INDEX

Testimony.

Bill of Complaint.

Filed April 3, 1925.

In Chancery of New Jersey

TO THE HONORABLE EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY.

The complainants, Ubaldo Traverso, of the City of Florence, in the Kingdom of Italy, Paul McMillin Butterworth, of West Hartford, in the state of Connecticut, Bankers Trust Company, of the City of New York, in the State of New York, Trustees, under the Last Will and Testament of Emerson McMillin, late of Mahwah, in the County of Bergen, in the State of New Jersey, deceased, show that:

1. On or about the 31st day of May, 1922, said Emerson McMillin of Mahwah aforesaid departed this life, possessed of a large amount of personal estate and seized in fee simply of a large amount of real estate as hereinafter more particularly set forth.

2. The said Emerson McMillin, deceased, left a Last Will and Testament, made and executed in due form of law which bears date and was duly executed on the 29th day of August, 1916, a true copy of which is hereunto annexed and hereby is made a part hereof.

3. In and by his said Will the said Emerson McMillin, deceased, among other things, nominated, constituted and appointed Marion McMillin, late of Mahwah, deceased, and said Ubaldo Traverso, of the City of Florence, in the King-

dom of Italy, Executors thereof, and therein and thereby, and in the event of the death or incapacity of either of said Executors, or their failure for any reason to serve, he appointed said Paul McMillin Butterworth as an Executor thereof, and therein and thereby he also appointed said Marion McMillin, now deceased, said Ubaldo Traverso and said Bankers Trust Company, trustees of the trust in and by his said Will therein created as hereinafter set forth, and therein and thereby, in the event of the death or incapacity of either said Marion McMillin, now deceased, or Ubaldo Traverso, or the failure, from any cause, of either to serve, he appointed said Paul McMillin Butterworth to serve as a trustee of said trust.

4. The said Will was duly proved by said Executors, Marion McMillin, now deceased, and Ubaldo Traverso, before the Surrogate of the County of Bergen, in the State of New Jersey, on or about the 12th day of June, 1922, and on or about the day and the year last aforesaid, letters testamentary were issued to said Marion McMillin, deceased, and Ubaldo Traverso, the said Executors named in said Will who thereupon immediately jointly took upon themselves the burden of the administration of said estate and so jointly continued such administration until the time of the death of said Marion McMillin, deceased, as hereinafter set forth.

The said Marion McMillin, deceased, Ubaldo Traverso and the Bankers Trust Company appointed as Trustees of said Will as aforesaid, immediately upon the death of said Emerson McMillin, deceased, accepted said trust and continued jointly as such Trustees until the death

of said Marion McMillin, deceased, as hereinafter set forth.

The said Marion McMillin departed this life on or about the 25th day of January, 1924, and immediately upon the death of said Marion McMillin, deceased, the said Paul McMillin Butterworth in and by said Will became an Executor of said Will and a Trustee of said trust, and immediately upon death of said Marion McMillin, deceased, letters testamentary were issued to said Paul McMillin Butterworth as an Executor of said Will, in place of said Marion McMillin, deceased, and said Paul McMillin Butterworth immediately upon the death of said Marion McMillin, deceased, accepted said trust created in said Will and became a Trustee thereof and since the death of said Marion McMillin, deceased, has acted as such Executor jointly with Ubaldo Traverso, and has been Trustee of said trust jointly with said Ubaldo Traverso, and said Bankers Trust Company, and has acted as such co-executor and been such co-trustee as aforesaid until the present time and so continues.

Certified copies of said letters testamentary issued to each of said Executors as aforesaid are in the possession of complainants ready to be produced as this Honorable Court may direct wherein the matters therein stated will more fully appear.

5. On or about the 5th day of October, 1922, Isabel McMillin, late of Mahwah aforesaid, now deceased, the widow of said Emerson McMillin, deceased, departed this life, leaving a Last Will and Testament, made and executed in due form, dated on the 7th day of April, 1922, a true copy of which is hereto annexed and is hereby made a part hereof. On or about the 27th day of No-

vember, 1922, the said Will of said Isabel McMillin, deceased, was duly proved by said Marion McMillin, now deceased, and said Bankers Trust Company, the Executors therein and thereby appointed, the said Emerson McMillin, the other Executor therein and thereby appointed having died as aforesaid prior to the death of said Isabel McMillin, and on or about the time of the probate of said last named Will, letters testamentary were duly issued to said Marion McMillin, now deceased, and said Bankers Trust Company, who thereupon immediately, jointly took upon themselves the burden of the administration of said Estate of said testatrix and so jointly continued such administration until the time of said death of Marion McMillin, deceased.

In and by her said Will, said Isabel McMillin, now deceased, appointed said Emerson McMillin, now deceased, said Marion McMillin, now deceased, and said Bankers Trust Company Executors of her said Last Will and Testament, and further provided that in the event that any of her said Executors should predecease her or decline to act, if two of said Executors shall remain qualified, they shall appoint a third Executor, and if two of said Executors remain unqualified she appointed her daughter Estelle McMillin Traverso to serve as Executrix, and in case she should not serve, the said Testatrix directed and ordered that the said Estelle McMillin Traverso with the said surviving Executor should name two other Executors to fill said vacancies.

In and by her said Will, said Isabel McMillin, now deceased, appointed said Emerson McMillin, now deceased, said Marion McMillin, now deceased, and said Bankers Trust Company Trustees of the trust created by her said Will

hereinafter set forth, and further provided that in the event that any of her said Trustees should predecease her or decline to act, if two of said Trustees shall remain qualified they shall appoint a third Trustee, and if two of said Trustees remain unqualified she appointed her daughter Estelle McMillin Traverso to serve as Trustee and in case she would not serve, the said Testatrix directed and ordered that the said Estelle McMillin Traverso with the said surviving Trustee should name two other Trustees to fill said vacancies.

Said Emerson McMillin, deceased, having predeceased said Isabel McMillin, deceased, as aforesaid, said Marion McMillin and said Bankers Trust Company accepted said trust immediately upon the death of said Isabel McMillin, deceased, and continued to be such joint trustees of said trust until the death of said Marion McMillin, deceased, and since the death of said Marion McMillin, deceased, said Bankers Trust Company has continued to be such trustee of said trust until the 11th day of October, 1924, at which time the said Estelle McMillin Traverso having renounced her right of administration, she, together with the Bankers Trust Company, the surviving Executor and Trustee, duly appointed Paul McMillin Butterworth and Ubaldo Traverso co-executors and co-trustees with the said Bankers Trust Company, who have undertaken the burden of such administration and now are the Executors and Trustees under said Will.

6. The said Emerson McMillin, deceased, upon his death left him surviving said Isabel McMillin, his widow, who died as aforesaid after his death, and as his heirs at law and next of kin four children and one grandchild, viz:

(1) said Marion McMillin, his son, by his said wife, Isabel McMillin, deceased, who died as aforesaid after said Emerson McMillin's death.

(2) Maude McMillin, his daughter by his wife said Isabel McMillin, deceased, who is unmarried and resides at Mahwah aforesaid.

(3) Estelle McMillin Traverso, his daughter by his said wife, Isabel McMillin, deceased, wife of Ubaldo Traverso who lives at Florence, in the Kingdom of Italy.

(4) Mary McMillin Norton, his daughter by his first wife who died prior to his marriage with said Isabel McMillin, deceased, widow of Oliver D. Norton, deceased, who now resides at Santa Barbara, in the State of California, and

(5) Helen Isabel McMillin, his granddaughter, who now resides in the City and State of New York, who is a daughter of Emerson McMillin, Jr., deceased, who was a son of said Emerson McMillin, deceased, by his said wife, Isabel McMillin, deceased, which said Emerson McMillin, Jr., died intestate, prior to the death of said Emerson McMillin, deceased, leaving him surviving said daughter, Helen Isabel McMillin, his only child and heir-at-law and next of kin.

7. The said Mary McMillin Norton did by writing under her hand and seal dated the 6th day of November, 1922, assign, transfer and set over unto her two sons, Emerson M. Butterworth and Corwin M. Butterworth, jointly and to the survivor of them, all of her right, title and interest in and of the Estate of Emerson McMillin, deceased, and particularly all of her right to share in the distribution or division of the Estate of said deceased as a beneficiary under the said Last Will and Testament of said deceased,

and the said instrument directed the said Trustees aforesaid to pay over and distribute to the said Emerson M. Butterworth and Corwin M. Butterworth and the survivor of them all moneys and property of every kind and amount to which they might at any time hereafter be entitled to under said Last Will and Testament. Which assignment is in the possession of the complainants ready to be produced as this Honorable Court may direct wherein the matters herein stated will more fully appear.

8. The said Marion McMillin died intestate and upon his death left him surviving his widow, Jane M. McMillin who resides at Mahwah aforesaid, and as his only heirs at law and next of kin, his sisters of the whole blood said Estelle McMillin Traverso, and said Maude McMillin; his sister of the half blood said Mary McMillin Norton, and his niece of the whole blood said Helen Isabel McMillin. A short time after the death of said Marion McMillin, deceased, his said widow, Jane M. McMillin, was appointed administratrix of his estate, to whom letters of administration were then issued by the Prerogative Court of New Jersey. Said Jane M. McMillin has taken upon herself the burden of the administration of the said estate of Marion McMillin, deceased, and so continues to act as such administratrix. A certified copy of said letters of administration issued to her are in the possession of the complainants ready to be produced as this Honorable Court may direct wherein the matters herein stated will more fully appear.

9. The said Isabel McMillin upon her death left her surviving as her only heirs at law and next of kin.

(1) Her said son, Marion McMillin, now deceased,

(2) Her said daughter, Maude McMillin,

(3) Her said daughter, Estelle McMillin Traverso, and

(4) Her said granddaughter, Helen Isabel McMillin.

10. By the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs of said Last Will and Testament of said Emerson McMillin, deceased he, the said testator provided as follows:

> "SIXTEENTH: My direct heirs at law, members of my family, and residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are to be equal, in every respect, as to his or her interest in the Trusteed Estate, are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey; my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New Jersey; my son Marion McMillin of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin, (only child of my deceased son Emerson McMillin, Jr.), now of Darlington, Mahwah, New Jersey. For all the persons named, I have previously made ample provision for their own welfare as well as the welfare of those depending on them. My granddaughter Helen Isabel, the only child of my deceased son, Emerson, inherited liberal sums from her father and from her mother. To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington estate shall remain intact in the family and I stipulate

that this must be so during the life of my wife, Isabel Morgan McMillin.

SEVENTEENTH: I give, devise and bequeath unto my Trustees to be hereinafter named, and their successors, in trust however, for the persons named in Section Sixteen, all the residue of my Estate, including leases of my summer home at Beaver Island, Upper Dam, Oxford County, Maine; the eighty six acre plot of land known as the Marion Cottage property of Mohegan Lake, West Chester County, New York; Apartment House at 320 West 86th Street, New York City, New York and my Darlington Estate, Mahwah, New Jersey; and all the farm equipments, produce, live stock, and household furniture, paintings, tapestries, textile fabrics, porcelains, potteries, bronzes, and art objects of every kind and character; and all the stocks, bonds, notes, cash, credits, and assets of any kind and of which I may die possessed, and not hereinbefore disposed of, but with the following conditions and stipulations; (a) The Beaver Island leases, the Marion Cottage Property and the city Apartment House in New York, are all to be sold as soon as may be, and the proceeds to be invested as the Trustees shall deem to the best interest of the Estate. (b) the household furniture, libraries and camp equipment at Beaver Island, including steamboat—to be disposed of—if convenient with the leases. The proceeds of all sales shall be invested by the Trustees for the Trust Estate. The Trustees shall permit the Darlington Estate with all it comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to operate the farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees.

EIGHTEENTH: All income from rents, dividends on stocks, interest on bonds or other securities not herein otherwise disposed of, in fact, all income of every kind and character, except the income of the Darlington Estate during its retention by the family, shall be paid to and received by the Trustees for the benefit of the Trust Estate and the Trustees are empowered to sell, dispose of, convey and give title to any kind of property, real or personal, at any and all times, when deemed advisable by them except as to disposition and sale of the Darlington Estate during the life of my wife.

NINETEENTH: From the income of the Trust Estate the Trustees shall (a) pay to my wife Isabel Morgan McMillin and to my son Marion McMillin jointly the sum of fifty thousand dollars per year, payable quarterly for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington Estate. In the event that my wife shall predecease me, then the fifty thousand dollars shall be paid to my son alone, for the purpose above mentioned. If the family desire to retain Darlington after the decease of both my wife and my son, they shall designate a head of the family in a manner that shall be satisfactory to the Trustees, and the person so designated shall receive and disburse the Darlington Estate Annuity. Should any of the persons named as my direct heirs and members of my family prefer not to make their home at Darlington, then such person, or persons shall each receive twenty-five hundred dollars per year, in quarterly payments, to be taken by the Trustees from the Darlington Estate fund of fifty thousand dollars per year herein above provided for.

TWENTIETH: From the income of the Trust Estate, after deducting the provisions of Section Nineteen, the Trustees shall pay to each of my direct heirs (and persons des-

ignated as members of the family and legatees of the Trust Estate), that is to say,—pay to Isabel Morgan McMillin, my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maude McMillin, to Marion McMillin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, payable quarterly. In the event of the Trust Estate not producing in any year an income sufficient, together with any accumulated income from previous years,—to pay fifty thousand dollars for the maintenance of the family and the up keep of the Darlington Estate, and fifty thousand dollars to each beneficiary named in this Section, then the sum of annual payments to the Darlington fund and to each individual named shall be reduced pro rata. On the other hand the Trustees may increase the several annual payments *pro rata,* whenever,—in their judgment,—the excess of annual income, or excess of accumulations shall warrant such increase. The matter of increase of payments to be wholly discretionary with the Trustees. It is not the intent of the Testator that the Trustees shall strive to increase the total value of the Estate, but that they shall be liberal in their distribution. The Trustees may pay any part, or all of the annuities in stocks, bonds or other securities instead of cash, if for any reason they, the Trustees, shall deem it advisable so to do.

TWENTY-FIRST: Upon the decease of both my wife and my son, the Trust shall,—except as hereinafter provided, cease and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family as designated in Section Six-

teen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued.

TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two Trustees shall,—for financial reasons,—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the Trustees to dispose by sale of the said Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate from, or for, whatever reason, it shall be the duty of the Trustees to promptly divide up the divisable assets, sell the remainder, and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees."

11. By the fourth, fifth, seventh and eighth paragraphs of said Last Will and Testament of said Isabel McMillin, deceased, she the said Testatrix, provided as follows:

"FOURTH: I direct, that all the rest, residue and remainder of the property and estate of which I may die seized and possessed whether real, personal or mixed, of

whatever description and wheresoever found, shall be divided into four parts of equal value; one of which parts I hereby give, devise and bequeath to my daughter, ESTELLE MARIE TRAVERSO, of Florence, Italy, absolutely; another of which parts I hereby give, devise and bequeath to my daughter MAUDE McMILLIN, of Darlington, New Jersey, absolutely; another of which parts I hereby give, devise and bequeath to my son MARION M. McMILLIN, absolutely.

The other equal fourth part I give, devise and bequeath to my Trustees hereinafter named, in trust as follows; said fourth part is to be set aside and held in trust for the benefit of my grandchildren, Emerson McMillin Stewart, Helen Isabel McMillin, and my step grandchild, Margaret Clark McMillin, in equal shares. My said Trustees shall pay quarter yearly the net income of said fourth part, after payment of all expenses of said last named trust, in three equal shares, to the respective guardians of my said grandchildren, Emerson McMillin Stewart, Helen Isabel McMillin and my step grandchild, Margaret Clark McMillin, for their benefit during the minority of each of them. When each of said last named beneficiaries shall reach the age of twenty-one years, and at any time thereafter until such beneficiary shall reach the age of thirty years, my said Trustees may pay and distribute to such beneficiary so reaching his or her majority, one-third of the principal of said fourth part of said residue in trust as aforesaid to him or her absolutely, if in the opinion of said Trustees it shall be to the best interests of such beneficiary to then receive his or her share of the said principal, and, if in the opinion of said Trustees circumstances shall warrant such payment; but it is my will and I direct, that when each of said

last named beneficiaries shall reach the age of thirty years, my said Trustees, then in any event, shall pay and distribute to such beneficiary so reaching the age of thirty years, one-third of the principal of said fourth part of said residue in trust as aforesaid, to him or her absolutely, in case the same shall not have been paid before that time. When each of said last named beneficiaries shall reach the age of twenty-one years in case my said Trustees shall in their discretion decide that such beneficiary shall not then be paid one-third of said principal, one-third of the said net income of said fourth part of said residue in trust as aforesaid, shall thereafter be paid to such beneficiary so reaching his or her majority for his or her own use until one-third of said principal shall thereafter be paid to him or her. In case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third part of said principal shall be payable to him or her, according to the provisions of this my will, leaving issue surviving such beneficiary the share of such beneficiary so dying shall go to his or her issue but in case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third part of said principal shall be payable to him or her as aforesaid, without leaving issue him or her surviving, the share of such beneficiary so dying shall go to the survivor, or to the survivors of them in equal shares.

FIFTH: It is my will and I order and direct, that upon the payment and distribution of any and all of the principal fund of any of the trusts provided for in this my will, my said Trustees may pay or distribute to any beneficiary or beneficiaries thereof, either any security or securities so held in trust at the true value thereof, or cash from

the proceeds of such security or securities after the same shall be converted into cash.

SEVENTH: I hereby appoint as Executors of this my Last Will and Testament, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey; my son, MARION McMILLIN, of Darlington, Ramsey, New Jersey, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York. In the event that any of my said Executors above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said Executors shall remain qualified, they shall appoint a third Executor. If two of said Executors shall remain unqualified, I appoint my daughter, ESTELLE McMILLIN TRAVERSO, to serve as an Executor, and with the survivor named another executor, to fill the remaining vacancy; or, in case she shall not serve, I order and direct that she with said surviving Executor shall name two other Executors to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies that may occur after my decease. Neither my Executors above named nor any successor shall be required to give bond.

EIGHTH: I hereby appoint as Trustees of each of the trusts herein and hereby created, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey, aforesaid, my son MARION McMILLIN of Darlington, Ramsey, New Jersey, aforesaid, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York, aforesaid. In the event that any of my said Trustees above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said Trustees shall remain qualified, they shall appoint a third Trustee. If two of said Trustees shall remain unqualified, I ap-

point my daughter, ESTELLE McMILLIN TRAVERSO, to serve as a Trustee, and with the survivor named another Trustee to fill the remaining vacancy; or in case she shall not serve, I order and direct that she with said surviving Trustee shall name two other Trustees to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies that may occur after my decease. Neither my Trustees above named nor any successor shall be required to give bond."

12. The said Isabel McMillin and Marion McMillin have died as aforesaid, and all the said surviving members of the family of said Emerson McMillin, deceased, referred to in the said twenty-first paragraph of his said Will, desire that said trust therein created should be terminated and that the corpus or principal of the said Estate of said Emerson McMillin, deceased, should be distributed among those persons who are entitled thereto. By reason of said deaths of said Isabel McMillin, deceased, and Marion McMillin, deceased, and said desire of said surviving members of the family of said Emerson McMillin, deceased, said trust is to cease and terminate according to the said provisions of said Will of said Emerson McMillin, deceased.

