
Guardian *at litem,* of infant Defendants,
Mary T. Martin, Aubrey H. Martin, Jr.,
and Archer N. Martin (now deceased).

JAMES F. MOONEY,
Solicitor of Defendants,
Clarence C. Martin and Lillian Martin.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown.

STUART A. YOUNG,
Guardian *ad litem* of infant Defendants,
Elizabeth L. Brown and
Harriet DeForest Brown.

Notice of Hearing.

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN *et al.*, Complainants, and CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*, Defendants.	On Bill, etc.

Take notice that this cause will be brought to a hearing on bill and answers filed therein before his Honor, Frederic W. Stevens, on the twenty-ninth day of September, nineteen hundred and fifteen, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard at the Chancery Chambers, Prudential Building, Newark, New Jersey.

Dated September 9, 1915.

Yours respectfully,

CHURCH & HARRISON,
Solicitors of Complainant.

Services of a copy of the foregoing notice of hearing is hereby acknowledged this ninth day of September, nineteen hundred and fifteen.

CORRA N. WILLIAMS,
Solicitor of Defendant,
Charles E. Kimball, substituted Trustee
under the will of Mary T. Martin.

WILLIAM BYRD,
Solicitor of Defendant,
Julia K. Martin.

WILLIAM BYRD,
Guardian *ad litem*, of infant Defendants,
Mary T. Martin, Aubrey H. Martin, Jr., and
Archer N. Martin (now deceased).

JAMES F. MOONEY,
Solicitor of Defendants,
Clarence C. Martin and Lillian Martin.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown.

STUART A. YOUNG,
Guardian *ad litem*, of infant Defendants,
Elizabeth L. Brown and
Harriet DeForrest Brown.

IN CHANCERY OF NEW JERSEY.

Before—His Honor Vice-Chancellor STEVENS.

Between

AUBREY H. MARTIN *et als.*,
Complainants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of MARY T. MARTIN *et als.*,
Defendants.

Messrs. CHURCH & HARRISON, and Mr. JAMES R. SLOAN (of the New York Bar), for the Complainants.

Messrs. YOUNG & BIGELOW, for Stuart A. Young, Guardian *ad litem*.

Mr. WILLIAM BYRD for Julia K. Martin; and Infant Defendants.

Mr. CORRA N. WILLIAMS, for Charles E. Kimball, Trustee.

Transcript of shorthand report of the evidence given upon the trial of the above stated cause, on Wednesday, September 29, 1915, at Chancery Chambers, Newark, N. J.

CHARLES E. KIMBALL, sworn.

Direct examination by Mr. Sloan:

Q. Mr. Kimball, you were intimately acquainted with the testatrix, Mary T. Martin, during her lifetime, and with her husband, Archer Martin, during his lifetime? A. I was.

Q. They resided in Summit, New Jersey, where you also resided, didn't they? A. Yes, sir, they did.

Q. Did they live in comfortable circumstances during their life, both of them? A. Very.

Q. Were they people of standing in the community in which they resided? A. They were.

Q. There were none better? A. They were leading people in the community.

Q. Have you known the four life beneficiaries under the will of Mrs. Martin since that time, Mr. Aubrey Martin, Mr. Lawrence Martin, Mr. Clarence Martin and Mrs. Brown? A. I have.

Q. Mrs. Brown is married and has two daughters, hasn't she? A. That is a fact.

Q. And is she at the present time living with her husband, Mr. George Brown? A. I understand she is not.

Q. Well, you have seen her and talked with her since they have been living apart, haven't you? A. The last time I saw her they were still on calling terms.

Q. Do you know Mr. George Brown? A. I do, sir.

Q. Is he a man who, since his marriage, has been successful in his affairs, and able to contribute from his earning to the support of his family?

The Court: Well, it seems to me that you are getting pure hearsay evidence.

Mr. Sloan: What I principally wanted from Mr. Kimball on this subject is evidence which will support our application for a separate advance to Mrs. Brown at this time.

The Court: Why is she not here?

Mr. Sloan: We had hoped to have her here, but one of the reasons she is seeking this advancement is that she was ill for the last year and a half, and she was confined in the Women's Hospital in Baltimore. I have written to her and her Baltimore at-

torney in the last three weeks urging upon them the necessity of her being here, and had hoped that she would come, but I had a letter that it would be impossible for her to move at the present time.

The Court: Well, you can get her deposition.

Mr. Sloan: If your Honor thinks that ought to be done that can be done. The Trustee has no opposition to this application for an advance, and in fact has admitted the facts.

The Court: You can make an offer, and perhaps counsel on the other side will admit the facts stated in your offer.

Mr. Byrd: I have no objection whatever to any reasonable advance to Mrs. Brown.

Mr. Williams: I represent the Trustee, and I understand he has no objection to making any reasonable advance; the question is how it shall be made, and when it shall be made.

The Court: Do you admit that she is in straits, that she is in a position in which it is absolutely necessary that she should have this money in order to live?

Mr. Williams: Well, the Trustee knows about that; I don't.

The Court: Well, have you any objection to this witness giving hearsay evidence?

Mr. Byrd: I have none.

Mr. Young: I represent the infants in that case, Mrs. Brown's children, and they are very much interested in this estate.

The Court: Yes, they are interested in preserving the corpus intact.

Mr. Sloan: That is their interest legally, your Honor; but I think under the circum-

stances that their interest at the present time is quite as much that their mother should have the advance as it is hers; she has got to support and educate them.

The Court: Have you any objection to the character of evidence?

Mr. Young: No.

The Court: Then let the witness state what their circumstances and the situation are.

A. Shall I go right on and tell the facts of the case?

By the Court:

Q. Tell the facts of the case, with reference to their circumstances and situation? A. Elsie Martin, the daughter, married George Brown of Baltimore, and George Brown shortly after that was in business with his brother in New York and Baltimore, under the style of H. C. Brown & Company.

Q. In what business? A. Stock brokerage business. H. C. Brown, his brother, having married one of Marcus Daley's daughters, that provided a large capital for them to operate with. During the life of that arrangement Mrs. George Brown and her family lived in Green Spring Valley, near Baltimore, in considerable affluence and spent a good deal of money; most of that I presume was furnished by—must have been furnished by Mr. George Brown, because the income from the Martin estate to Mrs. Brown had not exceeded two hundred dollars a month during any of that time. H. C. Brown & Company failed.

Q. When did they fail? A. They failed in 1908 or 9. Mrs. H. C. Brown died, and there were differences developed in the Daley family, Ambassa-

dor Gerard married a sister, and I don't think that they agreed about how things should be done, and that terminated George's income on any considerable score Mrs. Brown shortly after that —and she was living with her husband under more or less friction I believe—and in 1914 Mrs. Brown went to Europe with her aunt, Mrs. W. H. DeForest of Summit, and after the war she came home and had this collapse physically, and lived around with various members of the family, and was at Atlantic City with Mrs. DeForest, and finally went to Baltimore, and was in a hospital there, and on representations that were made to me by Mrs. DeForest, who was very devoted to her, and knows all about her, and by Mr. Pepper, and by Mrs. Brown herself, I advanced her a thousand dollars to make it possible for her to pay her hospital bills and other things that were pressing; that was along last Winter some time. She recovered, and this Summer was up in the Adirondacks, under very economical conditions, I believe, not spending very much money, and I understand that she came down from there three or four weeks ago, and after her return to Baltimore, where she is living with—visiting some friends—she became sick again. I understand that she is not living with her husband.

Q. What is the illness? A. Nervous prostration.

Q. Well, now, what income is she receiving from the estate at this time? A. She is receiving two hundred dollars a month.

Q. And has she any children? A. She has two children.

Q. Ages? A. I think one of them is twelve or thirteen, and the other one is nine or ten.

Q. Boys or girls? A. Both girls.

Q. And both living with her? A. Well, yes, they

live with her sometimes; there is quite a large family connection, and they are disposed of in various ways; I understand that as a matter of fact the eldest girl was at school last year.

Q. Boarding school? A. Boarding school; and a part of the expense of being at school was met by Mrs. Brown, or George Brown, somebody on her side, and that Mrs. Brown's cousins, the Farnums, of Philadelphia, who are well to do, pay the balance of it.

Q. Well, does not the father of these children contribute anything? A. As I say, I understand the fact is that some part of the expense of having this girl at school was contributed by George Brown.

Q. Does he contribute anything towards the support of his younger daughter? A. I cannot answer that question, I don't know what he contributes directly to his wife; the testimony is rather mixed on that subject, some of them say that he does, and some of them say that he does not; I haven't heard from Mrs. Brown on that particular point.

Q. Are they separated, as you understand, by an agreement? A. Well, they simply don't live together.

Q. Well, but there seems to be some arrangement by which the husband shall pay something. You do not know just what that is? A. I understand that many of the people who are interested in the situation have hoped and thought that very likely they might come together again. George Brown belongs to the Alexander Brown family of Baltimore, and while he has not got any money at the present time, there is a good deal of money going around through his family, one way or the other.

By Mr. Church:

Q. But he hasn't any money himself? A. Oh, I don't think so.

Further direct:

Q. And the younger child was, during most of the last year she has been with her mother, she was with her at Atlantic City, and has been with her almost continuously, hasn't she; she has not been with her father? A. I don't think she has been with her father; she was with Mrs. DeForest a little while ago up in Summit.

The Court: Well, it is important to know what contribution the husband makes.

Mr. Sloan: The verified allegation of the bill is to the effect, up to the time of the verification of the bill, that the husband had not contributed anything to the support of either of the children, and that is not denied by anybody. Now, it is alleged in the bill that the amount spent on taxes on improved property is about forty thousand dollars, and that is admitted in the answer. I do not think it is necessary at this time to go into the details of when those payments were made.