13. The said Executors of said last Will of Emerson McMillin, deceased, have as such Executors, fully administered his said estate, have filed their final account as such Executors and the same was duly passed and approved by the Orphans' Court of Bergen County on December 3, 1924, and the said Executors have transferred to said Trustees of said trust under said Will of said Emerson McMillin, deceased, all assets and property which remains in their hands as such Executors

to which said Trustees are entitled under the provisions of said Will.

The only real property of which said Emerson McMillin, deceased, died seized was the property mentioned in his said Will as his Darlington Estate at Mahwah, in the State of New Jersey aforesaid, and a tax title to about 300 acres of land known and designated as pine scrub land in Cheyobogan County, in the State of Michigan; the said Darlington Estate consisting of about 1000 acres of land and a large mansion and buildings thereon, and the contents thereof have been sold by said Trustees for $685,000. represented by cash of $285,000. and a purchase money mortgage of $400,000.

The said 300 acres of land in the State of Michigan worth, in the opinion of the complainants, about $300. has not been sold.

The assets consisting of personal property of said estate of Emerson McMillin, deceased, which is in possession of the said Trustees and which is now subject to distribution among the residuary legatees, is worth in the opinion of the complainants approximately $2,500,000.

14. The complainants are in doubt as to the meaning of certain provisions of said Will of said Emerson McMillin, deceased, and they are unable to determine with safety from the whole Will, which of certain claims or possible claims by parties claiming to be beneficiaries under said Will, is supported and justified by the true construction of said Will, in several particulars as follows:

(a) Whether by the true construction of said provisions of said Will of said Emerson McMillin, deceased, the principal or corpus of the

one-sixth portion of said trust fund which it is therein and thereby provided shall upon the determination of said trust, be divided and distributed among the six persons therein named as direct heirs at law and members of the family and residuary legatees of said Emerson McMillin, deceased, (which portion under said provisions of said Will of Emerson McMillin, deceased, would have gone to said Isabel McMillin, deceased, if she had been living at the time of said division and distribution of said trust fund) became vested in said Isabel McMillin, deceased, upon the death of said Emerson McMillin, deceased, so that her said Executor is entitled to the same upon such division and distribution, for the benefit of her estate under the said Will, to be given to those persons who may be entitled thereto under her said Will, or whether upon the death of said Isabel McMillin, deceased, the said principal and corpus of said one-sixth portion of said trust fund under the said provisions of the said Will of Emerson McMillin, deceased, is by his said Will given over to and belongs to the heirs at law or next of kin or devisees or legatees of said Isabel McMillin, deceased, and, if said principal or corpus of said one-sixth portion, in and by the provisions of the Will of said Emerson McMillin, deceased, is given over to and belongs to said heirs at law, or next of kin or devisees or legatees of said Isabel McMillin, deceased, upon her death as aforesaid, whether said Isabel McMillin, deceased, by the said provisions of the Will of said Emerson McMillin, deceased, was given a power to bequeath or devise or dispose by will of said principal and corpus of said one-sixth portion, and if she had such power as afore-

said, whether in and by the proper construction of said provisions of the said Will of said Isabel McMillin, deceased, she exercised such power, under the residuary clause of her said Will or otherwise, and whether under her said Will said one-sixth portion is given to or devolved upon her residuary legatees or devisees therein named, or in any respect passed is affected by her said Will.

(b) Whether by the true construction of said provisions of said Will Emerson McMillin, deceased, the principal or corpus of the one-sixth portion of said trust fund, which it is therein and thereby provided shall upon the termination of said trust be divided and distributed among the six persons therein named as direct heirs at law, and members of the family and residuary legatees of said Emerson McMillin, deceased, which one-sixth portion under said provisions of said Will of Emerson McMillin, deceased, would have gone to said Marion McMillion, now deceased, if he had been living at the time of said division and distribution of said trust fund according to the provisions of said Will of Emerson McMillin, (deceased), became vested in said Marion McMillin, now deceased, upon the death of said Emerson McMillin, deceased, so that the administratrix of said Marion McMillin, deceased, is entitled to the same upon such division and distribution, for the benefit of the Estate of said Marion McMillin and such persons as would be entitled to it under the statute of distribution of New Jersey, or whether upon the death of said Marion McMillin, deceased, the said principal and corpus of said last named one-sixth portion of said trust fund, under the said provisions of the said Will of Emerson

McMillin, deceased, is given over to and belongs to the heirs-at-law, or next of kin, of said Marion McMillin, deceased, and whether any part of said principal and corpus of said last named one-sixth portion of said trust fund under the provisions of said Will of Emerson McMillin, deceased, which may have been derived from the proceeds of the sale of said land is or shall be held herein to be land or real estate for the purpose of determining what person or persons may be entitled thereto, and what part thereof, if any, shall be held herein to be land or real estate, and what person or persons respectively may be entitled to the whole or any part thereof upon such division and distribution.

Complainants are without adequate remedy in the Courts of Law, and therefor pray:

1. That said Estelle McMillin Traverso, Maude McMillin, Mary McMillin Norton, Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso, both as Executors of the said Last Will and Testament of Isabel McMillin, deceased, and Trustees of the said trust created under her said last named Will, Jane M. McMillin both as administratrix of the Estate of said Marion McMillin, deceased, and in her individual capacity, Helen Isabel McMillin, Emerson McMillin Stewart, now Emerson McMillin, 3rd, Margaret Clark McMillin, Emerson M. Butterworth and Corwin M. Butterworth, who are the defendants in this suit, may answer this bill of complaint and each statement herein made, and that each defendant herein named particularly answer and disclose what right or interest he or she claims or may claim to have in or to the said trust fund or said assets of said Emerson

McMillin, deceased, under his said Will, and under or through the said Will of said Isabel McMillin, deceased or otherwise.

2. That the complainants may be advised and directed in regard to the said matters of doubt hereinbefore set forth, concerning the execution of the trusts of said Will of Emerson McMillin, deceased, and the performance of their duties as such Trustees, and especially that this Court may construe the said provisions of said Will of said Emerson McMillin, deceased, respecting said doubtful question, and especially that this Court by its decree may determine and declare whether by the true construction of said provisions of said Will of said Emerson McMillin, deceased, the principal or corpus of the one-sixth portion of said trust fund which it is therein and thereby provided shall upon the determination of said trust, be divided and distributed among the six persons therein named as direct heirs at law and members of the family and residuary legatees of said Emerson McMillin, deceased, (which one-sixth portion under said provisions of said Will of Emerson McMillin, deceased, would have gone to said Isabel McMillin, deceased, if she had been living at the time of said division and distribution of said trust fund), became vested in said Isabel McMillin, deceased, upon the death of said Emerson McMillin, deceased, so that her said executor is entitled to the same upon such division and distribution, for the benefit of her estate under the said Will, to be given to those persons who may be entitled thereto under her said Will, or whether upon the death of said Isabel McMillin, deceased, the said principal and corpus of said one-sixth portion of said trust

fund under the said provisions of the said Will of Emerson McMillin, deceased, is by his said Will given over to and belongs to the heirs at law or next of kin or devisees or legatees of said Isabel McMillin, deceased, and if said principal or corpus of said one-sixth portion, in and by the provisions of the Will of said Emerson McMillin, deceased, is given over to and belongs to said heirs at law, or next of kin or devisees or legatees of said Isabel McMillin, deceased, upon her death as aforesaid, whether said Isabel McMillin, deceased, by the said proportions of the Will of said Emerson McMillin, deceased, was given a power to bequeath or devise or dispose by will of said principal and corpus of said one-sixth portion, and if she had such power as aforesaid whether in and by the proper construction of said provisions of said Will of said Isabel McMillin, deceased, she exercised such power, under the residuary clause of her said Will or otherwise, and whether under her said Will said one-sixth portion is given to or devolved upon her residuary legatees therein named, or in any respect passed is affected by her said Will, and that this Court by its decree may determine and declare how the said principal or corpus of said one-sixth portion of said trust fund has devolved under said Will of said Emerson McMillin, deceased, and what defendant or defendants, person or persons are entitled thereto, and in what proportions such persons as are entitled to the same and that for such purpose this Court may by its decree construe the said Will of Isabel McMillin, deceased, in order to determine whether she exercised said power to give or dispose of said principal or corpus of said one-sixth part of said trust fund, in case such power was given to her by said

Will of said Emerson McMillin, deceased, or for any other purpose necessary or proper to determine what defendant or defendants, person or persons is entitled to said principal or corpus of said one-sixth part of said trust fund, and whether by the true construction of said provisions of said Will of Emerson McMillin, deceased, the principal or corpus of the one-sixth portion of said trust fund, which it is therein and thereby provided shall upon the termination of said trust be divided and distributed among the six persons therein named as direct heirs at law, and members of the family and residuary legatees of said Emerson McMillin, deceased, (which one-sixth portion under said provisions of said Will of Emerson McMillin, deceased, would have gone to said Marion McMillin, now deceased, if he had been living at the time of said division and distribution of said trust fund according to the provisions of said Will of Emerson McMillin, deceased) became vested in said Marion McMillin, now deceased, upon the death of said Emerson McMillin, deceased, so that the administratrix of said Marion McMillin, deceased, is entitled to the same upon such division and distribution, for the benefit of the estate of said Marion McMillin and such persons as would be entitled to it under the statute of distribution of New Jersey, or whether upon the death of said Marion McMillin, deceased, the said principal and corpus of said last named one-sixth portion of said trust fund, under the said provisions of the said Will of Emerson McMillin, deceased, is given over to and belongs to the heirs at law, or next of kin of said Marion McMillin, deceased, and whether any part of said principal and corpus of said last named one-

sixth portion of said trust fund under the provisions of said Will of Emerson McMillin, deceased, which may have been derived from the proceeds of the sale of said land is or shall be held herein to be land or real estate for the purpose of determining what person or persons may be entitled thereto and what part thereof, if any, is or shall be held herein to be land or real estate, and what person or persons respectively may be entitled to the whole or any part thereof upon such division and distribution.

And that this Court by its decree may determine and declare how the said principal or corpus of said last named one-sixth portion of said trust fund has devolved under said Will of said Emerson McMillin, deceased, and what defendant or defandants, person or persons may be entitled thereto, and in what proportions such persons as are entitled to the same, are entitled thereto.

And that the rights and interests of each of the several parties hereto, or such person or persons as may possess any rights or interests in the said trust may be authoritatively declared and established by the decree of this Court.

3. That a writ of subpoena may issue out of this Court, commanding said defendants to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

4. And that complainants may have such further or other relief as may be equitable.

JOHN L. GRIGGS,
Solicitor and of Counsel with Complainants.

WILL OF EMERSON McMILLIN.

I, EMERSON McMILLIN, of Darlington, Mahwah, New Jersey, being of sound and disposing mind, do hereby, make, publish and declare this my last will and testament, hereby revoking any other last wills and testaments by me at any other time heretofore made.

FIRST: I direct my Executors hereinafter named, to pay as soon as may be after my decease, all my just debts and funeral expenses.

SECOND: I give, devise and bequeath to my brother Andrew McMillin of Jackson, Ohio, provided he does not predecease me, the sum of ten thousand dollars.

THIRD: I give, devise and bequeath to my sister Ella Hardy of Lyndon, Illinois, provided she does not predecease me, the sum of ten thousand dollars.

FOURTH: I give, devise and bequeath to the grandchildren of my sister Eliza J. Ewing (deceased) the sum of fifteen thousand dollars, to be divided equally among the number. The grandchildren referred to are the children of Louisa Ewing Brown, formerly of the State of Alabama, now deceased, and the children of Hiram Lewis Ewing, now of Lyndon, Illinois. In the event that any of the said grandchildren predecease me leaving issue, such issue shall be the beneficiaries.

FIFTH: I give, devise and bequeath to the children (or their heirs) of my sister Margaret Rhoades, deceased, the sum of fifteen thousand dollars.

SIXTH: I give, devise and bequeath to the children (or their heirs) of my brother Milton

McMillin, deceased, the sum of ten thousand dollars.

SEVENTH: I give, devise and bequeath to the children (or their heirs) of my sister Sarah Thompson, the sum of fifteen thousand dollars.

EIGHTH: I give, devise and bequeath to the children (or their heirs) of my brother Andrew McMillin of Jackson, Ohio, provided he, my brother, predecease me, the sum of ten thousand dollars.

NINTH: I give, devise and bequeath to the children (or their heirs) of my brother Murray McMillin, deceased, the sum of ten thousand dollars.

TENTH: I give, devise and bequeath to the children (or their heirs) of my sister Ella Hardy, now of Lyndon, Illinois, provided she, my sister predecease me, the sum of ten thousand dollars.

ELEVENTH: Gifts to the children (or their heirs) means to the direct issue of my brothers' or sisters' children, and not to issue beyond the second generation, or to others who by adoption or otherwise might be heirs at law, except in the case of my sister Eliza, where it is her grandchildren and not her children who are made the beneficiaries. In that case her great grandchildren who do not predecease me shall be the beneficiaries. The sums devised to the children (or grandchildren) of my brothers and sisters differ in amounts. This is purposely done. During my life time, I have given more to those receiving the smaller sums, or to their parents, than was given to those to whom the larger sums are herein devised.

TWELFTH: I give, devise and bequeath to Mrs. Mary Louise Bright Nace, daughter of George W. Bright, of Columbus, Ohio, provided she does not predecease me, the sum of ten thousand dollars, with a request that she use the income or the principal, or both, at her discretion, (and with no responsibility to account to any one),—for the amelioration of distress amongst the needy of the City of Columbus, Ohio. She to have full power to provide for a successor in the event of her decease before the total sum and its income shall have been expended. In the event that she predecease me, the amount herein named reverts to my Estate.

THIRTEENTH: For the persons named in this paragraph, I have previously made some provision, but in addition to such sums as may have been previously given, I give and bequeath to each and every one named the sum of ten thousand dollars, Oliver D. Norton, husband of my daughter Mary, and now of Santa Barbara, California; Ubaldo Traverso, husband of my daughter Estelle, and now of Florence, Italy; Jane M. McMillin, wife of my son Marion, and now of Darlington, Mahwah, New Jersey; Paul McMillin Butterworth, grandson, and now of Hartford, Connecticut; Corwin McMillin Butterworth, grandson, and now of Santa Barbara, California; Emerson McMillin Butterworth, grandson and now of Santa Barbara, California; Emerson McMillin Stewart, grandson, and now known as Emerson McMillin, 3rd, at present in Florence, Italy; and to Margaret Clark McMillin, stepdaughter of my son Marion, and now of Darlington, Mahwah, New Jersey.

FOURTEENTH: In the event that any of the persons named in Section Thirteen shall prede-

cease me, without issue, then the amount therein designated to be given to such person, shall revert to my Estate.

FIFTEENTH: It shall be the privilege, and within the power of my Executors, to pay any or all, or part of any, or part of all the above name legacies, by the delivery of securities, stocks, bonds or notes receivable, the property of my Estate, in lieu of delivering cash if the Executors deem that course advisable, and it is my request made to each and every such beneficiary that if allotted stock of the American Light and Traction Company, that each of them shall retain the same and that each of them shall give to my son, Marion, a proxy to vote such stock,—so long as he shall remain connected in an official capacity with that Company. This is but a request and not a command.

SIXTEENTH: My direct heirs at law, members of my family, and residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are to be equal, in every respect, as to his or her interest in the Trusteed Estate, are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey, my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New Jersey; my son, Marion McMillin, of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin, (only child of my deceased son, Emerson McMillin, Jr.), now of Darlington, Mahwah, New Jersey. For all the persons named, I have previously made ample provision for their own welfare as well as for the welfare of those

depending upon them. My granddaughter, Helen Isabel, the only child of my deceased son, Emerson, inherited liberal sums from her father and from her mother. To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington Estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin.

SEVENTEENTH: I give, devise and bequeath unto my Trustees to be hereinafter named, and their successors, in trust however, for the persons named in Section Sixteen, all the residue of my Estate, including leases of my summer home at Beaver Island, Upper Dam, Oxford County, Maine; the eighty-six acre plot of land known as the Marion Cottage property of Mohegan Lake West Chester County, New York; Apartment House at 320 West 86th Street, New York City, New York; and my Darlington Estate, Mahwah, New Jersey; and all the farm equipments, produce, live stock, and household furniture, paintings, tapestries, textile fabrics, porcelians, potteries, bronzes, and art objects of every kind and character; and all the stocks, bonds, notes, cash, credits, and assets of any kind and of which I may die possessed, and not herein before disposed of, but with the following conditions and stipulations; (a) The Beaver Island leases, the Marion Cottage property, and the City Apartment House in New York, are all to be sold as soon as may be, and the proceeds to be invested as the Trustees shall deem to the best interest of the Estate. (b) The household furniture, libraries and camp equipment at Beaver Island, including steam boat,—to be dis-

posed of,—if convenient with the leases. The proceeds of all sales shall be invested by the Trustees for the Trust Estate. The Trustees shall permit the Darlington Estate with all its comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to operate the Farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees.

EIGHTEENTH: All income from rents, dividends on stocks, interest on bonds or other securities not herein otherwise disposed of, in fact, all income of every kind and character, except the income of the Darlington Estate during its retention by the family, shall be paid to and received by the Trustees for the benefit of the Trust Estate and the Trustees are empowered to sell, dispose of, convey and give title to any kind of property, real or personal, at any and all times, when deemed advisable by them, except as to the disposition and sale of the Darlington Estate during the life of my wife.

NINETEENTH: From the income of the Trust Estate the Trustees shall (a) pay to my wife Isabel Morgan McMillin and to my son Marion McMillin jointly the sum of fifty thousand dollars per year, payable quarterly for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington Estate. In the event that my wife shall predecease me, then the fifty thousand dollars shall be paid to my son alone, for the purpose above mentioned. If the family desire to retain Darl-

ington after the decease of both my wife and my son, they shall designate a head of the family in a manner that shall be satisfactory to the Trustees, and the person so designated shall receive and disburse the Darlington Estate Annuity. Should any of the persons named as my direct heirs and members of my family prefer not to make their home at Darlington, then such person, or persons shall each receive twenty-five hundred dollars per year, in quarterly payments, to be taken by the Trustees from the Darlington Estate fund of fifty thousand dollars per year herein above provided for.

TWENTIETH: From the income of the Trust Estate, after deducting the provisions of Section Nineteen, the Trustees shall pay to each of my direct heirs (and persons designated as members of the family and legatees of the Trust Estate), that is to say,—pay to Isabel Morgan McMillin my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maud McMillin, to Marion McMillin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, payable quarterly. In the event of the Trust Estate not producing in any year an income sufficient, together with any accumulated income from previous years,—to pay fifty thousand dollars for the maintenance of the family and the upkeep of the Darlington Estate, and fifty thousand dollars to each beneficiary named in this section then the sum of annual payments to the Darlington fund and to each individual named shall be reduced pro rata. On the other hand the Trustees may increase the several annual payments pro rata,

whenever,—in their judgment,—the excess of annual income, or excess of accumulations shall warrant such increase. The matter of increase of payments to be wholly discretionary with the Trustees. It is not the intent of the testator that the Trustees shall strive to increase the total value of the Estate; but that they shall be liberal in their distribution. The Trustees may pay any part, or all of the annuities in stocks, bonds or other securities instead of cash, if for any reason they, the Trustees, shall deem it advisable so to do.

TWENTY-FIRST: Upon the decease of both my wife and my son, the Trust shall,—except as hereinafter provided, cease and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family, as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued.

TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two

Trustees shall,—for financial reasons,—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the Trustees to dispose by sale of the said Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the Trustees to promptly divide up the divisable assets, sell the remainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or divisees.

TWENTY-THIRD: It is my desire that my son, Marion shall divide up my personal effects, such as jewelry, pins, buttons, etc., amongst my family and friends in such a way as to him seems appropriate. I desire that my son, Marion, shall have my riding horse, Shenandoah, with saddle and bridle, and also my gold watch.

TWENTY-FOURTH: I hereby appoint as the Executors of this my last will and testament my son, Marion McMillin, of Mahwah, New Jersey, and Ubaldo Traverso, of Florence, Italy, neither of whom shall be required to give bond. In the event of the death or incapacity of either of the above named Executors, or their failure for any reason to serve, then I appoint Paul McMillin Butterworth (grandson) an Executor, who may serve without bond. Should both my son, Marion, and my son-in-law, Ubaldo Traverso, fail, through any cause, to assume the duty of Executors, then I appoint to serve with Paul McMillin Butterworth, as Executor, the Bankers Trust Company of No. 14 Wall Street, New York, who may serve without bond.

TWENTY-FIFTH: I hereby appoint as Trustees under this my last will and testament my son, Marion McMillin, of Mahwah, New Jersey, my son-in-law Ubaldo Traverso, now of Florence, Italy, and the Bankers Trust Company of No. 14 Wall Street, New York, all of whom may serve without bond. In the event of the death or incapacity of either my son or my son-in-law, or the failure, from any cause, of either to serve,—then I desire my grandson, Paul McMillin Butterworth, to serve as Trustee without bond.

TWENTY-SIXTH: While there are three Trustees provided for in Section Twenty-five it shall be possible at all times for two Trustees acting in harmony to carry out any provision of the Trust.

In testimony whereof I have, in the presence of three witnesses, on this TWENTY-NINTH day of AUGUST of the year nineteen hundred and sixteen, hereunto signed my name and my scroll seal.

EMERSON McMILLIN, (SEAL)

Witnesses to testator's signature:

FRANCIS X. GOLLY, Ramsey, N. J.
WM. R. TROOP, Ramsey, N. J.
FRED HENION, Ramsey, N. J.

This Document or Will, consisting of seven pages of typewriting, each page initialled by the testator, was signed, sealed, published and declared by Emerson McMillin, the testator, as his LAST WILL AND TESTAMENT in the presence of us, and each of us and in the presence of each other, who, at his request and in his presence, and in the presence of each other have

herein above and hereunto, signed our names as witnesses, this, the TWENTY-NINTH day of AUGUST, nineteen hundred and sixteen.

FRANCIS. X. GOLLY, Ramsey, N. J.
WM. R. TROOP, Ramsey, N. J.
FRED HENION, Ramsey, N. J.

WILL OF ISABEL McMILLIN.

I, ISABEL McMILLIN, wife of Emerson McMillin, of Darlington, Ramsey, in the State of New Jersey, being of sound and disposing mind, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, hereby revoking any and all other wills and codicils by me at any time heretofore made.

FIRST: I direct my Executors hereinafter named to pay, as soon as may be convenient after my decease, all my just debts and funeral expenses.

SECOND: I give and bequeath the following sums of money or securities of equal value thereto as my Executors in their discretion shall deem best, viz:

(a) To my son-in-law, UBALDO TRAVERSO, now of Florence, Italy, the sum of fifteen hundred dollars ($1,500.00).

(b) To my daughter-in-law, JANE MAGUIRE McMILLIN, now of Darlington, New Jersey, the sum of ten thousand dollars ($10,000.00).

(c) To my son, MARION McMILLIN, the sum of six thousand dollars ($6,000.00).

(d) To PAUL McMILLIN BUTTERWORTH, now of Hartford, Connecticut, the sum of one hundred dollars ($100.00).

(e) To CORWIN McMILLIN BUTTERWORTH, now of Hartford, Connecticut, the sum of one hundred dollars ($100.00).

(f) To EMERSON McMILLIN BUTTERWORTH, now of Santa Barbara, California, the sum of one hundred dollars ($100.00).

(g) To MARIE SELB, daughter of my cousin, Nannie Thomas Selb, of Ironton, Ohio, the sum of one hundred dollars ($100.00).

It is my request, that the beneficiaries named in clauses d, e, f, and g, as hereinbefore provided, shall purchase something to be retained in memory of the donor.

THIRD: I give and bequeath to my husband, EMERSON McMILLIN, my box of table silver (a present from him to me), and any automobile or automobiles including the accessories therefor, of which I die possessed.

In case my husband, EMERSON McMILLIN, shall predecease me, then this bequest shall lapse and fall into and become a part of the residuum of my estate.

FOURTH: I direct, that all the rest, residue and remainder of the property and estate of which I may die seized and possessed whether real, personal or mixed, of whatever description and wheresoever found, shall be divided into four parts of equal value; one of which parts I hereby give, devise and bequeath to my daughter, ESTELLE MARIE TRAVERSO, of Florence, Italy, absolutely; another of which parts I hereby give, devise and bequeath to my daughter, MAUDE McMILLIN, of Darlington, New

Jersey, absolutely; another of which parts I hereby give, devise and bequeath to my son, MARION M. McMILLIN, absolutely.

The other equal fourth part I give, devise and bequeath to my Trustees hereinafter named, in trust as follows; said fourth part is to be set aside and held in trust for the benefit of my grandchildren, EMERSON McMILLIN STEWART, HELEN ISABEL McMILLIN, and my step grandchild, MARGARET CLARK McMILLIN, in equal shares. My said Trustees shall pay quarter yearly the net income of said fourth part, after payment of all expenses of said last named trust, in three equal shares, to the respective guardians of my said grandchildren, EMERSON McMILLIN STEWART, HELEN ISABEL McMILLIN and my step grandchild, MARGARET CLARK McMILLIN, for their benefit during the minority of each of them. When each of said last named beneficiaries shall reach the age of twenty-one years, and at any time thereafter until such beneficiary shall reach the age of thirty years, my said Trustees may pay and distribute to such beneficiary so reaching his or her majority, one-third of the principal of said fourth part of said residue in trust as aforesaid to him or her absolutely, if in the opinion of said Trustees it shall be to the best interests of such beneficiary to then receive his or her share of the said principal, and, if in the opinion of said Trustees circumstances shall warrant such payment; but it is my will and I direct, that when each of said last named beneficiaries shall reach the age of thirty years, my said Trustees, then in any event, shall pay and distribute to such beneficiary so reaching the age of thirty years, one-third of the principal of said

fourth part of said residue in trust as aforesaid, to him or her absolutely, in case the same shall not have been paid before that time. When each of said last named beneficiaries shall reach the age of twenty-one years in case my said Trustees shall in their discretion decide that such beneficiary shall not then be paid said one-third, of said principal, one-third of the said net income of said fourth part of said residue in trust as aforesaid, shall thereafter be paid to such beneficiary so reaching his or her majority for his or her own use until one-third of said principal shall thereafter be paid to him or her. In case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third part of said principal shall be payable to him or her, according to the provisions of this my will, leaving issue surviving such beneficiary, the share of such beneficiary so dying shall go to his or her issue; but, in case any of said three last named beneficiaries shall die at any time, either before or after my death, before the said period when said one-third part of said principal shall be payable to him or her as aforesaid, without leaving issue him or her surviving, the share of such beneficiary so dying shall go to the survivor, or to the survivors of them in equal shares.

FIFTH: It is my will and I order and direct, that upon the payment and distribution of any and all of the principal fund of any of the trusts provided for in this my will, my said Trustees may pay or distribute to any beneficiary or beneficiaries thereof, either any security or securities so held in trust at the true value thereof, or cash from the proceeds of such

security or securities after the same shall be converted into cash.

SIXTH: I give to my Executors and to my Trustees hereinafter named and to their successors, or the successor or successors of any of them together with the survivor or survivors, full power and authority to grant, bargain, sell and properly convey and dispose of any property, real, personal or mixed, of whatsoever kind or description or wheresoever found, of which I may be seized or possessed at the time of my death; and to reinvest the proceeds of such sale or disposition and to invest and change investments in such manner as to them may seem advisable.

SEVENTH: I hereby appoint as Executors of this my LAST WILL AND TESTAMENT, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey, my son MARION McMILLIN, of Darlington, Ramsey, New Jersey, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York. In the event that any of my said Executors above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said Executors shall remain qualified, they shall appoint a third Executor. If two of said Executors shall remain unqualified, I appoint my daughter, ESTELLE McMILLIN TRAVERSO, to serve as an Executor, and with the survivor name another executor to fill the remaining vacancy; or, in case she shall not serve, I order and direct that she with said surviving Executor shall name two other Executors to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies that may occur

after my decease. Neither my Executors above named nor any successor shall be required to give bond.

EIGHTH: I hereby appoint as Trustees of each of the trusts herein and hereby created, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey, aforesaid, my son MARION McMILLIN of Darlington, Ramsey, New Jersey, aforesaid, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York, aforesaid. In the event that any of my said Trustees above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said Trustees shall remain qualified, they shall appoint a third Trustee. If two of said Trustees shall remain unqualified, I appoint my daughter, ESTELLE McMILLAN TRAVERSO, to serve as a Trustee, and with the survivor name another Trustee to fill the remaining vacancy; or in case she shall not serve, I order and direct that she with said surviving Trustee shall name two other Trustees to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies that may occur after my decease. Neither my Trustees above named nor any successor shall be required to give bond.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this seventh day of April, A. D., Nineteen Hundred and Twenty-Two.

ISABEL McMILLIN, (SEAL)

Signed, sealed, published and declared by the testatrix, ISABEL McMILLIN, as and for her LAST WILL AND TESTAMENT, in the pres-

ence 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 hereunto subscribed our names as witnesses.

FRANK E. BARKER, 212 West 78th St. N. Y. City.
CARRIE E. THORNE, Floral Park, L. I.
H. BOARDMAN SPALDING, 46 East Park St., East Orange, N. J.

Amended Answer of Defendant, Helen Isabel McMillin.

The answer of Helen Isabel McMillin, one of the defendants in the above-entitled cause:

This defendant, answering the bill of complaint, says that:

1. Paragraph 1 of the bill of complaint is admitted.

2. This defendant believes the facts in paragraph 2 of the complaint to be correctly stated although for greater certainty she calls for the proof of and begs leave to refer to the last will and testament of the late Emerson McMillin.

3. Paragraph 3 of the complaint is admitted.

4. This defendant believes the facts in paragraph 4 of the bill of complaint to be correctly stated, although for greater certainty she begs leave to refer to the certified copies of the letters testamentary issued to the executors of the last will and testament of the late Emerson McMillin.

5. This defendant believes the facts in paragraph 5 of the bill of complaint to be correctly

stated, although for greater certainty she calls for the proof of and begs leave to refer to the last will and testament of the late Isabel McMillin and the letters testamentary issued to the executors thereof.

6. Paragraph 6 of the bill of complaint is admitted.

7. This defendant has no knowledge or information, save as she is informed by said bill of complaint, of the assignment referred to in paragraph 7 thereof.

8. This defendant believes the facts in paragraph 8 of the bill of complaint to be correctly stated, although for greater certainty begs leave to refer to the certified copy of the letters of administration issued to Jane M. McMillin, as administratrix of the estate of her husband, Marion McMillin, deceased.

9. Paragraph 9 of the bill of complaint is admitted.

10. This defendant believes that paragraphs 10 and 11 of the bill of complaint correctly quote from the wills of the late Emerson McMillin and the late Isabel McMillin, respectively, but refers for the true construction of said wills to the original or certified copies thereof.

11. Paragraphs 12 and 13 of the bill of complaint are admitted except that this defendant has no knowledge, save as she is informed by said bill, regarding the property and assets of the trust estate.

12. (a) This defendant is advised and therefore claims and says that by the true construction of the will, the one-sixth part of the corpus

of the trust fund established by the sixteenth and ensuing paragraphs thereof (which said one-sixth part would have vested in and been payable to the testator's widow, Isabel McMillin, if she had been living at the time of the expiration of said trust), did not vest in Isabel McMillin, upon the death of the testator, and that, if by the proper construction of the will the said one-sixth part did then vest in remainder in Isabel McMillin, said remainder was subject to being divested, and was in fact divested, by her death prior to the expiration of said trust estate. This defendant is further advised and therefore claims and says that the corpus of said one-sixth part of said trust fund was, by the terms of the will, given over at the expiration of said trust estate; viz., upon the death of the survivor of Isabel and Marion McMillin (unless said trust should be sooner terminated pursuant to the twenty-second paragraph of said will), to the issue, then surviving, of Isabel McMillin, *per stirpes*. This defendant is further advised and therefore claims and says that if a power of appointment was given by the will to Isabel McMillin, in respect of said one-sixth part of said corpus, said power was given, and could be validly exercised by said donee thereof, only in the event that she should die without leaving issue, her surviving; and shows that Isabel McMillin died leaving issue, as in the bill of complaint set forth, and, therefore, without such power of appointment. This defendant further says that Isabel McMillin did not exercise said power of appointment by her will, if such power she had.

(b) This defendant is advised and therefore claims and says that by the true construction of

the will, the one-sixth part of the corpus of the trust fund established by the sixteenth and ensuing paragraphs thereof (which said one-sixth part would have vested in and been payable to the testator's son, Marion McMillin, if he had been living at the time of the expiration of said trust), did not vest in Marion McMillin upon the death of the testator, and that, if, by the proper construction of the will, the said one-sixth part did then vest in remainder in Marion McMillin, said remainder was subject to being divested, and was, in fact, divested, by his death prior to the expiration of said trust estate. This defendant is further advised and therefore claims and says that the corpus of said one-sixth part of said trust fund was, by the terms of the will, given over at the expiration of said trust estate; viz., upon the death of the survivor of said Isabel and of Marion McMillin (said trust not having been sooner terminated pursuant to the twenty-second paragraph of said will), to the issue then surviving, of Marion McMillin. And this defendant shows that Marion McMillin died without leaving issue him surviving, and intestate, and therefore says that the testator died intestate in respect of the corpus of said one-six part.

13. This defendant is further advised and therefore claims and says that the proceeds of the sale of the land and premises known as Darlington Estate (referred to in said will) are and should be regarded as real estate and that said Darlington Estate was not at any time during, or at the time of the expiration of, the term of said trust estate, converted into personalty.

14. This defendant expressly dissents from each and every construction of the said last will

and testament of the said Emerson McMillin suggested in paragraph 14 of the bill of complaint, except so far as in this her answer she has expressly otherwise conceded.

All of which matters and things this defendant is ready to aver, maintain and prove and, to the extent hereinabove indicated, this defendant joins with the complainants in their prayer for the proper construction of said will and the ascertainment of the rights and interests of the parties to this suit in said estate.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with
the Defendant, Helen Isabel McMillin.

Answer of Defendant, Jane M. McMillin.

The answer of JANE M. McMILLIN, individually and as administratrix of the Estate of Marion McMillin, deceased:

This defendant, answering the bill of complaint herein, says:

I. The allegations of paragraph 1 are admitted.

II. The substantial accuracy of the allegations of paragraph 2 is admitted.

III. The allegations of paragraph 3 are admitted.

IV. The substantial accuracy of the allegations of paragraphs 4, 5 and 6 is admitted.

V. This defendant has no knowledge in respect of the assignment referred to in

paragraph 7 of the bill of complaint and leaves complainants to make such proof thereof as they may be advised is proper.

VI. This defendant admits the substantial accuracy of the allegations of paragraphs 8, 9, 10, 11, 12 and 13 except that this defendant has no knowledge in respect of the property and assets of the trust estate.

VII. This defendant is advised and therefore says that by the true construction of the will of Emerson McMillin, deceased:

1. The corpus of the one-sixth portion of said trust fund (referred to in subdivision (b) of paragraph 14 of the bill of complaint) vested in this defendant, Jane M. McMillin, in her individual capacity as substituted donee for her husband, Marion McMillin, under the will of Emerson McMillin, and as the widow and sole heir and next of kin of Marion McMillin within the intent and purport of the will of Emerson McMillin; or

2. Said one-sixth part of said corpus vested in Marion McMillin upon the death of Emerson McMillin and passed to and became vested in this defendant in her individual capacity as the widow, sole heir and next of kin of Marion McMillin.

3. The one-fourth part of the corpus of the one-sixth portion of said trust fund (referred to in subdivision (a) of paragraph 14 of the bill of complaint) on the death of Isabel McMillin, vested in Marion McMillin as substituted donee under the will of Emerson McMillin, and this defendant as the widow and sole heir

and next of kin of Marion McMillin within the intent and purport of the will of Emerson McMillin, is entitled to said one-fourth part as aforesaid; or

4. Said one-sixth portion of said trust fund vested in Isabel McMillin upon the death of Emerson McMillin and by the will of Isabel McMillin the one-fourth part of the corpus of said one-sixth portion of said trust fund vested in Marion McMillin and on the death of Marion McMillin passed to and became vested in this defendant in her individual capacity as the widow, sole heir and next of kin of Marion McMillin.

5. The proceeds of the sale of the lands known as the Darlington Estate are personalty and should be so regarded and distributed accordingly.

VIII. This defendant dissents from each construction of the will of Emerson McMillin suggested in paragraph 14 of the bill except insofar as conceded by this answer.

This defendant joins with the complainants in their prayer for the construction of said will and the ascertainment of the rights and interests of the parties to this suit.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with
Defendant, Jane M. McMillin.

Answer of Defendant, Margaret Clark McMillin.

The answer of MARGARET CLARK McMILLIN says:

1. The corpus of the one-sixth portion of the trust fund (referred to in subdivision (a) of paragraph 14 of the bill of complaint) vested in Isabel McMillin upon the death of Emerson McMillin and by the will of Isabel McMillin and particularly the fourth article thereof, this defendant became entitled to the interest in the trust for her benefit therein described.

2. As to the other matters in the bill of complaint alleged this defendant joins in the answer filed herein on behalf of defendant, Jane M. McMillin.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with
Defendant, Margaret Clark McMillin.

Answer of Defendant, Bankers Trust Company.

The defendant, Bankers Trust Company, as one of the executors and trustees under the last will and testament of Isabel McMillin, deceased, answering the bill of complaint, says:

1. Paragraphs 1 to 13, inclusive, are admitted.

2. Answering the 14th paragraph, this defendant alleges that by the true construction of the provisions of the last will and testament of Emerson McMillin, deceased, the corpus of the one-sixth portion of the trust fund which it is therein provided shall, upon the determination of such trust, be divided and distributed among the six persons therein named as direct heirs at law and members of the family and residuary legatees of the said Emerson McMillin, deceased, which portion under said provisions of said will would have gone to said Isabel McMillin, deceased, if she had been living at the time of said division and distribution of said trust fund became vested in said Isabel McMillin, deceased, upon the death of said Emerson McMillin, deceased, and that this defendant and its co-executors are entitled to the same upon such division and distribution for the benefit of the estate of the said Isabel McMillin, deceased. This defendant claims, however, that if by the true construction of said will the corpus of said one-sixth portion did not vest in the said Isabel McMillin upon the death of the said Emerson McMillin, then the said Isabel McMillin was given, by the provisions of said will, a power to bequeath or devise or dispose by will of said corpus of said one-sixth portion and that the

said Isabel McMillin exercised such power under the residuary clause of her last will and testament and in that event said one-sixth portion was given to and devolved upon her residuary legatees and devisees named in her said will.

This defendant joins in the prayer of the bill of complaint.