The Court: Well, there was a full statement of the situation of the estate in the other case, a very careful statement, and I presume that counsel will admit that that should go into this case, as far as it extends.

Mr. Byrd: That is very satisfactory.

The Court: Now, if you want to prove anything additional this is the time to do it. I do not think there is anything in that statement very definite, if I remember

rightly, with respect to the situation of the unimproved real estate. There is a large amount of unimproved real estate, and I do not understand that the statement dealt very much with that.

By Mr. Church:

Q. Can you tell us approximately the amount that has been spent in taxes? A. An examination of the accounts as filed prior to my time, and the payments made during my trusteeship, aggregate for all the taxes on property, improved and unimproved, about forty thousand dollars.

By Mr. Church:

Q. And that has all been paid out of income? A. That has all been paid out of income.

The Court: Well, if that is important, it ought to appear in the form of a statement; we ought to have definite facts.

A. That is taxes upon houses and the whole thing.

The Court: Well, if it is important there ought to be a definite statement. Now how about the saleability of the real estate?

A. The real estate, my theory about it is that during my time, which covers five years, that we have sold all the real estate that it was possible to sell at anywhere near a proper valuation. At the time these proceedings were had before Mr. Keen I submitted a valuation of this entire property, and I showed at that time that the sales then, as they had then been made, had been to realize substantially the estimates of value which had been put upon the property, and for the sales that have since been made that is also

true. Most of this property is quite distant from the station, and has to be sold in considerable sized plots and for handsome houses.

Q. (By the Court.) Let me understand exactly where it is. Is it between the station and the main road north of the station, that runs through Chatham and Madison and Morristown? A. Yes, sir; it is largely on Summit Avenue, which runs into the Morris Pike.

Q. (By the Court.) What is called the Morris Pike? A. The road to Morristown is called the Morris Turnpike, and there is a street called Summit Avenue, and a large amount of this property is on Summit Avenue, and on what many years ago Colonel Martin built up as Hillcrest.

Q. (By the Court.) How does it lie with respect to the Bassett place? A. Oh, the Bassett place is a little further off and a little nearer to Short Hills. One lot that the Martin estate owns is directly next to Mr. Bassett on the Morristown Pike.

Q. (By the Court.) How does it lie with reference to the Canoe Brook? A. The Canoe Brook is further west.

Q. (By the Court.) It is all on the south side of the Morris Pike? A. Yes.

Q. (By the Court.) Does it come down to the Morris Pike? A. Yes, but that part has been sold, except that on the easterly side, on the corner there is a little old house, and in the winter that lot is flooded as a skating rink, and that is a part of the Martin estate. And to explain to you the character of the property, the last important sale that I made was to Mr. Shipman, the Treasurer of the New York Life Company, a lot on the corner of Summit Avenue and Hillcrest, for which we obtained $11,500, and he

has just about completed a very handsome place there; the house must have cost forty thousand dollars to build.

Q. (By the Court.) What was its frontage? A. That was about four hundred feet on both sides; that was considered to be a very good price for it; I think there were about three acres of it altogether.

Q. (By the Court.) How many acres remain unsold? A. Acres?

Q. (By the Court.) Yes. A. Oh, I couldn't tell you that, I haven't got it added up in the way of acres.

Q. (By the Court.) Over fifty? A. I would think so. Then immediately across the street from the lot that we sold to Mr. Shipman I sold a lot to Felix Donner, of Newark, for $10,000; he has built a very handsome house there; and immediately below the lot sold to Shipman, a lot was sold to Mr. Adrian Riker, by my predecessor; that brought $15,000, I think; and Mr. Riker did not build on it, but afterwards sold it to Mr. Jaegel, a prominent coal merchant of Hoboken, and he has built a handsome house there; so that the land that is still available there, in fairness to the people who have already bought, or in fairness to the estate, has got to be dealt with in the same way. I consider the construction of those three houses, which all has taken place within a year or two, very much in the interest of this property.

Q. (By the Court.) Your judgment is that it ought to be sold in the same way that it has been? A. We estimated in the hearing before Mr. Keen that this property, all of it, we valued it at about two hundred and eighty thousand dollars, and I believe the fact is that it could just as well be sold for two hundred and eighty thou-

sand dollars as it could be sold for one hundred and forty thousand dollars, and there is very grave doubts if you could sell it for one hundred and forty thousand dollars, if you started that kind of a campaign, and that idea is, I think, supported by the brokers and dealers in Summit, all of whom constantly have this property for sale. There are one or two detached pieces of property, one on what they call the Boulevard, which is an older part of Summit, and development seems to have ceased there. There is a little cheap property down near the silk mill on Aubrey Street, a very few lots there, and those are being sold as opportunity arises; they are sold to Greeks and Syrians. There is some land on Overlook, which is the other side of the tract, it is a hill just to the left of the Lackawanna, as you come up by the coal pockets, the amount that we still have there is unimportant, and that goes from time to time; we sold a lot there for twelve hundred dollars two or three months ago. Then we have three houses that are a part of the income producing, and those houses were originally built in the Hillcrest section, as a part of the development of the property.

Mr. Church: If your Honor please, counsel will consent to the introduction in evidence of a statement from Mr. Kimball, taken from his books, of the amount of taxes, and that will save the necessity for producing the books here.

Mr. Byrd: I consent to that.

Examined by Mr. Byrd:

Q. When were you appointed substituted Trustee of this trust? A. In the Fall of 1908, I believe.

Q. Since your appointment the taxes have been paid from income? A. They have.

Q. And has the income during that period been ample to pay the taxes? A. It has.

The Court: Will not the statement show all that?

Mr. Byrd: Yes, but I think there ought to be some proved statement of this. The statement that he proposed to put in was a statement of taxes and not a statement of income; there will be nothing to show that the taxes have been paid out of income, and I want to show that has been done.

Q. In the case of assessments, what has been your practice since you were appointed? A. Been charged to the corpus.

Q. Have you compiled a list of the sales of property made since the death of Mary T. Martin? A. Yes.

Q. I show you a paper, and ask you if that is the statement? A. This statement I had prepared from the copies of the various accountings filed with the Surrogate by my predecessor; this covers the period from 1897 to 1909, and shows the receipts on account of principal and the disbursements on account of principal, covering that period.

Mr. Byrd: I offer that in evidence marked Exhibit D-a.

Q. There have been sales made since 1909? A. Yes.

Q. Those are the sales which you testified to a short time ago? A. Yes.

Q. Of Shipman and Donner? A. Yes.

Q. Those were among them? A. Yes.

Q. Heretofore has there been any apportionment

between principal and income of sales made by you? A. The sales of property have all been credited to principal.

Q. Now have you accounted from time to time as to your proceedings as Trustee of this trust? A. I have.

Q. In what courts have you accounted? A. I don't know—in the Surrogate's Court in Elizabeth.

Q. Do you recall the date of the last accounting? A. February, 1914.

Q. And how often between that and 1908 did you render accounts? A. That was the third accounting, I think, that I had made.

Q. Your third accounting? A. Yes.

Q. The prior accountings were also in the Orphans' Court of Union County? A. Yes, sir.

Q. Were those accountings made upon notice to all parties interested? A. I presume so.

Mr. Byrd: I offer that evidence for the purpose of establishing my plea that this question of apportionment is *res adjudicata.*

The Court: You cannot establish *res adjudicata* in that way. If you want to offer the accounts filed by this witness in the Surrogate's Court you may do that, but you cannot establish *res adjudicata* in this way.

(After argument.)

Mr. Byrd: Then I shall not offer the Orphans' Court decrees, as they are not relevant, but I do desire to offer the decrees of this Court.

The Court: Well, have you them here?

Mr. Byrd: No.

The Court: Then you have nothing to offer?

Mr. Byrd: Well, I was not advised that this question would be raised, until today.

Examined by Mr. Young:

Q. Was the advancement of a thousand dollars to Mrs. Elizabeth Brown, of which you speak, made under the order of the Court? A. It was not.

Q. Was it charged to corpus? A. The account covering that has not been filed yet; I understand if it is not allowed—

The Court: You need not commit yourself. You made that payment?

A. Yes.

The Court: Now, whether the payment is a proper payment or not, will be decided at the right time.

AUBREY H. MARTIN, sworn.

Direct examination by Mr. Sloan.

Q. You are a son of the testatrix, Mary T. Martin, and one of the beneficiaries under her will? A. I am.

Q. Are you receiving any income at the present time from this estate? A. No.

Q. What are your means of livelihood at the present time?

The Court: What are you going to ask?

Mr. Sloan: We are asking for a recovery back of these sums that have heretofore been paid out in taxes on the unimproved property; we are asking for it on two theories: First, as a matter of legal right; and, second, if it should be held we haven't

any legal right to it, the Court may exercise the discretion under the seventh clause of the will to make advancements to each of these beneficiaries equal to the amount of income of which they have been deprived.

The Court: Well, you may go on and ask the question, for the purpose of laying a foundation for your request. Of course, you have got to lay a foundation for a legal proposition before you can properly advance it. Now you may go on and lay your foundation for the proposition that you are entitled to have an amount equal to the taxes repaid.

Q. How are you living at the present time, Mr. Martin, what are your means of support? A. I have been doing a certain amount of engineering work, either consulting or construction work for people, but I have no actual position.

Q. Have you any actual position from which you receive a salary? A. Not now, no.

Q. Have you been able to contribute toward the—

The Court: Well, state what your average income from your own work is, your average annual income from your own work is.

A. It has been about six hundred dollars for the past two years.

Q. (By the Court.) Six hundred dollars annually? A. Annually.

Q. Whereabouts are your children at the present time? A. Short Hills.

Q. Living with their mother? A. Yes.

Q. (By the Court.) How many children have you? A. Two.

Q. Mr. Martin, has Mr. George Brown been contributing anything toward the support of your sister, Mrs. Brown?

The Court: Well, the witness cannot know that; you can get that evidence from Mrs. Brown herself.

Mr. Sloan: I thought in the absence of objection that might be admitted.

The Court: I allowed the Trustee to testify because he was impartial and has had, undoubtedly, communications with all the parties, and stands indifferent between them; but when you come to get hearsay evidence from interested parties that is a very different thing.

Examined by Mr. Byrd:

Q. Have you contributed anything to the support of the defendant, Julia K. Martin, or the infant defendants, Mary T. Martin and Aubrey H. Martin, Jr., since May, 1913? A. Yes, some; but I couldn't tell you the exact amount; it has been a comparatively small amount.

Q. About how much? Fifty dollars? A. More than that.

Q. One hundred dollars? A. Yes, I should think more than that.

Q. Well, how much? A. I don't really know; I could look it up for you.

Q. Well, not more than $150, is it? A. Probably not.

Q. (By the Court.) Well, you are living with your wife? A. No, I am not.

Q. In the bill in this case it has been stated that the advances to you amount to upwards of $35,000. I ask you if that is not an error? A. Advances to me at the present time, advances to me during what period?

Q. To date.

Mr. Sloan: If the Court please, Mr. Byrd has before him the decree of this Court, which is already stipulated to be part of the record, and that fixes the amount of his advances.

Mr. Byrd: I figured it at $29,000.

The Court: Well, the decree of the Court ascertains that conclusively.

A. It was decided in the other proceeding.

The Court: That matter was gone into with the utmost care, just as much care as it is possible to give to any subject.

LAWRENCE MARTIN, sworn.

Direct examination by Mr. Sloan:

Q. Are you the son of the testatrix, Mary T. Martin, and one of the beneficiaries under her will? A. I am.

Q. What income are you receiving at the present time from this estate? A. Well, at the present moment?

Q. For the last three months?

The Court: Well, for the last year.

Q. For the last year, then. It has been raised a little in the last three months. A. As I understand it, it is at the rate of $1,800.

Q. At the rate of $1,800? A. Yes.

Q. But you have not been receiving income at that rate for the last year? A. No, but the last two or three months.

Q. Before that it was at the rate of $100 a month? A. Yes.

Q. What is your occupation? A. Why, I am

in investment securities, unlisted stocks and bonds.

Q. Has that been a prosperous business for the last two or three years? A. Well, no; not with me.

Q. What has been your average earnings for the last three years? A. About six hundred dollars.

Q. About six hundred dollars a year? A. Yes, it is about six hundred, as near as I can judge.

Q. (By the Court.) Are you married? A. No, sir.

Mr. Church: Now that is all, except we will endeavor to get a deposition from Mrs. Brown.

The Court: Well, that will be absolutely necessary. Now I think that the accounts in the Orphans' Court should be offered in evidence, and it seems to me that the Trustee should make a statement of his receipts and disbursements since the time of the filing of the last account in the Orphans' Court, in order that we may know exactly what the condition of the estate is.

Mr. Byrd: May I have leave to offer in evidence the accounts and decrees in the Orphans' Court, and also the accounts and decrees in this Court, bearing upon this point?

The Court: Yes; I think it would be just as well to have it understood that they are all in.

Mr. Williams: The accounts were all here this morning, and I had an understanding with Mr. Church that they would be admitted in evidence.

The Court: Let the copies of the ac-

count in the Orphans' Court be brought in, and then let the Trustee supplement the last account to date.

Mr. Sloan: We have asked Mr. Hicks to prepare a statement, making an apportionment in his opinion as to how much of the taxes ought to be applied to unimproved and how much to improved in those particular cases, and Mr. Hicks is here, but he hasn't that statement completed.

The Court: When the statement is finished you can have copies made, and submit it to counsel, and they may agree that that is a fair statement.

Mr. Byrd: But I object to that as irrelevant.

The Court: You may object to it as irrelevant; I do not know whether it is relevant or not, but you can put it in with a statement of Mr. Hicks' view on the subject, and if you think it inaccurate you can have a statement made by somebody else.

Mr. Byrd: My objection is that it has nothing to do with the case at all.

Mr. Sloan: I take it that Mr. Hicks is qualified as an expert on Summit real estate.

Mr. Byrd: That is conceded.

CHARLES E. KIMBALL, recalled.

Direct examination by Mr. Williams:

Q. Mr. Kimball, you produce a statement of receipts and disbursements since the date of the filing of the last account in the Surrogate's Court of Union County, up to and including July first? A. Yes.

Offered in evidence and marked Exhibit 1 for Defendant Kimball, Trustee.

Mr. Church: I offer in evidence the will of Mary T. Martin, certified copy.

Marked Exhibit C-1.

Case Closed.

Stipulation

(In reference to pleadings at opening of case).

It is stipulated that the complainants may raise the question of apportionment under their prayer for general relief, and that the defendants shall have the benefit of all defenses to the application for this relief.

CORRA N. WILLIAMS,
Solicitor of Defendant,
Charles E. Kimball, Trustee, etc.

WILLIAM BYRD,
Solicitor of Defendant,
Julia K. Martin.

WILLIAM BYRD,
Guardian *ad litem* of infant Defendants,
Aubrey H. Martin, Jr., and Mary T. Martin.

JAMES F. MOONEY,
Solicitor of Defendants,
Lillian Martin and Clarence C. Martin.

STUART A. YOUNG,
Guardian *ad litem* of infant Defendants,
Elizabeth A. Brown and Harriet DeForrest Brown.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown.

ESTATE OF MARY T. MARTIN.

SUMMARY OCTOBER, 1909, JULY 1st, 1915.

Received from "Dillingham" items aggregating as follows:			$239,843.59
Bonds and Mortgages		$ 62,677.75	
Bills Receivable	$55,811.34		
Bills Receivable	5,233.34	61,044.68	
Shares Stock		45,875.00	
Various Chattels		605.00	
Cash		69,641.16	
		$239,843.59	
Additions:			
Sales			53,178.70
			$293,022.09
Deductions:			
Amount charged to Estate and credited to account Aubrey H. Martin		$41,055.50	
Amount as set forth below in detail		29,243.13	70,298.63
Capital Account			$222,723.46
Investments			213,591.25
Cash on hand			$ 9,132.21

Deductions from Principal:		
Paid C. C. Martin on order Court of Chancery		$ 7,500.00
A. H. Martin for support of children		3,420.00
Paid Elizabeth L. Brown on account of $5,000 application		1,000.00
Paid C. N. Williams for Fund account		25.00
Paid for improvements to Real Estate		4,224.76
Commissions on Sales		1,133.13
Paid City Solicitor for advertising intention of vacating street		38.80
Paid Legal Expenses		4,360.70
Paid for improvements to Dodsworth House		4,286.89
Expenditures on house 47 Hillcrest		867.66
Payments on Shipman Sale		386.19
Paid Chas. E. Kimball court allowance		2,000.00
		$29,243.13
Investments:		
Bond Stock		$ 47,281.67
Mortgage		145,720.40
Chattels		600.00
Bills Receivable:		
Julia K. Martin	$ 5,233.34	
A. H. Martin	$55,811.34	
Less charged to Estate and credited to A. H. Martin	41,055.50 14,755.84	19,989.18
		$213,591.25

Income Account:			
Rents			$15,634.93
Sundries			317.37
Interest			42,577.14
			$58,529.44
Less Deductions			55,087.91
Cash on hand			$ 3,441.53
Deductions from Income:			
Repairs		$ 3,428.62	
Expenses	$4,728.79		
Less amount allowed by Court and charged to Legal Expenses	1,625.10	3,103.69	
Insurance		405.61	
Taxes		13,794.47	
Commission on Rentals		189.00	
Commission paid Charles E. Kimball		2,216.29	
		$23,137.68	
Beneficiaries:			
C. Laurence Martin		$ 9,534.19	
Clarence C. Martin		9,571.01	
Elizabeth L. Brown		12,845.03	
		$55,087.91	

ESTATE OF MARY T. MARTIN

SUMMARY, OCTOBER, 1909-JULY 1, 1915.

Gross income		$58,529.44
Additional Credits:		
Interest on A. H. Martin debt of $14,755.84	$4,426.75	
Interest on advance A. H. Martin, $———, 6 years, 30%	7,964.75	
Interest on additional advance of $3,420	804.21	13,195.71
Income if realized		$71,725.15
Less expenditures		23,137.68
		$48,587.47
A. H. Martin ¼ share of above	$12,146.86	
A. H. Martin debt	13,195.71	
Overdraft	$ 1,048.85	

Account of Frank A. Dillingham, as Administrator with the will annexed of Mary T. Martin, shows amount of inventory, dated Dec. 16, 1896		$113,639.82
Debt due from Post, Martin & Co.		3,425.51
Income from personal property during year 1897		7,243.61
Total assets received		$124,308.94
Charges to Principal:		
Debts of decedent	$9,235.09	
Expenses of Administrator	1,600.60	
	$10,835.69	
Payments out of Income:		
Interest on mortgages $2,252.64		
General expenses 661.60	2,914.24	
Commissions & costs	5,490.00	
Paid F. A. Dillingham, Trustee, etc.,	4,300.00	23,539.93
Balance on hand Dec. 31, 1897		$100,769.01

Account of F. A. Dillingham as Administrator with the will annexed of Mary T. Martin, of August 20, 1898.