LINDABURY, DEPUE & FAULKS,
Solicitors and of Counsel with Defendant,
Bankers Trust Company, as one of
the Executors and Trustees under
the Will of Isabel McMillin, Deceased.

Answer of Defendant,
Mary McMillin Norton.

The answer of the defendant, Mary McMillin Norton, to the bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein.

JOHN W. HARDING,
Solicitor of Defendant, Mary McMillin Norton.

**Answer of Defendant,
Estelle McMillin Traverso.**

The answer of the defendant, Estelle McMillin Traverso, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendant.

Answer of Defendant, Maude McMillin.

The answer of the defendant, Maude McMillin, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendant.

Answer of Defendant, Ubaldo Traverso.

The answer of the defendant, Ubaldo Traverso, both as executor of the Last Will and Testament of Isabel McMillin, deceased, and Trustee of the said trust created under her said will, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendants.

Answer of Defendant, Paul McMillin Butterworth.

The answer of the defendant, Paul McMillin Butterworth, both as executor of the Last Will and Testament of Isabel McMillin, deceased, and Trustee of the said trust created under her said Will, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the

questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendant.

Answer of Defendant, Emerson M. Butterworth.

The answer of the defendant, Emerson M. Butterworth, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendant.

**Answer of Defendant,
Corwin M. Butterworth.**

The answer of the defendant, Corwin M. Butterworth, to bill of complaint:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements of fact alleged in the bill of complaint.

2. This defendant submits to such decree as this Court may make in the premises upon the questions raised in the bill of complaint filed herein, which shall decree, adjudge and secure to the defendant the property, rights and interests to which the defendant is equitably and justly entitled herein.

JOHN W. HARDING,
Solicitor of Defendant.

Testimony and Transcript of Statements of Counsel at Hearing.

Transcript of shorthand notes of testimony taken in the above-entitled matter, in the Chancery Chambers, in the City of Newark, New Jersey, before his Honor John H. Backes, Vice-Chancellor, in the presence of:

JOHN L. GRIGGS, for the complainants, Ubaldo Traverso, Paul McMillin Butterworth and Bankers Trust Company, Trustees under the Last Will and Testament of Emerson McMillin.

LINDABURY, DEPUE & FAULKS (Mr. Stryker) for the defendant, Bankers Trust Company as Executor and Trustee under the Last Will and Testament of Isabel McMillin, deceased.

WALL, HAIGHT, CAREY & HARTPENCE (Mr. Wall) for defendants, Jane M. McMillin, both as Administratrix of the Estate of Marion McMillin, deceased, and individually, and Margaret Clark McMillin.

HART & VANDERWART (Mr. Hart) for defendant, Emerson McMillin Stewart, now Emerson McMillin, 3rd.

PITNEY, HARDIN & SKINNER (Mr. Shelton Pitney) for the defendant, Helen Isabel McMillin.

JOHN W. HARDING, for the defendants, Mary McMillin Norton, Corwin M. Butterworth, Emerson M. Butterworth, Paul McMillin Butterworth, both as Executor of the Last Will and Testament of Isabel McMillin, deceased, and trustee of the said trust created under her said will; Ubaldo Traverso, both as Executor of the Last Will and Testament of Isabel McMillin, deceased, and trustee of the said trust created under her said will; Maude McMillin and Estelle McMillin Traverso.

MR. GRIGGS: This bill is filed by the complainants to assist them in determining the rights of the various claimants to certain parts of the residuary estate of Emerson McMillin, to construe certain parts of the will of the said Emerson McMillin and also certain parts of the will of Mrs. Isabel McMillin and determine the proper claimants thereto.

MR. GRIGGS: Emerson McMillin, a resident of the State of New Jersey, died at Mahwah, Bergen County, New Jersey, on May 31, 1922, leaving a Last Will and Testament dated August 29, 1916, which was duly probated in the office of the Surrogate of Bergen County on June 12, 1922.

He appointed his son, Marion McMillin, and his son-in-law, Ubaldo Traverso, Executors.

These executors duly qualified and took upon themselves the burden of the administration of the estate.

His son, Marion McMillin, died January 25, 1924, and upon his death and in accordance with the terms of the will, his grandson, Paul McMillin Butterworth, became executor and duly qualified before the Surrogate of Bergen County and he and Mr. Traverso continued the administration of the estate as executors.

The will appointed Ubaldo Traverso, Bankers Trust Company of New York and Marion McMillin, if he be alive, the trustees under said will, and Marion McMillin having died, Paul McMillin Butterworth, the substituted executor, became a co-trustee with the other two and the three accepted the trust and have acted as trustees up to the present time and so continue.

Emerson McMillin left him surviving:

1. Isabel McMillin, his widow.

2. Marion McMillin, his son by his said wife, Isabel McMillin.

3. Maude McMillin, his daughter by his said wife, Isabel McMillin.

4. Estelle McMillin Traverso, his daughter by his said wife, Isabel McMillin, and wife of Ubaldo Traverso.

5. Mary McMillin Norton, his daughter by his first wife who died prior to his marriage with the said Isabel McMillin, and widow of Oliver D. Norton, deceased.

6. Helen Isabel McMillin, his granddaughter, who is a daughter of Emerson McMillin, Jr., deceased, by his said wife, Isabel McMillin, deceased. The said Emerson McMillin, Jr., died prior to the death of the said Emerson McMillin, leaving him surviving the said Helen Isabel McMillin.

All of full age.

By the sixteenth, seventeenth, eighteenth nineteenth, twentieth, twenty-first, and twenty-second paragraphs of said Last Will and Testament of said Emerson McMillin, deceased, he, the said testator provided as follows:

> "SIXTEENTH: My direct heirs at law, members of my family, and residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey; my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New

Jersey; my son Marion McMillin of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin, (only child of my deceased son Emerson McMillin, Jr.) now of Darlington, Mahwah, New Jersey. For all the persons named, I have previously made ample provision for their own welfare as well as the welfare of those depending on them. My granddaughter Helen Isabel, the only child of my deceased son, Emerson, inherited liberal sums from her father and from her mother. To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin.

"SEVENTEENTH: I give, devise and bequeath unto my Trustees to be hereinafter named, and their successors, in trust however, for the persons named in Section Sixteen, all the residue of my estate, including leases of my summer home at Beaver Island, Upper Dam, Oxford County, Maine; the eighty-six acre plot of land known as the Marion Cottage property of Mohegan, Lake West Chester County, New York, Apartment house at 320 West 86th street, New York City, New York and my Darlington estate, Mahwah, New Jersey; and all the farm equipments, produce, live stock, and household furniture, paintings, tapestries, textile fabrics, porcelains, potteries, bronzes, and art objects of every kind and character; and all the stocks, bonds, notes, cash, credits, and assets of any kind and of which I may

die possessed, and not hereinbefore disposed of, but with the following conditions and stipulations; (a) The Beaver Island leases, the Marion Cottage property, and the city Apartment House in New York, are all to be sold as soon as may be, and the proceeds to be invested as the trustees shall deem to the best interest of the estate. (b) The household furniture, libraries, and camp equipment at Beaver Island, including steam-boat —to be disposed of—if convenient with the leases. The proceeds of all sales shall be invested by the trustees for the trust estate. The trustees shall permit the Darlington estate with all it comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to operate the farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the trustees.

"EIGHTEEN: All income from rents, dividends on stocks, interest on bonds or other securities not herein otherwise disposed of, in fact, all income of every kind and character, except the income of the Darlington Estate during its retention by the family, shall be paid to and received by the trustees for the benefit of the trust estate and the trustees are empowered to sell, dispose of, convey and give title to any kind of property, real or personal, at any and all times, when deemed advisable by them, ex-

cept as to disposition and sale of the Darlington estate during the life of my wife.

"NINETEEN: From the income of the trust estate the trustees shall (a) pay to my wife Isabel Morgan McMillin and to my son Marion McMillin jointly the sum of fifty thousand dollars per year, payable quarterly for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington estate. In the event that my wife shall predecease me, then the fifty thousand dollars shall be paid to my son alone, for the purpose above mentioned. If the family desire to retain Darlington after the decease of both my wife and my son, they shall designate a head of the family in a manner that shall be satisfactory to the trustees, and the person so designated shall receive and disburse the Darlington estate annuity. Should any of the persons named as my direct heirs and members of my family prefer not to make their home at Darlington, then such person or persons shall each receive twenty-five hundred dollars per year, in quarterly payments, to be taken by the trustees from the Darlington estate fund of fifty thousand dollars per year herein above provided for.

"TWENTIETH: From the income of the Trust estate, after deducing the provisions of Section Nineteen, the trustees shall pay to each of my direct heirs (and persons designated as members of the family and legatees of the trust estate), that is to say,—pay to Isabel Morgan McMillin, my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maude McMillin, to Marion Mc-

Millin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, payable quarterly. In the event of the trust estate not producing in any year an income sufficient, together with any accumulated income from previous years,—to pay fifty thousand dollars for the upkeep of the Darlington estate and fifty thousand dollars for the maintenance of each beneficiary named in this section, then the sum of annual payments to the Darlington fund and to each individual named shall be reduced pro rata. On the other hand the trustees may increase the several annual payments pro rata, whenever,—in their judgment,—the excess of annual income, or excess of accumulations shall warrant such increase. The matter of increase of payments to be wholly discretionary with the trustees. It is not the intent of the testator that the trustees shall strive to increase the total value of the estate, but that they shall be liberal in their distribution. The trustees may pay any part, or all of the annuities in stocks, bonds or other securities instead of cash, if for any reason they, the trustees, shall deem it advisable to do so.

"TWENTY-FIRST: Upon the decease of both my wife and my son, the trust shall,—except as hereinafter provided, cease and determine through the trustees disposing by sale of all the undivisable property (excepting only my mausoleum in Woodland Cemetery in the City of New York, which

mausoleum is to be and remain the property of my family as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the trust shall be continued.

"TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two trustees shall,—for financial reasons—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the trustees to dispose by sale of Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the trustees, to promptly divide up the divisable assets, sell the remainder, and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees."

Isabel McMillin, wife of Emerson McMillin, died October 5, 1922, leaving a last will and testament dated April 7, 1922, which was probated before the Surrogate of Bergen County on November 27, 1922.

She appointed her son, Marion McMillin, and the Bankers Trust Company of New York Executors and Trustees.

Marion McMillin and the Bankers Trust Company duly qualified and took upon themselves the burden of the administration of the estate and so continued until the time of the death of Marion McMillin.

By the terms of Mrs. McMillin's will, in case any of her executors or trustees died or became disqualified in any way to serve, she directed that her daughter, Mrs. Estelle McMillin Traverso, with the surviving executor or trustee, should name two other executors or trustees, and Marion McMillin having died, Mrs. Traverso with the consent of the surviving trustee, the Bankers Trust Company, named and appointed Paul McMillin Butterworth and Ubaldo Traverso co-executors and co-trustees with the said Bankers Trust Company, who took upon themselves the burden of the administration of the estate as executors and trustees.

Mrs. Isabel McMillin left her surviving as her heirs at law and next of kin:

1. Her son, Marion McMillin, now deceased.
2. Her daughter, Maude McMillin.
3. Her daughter, Estelle McMillin Traverso, and
4. Her granddaughter, Helen Isabel McMillin.

All of full age.

By the fourth, fifth, seventh and eighth paragraphs of said last will and testament of said Isabel McMillin, deceased, she the said testatrix, provided as follows:

"FOURTH: I direct, that all the rest, residue and remainder of the property and estate of which I may die seized and possessed whether real, personal or mixed, of whatever description and wheresoever found, shall be divided into four parts of equal value; one of which parts I hereby give, devise and bequeath to my daughter, ESTELLE MARIE TRAVERSO, of Florence, Italy, absolutely; another of which parts I hereby give, devise and bequeath to my daughter, MAUDE McMILLIN, of Darlington, New Jersey, absolutely; another of which parts I hereby give, devise and bequeath to my son, MARION M. McMILLIN, absolutely.

The other equal fourth part I give, devise and bequeath to my trustees hereinafter named, in trust as follows; said fourth part is to be set aside and held in trust for the benefit of my grandchildren, Emerson McMillin Stewart, Helen Isabel McMillin, and my step grandchild, Margaret Clark McMillin, in equal shares. My said trustees shall pay quarter yearly the net income of said fourth part, after payment of all expenses of said last named trust, in three equal shares, to the respective guardians of my said grandchildren, Emerson McMillin Stewart, Helen Isabel McMillin and my step grandchild, Margaret Clark McMillin, for their benefit during the minority of each of them. When each of said last named beneficiaries shall

reach the age of twenty-one years, and at any time thereafter until such beneficiary shall reach the age of thirty years, my said trustees may pay and distribute to such beneficiary so reaching his or her majority, one-third of the principal of said fourth part of said residue in trust as aforesaid to him or her absolutely, if in the opinion of said trustees it shall be to the best interests of such beneficiary to then receive his or her share of the said principal, and, if in the opinion of said trustees circumstances shall warrant such payment; but it is my will and I direct, that when each of said last named beneficiaries shall reach the age of thirty years, my said trustees then in any event, shall pay and distribute to such beneficiary so reaching the age of thirty years, one-third of the principal of said fourth part of said residue in trust as aforesaid, to him or her absolutely, in case the same shall not have been paid before that time. When each of said last named beneficiaries shall reach the age of twenty-one years in case my said trustees shall in their discretion decide that such beneficiary shall not then be paid one-third of said principal, one-third of the said net income of said fourth part of said residue in trust as aforesaid, shall thereafter be paid to such beneficiary so reaching his or her majority to his or her own use until one-third of said principal shall thereafter be paid to him or her. In case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third of said principal shall be

payable to him or her, according to the provisions of this my will, leaving issue surviving such beneficiary the share of such beneficiary so dying shall go to his or her issue but in case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third part of said principal shall be payable to him or her as aforesaid, without leaving issue him or her surviving, the share of such beneficiary so dying shall go to the survivor, or to the survivors of them in equal shares.

"FIFTH: It is my will and I order and direct, that upon the payment and distribution of any and all of the principal fund of any of the trusts provided for in this my will, my said trustees may pay or distribute to any beneficiary or beneficiaries thereof, either any security or securities so held in trust at the true value thereof, or cash from the proceeds of such security or securities after the same shall be converted into cash.

"SEVENTH: I hereby appoint as executors of this my last will and testament, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey; my son, MARION McMILLIN, of Darlington, Ramsey, New Jersey, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York. In the event that any of my said executors above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said executors shall remain qualified, they shall appoint a third executor. If two of

said executors shall remain unqualified, I appoint my daughter, ESTELLE McMILLIN TRAVERSO, to serve as an executor, and with the survivor name another executor, to fill the remaining vacancy; or, in case she shall not serve, I order and direct that she with said surviving executor shall name two other executors to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies that may occur after my decease. Neither my executors above named nor any successor shall be required to give bond.

"EIGHTH: I hereby appoint as trustees of each of the trusts herein and hereby created, my husband, EMERSON McMILLIN, of Darlington, Ramsey, New Jersey, aforesaid, my son, MARION McMILLIN of Darlington, Ramsey, New Jersey, aforesaid, and THE BANKERS TRUST COMPANY of No. 14 Wall Street, New York City, New York, aforesaid. In the event that any of my said trustees above appointed shall predecease me or shall decline to act, or in any way be disqualified to serve, then, if two of said trustees shall remain qualified, they shall appoint a third trustee. If two of said trustees shall remain unqualified, I appoint my daughter, ESTELLE McMILLIN TRAVERSO, to serve as a trustee, and with the survivor name another trustee to fill the remaining vacancy; or in case she shall not serve, I order and direct that she with said surviving trustee shall name two other trustees to fill said vacancies. It is my will, that the same rule as above set forth shall apply for filling any vacancies

that may occur after my decease. Neither my trustees above named nor any successor shall be required to give bond."

The son, Marion McMillin, having died January 25, 1924, intestate, his wife, Jane M. McMillin, was appointed administratrix by the Prerogative Court of the State of New Jersey and has undertaken the burden of the administration thereof.

Marion McMillin upon his death left him surviving as his only heirs at law and next of kin:

1. Jane M. McMillin, his widow.
2. His sister of the whole blood, Estelle McMillin Traverso.
3. His sister of the whole blood, Maude McMillin.
4. His sister of the half blood, Mary McMillin Norton, and
5. His niece of the whole blood, Helen Isabel McMillin.

All of full age.

Mary McMillin Norton, the oldest daughter of Emerson McMillin, assigned to her two sons, Emerson M. Butterworth and Corwin M. Butterworth, all of her right, title and interest in the estate of Emerson McMillin, deceased, in writing under her hand and seal dated November 6, 1922.

The widow, Isabel McMillin, and the son, Marion McMillin, having died, the surviving members of the family desire that the trust created under the will should be terminated and that the estate be distributed among the persons entitled thereto.

The executors of the will of Emerson McMillin have fully administered his estate and the final account was duly passed and approved by the Orphans' Court of Bergen County on December 3, 1924, and the executors have transferred to the trustees all of the assets and property which remained in their hands as executors to which the trustees were entitled.

The only real property of which Emerson McMillin died seized was the property mentioned in his will as the Darlington estate at Mahwah, and tax title to about three hundred acres of scrub pine land in Cheybogan County, Michigan. The Darlington estate consisted of about eleven hundred acres of land and a large mansion and buildings. The Darlington estate, together with the contents of the buildings, were sold by the trustees to a corporation known as Darlington Development Corporation for $685,000.00, represented by cash of $285,000.00 and a purchase money mortgage of $400,000.00.

The assets consisting of personal property of the estate of Emerson McMillin now in the hands of the trustees and subject to distribution is worth approximately, in the opinion of the complainants, $2,500,000.00.

The complainants are in doubt as to the meaning of certain provisions of the will of Emerson McMillin and are unable to determine which of certain claims or possible claims by parties claiming to be beneficiaries under the will, is supported and justified by the true construction of the will, and, therefore, ask in these proceedings that they may be advised and directed in regard to the matters in doubt set forth in the bill, concerning the execution of the trusts in the performance of their duties as trustees,

and that this Court may construe the provisions of Mr. McMillin's will and determine and declare whether by the true construction of said provisions, whether—

The principal or corpus of the one-sixth portion of said trust fund, upon the determination of the trust, be divided and distributed among the six persons named as direct heirs and members of the family and residuary legatees of Emerson McMillin, deceased, (which one-sixth portion would have gone to Isabel McMillin, deceased, if she had been living at the time of said division and distribution of the trust fund), became vested in her upon the death of Emerson McMillin, so that her executors are entitled to the same for the benefit of her estate under her will, to be given to those persons who may be entitled thereto under her will, or whether—

Upon Mrs. McMillan's death the principal and corpus of said one-sixth portion of the trust fund under the will of Emerson McMillin, deceased, is by his will given over to and belongs to the heirs at law or next or kin or devisees or legatees of said Isabel McMillin, and—

If the said one-sixth portion of the principal of the estate of Emerson McMillin is given over and belongs to the heirs at law, or next of kin or devisees or legatees of Mrs. McMillin upon her death as aforesaid, and whether—

Isabel McMillin by the provisions of the will of Emerson McMillin was given a power to bequeath or devise or dispose by will of said principal and corpus of said one-sixth portion, and—

If she had such power as aforesaid whether in and by the proper construction of the will of Isabel McMillin she exercised such power under

the residuary clause of her said will or otherwise, and—

Whether under her said will the one-sixth portion is given to or devolved upon her residuary legatees therein named, or in any respect passed, and—

This Court may determine and declare how the principal or corpus of said one-sixth portion of said trust fund has developed under the will of Emerson McMillin, deceased, and what defendant or defendants are entitled thereto and in what proportions, and—

Whether by the true construction of the provisions of the will of Emerson McMillin, the principal or corpus of the one-sixth portion of said trust fund, shall upon the termination of said trust be divided and distributed among the six persons therein named as direct heirs at law and members of the family and residuary legatees of Emerson McMillin, (which one-sixth portion under said provisions of the will of Emerson McMillin would have gone to Marion McMillin, now deceased, if he had been living at the time of the division and distribution of said trust fund) became vested in Marion McMillin, now deceased, upon the death of Emerson McMillin, deceased, so that his administratrix, Mrs. Jane M. McMillin, is entitled to the same upon such division and distribution for the estate of the said Marion McMillin, and such persons as would be entitled to it under the statute of distribution of New Jersey, or—

Whether upon the death of Marion McMillin, the said principal and corpus of the said one-sixth portion of the trust fund under the will of Emerson McMillin is given over to and belongs

to the heirs at law or next or kin of Marion McMillin, and—

Whether any part of the said principal and corpus of the said one-sixth portion of said trust fund under the will of Emerson McMillin which may have been derived from the proceeds of the sale of the said land is or shall be held to be land or real estate for the purpose of determining what person or persons may be entitled thereto and what part thereof, if any, is or shall be held herein to be land or real estate, and what person or persons respectively may be entitled to the whole or any part thereof upon such division and distribution.