Amount on hand as per previous account		$100,769.01
Income received		3,630.11
Total		$104,339.12
Charges to principal indebtedness of estate	$10,643.75	
Charges to income	220.17	
Payment to F. A. Dillingham, Trustee, etc., out of principal	4,000.00	
out of income	1,925.00	16,788.92
Balance in hands of Administrator		$87,610.20

Account of F. A. Dillingham, Administrator with the Will annexed, of Mary T. Martin, dated Dec. 31, 1898:

Balance on hand as per previous account		$87,610.20
Income received		2,137.61
Total		$89,747.81
Payments:		
Charges to principal indebtedness of estate	400.00	
Charges to income, general expenses	36.65	
Accounting costs and commissions on income	152.32	
Payments to F. A. Dillingham, substituted Trustee, etc., out of principal	1,600.00	
out of income	1,121.27	3,310.24
Balance on hand		$86,437.57

Final account of F. A. Dillingham, Administrator with the Will annexed of Mary T. Martin, dated December 31, 1899.

Balance on hand as per last account		$86,437.57
Income received		4,719.54
Total		$91,157.11
Payments:		
Charges to principal indebtedness of estate	$32,856.68	
Expenses of administration	490.75	33,347.43
Balance paid to F. A. Dillingham as Substituted Trustee, etc.		$57,809.68

It appears from the foregoing Administrator's accounts that the total amount of cash received by F. A. Dillingham, as substituted Trustee under the will of Mary T. Martin, from himself as Administrator C. T. A., was $57,809.68.

The several accounts of F. A. Dillingham, as Administrator, etc., were duly approved by the Orphans' Court of Union County upon notice to all parties in interest, and decrees were entered accordingly.

Accounts of Frank A. Dillingham, as Substituted Trustee under the Will of Mary T. Martin, deceased:

FIRST ACCOUNT.

Dated December 31, 1897.

As to Principal:		
Sales of property		$5,255.00
Charges to Principal:		
Improvements to real property	$2,955.49	
Surrogate's fees	60.00	3,015.49
Balance of principal on hand		$2,239.51

As to Income:

Rents received		$8,692.01
Received from F. A. Dillingham, Administrator		4,300.00
Sundries		238.13
Total receipts		$13,230.14
Charges to Income:		
Taxes on real property	$3,819.87	
Interest on mortgages	200.00	
Premium on fire insurance	250.21	
Repairs on houses	2,846.61	
Management of real property (labor)	1,807.50	
General expenses	793.85	
Payments under 6th clause of will	29.00	
Income to Elizabeth L. Martin	500.00	
Payments to Beneficiaries ($600) each	2,400.00	
Commissions on income	661.51	
Total payments		13,309.55
Deficit		$79.41

SECOND ACCOUNT.

Dated August 20, 1898.

As to Principal:

Balance as per last account		2,239.51
Sales of property		150.00
Amount received from F. A. Dillingham, Administrator C. T. A.		4,000.00
Claim against Summit Land Co.		320.22
Total principal received		$6,709.73

Charges to Principal:

Assessment and repairs	$2,450.61	
Condert Bros. on acct. mtge. Chatham farm—	4,000.00	6,450.61
Balance on hand		$259.12

As to Income:

Income received from F. A. Dillingham, Administrator C. T. A.	$1,925.00	
Rents	4,755.64	$6,680.64

Charges to Income:

Interest on mortgage	$110.58	
Insurance	238.80	
Repairs on houses	1,763.80	
Management of real property	163.39	
Payment under 6th clause of will	5.00	
Payment under 4th clause of will	100.00	
Paid to beneficiaries	350.00	
Deficit on last account	78.41	
Error in last account	1.00	
Surrogate's fee	634.00	
Total charges		4,053.35
Balance on hand		$2,627.29

THIRD ACCOUNT.

Dated December 31, 1899.

As to Principal:

Balance as per last account		$1,369.49
Sales of property		74,650.00
Amount received from F. A. Dillingham, Administrator, C. T. A.		55,937.57
Total principal received		$131,957.06
Charges to Principal:		
For repairs, improvements, commissions, etc.		28,533.50
Balance principal on hand		$103,423.56

As to Income:

Balance as per last account		$1,193.92
Rents due for 1898—not included in last account		452.09
Rents for 1899 and other income		9,008.19
Income received from F. A. Dillingham, Administrator C. T. A.		1,872.11
Total income received		$12,526.31
Charges to Income:		
Repairs and care of houses	$2,165.03	
Expenses	698.89	
Management of estate	1,185.49	
Taxes	1,990.16	
Insurance premiums	654.13	
Paid beneficiaries	5,100.00	
Commissions to F. A. Dillingham	566.61	
Total charges		12,360.31
Balance income on hand		$166.00

FOURTH ACCOUNT.

Dated December 31, 1900.

As to principal:		
Balance as per last account		$103,423.56
Sales of real property		23,735.00
Cash		131.02
Total principal received		$127,289.58
Charges to principal:		
Improvements to real estate	$5,536.95	
Commissions, etc.	2,576.85	
Total charges		8,113.80
Balance principal on hand		$119,175.78
As to income:		
Balance of income as per last account		$166.00
Rents of houses		8,361.28
Fire wood, etc.		170.92
Interest		4,215.26
Total income received		$12,913.46
Charges to income:		
Repairs to houses	$2,970.38	
Management of estate	2,453.27	
Insurance premiums	112.20	
Expenses	497.35	
Taxes	1,526.20	
Paid beneficiaries	5,350.00	
Commissions, F. A. D.	637.37	
Total charges		13,546.77
Deficit		$633.31

FIFTH ACCOUNT.

Dated December 31, 1901.

As to principal:		
Balance as per last account		$119,175.78
Sales of real estate		994.13
Total principal received		$120,169.91
Charges to principal:		
Improvements to real estate	$3,231.37	
Commissions	1,461.56	
Total charges		4,692.93
Balance principal on hand		$115,476.98
As to income:		
Rents of houses		$8,275.00
Firewood, etc.		42.00
Interest		5,537.17
Total income received		$13,854.17
Charges to income:		
Deficit in 1900	633.31	
Repairs to houses	3,752.85	
Management of estate	1,957.82	
Insurance	32.20	
Expenses	941.95	
Taxes	1,573.78	
Paid to beneficiaries	5,379.80	
Commissions, F. A. D.	692.70	
Total charges		14,964.41
Deficit		$1,110.24

SIXTH ACCOUNT.

Dated December 31, 1902.

As to principal:		
Balance as per last account		$115,476.98
Sales of real estate		8,090.00
Total principal received		$123,566.98
Charges to principal:		
Improvements to real estate	$1,715.32	
Commissions	1,598.27	
Total charges		3,313.59
Balance principal on hand		$120,253.39
As to income:		
Rents of houses		7,875.00
Firewood, etc.,		21.25
Interest		5,238.79
Total income received		$13,135.04
Charges to income:		
Deficit in 1901	$1,110.24	
Repairs to houses	1,640.29	
Management of estate	970.37	
Insurance	261.40	
Taxes	1,860.18	
Paid beneficiaries	6,350.00	
Commissions	656.70	
Total charges		13,259.27
Deficit		124.23

SEVENTH ACCOUNT.

Dated December 31, 1903.

As to principal:

Balance as per last account (sic)		$121,253.39
Sale of real estate		1,037.74
Total principal received		$122,291.13
Charges to principal:		
Improvements to real estate	$2,064.00	
Commissions	300.00	
Total charges		2,364.00
Balance principal on hand		$119,927.13

As to income:

Rents of houses		$7,392.00
Sundries		101.00
Interest		5,017.08
Total income received		$12,510.08
Charges to income:		
Deficit in 1902	$124.23	
Repairs to houses	156.33	
Management of estate	1,531.27	
Insurance	202.00	
Expenses	273.26	
Taxes	34.29	
Paid beneficiaries	6,610.20	
Commissions	618.31	
Total charges		12,050.32
Balance income on hand		$459.76

EIGHTH ACCOUNT.

Dated December 31, 1904.

As to principal:		
Balance principal on hand as per last account		$119,927.13
Sale of real estate		21,400.00
Total principal received		$141,327.13
Charges to principal:		
Improvements to real estate	$2,402.31	
Commissions, etc.	1,847.50	
Total charges		4,249.81
Balance principal on hand		$137,077.32
As to income:		
Balance on hand as per last account		$459.76
Rents of houses		7,198.00
Sundries		38.00
Interest		5,399.53
Total income received		$13,095.29
Charges to income		
Repairs to houses	$1,796.80	
Management of estate	765.82	
Insurance	25.00	
Expenses	553.44	
Paid to beneficiaries	5,400.00	
Commissions	631.77	
Total charges		13,590.39
Deficit		$495.10

NINTH ACCOUNT.

Dated December 31, 1905.

As to principal:		
Balance on hand as per last account		$137,077.32
Sale of real estate		7,055.00
Total principal received		$144,132.32
Charges to principal:		
Improvements to real estate	$391.46	
Commissions	705.50	
Total charges		1,096.96
Balance principal on hand		$143,035.36
As to income:		
Rents of houses	$7,148.83	
Sundries	23.00	
Interest	6,623.79	
Total income received		$13,795.62
Charges to income:		
Deficit in 1904	$495.10	
Repairs to houses	2,794.82	
Management of estate	595.45	
Insurance	206.05	
Expenses	364.10	
Taxes	2,080.80	
Paid to beneficiaries	6,660.00	
Commissions	689.78	
Total charges		13,826.10
Deficit		30.48

TENTH ACCOUNT.

Dated December 31, 1906.

As to principal:

Balance on hand as per last account		$143,035.36
Sale of real estate		34,437.60
Stock dividend (Agate Land Co.)		15,000.00
Total principal received		$192,472.96

Charges to principal:

Improvements to real estate	$1,246.18	
Commissions	3,237.50	
Total charges		4,483.68
Balance principal on hand		$187,989.28

As to income:

Rents of houses		$6,653.34
Sundries		23.00
Interest		11,958.10
Total income received		$18,634.44

Charges to income:

Deficit in 1905	$30.48	
Repairs to houses	4,242.09	
Management of estate	972.09	
Insurance	146.68	
Expenses	419.67	
Taxes	2,678.00	
Paid to beneficiaries	7,800.00	
Commissions	944.22	
Note, W. C. L. Rubsamen, uncollectible because of insolvency	1,250.00	
Total charges		18,483.23
Balance income on hand		$151.21

ELEVENTH ACCOUNT,

Dated December 31, 1907.

As to principal:

Balance on hand as per last account		$187,989.28
Sales of land		32,600.00
Total principal received		$220,589.28
Charges to principal:		
Improvements to real estate	$10,065.16	
Advance under 7th clause of Will to A. H. Martin	1,000.00	
Commissions	1,900.00	
Total charges		12,965.16
Balance principal on hand		$207,624.12

As to income:

Balance of income on hand	$151.21	
Rents of houses	6,410.04	
Interest	8,638.33	
Sundries	23.00	
Total income received		$15,222.58
Charges to income:		
Repairs to houses	3,741.27	
Management of estate	1,015.82	
Insurance	22.50	
Expense	317.41	
Taxes	283.89	
Paid beneficiaries	7,800.00	
Commissions	842.13	
Total charges		14,023.02
Balance income on hand		$1,199.56

TWELFTH ACCOUNT.

Dated December 31, 1908.

As to principal:

Balance on hand as per last account		$207,624.12
Sales of real estate		18,991.00
Total principal received		$226,615.12
Charges to principal:		
Improvements to real estate	$4,302.85	
Advance under 7th clause of will to A. H. Martin	1,000.00	
Commissions	1,427.56	
Total charges		6,729.41
Balance principal on hand		$219,885.71

As to income:

Balance on hand as per last account		$1,199.56
Rents of houses		4,923.00
Sundries		90.47
Interest		9,829.18
Total income received		$16,042.21
Charges to income:		
Repairs to houses	$2,050.00	
Management of estate	476.08	
Insurance	166.23	
Expenses	793.66	
Taxes	5,277.27	
Paid beneficiaries	7,680.00	
Commissions	738.34	
Total charges		17,181.61
Deficit		$1,139.40

THIRTEENTH ACCOUNT.

Dated September 15, 1909.

As to Principal:

Balance on hand as shown by last account (sic)		$220,160.71
Sales of land		29,520.00
Total principal received		$249,680.71

Charges to Principal:

Improvements to real estate	$4,425.37	
Advance under 7th clause of will to A. H. Martin $3,000 to C. C. Martin 500	3,500.00	
Commissions	1,583.00	
Legal services	261.25	
Surrogate's fees	67.50	9,837.12
Balance principal on hand		$239,843.59

As to Income:

Rents of houses	$3,238.56
Sundries	57.99
Interest	5,481.80
Total Income received	$8,778.35

Charges to Income:

Deficit in 1908	$1,139.40	
Repairs to houses	1,004.47	
Management of estate	745.95	
Insurance	102.00	
Expenses	478.45	
Paid to beneficiaries	4,797.34	
Commissions	432.49	
Total charges		8,700.74
Balance income on hand		$77.61

Account of Charles E. Kimball, Substituted Trustee, from October 6, 1909 to May 1, 1913:

As to Principal:

Balance on hand as shown by last Dillingham Account—turned over to Kimball, Trustee		$239,843.59
Sales of land		24,503.50
Amount paid on mortgage of D. L. Haigh		1,000.00
Total principal received		$265,347.09

Charges against Principal:

Improvements to real estate	$2,457.41	
Advance to A. H. Martin	3,420.00	
Advance to C. C. Martin	7,500.00	
Commissions	517.50	
Total charges		13,894.91
Balance principal on hand		$258,152.18

As to Income:

Rents from dwelling houses		$11,894.10
Sundries:		
F. A. Dillingham, balance income	77.61	
N. Y. Telephone Co. & others	153.76	231.37
Interest		23,548.95
Total income received		$35,673.42

Charges against Income:

Repairs to dwelling houses		$3,047.79	
For various other purposes		3,206.69	
Insurance		226.11	
Taxes 1909 to 1912 inclusive		9,165.20	
Paid to beneficiaries:			
C. C. Martin	5,227.78		
C. L. Martin	5,600.00		
Elizabeth L. Brown	7,850.00	18,677.78	
Total charges			34,323.57
Balance income on hand			$1,350.85

Stipulation.

It is stipulated that the foregoing accounts were judicially settled upon notice to all parties in interest and that decrees confirming them were duly entered in the Orphans' Court of Union County.

CORRA N. WILLIAMS,
Solicitor of Defendant Charles E. Kimball, Trustee, etc.

WILLIAM BYRD,
Solicitor of Defendant Julia K. Martin.

WILLIAM BYRD,
Guardian *ad litem* of Infant Defendants Aubrey H. Martin, Jr., and Mary T. Martin.

JAMES F. MOONEY,
Solicitor of Defendants Lillian Martin and Clarence C. Martin.

STUART A. YOUNG,
Guardian *ad litem* of Infant Defendants Elizabeth A. Brown and Harriet De Forrest Brown.

WYNANT D. VANDERPOOL,
Solicitor of Defendant George Brown.

MEMORANDUM OF MARTIN ESTATE—PRINCIPAL ACCOUNT.

1897	Sales of Shadyside lot to James Fox	$700.00
	Sale of land on Aubrey Street	55.00
	Sale of lots on Nuthurst Road to Truslow	2,000.00
	Sale of stable on Woodland Avenue to Harriet Martin	1,000.00
	Sale of land on Shadyside Avenue to George Edwards	1,500.00
1898	Sale of lot on Aubrey Street to Mary Barry	150.00
1899	National Transit Company, Passaic farm	3,400.00
	Overlook lots	15,200.00
	Stoney Hill Farm	4,000.00
	Aubrey Street, H. G. Woods,	50.00
	Overlook Lot No. 13	1,025.00
	Nuthrust estate	50,000.00
1900	Theo. Burdel, Nuthurst property	22,650.00
1901	Land on Aubrey Street	225.00
	Land on Aubrey Street	150.00
	Land on Aubrey Street	225.00
	Land on Aubrey Street	300.00
	Land on Aubrey Street	81.63
1902	Kate Ahern	8,000.00
1903	L. W. Chubb, on account	500.00
	Aubrey Street	90.00
1904	Mrs. Chubb	7,900.00
	E. A. Embury	6,000.00
	M. M. Seiler	7,500.00
1905	Rahway Valley Railway	5,275.00
	A. B. Wallace	750.00
	C. J. Canda	1,000.00
1906	A. B. Wallace	1,000.00
	Agate Land Co., stock dividend	15,000.00
	James Heard	11,000.00
	L. A. Gibby	2,000.00

	A. B. Wallace	1,000.00
	Albert Helmwrath	9,500.00
	M. Bokesian	140.00
	George McCutcheon	7,500.00
	Albert Helmwrath	2,500.00
1907	Adrian Reicker	16,000.00
	A. D. Nichols	11,000.00
	G. W. McCutcheon	3,600.00
	L. E. Katzenbach	2,000.00
1908	Aubrey Street	53.50
	E. H. Raymond	800.00
	I. S. Cain	1,000.00
	L. J. Jones	975.00
	T. J. Coffey,	1,000.00
	D. L. Haigh	11,000.00
	W. H. Belknap	4,052.65
	Hillcrest lands	100.00
	W. H. Garton	2,800.00
1909	M. F. Becker, Shadyside	1,420.00
	S. W. Kent, Shadyside	2,800.00
	M. Siebert, Shadyside	1,400.00
	C. Wolf, Overlook	600.00
	J. P. Minn, Chatham Farm	6,000.00
	C. F. Jenks, house and lot, 254 feet front	12,000.00
	J. Mantell	1,600.00
	W. H. Garten	900.00
	Total	$270,477.78

Note.—1897, Dillingham, Administrator of Estate of Mary T. Martin, rendered his final accounting, paid debts aggregating $33,347.00 and handed over to himself as Trustee the balance, $57,809.68, which consisted of stock of the Agate Land Company, the Summit Land Company, and indebtedness of Aubrey H. Martin.

MEMORANDUM OF MARTIN ESTATE—PRINCIPAL ACCOUNT.

	RECEIPTS		DISBURSEMENTS
1897	$ 5,255.00	1897	$ 3,015.49
1898	5,580.59	1898	6,450.61
1899	130,587.57	1899	28,533.50
1900	23,866.02	1900	8,113.80
1901	994.13	1901	4,692.93
1902	8,090.00	1902	3,313.59
1903	1,037.74	1903	2,364.00
1904	21,400.00	1904	4,249.81
1905	7,055.00	1905	1,096.96
1906	49,437.60	1906	4,483.68
1907	32,600.00	1907	12,965.16
1908	18,991.00	1908	6,729.41
1909	29,520.00	1909	9,837.12
	$334,414.65		$95,846.06
	95,846.06		
	$238,568.59		

Opinion.

(Filed February 2nd, 1916.)

IN CHANCERY OF NEW JERSEY.

Between

AUBREY H. MARTIN *et al.*,
Complainants,

and

CHARLES E. KIMBALL, Trustee *et al.*,
Defendants.

Mr. ALONZO CHURCH, of Church & Harrison, with Mr. JAMES R. SLOANE, of New York, for Complainants.