And that this Court may determine and declare by its decree how the principal and corpus of the said one-sixth portion of the trust fund devolved under the will of Emerson McMillin and what defendant or defendants, person or persons may be entitled thereto, and in what proportions such persons as are entitled to the same are entitled thereto.

And that the rights and interests of each of the several parties hereto, or such person or persons as may possess any rights or interests in the said trust may be authoritatively declared and established by the decree of this Court.

I thought it would be well for counsel in open Court to agree to this statement of facts presented by me and then present any other facts that they might have, which we can either attempt to prove or agree to. I will agree practically to anything that Mr. Pitney and Mr. Wall agree to, that is within reason.

Mr. Wall: Insofar as to the statements that are already admitted in the answer, and, insofar

as it deals with the question of pedigree and positive statements of fact, it is satisfactory to my client, Jane M. McMillin, individually and as administratrix of the estate of Marion McMillin, deceased.

Mr. Stryker: Insofar as the statement deals with the allegations in the bill and matters of pedigree and qualification of trustees and executors, it is satisfactory to my client. I think, however, that a qualification should be added, and I have no doubt Mr. Griggs will agree to this. Mr. Griggs stated that the personal estate now in the hands of the trustees for distribution amounts to $2,500,000. That is strictly true as I understand it, but in connection with that statement I think the facts should be mentioned that a distribution of $2,000,000 of personalty was made prior to the filing of the bill of complaint in this suit. That is, each of the direct heirs, with the exception of the estate of Mrs. Isabel McMillin—each of the five other direct heirs mentioned in the will of Emerson McMillin, received $400,000 on account of the corpus of the personal estate of the trust, so that the entire personal estate in trust is $4,500,000, or was, prior to that distribution, in which the estate of Mrs. Isabel McMillin has as yet had no share. At the proper time I would like to add some additional proof. So far as the statement now made is concerned, that is our position.

Mr. Pitney: I substantially join in what Mr. Stryker said, so far as the allegations of the bill of complaint—or so far as Mr. Griggs' statement of the facts are repetitious of the allegations of the bill of complaint, as admitted in my answer, they may be regarded as stipulated by me.

The Court: You are not telling me anything —you are not adding anything.

Mr. Pitney: I am not adding yet, but I propose to offer and add other things.

The Court: By way of statement?

Mr. Pitney: By way of statement—to which Mr. Griggs has said he would agree if Mr. Wall would agree. In connection with the position which I take on the various points that arise for determination here, it is very important for me to have in the record the payment of the legacies mentioned in paragraphs 2 to 11 inclusive of the will. Those were legacies to collaterals, two of them a brother and sister, others to nieces and nephews and still others to grandnieces and nephews of the testator, being descendants of his brothers and sisters. Of course, as counsel has pointed out, one of the questions is the meaning of the word "Heirs" in the clause "to them, their heirs or devisees." I maintain that the word "heirs" means "issue" and that it must be so read from the entire will. I have sent to the Surrogate for a certified copy of the accounts filed by the executors so that it may appear of record in proper proof what these legacies have been and who received them—who were allowed to receive them and to whom they have been paid and the amount. I understand there are substantially fifty collateral beneficaries that have received these legacies. Is counsel able to stipulate that in the record?

The Court: In showing that you purpose to show that the executors themselves construed the will?

Mr. Pitney: No, your Honor. My purpose is to throw light upon the testator's meaning when

he used the clause "or their heirs." Some counsel insist that it means heirs at law and next of kin—heirs at law as to the realty and next of kin as to the personalty—but I contend that that is not so. In addition I think it is important that your Honor should know something regarding the will itself and how it was drawn. We none of us know very much about it.

The Court: You mean to say we ought to have proof of the associated circumstances to throw light on what the testator meant?

Mr. Pitney: No. I meant this, your Honor. We should have something to aid your Honor in this regard, that the testator, so far as we have been able to understand, drew his own will without the advice of counsel. I think it is important that it appear, by stipulation, that so far as we have been able to ascertain, he drew this will without advice of counsel.

The Court: You will have to put your stipulation in formal shape.

Mr. Harding: I represent seven of these defendants, Mary McMillin Norton, Corwin M. Butterworth. Emerson M. Butterworth, Paul McMillin Butterworth, both as executor of the last will and testament of Isabel McMillin, deceased and trustee of the said trust created under her said will, Ubaldo Traverso, both as executor of the last will and testament of Isabel McMillin, deceased and trustee of the said trust created under her said will, Maude McMillin and Estelle McMillin Traverso, and I am put in the position perhaps of being more of a neutral than Mr. Griggs. I am authorized and confined to filing an answer submitting to the decree of this Court, by my clients, so that whatever their

interests may be, that is the position that I am in.

Mr. Hart: I represent Emerson McMillin Stewart, now Emerson McMillin 3rd, and my position—my instructions are precisely the same as those expressed by Mr. Harding. Our answer admits all the allegations in the bill.

Mr. Griggs: I offer in evidence last will and testament of Emerson McMillin.

(Paper marked Exhibit C. 1.)

Mr. Griggs: I offer in evidence letters testamentary showing qualification of Marion McMillin as executor of Emerson McMillin.

(Paper marked Exhibit C. 2.)

Mr. Griggs: I offer letters testamentary showing qualification of Ubaldo Traverso as executor of Emerson McMillin.

(Paper marked Exhibit C. 3.)

Mr. Griggs: I offer letters testamentary showing qualification of Paul McMillin Butterworth as executor of Emerson McMillin in place and stead of Marion McMillin.

(Paper marked Exhibit C. 4.)

Mr. Griggs: I offer last will and testament of Isabel McMillin, deceased, dated April 7, 1922.

(Paper marked Exhibit C. 5.)

Mr. Griggs: I offer letters testamentary showing appointment of Marion McMillin and the Bankers Trust Company as executors of Isabel McMillin.

(Paper marked Exhibit C. 6.)

Mr. Griggs: I offer appointment by Estelle McMillin Traverso and Bankers Trust Company of Paul McMillin Butterworth and Ubaldo Traverso as executors of Isabel McMillin.

(Paper marked Exhibit C. 7.)

Mr. Griggs: I offer appointment by Estelle McMillin Traverso and Bankers Trust Company, surviving trustees, of Paul McMillin Butterworth and Ubaldo Traverso as co-trustees under the will of Isabel McMillin.

(Paper marked Exhibit C. 8.)

Mr. Griggs: I offer letters of administration issued to J. M. McMillin as administratrix of Marion McMillin, deceased.

(Paper marked Exhibit C. 9.)

Mr. Griggs: I offer assignment by Mary McMillin Norton to Emerson M. and Corwin M. Butterworth of all her interest in the Estate of Emerson McMillin.

(Paper marked Exhibit C. 10.)

Mr. Griggs: I also wish to call your Honor's attention to the fact that the trustees of Emerson McMillin sold the real estate at Darlington to a corporation known as the Darlington Development Company for $685,000, $285,000 of which was cash and they took back a purchase money mortgage for $400,000, which came in default and a bill was filed in this Court to foreclose the mortgage and the property was repurchased by the trustees, so that the title to that property is back now in the trustees. I bring that up because in the provisions of the will your Honor will note that the testator said that after the trust should cease the trustees should sell all undivisable property and divide the proceeds among the heirs mentioned, so the question will arise here today as to whether there was a conversion.

JANE M. McMILLIN, sworn for defendants.

Direct examination by Mr. Wall.

Q Mrs. McMillin, you are the widow of Marion McMillin? A Yes, sir.

Q Do you recollect the age of your husband at the time of his death? A In his forty-seventh year.

Q And how did his age compare with the ages of his brothers and sisters, the children of Emerson McMillin. I mean was he the youngest or oldest, or what? A The youngest.

Q Are you able to say approximately what the age of Mrs. Norton was at the time of Emerson McMillin's death? A I should think about fifty-six or fifty-seven.

Q And Estelle McMillin Traverso? A About fifty-three or fifty-two.

Q And Maude McMillin? A About fifty.

Q And Helen Isabel McMillin, the granddaughter? A I think about twenty-two or twenty-three, I should think.

Cross examination by Mr. Pitney.

Q Do you know what the age of the testator, Emerson McMillin was when he died? A Seventy-eight.

Q Do you know how old Isabel, his wife was, when she died? A Seventy-six.

Q In 1922? A 1922.

Q What was the testator's health, if you know, at the time he drew his will, August 29, 1916? A I think he was in very good health.

Q He went to New York about three times a week, did he not? On business? A Yes, sir; or perhaps oftener at that period.

Q And rode horseback every day that he was at Darlington? A Yes, sir.

Q And he continued in apparent good health until at least 1919? A Yes, sir.

Q What was the date of your marriage, please? I mean the year? A June 10, 1908.

Q Were there any children born of your marriage? A No.

Q Do you know when Emerson McMillin, Jr., the father of Helen Isabel McMillin died? A He died when she was five years old. You can compute back.

Q That was in 1905? A Yes, sir.

Q And how old was Isabel when her mother died? A She died when Isabel was fourteen.

Q That was 1913. Do you know when Mr. McMillin purchased the Darlington estate at Mahwah, about? A Yes, sir; in, I think, about fourteen years ago.

Q Just about two years after your marriage, wasn't it, Mrs. McMillin, 1910? A Yes, sir.

Q Do you know which of the testator's brothers and sisters and nephews and nieces and grand nephews and grand nieces were surviving at the time of his death—those mentioned in the will? Do you know the collaterals? A No, not very distinctly. They have those all down, though, Mr. Griggs has them.

Q What was Mrs. McMillin, Senior's, health in August, 1916, when Mr. McMillin drew his will? A In quite good health at that time.

Q What was your husband's health at that time? Also good? A Oh, yes. Also good, he was in good health.

Q What was the condition of your husband's health at your father-in-law's death—the testa-

tor's death? A He was in good health at that time. He hadn't been well from the time he had been in the Army, but he was not ill.

Q What was Mrs. McMillin's health at the time of her husband's death? A She was rather frail of health and the shock of his death made her go down hill very rapidly from the time of his death.

Q Very rapidly? A Yes, sir; she lost ground very rapidly.

Q Was his last illness long? A He was really only ill a few days at the end, but he hadn't been in good health for a year or two, been breaking.

Q You have a daughter by your former marriage, have you not? A Yes, sir.

Q And her name is Margaret Clark McMillin? A Margaret Clark McMillin.

Q And she is one of the beneficiaries named in Isabel McMillin's will? A Yes, sir.

Q She got a one twelfth under Isabel McMillin's will? A Yes, sir.

Q One twelfth of the residue? A Yes, sir.

Q How old is your daughter? A She is in her twenty-third year.

Q Do you know how old the three Butterworth men are? A Yes, sir, approximately. One is here in court.

The Court: How old are they?

The Witness: Paul McMillin Butterworth, thirty-eight; Corwin McMillin Butterworth, thirty-six; Emerson McMillin Butterworth, thirty-two.

The Court: Anything else to be established?

Mr. Pitney: I would like to reserve the right to put in the account showing the legacies.

The Court: You may do so.

Mr. Pitney: Of course, that is a long affair. I think if counsel will state that there were fifty collateral legatees received shares that will be all I need.

Mr. Griggs: I think there were fifty-six.

Mr. Pitney: Fifty-six shared in paragraphs 2 to 11, of the will.

The Court: Now, will we take a narrative of Mr. Griggs' opening as part of the agreed state of facts? There have been a great many interruptions and arguments. Eliminate all that and take his narration of the facts?

Mr. Pitney: Yes, sir; upon the same understanding that Mr. Stryker mentioned.

The Court: Yes; make a summary.

Mr. Griggs: I can read it right off without the stenographer taking it and without the interruptions. (Producing paper.)

The Court: Let it go in.

Mr. Stryker: I understand Mr. Griggs consents to the condition I made with regard to the whole amount of the corpus of the estate.

The Court: That will be part of it.

Mr. Pitney: I see no reason why we cannot stipulate that as far as counsel in this case have been able to ascertain this will was drawn by the testator without advice of counsel.

Mr. Griggs: I cannot stipulate, sir, as Mr. Pitney puts it. As far as I know, and I think I know further than Mr. Pitney, because in all probability Mr. McMillin would have asked Mr. Harding or our office to have drawn it,—but he didn't do it, but as to saying he did it without advice of counsel—(interrupted).

The Court: He didn't say that—"As far as we have been able to ascertain."

Mr. Pitney: I had a counter-claim, but on further consideration I asked Mr. Wall and Mr. Griggs to consent to my withdrawing it. They have so consented and I have amended my answer in some particulars. There was an order allowing me to amend in certain particulars and withdraw the counter-claim. Mr. Wall and Mr. Griggs, who are the only ones interested in the counter-claim, have consented.

TESTIMONY CLOSED.

Opinion of Vice-Chancellor.

On bill for construction of will.

1. A legacy to a trustee is deemed in equity to vest in the *cestui que* trust.

2. A legacy is deemed vested at the death of the testator though the right of possession be postponed to some future period.

3. A legacy is deemed vested if the income is directed to be paid the donee until the payment of the principal at a future period.

4. The proceeds of real estate sold by an executor under positive directions of the will are regarded as personal property for the purpose of distribution.

5. A legacy of personal property to "heirs" —*held* to mean "distributees" under the statute of distribution, and one to "devisees"—*held* to mean legatees.

6. A bequest of the residue in trust for the members of testator's family, share and share alike, payable to them "if then living" at the period of distribution, and if deceased to their "heirs" or "devisees," the contingency attaches to the payment, not to the gift, and confers a vested estate subject to being divested, and vested in the substituted donees upon the death of the primary legatees.

7. The same words in different parts of a will, used to express a common purpose, are presumed to have been used in the same sense.

8. A legacy by way of limitation over to the "devisees" of a primary legatee upon the latter's death before distribution does not confer

a power of appointment. The legacy does not rest on a delegated authority to select the substituted donee.

9. A bequest to members of a family is not presumed to be to them as a class, so that the survivors taken upon the death of a member before distribution, when the legatees are named and the legacy is to them, share and share alike.

For complainants, John L. Griggs.

For defendants, Lindabury, Depue & Faulks (Mr. Stryker), Pitney, Hardin & Skinner (Mr. Shelton Pitney and Mr. Mahlon Pitney) and Wall, Haight, Carey & Hartpence (Mr. Wall).

BACKES, *V.-C.*

The first fifteen paragraphs of the last will and testament of Emerson McMillin, deceased, are devoted to pecuniary legacies to relatives. This litigation involves the true meaning of the following sections:

> "SIXTEENTH: My direct heirs at law, members of my family, and residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are to be equal, in every respect, as to his or her interest in the Trusteed Estate, are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey, my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New Jersey; my son, Marion McMillin, of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin, (only child of my deceased son, Emerson McMillin, Jr.), now of Darlington, Mahwah, New Jersey. For all the persons named, I have previously made ample provision for their

own welfare as well as for the welfare of those depending upon them. My granddaughter, Helen Isabel, the only child of my deceased son, Emerson, inherited liberal sums from her father and from her mother. To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington Estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin.

SEVENTEENTH: I give, devise and bequeath unto my Trustees to be hereinafter named, and their successors, in trust however, for the persons named in Section Sixteen, all the residue of my Estate, including leases of my summer home at Beaver Island, Upper Dam, Oxford County, Maine; the eighty-six acre plot of land known as the Marion Cottage property of Mohegan Lake West Chester County, New York; Apartment House at 320 West 86th Street, New York City, New York; and my Darlington Estate, Mahwah, New Jersey; and all the farm equipments, produce, live stock, and household furniture, paintings, tapestries, textile fabrics, porcelains, potteries, bronzes, and art objects of every kind and character; and all the stocks, bonds, notes, cash, credits, and assets of any kind and of which I may die possessed, and not herein before disposed of, but with the following conditions and stipulations: (a) The Beaver Island leases, the Marion Cottage property, and the City Apartment House in New York, are all to be sold as soon as may be, and the proceeds to be invested as the Trustees shall deem to the best interest of the Estate. (b) The household furniture, libraries and camp equipment at Beaver Island, including steam boat,—to be disposed of,—if convenient with the leases. The proceeds of all sales shall be invested by the Trustees for

the Trust Estate. The Trustees shall permit the Darlington Estate with all its comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to operate the Farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees.

EIGHTEENTH: All income from rents, dividends on stocks, interest on bonds or other securities not herein otherwise disposed of, in fact, all income of every kind and character, except the income of the Darlington Estate during its retention by the family, shall be paid to and received by the Trustees for the benefit of the Trust Estate and the Trustees are empowered to sell, dispose of, convey and give title to any kind of property, real or personal, at any and all times, when deemed advisable by them, except as to the disposition and sale of the Darlington Estate during the life of my wife.

NINETEENTH: From the income of the Trust Estate the Trustees shall (a) pay to my wife Isabel Morgan McMillin and to my son Marion McMillin jointly the sum of fifty thousand dollars per year, payable quarterly for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington Estate. In the event that my wife shall predecease me, then the fifty thousand dollars shall be paid to my son alone, for the purpose above mentioned. If the family desire to retain Darlington after the decease of both my wife and my son, they shall designate a head of the family in a manner that shall be satisfactory to the Trustees, and the person so designated shall receive and disburse the Dar-

lington Estate Annuity. Should any of the persons named as my direct heirs and members of my family prefer not to make their home at Darlington, then such person or persons shall each receive twenty-five hundred dollars per year, in quarterly payments, to be taken by the Trustees from the Darlington Estate fund of fifty thousand dollars per year herein above provided for.