Mr. STUART YOUNG, Counsel *pro se* and Guardian *ad litem* for the Infant Defendants, Elizabeth L. Brown and Harriet DeForrest Brown.

Mr. WILLIAM BYRD, Counsel *pro se* and Guardian *ad litem* for the Infant Defendants, Aubrey H. Martin, Jr., and Mary T. Martin, and Counsel for defendant Julia K. Martin.

Mr. CORRA N. WILLIAMS, for Charles E. Kimball, Trustee.

STEVENS, V. C. This is a bill based upon the provisions of the will of Mary T. Martin, a resident of Summit, who died in October, 1894. It seeks a decree requiring the Trustee to pay to complainants certain sums of money which it is alleged have been wrongfully withheld because the will has been erroneously interpreted by the

parties. It also asks that the Court empower the Trustee to pay certain sums of money out of the principal of the estate, under a discretionary power that might have been exercised by the original Trustee, but can now be exercised only by the Court itself.

The will was, as to some of its provisions, before this Court in Dillingham *v.* Martin, 16 Dick., 276, and was construed by Chancellor Magie, but not in the respects here considered.

The testatrix, after giving various legacies, provided as follows:

"Sixth: All the rest, residue and remainder of my estate of every name and nature and wheresoever the same may be situate, of which I may die seized or possessed or which at my death I may be entitled to, I give, devise and bequeath to my husband, Archer N. Martin, and Charles E. Kimball, to have and to hold the same to them or the survivor or successor of him or them or their or his heirs forever; but in trust nevertheless to and for the following uses and purposes, to wit: to convert the same into cash and invest and reinvest the same from time to time at their discretion or at the discretion of the survivor or successor of them, in such manner and in such securities or investments, real or personal, as to them or him may seem best and to take, collect and receive the rents, issues, interest, income, dividends and profits thereof and pay the same over to my said husband for and during his natural life to be used and employed by him wholly at his discretion for the benefit of himself and the comfort, education and support of my children." She then makes a provision of considerable length designed to protect her property against her husband's creditors and proceeds as follows: "And I hereby grant to my said Trus-

tees the right and power to advance to my said husband, from time to time at his request, from the principal of said trust, such sums as they in the exercise of a liberal discretion may deem proper to advance to him.

"Seventh. I hereby empower my said husband to dispose of the trust fund mentioned and referred to in the foregoing sixth section or so much thereof as shall remain in the hands of said Trustees at his death by his last will and testament in such manner as he shall deem best, but in the event that he shall fail to exercise said power of disposition, I direct that then said trust fund be divided into equal shares, one for each of the children I shall leave and one for the child or children as the case may be of any and every of my children who may then have died leaving child or children living at the time of the death of my said husband; and I empower the Trustee who shall survive my said husband to designate and set apart and invest and reinvest one of said shares for each of my surviving children and one for the child or children as the case may be of any deceased child or children of mine (a share for the child or children of each deceased child) and to pay over the rents, income, issues and profits of each share accordingly, to the person or persons for whom the same shall be so designated and set apart for the natural life of the said person or persons and at the death of said person or persons the share is to go to the next of kin of such person or persons and I give the same accordingly.

"And I hereby grant to said Trustees and the survivor of them the broadest discretion as to the property or securities in which to make investment, and I hereby authorize and empower them

to advance a portion of the principal of the share to the person or persons for whom the same may be so set apart and designated whenever said Trustees or the survivor of them shall deem it expedient in view of the necessities, comfort or wellfare of such person or persons.

"Eleventh. I hereby grant to my Executors and Trustees hereunder full power of sale of any and all my estate upon credit or for cash and I hereby empower them to execute such proper deeds, assignments or conveyances as shall be necessary or proper to enable them to execute such sale or sales, and I hereby further grant to them full power, authority and discretion to use any part of the principal of either or any of the funds herein granted to them for the purpose of improving real estate devised by me or for the purpose of maintaining the same in good condition and I hereby grant to my said Trustees, right, power and discretion to change investments from time to time and to invest the funds submitted to their care in safe interest bearing or dividend paying securities or on bond and mortgage or in improved real estate."

The husband of testatrix died in December, 1894, that is, within three months after testatrix died. Her son Aubrey, who had, by codicil, been substituted for Mr. Kimball, acted as Trustee until December, 1896, when he was replaced by Mr. Dillingham, who acted until October, 1909. Then Mr. Kimball was appointed and is now acting.

The complainants make two contentions: First, that the taxes on real estate should have been paid out of the proceeds of the land sold and not out of income. Second, that the proceeds of the sale of the unimproved real estate actually

sold should have been apportioned between the life tenants and the remainderman on the theory of a notional conversion of the land into money immediately upon testatrix' death.

The yearly accounts filed with the Surrogate of Union County by Mr. Dillingham show, first, a capital account and then a separate income account of moneys received and expended. The taxes therein appear to have been paid out of income, and this practice continued from 1896 to 1909 without objection by anyone. The net income alone, after making such payments, was distributed among the children.

I presume that Mr. Kimball's practice was the same, but his accounts are not before me. On this, it is contended on behalf of the infant children of the life tenants, first, that the taxes were properly paid out of income, and, secondly, that the life tenants are now, in any event, estopped by the allowance by the Orphans' Court of the accounts stated in that way, from contending otherwise, on the principle that the matter is *res adjudicata*. It seems to me so plain that, under our decisions, the taxes are payable out of income, that it is unnecessary to discuss the second question.

Holcomb *v.* Holcomb, 12 C. E. Gr., 473; 2 Stew., 597;
Cadmus *v.* Combes, 10 Stew., 264;
Brearley *v.* Molton, 17 Dick., 345.
In re Morton, 4 Buch., 797.

The contention that the proceeds of sales of real estate should be apportioned merits a more extended consideration.

Mrs. Martin appears to have been a woman of considerable means. Her personal estate was inventoried at $113,639. Her real estate may have

been worth four or five hundred thousand dollars. The unsold portion is valued by Mr. Kimball at $280,000. The property lies on the western slope of the hill northwest of and adjoining the built up portions of Summit. It was, no doubt, until recently, farm land or land adapted to a gentleman's country residence. At the time of Mrs Martin's death, at least ten houses had been built upon it and the accounts of Mr. Dillingham show that he, properly or improperly, spent large sums in developing it, so as to make it suitable for residences of the better kind. The Trustee has sold many lots at high prices and all but three of the houses. From the little evidence, gleaned from the accounts filed and from what Mr. Kimball says on the witness stand, it is fairly inferable that at the time of Mrs. Martin's death the land regarded as a country place may be said to have been improved and regarded as town lots, as far as unbuilt upon it may be said to have been unimproved.

Now what the Court is asked to decide is that the unimproved lots actually sold should have been regarded as having beeen converted into money at the time of Mrs. Martin's death; and that so regarded, the price paid should have been treated as, in part, interest or income, and distributed as such.

The principle invoked is that which, under certain conditions, is applied to personal property and is thus stated in Lewin on Trusts (Vol. 1, 303): "Where at the death of the testator the property is not in the state in which it is directed to be, the tenant for life is, before the conversion, entitled, as the Court has now decided, not to the actual produce, but to a reasonable fruit of the property from the death of the testator up to the time of the conversion, whether made in the course

of the first year or subsequently. If the conversion has been postponed either through the fault of the Trustee or because he could not convert sooner, that ought not to vary the respective rights of the life tenant and the remainderman." A similar rule, in the case of unimproved real estate, has been adopted by the Courts of Massachusetts and New York, where the direction to sell is imperative and the conversion not to be postponed. Edwards *v.* Edwards, 67 N. E., 659; Lawrence *v.* Littlefield, 109 N. E., 612. Whether this be the present English rule may be open to doubt. *In re* Searle, 1900, 2 Ch., 829.

In Yates *v.* Yates, 28 Beav., 637, a testator left unimproved real estate to Trustees for the benefit of his wife, with remainder to others; but with absolute discretion to the Trustees as to whether they should or should not sell. In the course of his judgment, the Master of the Rolls said: "The principle of the Court I apprehend to be quite clear where a testator gives property to Trustees, with a nabsolute trust for conversion and with a discretion as to the time at which the conversion shall take place; if from any cause whatever arising from the exercise of the discretion and judgment of the Trustee, the conversion is delayed, then the tenant for life is not to be prejudiced by that delay, but is to have the same benefit as if the conversion had taken place within a reasonable time of the death of the testator, which is usually fixed at twelve months from that period." This passage was criticised by Kekewich, J., in the case, *in re* Searles (*supra*), so far as it applied the rule of notional conversion to cases in which the sale was not improperly postponed. The statement of the Master of the Rolls was, in fact, mere dictum as applied to such cases. What he actually decided

was that as the will gave an absolute discretion to the Trustees as to whether they would or would not sell at all, there was no conversion, notional or otherwise until sale. It may, I think, be safely asserted that notional conversion will not be referred to a time anterior to the time when conversion is directed. If in my will I direct that my property shall not be sold until ten years after my death, it cannot be deemed converted as of the time of my death.

In the case in hand the will gives the property to Trustees in trust to convert the same into cash and invest and reinvest, from time to time, at their discretion. If the will stopped here I should have no hesitation in holding that immediate conversion was directed; but there are other clauses which negative the idea of such conversion. The will provides that the husband of testatrix and his co-Trustee are to take and receive (*inter alia*) the rents, issues and profits of the property for and during the natural life of the husband. If testatrix intend her husband to enjoy the rents, that negatives the idea that she intends him to enjoy notional income. If she give him rents she cannot be deemed to contemplate a condition of the property in which there will be no rents. No Court has held that he can have both. But the testatrix goes further; she gives the rents to her children after her husband's—the first life-tenant's—death. She therefore contemplates that they too may enjoy rents. In the eighth clause, she gives her Trustees full power, authority and discretion to use any part of the principal "for the purpose of improving the real estate devised by her or for the purpose of maintaining the same in good condition." This direction negatives the idea that she intends an immediate conversion; especially an immediate

conversion of her unimproved land, for the authority is not to improve real estate that might, under the authority contained in the sixth clause, be purchased as an investment, but to improve real estate devised "by me" and to maintain it in good condition.

How long property so improved might be kept and maintained I need not now consider. It is difficult to fix any limit short of the period of the life tenancies. The fact that she authorized the Trustees to invest the proceeds of the sale of her real estate in other real estate proves that she was not averse to investment in land. The cases of Edwards *v.* Edwards and Lawrence *v.* Littlefield (*supra*) were cases of land wholly unimproved, and cases too in which no authority was given to improve or to postpone the same at the discretion of the Trustees: in which, in the words of Knowlton, C. J., the will did not "indicate an intention that the time for establishing the fund should be postponed." The case in hand more nearly resembles Yates *v.* Yates and *In re* Searles (*supra*) than it does those cases.

I do not see how in a case circumstanced as this is the improved and unimproved portions of the land can be, notionally, separated. As the testatrix has not separated them I do not see how the Court can. Putting it most strongly for the life tenants, the property is at least partially improved. No cases have been cited that show that notional conversion is dependent upon the quantity of rent received. Indeed, it is not shown by any evidence outside of the meager indications to be obtained from looking over the accounts filed, that the property is not still one whole. There is scarcely anything to indicate that it may not have been one whole at testatrix' death.

The presumption of a notional conversion is only resorted to where the will does not speak. The will, of course, controls; and if it appear that what testatrix intended was that the life tenants should have rents only up to the time of conversion and thereafter the income derived from the sale, the Court must give effect to her intention. Here, whether we look only at the provisions of the will itself or read it in the light of the surrounding circumstances, it seems clear that as long as the property remains unconverted, the life tenants are to have such rent only as it yields; nothing more. And this is the practical construction put upon the will by the parties themselves for over twenty years. The administration of the estate has proceeded and the accounts have been audited and settled on this basis.

As the will is drawn, the construction thus placed upon it does not bear harshly upon the life tenants; for it authorized the Trustees to advance a portion of the principal to the children whenever the Trustees shall deem it expedient in view of their "necessities, comfort or welfare." Under this clause Mrs. Brown now asks an advance. She is receiving as her share of the income about $2,000 a year. She asks for an advance of $5,000. It was decided by Chancellor Magie, in the Dillingham case (*supra*), that this part of the trust did not devolve upon the substituted Trustee, but must be executed by the Court. It appears that Mrs. Brown has two daughters, ten and thirteen years old, Their education at present is being paid for by their father, who is living separate from his wife and is, she says, financially embarrassed. While living together in or near Baltimore they lived in an expensive way. Mrs. Brown says her hus-

band's family is prominent socially in Baltimore, that she has moved in the best society and expects her children to do likewise, and she thinks $5,000 would be a proper support.

If this sum should be taken year by year out of her and her children's share of the principal, it is apparent that in the course of fifteen or twenty years, there would be nothing left and the money given to the children would be dissipated. This Court could not, in the proper execution of the trust, authorize the payment of such a sum. It would not be for her own welfare or that of her children, as long as her husband is able or can be made to educate his children, that the capital fund should be depleted for educational purposes. Nor can it be impaired to enable Mrs. Brown to keep up the style of living to which she has been accustomed. She says that she has had a nervous breakdown, caused, I suppose, by her marital troubles, and that she has spent about $3,000 in consequence; that she now owes about $600 on that account and is still under her physician's care. She says that she owes in addition $800 for money borrowed. The Trustee has already advanced her $1,000. In view of all the circumstances, I think she may have a further allowance of $2,000, but this will not be a precedent for any future allowance, based merely on the ground that she has incurred other debts.

Final Decree.

(Filed March 31st, 1916.)

IN CHANCERY COURT OF NEW JERSEY.

Between
AUBREY H. MARTIN *et al.*,
Complainants,
and
CHARLES E. KIMBALL, Trustee, etc., *et al.*,
Defendants.
} On Bill, etc.

The complainants having filed their bill in the above stated cause praying that a decree might be made requiring the said Charles E. Kimball, substituted Trustee under the last will and testament of Mary T. Martin, deceased, to pay to the complainants certain sums of money disbursed from income by him and the former Trustees for taxes on the improved and unimproved estate, and further directing the said Trustee to pay certain sums of money out of the principal of the estate under the discretionary power that might have been exercised by the original Trustee, and praying for other and further relief; and the complainants under the prayer for general relief in said bill of complaint, and with the consent of all parties hereto, having prayed for a decree for an equitable apportionment as between life tenants and remaindermen of the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, heretofore treated as corpus of said estate; and the said defendant, Charles E. Kimball, Trustee as aforesaid, having through Corra N. Williams, his solicitor, filed his

answer to the said bill; and the said infant defendants, Aubrey H. Martin, Jr., and Mary T. Martin, having through their Guardian *ad litem,* William Byrd, filed their answer to the said bill; and the said infant defendants, Harriet Brown and Elizabeth Brown, having through their Guardian *ad litem,* Stuart Young, filed their answer to the said bill; and the said defendant, Clarence C. Martin, having filed his answer to the said bill; and the said matter having come on for final hearing upon the said bill and answers and proofs taken in open court in the presence of Alonzo Church, Esquire, and James H. Sloane, Esquire, of counsel for the complainants, and Stuart Young, Esquire, counsel *pro se* and Guardian *ad litem* for the infant defendants, Harriet Brown and Elizabeth Brown, and William Byrd, Esquire, counsel *pro se* and Guardian *ad litem* for the infant defendants, Aubrey H. Martin, Jr., and Mary T. Martin; and the matter having been considered after hearing the arguments of the respective counsel for the said parties complainant and defendant; and it appearing to the Court that the prayer of the said bill should be denied except such parts thereof as prayed for an allowance to the complainant, Elizabeth Brown, from the corpus or principal of said estate under the provisions of the will of the said Mary T. Martin;

It is thereupon, on this 30th day of March, nineteen hundred and sixteen, ordered, adjudged and decreed by the Chancellor of the State of New Jersey, pursuant to the power and authority in him vested, on motion of Alonzo Church, Esquire, counsel for the said Elizabeth Brown, that the application of the said Elizabeth Brown for an allowance from the corpus of the estate be and the same is hereby granted to the extent that the

said Charles E. Kimball, Trustee as aforesaid, is empowered to pay from the corpus or principal of the estate of said Mary T. Martin the sum of two thousand dollars ($2,000) in addition to the sum of one thousand dollars ($1,000), which he has already advanced to said Elizabeth Brown during the pendency of this suit, which is hereby ratified and allowed.

And it is further ordered, adjudged and decreed that the applications of said complainants, Aubrey H. Martin and Charles L. Martin for an allowance from the corpus of the estate under the provisions of the will, be and the same are hereby denied.

And it is further ordered, adjudged and decreed that the taxes upon the improved and unimproved lands belonging to said estate were properly paid out of the income of said estate.

And it is further ordered, adjudged and decreed that the application of the complainants that the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, heretofore treated as corpus, be equitably apportioned between the life tenants and remaindermen, be and the same hereby is denied.

It is further ordered, adjudged and decreed that a counsel fee of two hundred dollars and their taxed costs be and the same is hereby allowed to Messrs. Church and Harrison, solicitors and of counsel for the complainant, Elizabeth Brown; that a counsel fee of two hundred dollars and his taxed costs be and the same is hereby allowed to William Byrd, solicitor and counsel *pro se* and Guardian *ad litem* of the infant defendants, Aubrey H. Martin, Jr., and Mary T. Martin; and that a counsel fee of two hundred and fifty dollars and his taxed costs be and the same hereby is allowed to Stuart Young, solicitor

and counsel *pro se* and Guardian *ad litem* of the infant defendants, Harriet Brown and Elizabeth Brown.

Respectfully advised,
FREDERIC W. STEVENS,
V. C.

Notice of Appeal of Complainants.

(Filed April 17, 1916.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN *et al.*, Complainants, and CHARLES E. KIMBALL, Trustee, etc., *et al.*, Defendants.	On Bill, etc.

The complainants hereby appeal to the Court of Errors and Appeals in the last resort in all causes from the following portions of the final decree made in the above stated cause and dated March 30, 1916:

"And it is further ordered, adjudged and decreed that the applications of said complainants, Aubrey H. Martin and Charles L. Martin, for an allowance from the corpus of the estate under the provisions of the will, be and the same are hereby denied.

"And it is further ordered, adjudged and decreed that the taxes upon the improved and unimproved lands belonging to said estate were properly paid out of the income of said estate.

"And it is further ordered, adjudged and decreed that the application of the complainants that the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, heretofore treated as corpus, be equitably apportioned between the life tenants and remaindermen, be and the same is hereby denied."

Dated April 10, 1916.

CHURCH & HARRISON,
Solicitors of Complainants.

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

ALONZO CHURCH,
Of Counsel with Complainants.

April 12, 1916.

Service of a copy of the within notice of appeal is hereby acknowledged.

CORRA N. WILLIAMS,
Solicitor of Deft. Chas. E. Kimball, Trusteee, etc.

WILLIAM BYRD,
Solicitor of Deft. Julia K. Martin.

JAMES F. MOONEY,
Solicitor of Defts. Lillian Martin and Clarence C. Martin.

WILLIAM BYRD,
Solicitor of William Byrd, Guardian *ad litem* of infant defendants Aubrey H. Martin, Jr., and Mary T. Martin.