TWENTIETH: From the income of the Trust Estate, after deducting the provisions of Section Nineteen, the Trustees shall pay to each of my direct heirs (and persons designated as members of the family and legatees of the Trust Estate), that is to say,—pay to Isabel Morgan McMillin my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maude McMillin, to Marion McMillin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, payable quarterly. In the event of the Trust Estate not producing in any year an income sufficient, together with any accumulated income from previous years,—to pay fifty thousand dollars for the maintenance of the family and the upkeep of the Darlington Estate, and fifty thousand dollars to each beneficiary named in this section then the sum of annual payments to the Darlington fund and to each individual named shall be reduced pro rata. On the other hand the Trustees may increase the several annual payments pro rata, whenever,—in their judgment,—the excess of annual income, or excess of accumulations shall warrant such increase. The matter of increase of payments to be wholly discretionary with the Trustees. It is not the intent of the testator that the Trustees shall strive to increase the total value of the Estate; but that they shall be liberal in

their distribution. The Trustees may pay any part, or all of the annuities in stocks, bonds or other securities instead of cash, if for any reason they, the Trustees, shall deem it advisable so to do.

TWENTY-FIRST: Upon the decease of both my wife and my son, the Trust shall,—except as hereinafter provided, cease, and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family, as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued.

TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two Trustees shall,—for financial reasons,—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the Trustees to dispose by sale of the said Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the Trustees to

promptly divide up the divisable assets, sell the remainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees."

The testator died May 31, 1922. All the beneficiaries mentioned in the sixteenth paragraph survived him. His widow died October 5, 1922, testate, leaving the residue of her estate to her two daughters, Estelle McMillin Traverso and Maude McMillin, and her son Marion McMillin, each a fourth, and to trustees, for the use of two grandchildren and a step-grandchild, the remaining fourth. Her heirs at law were her two daughters, her son and a granddaughter, Helen Isabel McMillin, daughter of a deceased son, Emerson McMillin, Jr. Marion McMillin died January 5, 1924, without issue and intestate, leaving a widow, Jane M. McMillin, his administratrix. The trust was terminated on the death of Marion. The real estate has been sold and the estate is ready for distribution. The trustees seek the guidance of the court as to the disposition to be made of the shares given to the widow and Marion, and propound these questions: Was the gift to the widow vested absolutely and is it payable to her executors; or is it payable to her heirs at law or next of kin, or to the residuary legatees under her will? And as to the gift to the son Marion, deceased, was it vested absolutely and is it payable to his administratrix, or is it payable to his heirs at law or next of kin? The further question is, Are the proceeds of the sales of lands to be treated as realty or personalty?

The testator evidently drew his own will, embodying a comprehensive and well rounded scheme of testamentary disposition, and no

doubt felt he had set down his wishes in such plain fashion that there could be no two notions as to its meaning. And were it not for the inept use of technical terms, of which, it seems, he had a conversational familiarity, much confusion would have been spared. The will is evidently the product of a straight thinking mind, of unequivocal purpose, and whatever may be the primary legal import of the variety of expressions used, the testator's meaning is not obscure from the lay viewpoint, nor from the judicial standpoint if we apply the rules of construction to the development of his intention rather than try to square the will with the rules. The cardinal rule is, the real intention of the testator, in whatever form it finds expression.

The testator died possessed of a large fortune and "Darlington," his homestead of many hundred acres. His all engrossing thought was to leave his estate (except pecuniary legacies to his relatives) to the six members of his family, in equal shares, and gave emphasis to this in the keynote section (Sixteen) wherein he described them by name and as the "residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are to be equal, in every respect, as to his or her interest in the Trusteed Estate." Each was to have a vested undivided sixth in his or her own right.

The estate was given, in language of express and immediate gift, to the trustees "for the persons named in Section Sixteen," and in equity the gift is deemed to be to the *cestui que* trust as though it had been made directly to them. Neilson *v.* Bishop, 45 N. J. Eq. 473; Miller *v.* Worrall, 59 N. J. Eq. 134. The postponement of the enjoyment of the corpus was

not because of anything personal to the legatees. The intervention of the legal estate in the trustees was merely for the convenience of the estate, i. e., for more advantageously handling the interests pending the trust, and the legacies vested at the death of the testator. Post *v.* Herbert, 27 N. J. Eq. 540. And upon the death of a legatee it vested in the substituted donee in his or her stead. Crane *v.* Bolles, 49 N. J. Eq. 373. The gift of the income in equal shares to the legatees until they should come into the principal in equal shares also marks the vesting of the estate. Dusenberry *v.* Johnson, 59 N. J. Eq. 336; Fidelity-Union Trust Co. *v.* Rowland, 4 Adv. Rep. 603. Another strong indication that the estate vested is the gift of an undivided sixth interest to the widow, though the testator knew she could not live to come into possession of the corpus. She would have been let in but for the trust for the maintenance of "Darlington," or had the trust been destructible in her lifetime.

Having first secured his estate to the six members of his family the testator planned to continue the home, in all its splendor, for their use, at least during his widow's remaining years, and to provide for their maintenance in keeping with their ultimate inheritance. By the variable gifts for the upkeep of "Darlington" and to the members of his family during the period of the trust he, in effect, appropriated the entire income to their use.

The testator's idea was that the division of the corpus should be in liquid assets, and to that end directed that all his real estate be sold for the purpose of distribution, and under well recognized principles the proceeds are deemed to

be personal property. Cook's Exrs. *v.* Cook's Admrs., 20 N. J. Eq. 375; Baldwin *v.* Taylor, 37 N. J. Eq. 78.

Upon the termination of the trust, after the death of the widow, the trustees were directed to pay over the residuary estate "by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs, or to the devisees of any deceased member or members." Here the testator dealt with the distribution of the corpus, not with the substance of the gift. The members of his family "if then living" (at the distribution) were to receive their shares, and deceased members' shares were transmitted by way of substitution to their "heirs or devisees." The payment to them and not the gift of the shares was upon condition that they survive the period of the trust. Security Trust Co. *v.* Lovett, 78 N. J. Eq. 445. The testator's widow obviously could not, and his son Marion did not live to come into the enjoyment of the corpus, and their shares consequently devolve upon those who would take as "devisees" under their last wills and testaments, or, in default of a will, to their "heirs" by operation of law as though they had died possessed. The testator intended, and it is clear, that the shares to the members of his family who could not or would not come into possession should pass to those who would *inherit* from them. He conceived that "devisees" supplanted "heirs" and meant that the devisees should take to the exclusion of heirs, if there was a will, if not, the heirs were to take; not,

as has been argued, that it was given without choice to either the one class or the other. This applies also to the income given to the heirs or devisees of a deceased legatee, consistent with the testator's intention that the share of each member of his family in the residuary estate should be equal to the share of the others.

The subject matter of the gift being personal property the word "devisees" is referable to "legatees," and "heirs" to those who take under the statute of distribution. The word "heirs" when applied to the disposition of personal property has been uniformly held in this State to indicate distributees under the statute. In Leavitt *v.* Dunn, 56 N. J. L. 309, an insurance policy payable to the "heirs" of the insured was held by the Court of Appeals to include the widow. In Meeker *v.* Forbes, 84 N. J. Eq. 271, aff'd 86 N. J. Eq. 255, Vice-Chancellor Stevens held that a substitutionary gift of personal property to the "heirs at law" of a legatee who died before distribution without issue passed to his widow, and the ruling is dispositive of the claim of Marion's widow.

The doctrine of these authorities is not criticised, but it is contended that the word "heirs" was used in the sense of issue. This is based on the testator's supposed love of kin or "pride of blood," and is said to be indicated in other parts of the will. The fact that he gave the share of his widow to her "devisees" without restriction as to kinship is a forceful denial. It is, however, pointed out that by the fourth section of the will a pecuniary legacy was given to the grandchildren of the testator's sister, Eliza J. Ewing, children of her son and daughter, and "in the event that any of the said grandchildren

predecease me leaving issue such issue shall be the beneficiaries"; and by sections five to ten, pecuniary legacies are given to the children (or their heirs) of his remaining brothers and sisters, and that by the eleventh section it is provided that "Gifts to the children (or their heirs) means to the direct issue of my brothers' or sisters' children, and not to issue beyond the second generation, or to others who by adoption or otherwise might be heirs at law, except in the case of my sister Eliza, where it is her grandchildren and not her children who are made the beneficiaries. In that case her great grandchildren who do not predecease me shall be the beneficiaries," and it is argued from this that the testator thereby indicated an intention that his estate should not go to strangers—to Marion's widow, and to the step-grandchild under the will of the testator's widow. It is undoubtedly the rule that the same words in different parts of a will, used to express a common purpose, are presumed to have been used in the same sense (2 Jarman, 5th Ed. 773), but it is difficult to see how the application of the rule is helpful. By the eleventh section the testator simply meant to limit the representation, not to restrict the gift to his kin. By "direct issue" he referred to immediate issue, to the children of the primary legatees—the second generation; and this he clarified by excepting the case of his sister Eliza "where it is her grandchildren and not her children who are made the beneficiaries." Cases in this State, cited as holding the word "heirs" to mean issue, will be found, upon examination, were decided upon peculiar circumstances calling for that meaning. Bruere *v.* Bruere, 35 N. J. Eq. 432; Baldwin *v.* Taylor, *supra;* Randolph *v.* Randolph, 40 N. J. Eq. 73;

Dawson *v.* Schaefer, 52 N. J. Eq. 541; Dean *v.* Nutley, 70 N. J. L. 217; In re Smisson, 79 N. J. Eq., 233, the claim of Jacob Schaab as an "heir" of his widow's personal estate was not considered, as it was not in the later case involving the same estate. Cranstoun *v.* Westendorf, 91 N. J. Eq. 34.

The insistence that the alternative gift to the "devisees" of a deceased member of testator's family conferred only a power of appointment, and that the power was not exercised by the testator's widow, is without merit. Farnum *v.* Pa. Co., 87 N. J. Eq. 108, aff'd *Id.* 652, is cited. The gift over does not rest on the exercise of a delegated authority to the widow to select the donees. The widow had the power to create, not to appoint the substitutes. The executory bequest defines the donees who take by the limitation over as those who answer the description of "heirs" or "devisees" of a deceased legatee. The bequests are self-executing to their devisees, if there is a will, to their "heirs," if there is not. The gifts to them are effected by the testator's will, not by the legatee's direction.

The contention that the gift of the residue to the six members of the testator's family was to them as a class, and that Marion's share, he having died without issue, fell into the residue and is divisible among the survivors of the class, ignores the distinguishing features of the bequest, that it is to the legatees severally, by name, and the distribution of the undivided residue among them in equal shares. Dildine *v.* Dildine, 32 N. J. Eq. 78.

The contention that the vested estate of the widow was not divested by her death before the period of distribution because the gift over is

void for uncertainty in that it is given indefinitely to her heirs *or* devisees (11 R. C. L. 484; Dusenberry *v.* Johnson, *supra*), presents a purely academic question. The legatees under the widow's will and the widow of Marion under the statute of distribution (C. S. C. S. 2629) take whether the limitation over be good or bad, and the executors are advised to pay the respective shares to them.

Final Decree.

Filed July 10, 1926.

This cause coming on to be heard in the presence of John L. Griggs, Esq., of counsel with the complainants; Albert C. Wall, Esq., of Wall, Haight, Carey & Hartpence, of counsel with the defendants, Jane M. McMillin, both as administratrix of the Estate of Marion McMillin, Deceased, and individually, and Margaret Clark McMillin; A. C. Hart, Esq., of Hart & Vanderwart, of counsel for Emerson McMillin Stewart, now Emerson McMillin, 3rd; Shelton Pitney, Esq., of Pitney, Hardin & Skinner, of counsel for the defendant, Helen Isabel McMillin; John W. Harding, Esq., of counsel for the defendants, Mary McMillin Norton, Corwin M. Butterworth, Emerson M. Butterworth, Paul McMillin Butterworth, both as Executor of the last will and testament of Isabel McMillin, Deceased, and trustee of the trust created under her said will. Ubaldo Traverso, both as Executor of the last will and testament of Isabel McMillin, Deceased, and trustee of the trust created under her will; Maude McMillin and Estelle McMillin Traverso;

Josiah Stryker, Esq., of Lindabury, Depue & Faulks, of counsel for Bankers Trust Company as one of the executors and trustees under the last will and testament of Isabel McMillin, Deceased, and the pleadings and proofs having been read and the respective counsel having been heard and the court having duly considered the said pleadings, proofs and arguments,

AND IT DULY APPEARING that on the 31st day of May, 1922, Emerson McMillin died a resident of Mahwah, in the County of Bergen and State of New Jersey, leaving a last will and testament which was duly admitted to probate before the Surrogate of the County of Bergen on the 12th day of June, 1922; that the said Emerson McMillin left him surviving

1. Isabel Morgan McMillin, his widow, who died on the 5th day of October, 1922.

2. Marion McMillin, a son by his said wife, Isabel Morgan McMillin, who died on the 25th day of January, 1924.

3. Maude McMillin, a daughter by his said wife, Isabel Morgan McMillin, who is unmarried.

4. Estelle McMillin Traverso, a daughter by his said wife, Isabel Morgan McMillin, who is the wife of Ubaldo Traverso.

5. Mary McMillin Norton, a daughter by his first wife, who died prior to his marriage with said Isabel Morgan McMillin. Said Mary McMillin Norton is the widow of Oliver D. Norton, Deceased.

6. Helen Isabel McMillin, a granddaughter, who is the daughter of Emerson McMillin, Jr., Deceased, who was a son of the testator by his said wife, Isabel Morgan McMillin; that the said last will and testament of the said Emerson Mc-

Millin, after providing for certain bequests, provided in and by the 16th, 17th, 18th, 19th, 20th, 21st and 22nd paragraphs as follows:

"SIXTEENTH: My direct heirs at law, members of my family, and residuary legatees of the Estate Trusteed in Section Seventeen, and all of whom are to be equal, in every respect, as to his or her interest in the Trusteed Estate, are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey; my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New Jersey; my son, Marion McMillin, of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin, (only child of my deceased son, Emerson McMillin, Jr.), now of Darlington, Mahwah, New Jersey. For all the persons named, I have previously made ample provision for their own welfare as well as for the welfare of those depending upon them. My granddaughter, Helen Isabel, the only child of my deceased son, Emerson, inherited liberal sums from her father and from her mother. To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington Estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin.

SEVENTEENTH: I give, devise and bequeath unto my Trustees to be hereinafter named, and their successors, in trust however, for the persons named in Section Sixteen, all the residue of my Estate, including leases of my summer home at Beaver Island, Upper Dam, Oxford County, Maine; the eighty-six acre plot of land known as the Marion Cottage property of Mohegan Lake

West Chester County, New York; Apartment House at 320 West 86th Street, New York City, New York; and my Darlington Estate, Mahwah, New Jersey; and all the farm equipments, produce, live stock and household furniture, paintings, tapestries, textile fabrics, porcelains, potteries, bronzes, and art objects of every kind and character; and all the stocks, bonds, notes, cash, credits, and assets of any kind and of which I may die possessed, and not herein before disposed of, but with the following conditions and stipulations; (a) The Beaver Island leases, the Marion Cottage property, and the City Apartment House in New York, are all to be sold as soon as may be, and the proceeds to be invested as the Trustees shall deem to the best interest of the Estate. (b) The household furniture, libraries and camp equipment at Beaver Island, including steam boat,—to be disposed of,—if convenient with the leases. The proceeds of all sales shall be invested by the Trustees for the Trust Estate. The Trustees shall permit the Darlington Estate with all it comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to operate the Farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees.

EIGHTEENTH: All income from rents, dividends on stocks, interest on bonds or other securities not herein otherwise disposed of, in fact, all income of every kind and character, except the income of the Darlington Estate during its retention by the family, shall be paid to and received by the Trustees for the benefit of the Trust Estate and the Trustees are empowered to sell, dispose of, convey and give title to any kind of property,

real or personal, at any and all times, when deemed advisable by them, except as to the disposition and sale of the Darlington Estate during the life of my wife.

NINETEENTH: From the income of the Trust Estate the Trustees shall (a) pay to my wife Isabel Morgan McMillin and to my son Marion McMillin jointly the sum of fifty thousand dollars per year, payable quarterly for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington Estate. In the event that my wife shall predecease me, then the fifty thousand dollars shall be paid to my son alone, for the purpose above mentioned. If the family desire to retain Darlington after the decease of both my wife and my son, they shall designate a head of the family in a manner that shall be satisfactory to the Trustees, and the person so designated shall receive and disburse the Darlington Estate Annuity. Should any of the persons named as my direct heirs and members of my family prefer not to make their home at Darlington, then such person, or persons shall each receive twenty-five hundred dollars per year, in quarterly payments, to be taken by the Trustees from the Darlington Estate fund of fifty thousand dollars per year herein above provided for.

TWENTIETH: From the income of the Trust Estate, after deducting the provisions of Section Nineteen, the Trustees shall pay to each of my direct heirs (and persons designated as members of the family and legatees of the Trust Estate), that is to say,—pay to Isabel Morgan McMillin, my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maude McMillin, to Marion McMillin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, pay-

able quarterly. In the event of the Trust Estate not producing in any year an income sufficient, together with any accumulated income from previous years,—to pay fifty thousand dollars for the maintenance of the family and the upkeep of the Darlington Estate, and fifty thousand dollars to each beneficiary named in this section, then the sum of annual payments to the Darlington fund and to each individual named shall be reduced pro rata. On the other hand the Trustees may increase the several annual payments pro rata, whenever,—in their judgment,—the excess of annual income, or excess of accumulations shall warrant such increase. The matter of increase of payments to be wholly discretionary with the Trustees. It is not the intent of the testator that the Trustees shall strive to increase the total value of the Estate; but that they shall be liberal in their distribution. The Trustees may pay any part, or all of the annuities in stocks, bonds or other securities instead of cash, if for any reason they, the Trustees, shall deem it advisable so to do.

TWENTY-FIRST: Upon the decease of both my wife and my son, the Trust shall,—except as hereinafter provided, cease, and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family, as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased mem-

ber or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued.

TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two Trustees shall,—for financial reasons,—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the Trustees to dispose by sale of the said Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the Trustees to promptly divide up the divisable assets, sell the remainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees."

AND IT FURTHER DULY APPEARING that the testator's said widow, Isabel Morgan McMillin, died, as above stated, on the 5th day of October, 1922, leaving a last will and testament which was duly admitted to probate on the 27th day of November, 1922, and leaving as her only heirs at law and next of kin, her said son, Marion McMillin, her said daughter, Maude McMillin, her said daughter, Estelle McMillin Traverso and her said granddaughter, Helen Isabel McMillin; that the Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso are now the executors and trustees under the said will of the said Isabel Morgan McMillin; that in and by the 4th paragraph of said will the said Isabel Morgan McMillin provided as follows:

Final Decree.

"FOURTH: I direct, that all the rest, residue and remainder of the property and estate of which I may die seized and possessed whether real, personal or mixed, of whatever description and wheresoever found, shall be divided into four parts of equal value; one of which parts I hereby give, devise and bequeath to my daughter, ESTELLE MARIE TRAVERSO, of Florence, Italy, absolutely; another of which parts I hereby give, devise and bequeath to my daughter, MAUDE McMILLIN, of Darlington, New Jersey, absolutely; another of which parts I hereby give, devise and bequeath to my son, MARION M. McMILLIN, absolutely.

The other equal fourth part I give, devise and bequeath to my Trustees hereinafter named, in trust as follows; said fourth part is to be set aside and held in trust for the benefit of my grandchildren. EMERSON McMILLIN STEWART, HELEN ISABEL McMILLIN, and my step grandchild, MARGARET CLARK McMILLIN, in equal shares. My said Trustees shall pay quarter yearly the net income of said fourth part, after payment of all expenses of said last named trust, in three equal shares, to the respective guardians of my said grandchildren, EMERSON McMILLIN STEWART, HELEN ISABEL McMILLIN and my step grandchild, MARGARET CLARK McMILLIN, for their benefit during the minority of each of them. When each of said last named beneficiaries shall reach the age of twenty-one years, and at any time thereafter until such beneficiary shall reach the age of thirty years, my said Trustees may pay and distribute to such beneficiary so reaching his or her majority, one-third of the principal of said fourth part of said residue in trust as aforesaid to him or her absolutely, if in the opinion of said Trustees it shall be to the best interests of such bene-

ficiary to then receive his or her share of the said principal, and, if in the opinion of said Trustees circumstances shall warrant such payment; but it is my will and I direct, that when each of said last named beneficiaries shall reach the age of thirty years, my said Trustees, then in any event, shall pay and distribute to such beneficiary so reaching the age of thirty years, one-third of the principal of said fourth part of said residue in trust as aforesaid, to him or her absolutely, in case the same shall not have been paid before that time. When each of said last named beneficiaries shall reach the age of twenty-one years in case my said Trustees shall in their discretion decide that such beneficiary shall not then be paid said one-third of said principal, one-third of the said net income of said fourth part of said residue in trust as aforesaid, shall thereafter be paid to such beneficiary so reaching his or her majority for his or her own use until one-third of said principal shall thereafter be paid to him or her. In case any of said three last named beneficiaries shall die at any time, either before or after my death, before the period when said one-third part of said principal shall be payable to him or her, according to the provisions of this my will, leaving issue surviving such beneficiary, the share of such beneficiary so dying shall go to his or her issue; but, in case any of said three last named beneficiaries shall die at any time, either before or after my death, before the said period when said one-third part of said principal shall be payable to him or her as aforesaid, without leaving issue him or her surviving, the share of such beneficiary so dying shall go to the survivor, or to the survivors of them in equal shares."

AND IT FURTHER DULY APPEARING that the testator's said son, Marion McMillin, died intestate and without issue, on the 25th

day of January, 1924, leaving him surviving his widow, Jane M. McMillin, and as his only heirs at law and next of kin, his sisters of the full blood, said Estelle McMillin Traverso and said Maude McMillin, his sister of the half blood, said Mary McMillin Norton, and his niece of the whole blood, said Helen Isabel McMillin; and that the said Jane M. McMillin has been duly appointed administratrix of his estate by the Prerogative Court of this State,

AND IT FURTHER DULY APPEARING that the Darlington Estate has been sold and that all of the surviving members of the family of the said Emerson McMillin referred to in the above recited 21st paragraph of his said will, desire that the said trust therein created shall be terminated and that the corpus and principal of the said Estate of Emerson McMillin, Deceased, should now be distributed among those persons who are entitled thereto,

AND the court being of the opinion that the complainants are entitled to be advised and directed in accordance with the prayer of the bill of complaint in this cause,

IT IS, on this 10th day of July, 1926, on motion of John L. Griggs, of counsel with the complainants, by EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED and the said Chancellor, by virtue of the power and authority of this Court, does hereby ORDER, ADJUDGE AND DECREE as follows:

1. That the principal or corpus of the one-sixth portion of the rest and residue of the Estate of Emerson McMillin, deceased, which, under the provisions of said will, would have gone to said Isabel Morgan McMillin, deceased,

if she had been living at the time of the distribution of said trust fund, shall be distributed by the complainants as trustees under the last will and testament of Emerson McMillin, deceased, as follows:

(a) One equal fourth part thereof to the defendant, Estelle Marie Traverso.

(b) One equal fourth part thereof to the defendant, Maude McMillin.

(c) One equal fourth part thereof to the defendant, Jane M. McMillin, as administratrix of the Estate of Marion McMillin, Deceased.

(d) The remaining equal fourth part thereof to the defendants, Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso, as trustees under the last will and testament of said Isabel Morgan McMillin, Deceased, (therein designated as Isabel McMillin) in trust for the uses and purposes set forth in the above recited second subdivision of the fourth paragraph of said last will and testament of said Isabel Morgan McMillin, Deceased.

2. That the one-sixth portion of the said rest and residue of the Estate of the said Emerson McMillin, Deceased, which would have gone to the said Marion McMillin if he had been living at the time of the division and distribution of said trust fund, shall be paid and distributed by the said complainants to the said Jane M. McMillin, widow of the said Marion McMillin.

3. That in making distribution of the said trust fund, allowance shall be made by the said complainants for amounts, both of principal and

income, previously distributed to any of the beneficiaries thereunder.

E. R. WALKER,
Chancellor.

Respectfully advised,

(Sgd) JOHN H. BACKES,
V.-C.

Notice of Appeal.

The defendant, Helen Isabel McMillin, hereby appeals from so much of the final decree made in the above entitled cause on the 10th day of July, 1926, on the advice of the Honorable John H. Backes, one of the Vice-Chancellors of this Court, as declares:

1. That the principal or corpus of the one-sixth portion of the rest and residue of the Estate of Emerson McMillin, deceased, which, under the provisions of said will, would have gone to said Isabel Morgan McMillin, deceased, if she had been living at the time of the distribution of said trust fund, shall be distributed by the complainants as trustees under the last will and testament of Emerson McMillin, deceased, as follows:

(a) One equal fourth part thereof to the defendant, Estelle Marie Traverso.

(b) One equal fourth part thereof to the defendant, Maude McMillin.

(c) One equal fourth part thereof to the defendant, Jane M. McMillin, as administratrix of the Estate of Marion McMillin, deceased.

(d) The remaining equal fourth part thereof to the defendants, Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso, as trustees under the last will and testament of said Isabel Morgan McMillin, deceased, (therein designated as Isabel McMillin) in trust for the uses and purposes set forth in the above recited second sub-division of the fourth paragraph of said last will and testament of said Isabel Morgan McMillin, deceased, and

That the one-sixth portion of the said rest and residue of the Estate of the said Emerson McMillin, deceased, which would have gone to the said Marion McMillin if he had been living at the time of the division and distribution of said trust fund, shall be paid and distributed by the said complainants to the said Jane M. McMillin, widow of the said Marion McMillin.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with
the Defendant, Helen Isabel McMillin.

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

SHELTON PITNEY,
Of Counsel with Defendant,
Helen Isabel McMillin.

Dated: October 20, 1926.

Petition of Appeal.

New Jersey Court of Errors and Appeals

Between	
UBALDO TRAVERSO, PAUL McMILLIN BUTTERWORTH and BANKERS TRUST COMPANY, Trustees under the Last Will and Testament of Emerson McMillin, Deceased, *Complainants-Respondents,*	*On Appeal from the Court of Chancery.*
and	
HELEN ISABEL McMILLIN, *Defendant-Appellant.*	*Petition of Appeal.*

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

The petition of Helen Isabel McMillin, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds herself aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 10th day of July, 1926, in a cause wherein Ubaldo Traverso, Paul McMillin Butterworth and Bankers Trust Company, Trustees under the Last Will and Testament of Emerson McMillin, deceased, were complainants and Estelle McMillin Traverso, Maude McMillin, Mary McMillin Norton; Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso, executors of and trustees under the last will and

testament of Isabel McMillin, deceased, Jane M. McMillin, individually and as administratrix of the estate of Marion McMillin, deceased, Helen Isabel McMillin, Emerson McMillin Stewart (now Emerson McMillin III), Margaret Clark McMillin, Emerson McMillin Butterworth and Corwin McMillin Butterworth were defendants, in this respect, to wit:

That said decree adjudges

That the principal or corpus of the one-sixth portion of the rest and residue of the Estate of Emerson McMillin, deceased, which, under the provisions of said will, would have gone to said Isabel Morgan McMillin, Deceased, if she had been living at the time of the distribution of said trust fund, shall be distributed by the complainants as trustees under the last will and testament of Emerson McMillin, Deceased, as follows:

(a) One equal fourth part thereof to the defendant, Estelle Marie Traverso.

(b) One equal fourth part thereof to the defendant, Maude McMillin.

(c) One equal fourth part thereof to the defendant, Jane M. McMillin, as administratrix of the Estate of Marion McMillin, Deceased.

(d) The remaining equal fourth part thereof to the defendants, Bankers Trust Company, Paul McMillin Butterworth and Ubaldo Traverso, as trustees under the last will and testament of said Isabel Morgan McMillin, Deceased, (therein designated as Isabel McMillin) in trust for the uses and purposes set forth in the above recited second sub-division of the fourth paragraph of said last will and testament of said Isabel Morgan McMillin, Deceased, and

That the one-sixth portion of the said rest and residue of the Estate of the said Emerson McMillin, Deceased, which would have gone to the said Marion McMillin if he had been living at the time of the division and distribution of said trust fund, shall be paid and distributed by the said complainants to the said Jane M. McMillin, widow of the said Marion McMillin.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for that the remainder interests in the residuary estate of the testator, Emerson McMillin, were contingent, and did not vest upon his death, and that, if vested, the share of Isabel McMillin was divested upon her death in favor of her issue; that the alternative gifts "to the heir or heirs" meant "issue" of the primary remaindermen, and not their heirs at law or next of kin; that the share of Isabel McMillin, referred to in the decree, did not devolve upon those who took as devisees under her will but to her issue her surviving; that the share of Marion McMillin, referred to in the decree, did not devolve upon his next of kin, but fell in or lapsed by reason of his death prior to the vesting of the residuary estate in remainder, or, in the alternative, passed as intestate property of the testator, Emerson McMillin; and that the proceeds of the residuary real estate must be considered to have retained its character as realty.

Your petitioner therefore prays that the said decree of the Chancellor may be in the particular aforesaid reversed, set aside and for nothing holden. And that your petitioner may have

such relief in the premises as to this honorable Court shall seem meet.

PITNEY, HARDIN & SKINNER,
Solicitors of Appellant.

SHELTON PITNEY,
Of Counsel.

Service of a copy of the within petition of appeal is hereby acknowledged this 22d day of October, 1926.

JOHN L. GRIGGS,
Solicitor of Complainants-Respondents.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Respondents, Jane M. McMillin and Margaret Clark McMillin

LINDABURY, DEPUE & FAULKS,
Solicitors of Respondent, Bankers Trust Company, one of the executors, etc.,

HART & VANDERWART,
Solicitor of Respondent, Emerson McMillin, III,

CHAS. S. STALTER,
Solicitor of Respondents, Maude McMillin; Estelle McMillin Traverso; Corwin M. Butterworth and Emerson M. Butterworth, assignees of Mary McMillin Norton; Paul McMillin Butterworth executor & Trustee of Estate of Isabel McMillin, dec.; Ubaldo Traverso, executor & trustee of Estate of Isabel McMillin, dec.

Answer of Complainants-Respondents to Petition of Appeal.

The answer of the above-named respondents to the petition of appeal of the above-named appellant:

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 the 10th day of July, 1926, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; 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.

JOHN L. GRIGGS,
Solicitor for and of Counsel
with Respondents.

Answer of Jane M. McMillin to Petition of Appeal.

The answer of JANE M. McMILLIN, individually and as administratrix of the Estate of Marion McMillin, deceased, and MARGARET CLARK McMILLIN to the petition of appeal of the above-named appellant.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on the 10th day of July, 1926, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purpose in said petition mentioned and as therein set forth; but as to the substance and form of said decree these appellees beg leave to refer thereto when the same shall be produced.

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

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
, with said Appellees.

Answer of Bankers Trust Company to Petition of Appeal.

The answer of the Bankers Trust Company as one of the Executors and Trustees under the Last Will and Testament of Isabel McMillin, deceased, one of the respondents to the petition of appeal of the above-named appellant.

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 decree was on the 10th day of July last past made and entered in the Court of Chancery, in the cause for the purpose mentioned in the said petition, as is 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 it prays that the same may be affirmed with costs to be adjudged to this respondent.

LINDABURY, DEPUE & FAULKS,
Solicitors of Bankers Trust Company as one of the Executors and Trustees under the Last Will and Testament of Isabel McMillin, Deceased.

Answer of Emerson McMillin Stewart to Petition of Appeal.

The answer of Emerson McMillin Stewart (now Emerson McMillin, III), one of the above-named appellees to the petition of appeal of Helen Isabel McMillin, the above-named appellant.

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

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

HART & VANDERWART,
Solicitors for and of Counsel with
Appellee Emerson McMillin Stewart,
now Emerson McMillin, III.

Answer of Maude McMillin and Others to Petition of Appeal.

The answer of Maude McMillin; Corwin M. Butterworth and Emerson M. Butterworth, assignees of Mary McMillin Norton; Paul McMillin Butterworth, executor and trustee of the Estate of Isabel McMillin, deceased; Ubaldo Traverso, executor and trustee of the Estate of Isabel McMillin, deceased; and Estelle McMillin Traverso, to the petition of appeal of the abovenamed appellant:

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 the 10th day of July, 1926, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; 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.

CHAS. C. STALTER,
Solicitor of Respondents, Maude McMillin; Corwin M. Butterworth, and Emerson M. Butterworth, assignees of Mary McMillin Norton; Paul McMillin Butterworth, executor and trustee of the Estate of Isabel McMillin, deceased; Ubaldo Traverso, executor and trustee of the Estate of Isabel McMillin, deceased; and Estelle McMillin Traverso.

New Jersey Court of Errors and Appeals

Between

UBALDO TRAVERSO, PAUL MCMILLIN BUTTERWORTH and BANKERS TRUST COMPANY, Trustees under the last will and testament of Emerson McMillin, deceased,
Complainants-Respondents,

and

ESTELLE MCMILLIN TRAVERSO and others,
Defendants-Respondents,

HELEN ISABEL MCMILLIN,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF OF APPELLANT, HELEN ISABEL McMILLIN.

Statement of the Case.

Emerson McMillin died a resident of Mahwah, in Bergen County, on May 31, 1922, at the age of seventy-eight. The bill of complaint in this cause was filed by the trustees under his will to secure a judicial construction thereof. The will, which was executed on August 29, 1916, is printed in the state of case, pages 25 to 34. It was apparently drawn without aid of counsel, and the solicitors of

the parties to this suit have stipulated that such is the fact, as far as they have been able to ascertain. The meaning of Paragraph Twenty-first is in doubt and to resolve the doubt the bill was filed.

The residuary estate was given to the trustees to hold during the lives of the testator's wife and son. During that term the trustees were to collect the income and to pay therefrom $50,000 per year for the maintenance of the testator's family at his country estate, Darlington, with provision for the payment of $2,500 per year out of said sum to any member of the family preferring not to live there, and $50,000 to each of the six persons named as such members. Item Twenty-first is as follows:

> "Upon the decease of both my wife and my son, the Trust shall,—except as hereinafter provided, cease and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family, as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, *if then living,* share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued." (Italics ours.)

The persons named in Section Sixteen and referred to in Section Twenty-first, above quoted,

were the testator's wife, Isabel Morgan McMillin, his daughters, Mary McMillin Norton, Estelle McMillin Traverso and Maude McMillin, his son, Marion McMillin and his granddaughter, the appellant, Helen Isabel McMillin. All six survived the testator.

For the information of the Court, the testator's family may be thus described:

The testator married twice. By his first marriage he had one child, the defendant, Mary McMillin Norton, who is the mother by her first marriage of the three defendants, Paul McMillin Butterworth, Corwin McMillin Butterworth and Emerson McMillin Butterworth. There were four children of the testator's second marriage to Isabel Morgan McMillin, Emerson McMillin, Jr., Estelle McMillin Traverso, Maude McMillin and Marion McMillin. The appellant, Helen Isabel McMillin, is the only child of Emerson McMillin, Jr., who died in 1905. Estelle McMillin Traverso is the mother by a former marriage of the defendant, Emerson McMillin Stewart, now known as Emerson McMillin, III. Maude McMillin remains unmarried.

The testator's second wife, Isabel Morgan McMillin, survived him by about four months and died on October 5, 1922, at the age of seventy-six. The testator's son, Marion McMillin, died on January 25, 1924, without issue and intestate. He left him surviving his widow, the defendant, Jane M. McMillin, who is the administratrix of his estate. The defendant, Margaret Clark McMillin is the child of Jane M. McMillin by her former marriage.

The testator also had seven brothers and sisters, to each of whom or to their respective lines, the testator gave a pecuniary legacy, as will more fully appear in the discussion of Paragraphs Second to

Eleventh of the will. Upon the testator's death, his executors found that said legacies were distributable among fifty-six persons of the testator's blood, a sister, nephews, nieces, grandnephews, grandnieces, etc.

The trust established by Sections Sixteenth to Twenty-second of the will "ceased and determined" upon the death of the testator's son, Marion McMillin, on January 25, 1924. It was not continued by vote of a majority of the surviving members of the testator's family, as permitted by the Twenty-First Section. Mrs. Norton, Mrs. Traverso, Maude McMillin, and Helen Isabel McMillin are still living. Upon the death of Marion McMillin, each of them became entitled to an equal share, either one-sixth or one-fifth, of the *corpus* of the trust estate. The questions involved are the disposition of the share which the widow, Isabel Morgan McMillin, would have taken if she had survived the time for the division of the corpus, and the disposition of the share that the son, Marion, would have taken if he had survived the division. Under the terms of the will, the widow could not possibly have so survived and it was unlikely that Marion would. He did not, for neither the option of the family nor the decision of the trustees to shorten the term of the trust, as permitted by paragraph Twenty-Second, was exercised.

Grounds of Appeal.

These are set forth in the petition of appeal, state of case, at page 110, line 12 *et seq.* The decree of the Court of Chancery advised by Vice Chancellor Backes, whose opinion is printed at page 84, *et seq.* of the state of case, adjudges:

1. that the share of the residuary estate which would have gone to the testator's widow, Isabel Morgan McMillin, if she had been living at the time of the distribution of the trust estate, shall be distributed by the trustees directly to the residuary legatees of Isabel Morgan McMillin, whose will was also made a part of the bill of complaint in this cause and is found at page 35 *et seq.* of the state of case. By the Fourth item of her will, Isabel Morgan McMillin, bequeathed and devised one-fourth of her residuary estate to each of her three children who survived her, Mrs. Traverso, Maude McMillin and Marion McMillin. The remaining one-fourth part she bequeathed and devised to trustees for the equal benefit of her two grandchildren, Emerson McMillin Stewart (son of Mrs. Traverso) and the appellant, Helen Isabel McMillin, and her step-grandchild, Margaret Clark McMillin (daughter of Jane M. McMillin by her former marriage). More particularly, the decree adjudges (case p. 106) that of said one-sixth part of the residue of the estate of Emerson McMillin, one-fourth shall be paid to Mrs. Traverso, one-fourth to Maude McMillin, one-fourth to Jane M. McMillin, as administratrix of the estate of Marion McMillin, deceased, and the remaining one-fourth to the trustees under the will of Isabel Morgan McMillin, deceased, in trust for the uses and purposes set forth in the said Fourth paragraph of the latter's will; and

2. that the one-sixth part of the residue of the estate of Emerson McMillin, which would have gone to Marion McMillin if he had been living at the time of the termination of the trust estate, shall be paid to Jane M. McMillin, widow of the testator's son, Marion McMillin.

Appellant contends that the decree is erroneous in so ordering payment of said parts of the residuary estate and insists that it should have been adjudged that the remainders were contingent upon the remaindermen surviving the termination of the trust estate; or, if vested, that the remainder to which the widow would have been entitled, had she survived the time for division, was divested by her death before that time leaving heirs; that "heirs" means "issue"; and, whether the remainders were contingent or so divested, that the widow's share should have been adjudged payable to her issue, *per stirpes,* Mrs. Traverso, Maude McMillin and the appellant.