STUART A. YOUNG,
Solicitor for Stuart A. Young, Guardian *ad litem* of infant defendants Elizabeth A. Brown and Harriet DeForrest Brown.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown, Jr.,

Petition of Appeal.

(Filed April 24, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

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

The petition of Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown, the appellants in the above cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the thirtieth day of March, nineteen hundred and sixteen, wherein your petitioners were complainants and Charles E. Kimball, substituted Trustee under the last will and testament of Mary T. Martin, deceased, Clarence C. Martin, Aubrey H. Martin, Jr., Archer N. Martin, since deceased, Mary T. Martin, Elizabeth L. Brown, Harriet DeForrest Brown, George Brown, Julia K. Martin and Lil-

lian Martin were defendants, in this respect, to wit, that the said decree adjudges and decrees:

> "That the applications of said complainants, Aubrey H. Martin and Charles L. Martin for an allowance from the corpus of the estate under the provisions of the will, be and the same are hereby denied.
>
> "That the taxes upon the improved and unimproved lands belonging to said estate were properly paid out of the income of said estate.
>
> "That the application of the complainants that the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, heretofore treated as corpus be equitably apportioned between the life tenants and remaindermen be and the same hereby is denied."

And your petitioners humbly appeal from those portions of said decree of the Chancellor which decree as aforesaid, upon the ground that the same are erroneous for that the said decree should have given relief to the said complainants in those respects, and should have made an allowance to said complainants Aubrey H. Martin and Charles L. Martin from the corpus of the estate of said Mary T. Martin under the provisions of her will, and should have decreed that the taxes upon the improved and unimproved lands belonging to said estate were not properly paid out of the income of said estate, and should have decreed that the application of the said complainants that the proceeds of sales of real estate since the death of the testatrix, Mary T. Martin, heretofore treated as corpus, be equitably apportioned between the life tenants and remaindermen.

Your petitioners therefore pray that the said

decree of the Chancellor may be in the particulars aforesaid reversed, set aside, and for nothing holden, and that your petitioners may have such other relief in the premises as to this honorable Court shall seem meet.

CHURCH & HARRISON,
Solicitors of Appellants.

Alonzo Church,
Of Counsel with Appellants.

Service of a copy of the within petition of appeal is hereby acknowledged this 25th day of April, 1916.

C. N. WILLIAMS,
Solicitor of Defendant,
Charles E. Kimball,
Substituted Trustee, etc.

JAMES F. MOONEY,
Solicitor of Defendants,
Clarence C. Martin and
Lillian Martin.

WILLIAM BYRD,
Solicitors of Defendant.
Julia K. Martin.

WILLIAM BYRD,
Solicitor of William Byrd,
Guardian *ad litem* of
infant defendants
Aubrey H. Martin, Jr., and
Mary T. Martin.

WYNANT D. VANDERPOOL,
Solicitor of Defendant,
George Brown, Jr.

STUART A. YOUNG,
Solicitor of Stuart A. Young,
Guardian ad litem of infant defendants
Elizabeth H. Brown and
Harriet DeForrest Brown.

Answer to Petition of Appeal of Infant Defendants, Elizabeth L. Brown and Harriet DeForrest Brown.

(Filed April 28th, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

The answer of the defendant-respondents, Elizabeth L. Brown and Harriet DeForrest Brown, by Stuart A. Young, their Guardian *ad litem,* to the petition of appeal of the above named complainants-appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit that a decree was on March 30, 1916, made and entered in the Court of Chancery in the said cause for the purpose mentioned in said petition, but as to the substance and form thereof these respondents pray to refer thereto

when the same shall be produced. And these respondents 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 adjudged to these respondents.

YOUNG, BIGELOW & FAYERWEATHER,
Solicitors for and of Counsel with
Stuart A. Young, Guardian *ad litem* of Defendants-Respondents, Elizabeth L. Brown and Harriet DeForrest Brown.

Answer to Petition of Appeal of Infant Defendants, Mary T. Martin and Aubrey H. Martin, Jr.

(Filed .)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

} On Appeal, etc.

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

The answer of the infant respondents, Mary T. Martin and Aubrey H. Martin, Jr., by William Byrd, their Guardian *ad litem*, to the petition of appeal of the above named appellants.

These respondents not ackowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, admit that a final decree bearing date the 30th day of March, 1916, was duly made and entered in this cause in the Court of Chancery

as stated in the petition, but as to the substance and form thereof these respondents refer to the original decree. And these respondents are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to them.

Dated April 27th, 1916.

WILLIAM BYRD,
Solicitor and Counsel *pro se* and Guardian *ad litem* of the Infant Respondents, Mary T. Martin and Aubrey H. Martin, Jr.

Answer to Petition of Appeal of Defendant, Charles E. Kimball, Substituted Trustee, Etc.

(Filed May 3rd, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants-Appellants,

and

CHARLES E. KIMBALL, Substituted Trustee under the Will of Mary T. Martin, deceased *et al.*,
Defendants-Respondents.

On Appeal, etc.

The answer of the above named respondent, Charles E. Kimball, substituted Trustee under the will of Mary T. Martin, deceased, to the petition of appeal of the above named appellants.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a final decree was on the thirtieth day of March, nineteen hundred and sixteen last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as therein stated, but

as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent.

CORRA N. WILLIAMS,
Solicitor and of Counsel with said
Respondent, Charles E. Kimball,
substituted Trustee, &c.

[7981]

PETITION AND ORDER APPOINTING GUARDIAN AD LITEM FOR INFANT DEFENDANT MARY T. MARTIN.

(Filed April 23, 1915.)

IN CHANCERY OF NEW JERSEY.

Between AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN, Complainants, and CHARLES E. KIMBALL, as Substituted Trustee under the Will of Mary T. Martin, deceased, MARY T. MARTIN, *et als*, Defendants.	On Bill, etc.

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

The petition of Mary T. Martin, daughter of the defendant Julia K. Martin, of the Township of Millburn, in the County of Essex, respectfully shows that your petitioner is one of the defendants named in a bill of complaint filed in this honorable court by Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown, complainants, against Charles E. Kimball as substituted trustee under the will of Mary T. Martin, deceased, and your petitioner, and others, defendants, to be relieved touching the matters in the said bill of complaint set

forth; that your petitioner is a minor under the age of twenty-one years and over the age of fourteen years; that by reason of her minority she is unable to answer or make defense unto the said bill of complaint in a legal, competent and proper manner. Your petitioner, therefore, prays that William Byrd, Esq., counsellor at law, of Short Hills, New Jersey, may be appointed by your Honor in this honorable court guardian ad litem of your petitioner, for her and in her behalf to make answer and defense to the said bill of complaint.

And your petitioner will ever pray, etc.

Dated April 19th, 1915.

MARY T. MARTIN.

Signed in the presence of
Laurance Angel.

I, William Byrd, above named, do hereby consent and agree to accept the appointment of guardian ad litem, above prayed for, of Mary T. Martin, daughter of the defendant Julia K. Martin, a minor under the age of twenty-one years, to make answer and defense, in behalf of said infant, to the bill of complaint lately exhibited in the Court of Chancery of the State of New Jersey by Aubrey H. Martin, Charles Lawrence Martin and Elizabeth Brown, the complainants, against Charles E. Kimball, as substituted trustee under the will of Mary T. Martin, deceased, and said Mary T. Martin, and others, defendants.

In Witness Whereof, I have hereunto subscribed my name the 19th day of April, in the year 1915.

WILLIAM BYRD.

Signed in the presence of
Laurance Angel.

New Jersey, ss.:

Laurance Angel, of Short Hills, in the County of Essex, and State of New Jersey, of lawful age, being duly sworn according to law, on his oath saith: That he, this deponent, was present and saw William Byrd subscribe his name to the above written agreement, the same having been by this deponent first read over to the said William Byrd, and this deponent was also present and saw the above-named Mary T. Martin subscribe the foregoing petition, the said petition having been by this deponent first read over to the said Mary T. Martin; and this deponent saith that from information given to him and from the appearance of said Mary T. Martin, this deponent verily believes and hath no doubt that the said Mary T. Martin is under the age of twenty-one years; and this deponent further believes, from the above-stated grounds of belief, that the said Mary T. Martin is over the age of fourteen years.

LAURANCE ANGEL.

Sworn and subscribed at Short Hills,
in the County of Essex, this 19th
day of April, A. D. 1915, before me.

Edward G. Layng,
Notary Public.

[SEAL.]

ORDER APPOINTING GUARDIAN AD LITEM.

IN CHANCERY OF NEW JERSEY.

Between
AUBREY H. MARTIN, CHARLES LAWRENCE MARTIN and ELIZABETH BROWN,
Complainants,
and
CHARLES E. KIMBALL, as Substituted Trustee under the Will of Mary T. Martin, deceased, MARY T. MARTIN, *et als*,
Defendants.

Upon reading the petition filed in this cause by Mary T. Martin, one of the defendants in this cause, setting forth that she, the said Mary T. Martin, is a minor over the age of fourteen years, and praying that William Byrd, Esq., counsellor at law, of Short Hills, New Jersey, may be appointed her guardian *ad litem*, for her and in her behalf to make answer and defense to the complainants' bill of complaint; and upon reading the written assent of the said William Byrd annexed to the said petition that said appointment be made, and also the affidavit of Laurance Angel, verifying the age of the said petitioner, and setting forth that the said petition and assent were signed in his presence: It is on this 23rd day of Aprl, 1915, Ordered that the said William Byrd be appointed guardian *ad litem* of the said Mary T. Martin, by whom she may appear and answer, and defend this suit.

E. R. WALKER,
C.