As Marion McMillan died without issue, appellant claims that his contingent remainder either "fell in", with a resulting division of the residue into fifths, or lapsed and passed as intestate property of the testator.

The meaning of the clause "or to the devisee" of any deceased member is too uncertain and ambiguous to be given effect. Appellant submits that it was error to attribute to it the meaning "residuary legatees" of Isabel Morgan McMillan. It is unnecessary to fix the meaning because Isabel Morgan McMillin died leaving issue and the further alternative substitution in favor of her "devisee" was inoperative, whatever its true significance, Marion McMillin died intestate so that under no reasonable interpretation of the word "devisee," would the gift to *his* "devisee" take effect.

POINT I.

It is apparent from the whole will that the testator's dominant purpose was to benefit his own blood.

At the time he executed his will, the testator estimated that the income from his income-producing property, after the payment of pecuniary legacies, would amount to $350,000 per annum, as is apparent from the Nineteenth and Twentieth paragraphs of the will. We understand that his estate proved to be of a value of approximately $8,000,000.

The testator made but a single bequest of a charitable nature, a gift of $10,000 for the purpose mentioned in Paragraph Twelfth of the will.

By the Thirteenth paragraph of the will, the testator made eight bequests of $10,000 each, two of them to his sons-in-law, one to his daughter-in-law, Jane M. McMillin, wife of his son, Marion, a fourth to Margaret Clark McMillin, daughter of Jane M. McMillin by her first marriage, and the remaining four to his grandchildren other than the appellant.

Thus of the entire estate only $50,000 was bequeathed to persons not of his own blood. The charitable bequest mentioned in the Twelfth paragraph was made to lapse if Mrs. Nace, to whom it was given, should predecease the testator and each of the pecuniary legacies given by the Thirteenth paragraph were, by the Fourteenth paragraph, made to lapse if the legatees predeceased the testator, without issue.

By Paragraphs Second to Eleventh, inclusive, the testator gave each of his seven brothers and

sisters, or their respective immediate descendants, a pecuniary legacy.

Before seeking the meaning of the Twenty-first paragraph of the will, which provides for the payment of the *corpus* of the residuary estate upon the termination of the trust, and particularly before the significance of the clause "if then living" can be ascertained, the entire will must be analysed. It appears from what we have said that the estate, barring the small legacy to Mrs. Nace, is given to three classes of beneficiaries:

(*a*) Collaterals,

(*b*) Two sons-in-law, a daughter-in-law, a step-granddaughter and four grandsons, named in Paragraph Thirteenth, and

(*c*) The six members of the testator's own family, named in the Sixteenth paragraph of the will.

As to the Legacies to Collaterals.

Every legacy of this class is made conditional upon the collateral legatee or legatees surviving the testator:

Paragraph Second: To testator's brother Andrew, "provided he does not predecease me."

Paragraph Third: To testator's sister, Ella, "provided she does not predecease me."

Paragraph Fourth: To the grandchildren of testator's sister, Eliza, but "in the event that any of the said grandchildren predecease me leaving issue, such issue shall be the beneficiaries."

Paragraphs Fifth, Sixth, Seventh and Ninth: "To the children (or their heirs)" of two deceased brothers and two deceased sisters of the testator.

Paragraph Eighth: (Alternative of Paragraph Second), to Andrew's "children (or their heirs)" provided Andrew predecease the testator.

Paragraph Tenth: (Alternative of Paragraph Third), to Ella's "children (or their heirs)" provided Ella predecease the testator.

The testator's intention in respect of the gifts to his nephews and nieces in Paragraphs Fifth to Tenth, inclusive, "or their heirs," is defined in Paragraph Eleventh, as follows:

> "Gifts to the children (or their heirs) means to the direct issue of my brothers' or sister's children, and not to issue beyond the second generation, or to others who by adoption or otherwise might be heirs at law, except in the case of my sister, Eliza, where it is her grandchildren and not her children who are made the beneficiaries. In that case her great grandchildren who do not predecease me shall be the beneficiaries."

Testator clearly intended that:

(*a*) Only his blood could take, his brother Andrew, and his sister Ella and the direct descendants of each of his deceased brothers and sisters;

(*b*) In each collateral line the pecuniary legatee or legatees named were of the senior generation thereof having a survivor or survivors living at the date of the will;

(*c*) Only by surviving the testator could such senior survivor or survivors take; and

(*d*) Each legacy should go, in the event that such senior generation should become extinct be-

fore the testator's death, to (and only to) the next generation of that line, or *stirps,* and only if such next generation had survivors at the testator's death.

In his opinion, case, page 94, line 28, Vice Chancellor Backes says that by the Eleventh Section of the will the testator "simply meant to limit the representation, not to restrict the gift to his kin."

We respectfully submit that the learned Vice Chancellor overlooked the full significance of the limitation. It is true that the testator limited the representation, but he likewise restricted the legatees to those of his blood. By no stretch of the imagination can a case be supposed in which any one of the legacies given by Paragraphs Second to Tenth, inclusive, would have become payable to a person not of the testator's blood. By force of the provisions of those paragraphs and of the Eleventh paragraph every one except a brother, a sister, a nephew, a niece, a grandnephew or grandniece, etc., was positively excluded. The testator was careful to exclude all "others who by adoption or otherwise might be heirs at law."

As to Legacies to "In-Laws" and the Four Grandsons.

Similarly the legatees of the second class named in the Thirteenth paragraph of the will, which includes the defendant, Jane M. McMillin, could take only by surviving the testator, and their issue as their substitutes only by so surviving. Otherwise the legacy in question was to "revert" to the estate.

As Jane M. McMillin is not of the testator's blood, it is an unnatural construction that gives

her, as substituted donee, an equal share of the residuary estate with the members of the testator's immediate family in addition to her pecuniary legacy. This will, of all wills, may not be so construed as to give a greater benefit to a stranger to the testator's blood. See *Rowley* v. *Currie,* 94 N. J. Eq. 606, 613; *Miller* v. *Worrall,* 62 N. J. Eq. 776, 779, and *In re Henderson,* 4 Adv. Rep. 1033 (Misc.).

In the disposition of the income and of the *corpus* of the residuary estate upon the termination of the trust, it would be natural to find that the testator limited the class of beneficiaries, to his blood, as he did in the case of collateral legatees.

POINT II.

The condition, "if then living," found in Paragraph Sixteenth, when construed in the light of the entire will, necessarily makes the remainder interests in the residuary estate contingent.

We submit that the phrase "if then living," goes to the substance of the gift. The event specified, *i. e.,* survival at the time of division of the *corpus,* is annexed to the gift itself and constitutes a condition precedent to the vesting of the remainders. In this case, it is not disputed that the word, "then", refers to the time of the expiration of the trust estate and division of *corpus.*

As in the case of the gifts to collaterals we find the testator making a disposition of the *corpus* of his residuary estate, *per stirpes,* naming as the original members of the most favored class, (in addition to his wife who could not take), the senior

living members of each lineal line. The appellant, Helen Isabel McMillin, "if then living", is preferred over the testator's other grandchildren because her father had died before the making of the will.

The phrase, "if then living", was employed by the testator to serve the same purpose in respect of the beneficiaries of the remainder of the trust estate, as the clause "provided he does not predecease me" in the Second and Third paragraphs of the will touching the general legacies therein given. Each clause imposes a clear condition. The purpose of both conditions is to restrict the beneficiaries to persons of the testator's blood by making the gifts depend upon survival of the beneficiaries at the time for payment. Just as only those of his collateral blood relations who survived him could take, so only those who survived the termination of the trust estate were entitled to receive a share of the principal thereof. He intended to restrict the estate to his blood who survived the trust term, *per stirpes,* and studiously avoided a passage of title to any stranger to his blood.

In each direct line of descent, as in each collateral line, the primary legatee named is of the senior generation thereof which had a survivor living at the date of the will and at testator's death.

In each direct line, as in each collateral line, the first substitution, in the event that the primary beneficiary should not be "then living", is in favor of the next generation of that line, as will be seen.

As was said by this Court in *Teets* v. *Weise*, 47 N. J. L. 154, 156:

> "The evident intention of the testator harmonizes with this construction of the language. He intended to keep the estate in those children and grandchildren of his daughter who survived her, and not to put it in the power

> of any of her children who should die before her, without children, to pass the title to a stranger to his blood. The language limiting the estate to the children and grandchildren of his daughter who might be living at the time of her death, is of the substance of the devise, and does not refer to the time of enjoyment. When the event specified is annexed to the devise itself, the estate does not vest unless the event happens. In this case the event did not happen. Richard was not alive when his mother died."

The uncertainty of life is reflected in the law and any limitation depending upon the life of a person at a certain time is contingent rather than vested. When the remainder depends on living beyond the death of the life tenant, it will not vest until the death of the life tenant. A remainder is contingent when dependent on the remainderman surviving the time of distribution.

> *2 Schouler on Wills* (6th Ed.) Sections 1282, 1283;
> *Fearne on Remainders,* p. 216.

Discussing the rule given by *Fearne,* that "the present capacity of taking effect in possession" marks a vested remainder, *Austin's Jurisprudence* says, at p. 895:

> "We may imagine a contingent remainder which is presently capable of taking effect in possession, in case the preceding estate were presently to end. For example: If land be given to A for life, and, in case B survives A, to B in fee, B has a contingent remainder; for it is uncertain whether B will survive A. And yet the estate of B, so long as B lives, is presently capable of taking effect in possession, in case A's estate presently determines. For if

> A were now to die, leaving B him surviving, B's estate would not only become vested by the happening of the given contingency, but by the happening of the same event would also take effect in possession; that is to say, B would become entitled to a present or perfect right coupled with a right of present enjoyment or exercise. The present capacity of taking effect in possession, if the possession were now to become vacant, will not then distinguish a vested from a contingent remainder; inasmuch as there are contingent as well as vested remainders to which the same capacity is incident."

The will at bar is the case put by Mr. Austin. The remainders were each subject to the condition precedent that the remainderman should be living at the termination of the trust. There was uncertainty as to the *right* of enjoyment as well as the usual uncertainty of actual enjoyment.

In *Hutchinson* v. *Exton,* 53 N. J. Eq., 688, the order of the Court of Chancery was unanimously affirmed by this Court for the reasons given by Vice Chancellor Bird. In that case the will directed that at the death of the testator's wife who, with the six children, was entitled to share the income during her lifetime, it should be divided "between my said six daughters, share and share alike, the issue of any deceased child taking collectively the share of the parent." It was held that the remainders to the six children were contingent. Vice Chancellor Bird said:

> "Nothing whatever of the principal of this personal estate is in any manner given to the children of the testator during the lifetime of his widow, who is trustee. Therefore, at the death of Mrs. Hutchinson she had no right or title whatsoever in any of the principal of her

father's personal estate. No part of this could her husband, either as next of kin or as administrator, possibly lay claim to before the death of the widow, who held the title by express directions.

"At the death of the trustee came also the period of the distribution of the estate according to law. Each child then living was entitled to an equal share of the personal estate, and in case of the death of any, leaving children, such children were entitled collectively to the share the parent would have taken if living. Here, then, at the period of distribution express provision is made for the persons who are to take. In case of the death of any child, leaving children, such children are substituted in the place of the parent."

The case at bar is stronger because of the express condition imposed upon the right of enjoyment by the phrase "if then living." While the six Exton daughters were not named in the clause providing for the division of the remainder it would seem that they had been named in an earlier clause of the will, but whether that is so or not the decision was not rested upon the ground that the gift was to a class. As in the case at bar, at the period of distribution, "express provision was made for the persons who are to take."

In *Robinson* v. *Palmer,* 90 Me., 240, 38 Atl. Rep. 103, the Court considered a will which provided that at the death of testator's wife the residue of his estate should be "apportioned equally among my children (naming them) *if they shall be living,* but if they or any of them shall die previous to the death of my wife, then his or her portion shall descend to his or her children." Two of the children died before their mother leaving children surviving her, and one with no children, but a

widow. It was held that the last mentioned child took no interest under the will which he could devise. The Court said:

> "For while it is true that courts have very generally adopted the rule of construction that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested, it is equally well settled that in the interpretation of wills the intention of the testator must control.
>
> "The persons who were to take this remainder upon the termination of the life estate were not ascertained. They were the four children named, if living. Until the termination of the precedent estate by the death of the life tenant, it was impossible to tell who would take under this devise. The estate was so limited that its vesting depended upon a contingency. The testator used language commonly employed for the purpose of expressing an intention that the vesting of the remainder was to depend upon the contingency.

Neilson v. *Bishop*, 45 N. J. Eq., 473, and *Miller* v. *Worrall*, 59 N. J. Eq., 134, reversed on other grounds, 62 N. J. Eq., 776, were cited by the Court below to support the conclusion that the remainders vested at Emerson McMillin's death. In neither case was any condition imposed, as here, upon the vesting. The will under consideration in *Security Trust Co.* v. *Lovett*, 78 N. J. Eq., 445, also cited in the opinion of Vice Chancellor BACKES, is another example of an *unconditional* gift to remaindermen, with provision for divesting in favor of the issue of a remainderman dying before the distribution. Vice Chancellor STEVENS pointed out in *Miller* v. *Worrall* that there was an immediate and express gift to

the remaindermen, who were also entitled to payments on account of principal in the lifetime of the widow, with her consent. *Neilson* v. *Bishop* was decided in the Court of Chancery prior to the decision of this Court in *Hutchinson* v. *Exton, supra,* upon which appellant relies, and the provisions of the will considered in the earlier case differ materially from those contained in the *Exton* will and in the instant will.

POINT III.

The clause "or their heir or heirs" must be construed to mean "or their issue."

1. The same words employed in a particular sense in one part of a will must be held to have been used in the same sense in all other parts of the will.

Stewart v. *Stewart,* 61 N. J. Eq. 25 (as to words, "I desire");
Dennis v. *Dennis,* 86 N. J. Eq. 423, 428 (as to word, "issue");
Cody v. *Bunn,* 46 N. J. Eq. 131, 133 (as to, "or their lawful heirs");
2 Jarman (5th Ed.) 733.

In the will under consideration the same clause, "or their heirs" was used in Paragraphs Fifth to Tenth, inclusive, and was thereupon defined in Paragraph Eleventh as meaning "direct issue and not to issue beyond the second generation, or to others who by adoption or otherwise might be heirs at law." Here we find a clear distinction drawn between "heirs" and "heirs at law." The testator

undoubtedly intended to exclude from inheritance the spouse of any beneficiary. The term "heirs" was further limited, as we have seen, to the senior generation having surviving members.

In the Sixteenth paragraph of his will the testator first described his wife, his four children and the appellant, his granddaughter, as his direct "heirs at law." Probably realizing that he had defined "heirs" as "issue", and that his residuary legatees included his wife who would not be an "heir" within his own definition, the testator felt that some further definition was necessary and hit upon "members of my family." Thinking that this might be too broad, he further described them as residuary legatees and finally named them. If they had not included his wife, he probably would have referred to them simply as "heirs" which he clearly regarded as the equivalent of issue of the senior generation of each *stirps*. Upon providing for the substitutionary remainder to the "heirs" of the members of his family, he felt relieved of any necessity of again defining the term as meaning "issue."

2. The doctrine of the cases in which "heirs" has been construed to mean next of kin entitled to take under the statute of distribution, is not criticized. However, we submit that the meaning of "heirs," as gathered from the entire context of the will of Emerson McMillin, is "issue." Not only has the testator defined the meaning of "heirs" within the four corners of the will, but as already demonstrated, his dominant purpose was to benefit only those of his blood. For a similar reason "heirs" was held to mean "children" in *Cody* v. *Bunn*, 46 N. J. Eq. 131, 134. In numerous cases in New Jersey the word "heirs" has been construed to mean "issue."

Bruere v. *Bruere,* 35 N. J. Eq. 432;
Chadwick v. *Chadwick,* 37 N. J. Eq. 71;
Baldwin v. *Taylor,* 37 N. J. Eq. 78;
Randolph v. *Randolph,* 40 N. J. Eq. 73;
Dean v. *Nutley,* 70 N. J. L. 217;
In re Smisson, 79 N. J. Eq. 233, 242.

We do not think that those cases "were decided upon peculiar circumstances." On the contrary, we believe and submit that the facts involved make them exact authorities for the case at bar.

In *Bruere* v. *Bruere,* lands were conveyed to the defendant in trust for the use of Henry Bruere, for his life, and at his death to convey the same to Henry's child or children "or their heirs"; and further, in default of such heirs, to Robert Bruere, his heirs and assigns. Henry, the life tenant, died leaving two children, the complainants, who were unmarried and without issue and who sued to compel the trustee to surrender the fee of the lands to them.

It was held that "heirs" meant "issue" because if it meant any persons capable of succeeding to the inheritance, there could be no default in heirs, and, therefore, no occasion for the last limitation in favor of Robert, so long as the defendant, who was the complainants' paternal uncle, or any persons of his blood, were in existence. Vice-Chancellor Van Fleet in deciding that the complainants were entitled to a conveyance, said:

> "Hence, it is clear, I think, that the word "heirs" was not used in its most comprehensive sense. To so construe it, would render one provision of the trust entirely abortive. Another construction may be adopted, which will give effect to each provision of the trust. The Court is bound in construing an instrument, when its language may be read, fairly, in two senses, to

> adopt that reading which will give full effect to all of its provisions, in preference to a construction which will permit only part of its provisions to be carried into effect."

In the case at bar, after the substitutionary remainder to the "heirs", a further remainder is given to the "devisee." If "heirs" were construed in its broadest sense as meaning heirs at law and next of kin or those entitled to take under the statute, the last alternative remainder would be unnecessary because the heirs at law and next of kin of the testator's issue would include the collateral, as well as the lineal, heirs at law and next of kin of the testator. It appears from the evidence in this cause that the legacies to collaterals mentioned in Paragraphs Second to Tenth were divided among fifty-six persons of the testator's blood. It is inconceivable that the testator considered the possibility of failure of all those who would have been entitled to take under the statute. It is natural, however, whatever the meaning of "devisee," that he should have considered and tried to provide against intestacy upon the failure of *issue* of a particular line.

In this connection it is to be noted that in the Twenty-first paragraph the testator used the singular as well as plural of "heirs." He directed that if any of his primary residuary legatees should be deceased, "their *heir* or heirs" should take. The testator had in mind one or more issue. Mrs. Traverso had one child living and Mrs. Norton had three. Testator cannot be supposed to have contemplated the death of all of his four living children, all of his five grandchildren, and all of his collateral blood relations, who proved to be fifty-six in number.

In *Baldwin* v. *Taylor, supra,* the testator by the ninth clause of his will gave the residue of his estate, real and personal, to his executors, to invest the sum of $4,000 and pay certain of the income therefrom to his widow, and to divide "the balance equally among my children or their heirs." By the Tenth clause he stated that it was his intention that if any of his children should die "leaving heirs," their portion should go "to such heirs, if not, it shall be divided among my surviving children." Chancellor Runyon said:

> "The words, or their heirs, are evidently substitutionary, and by the word, heirs, the testator undoubtedly meant issue. His intention, judged by that section alone, was to provide that his children should have that balance absolutely, if they should be alive at the time of the distribution to take it, but if any of them should then be dead, their issue should take in their stead * * * . The tenth section is merely an extension of the substitutionary provision of the ninth."

In the Court below importance was attached to the provision of the Sixteenth paragraph that all members of the family were "to be equal in every respect, as to his or her interest in the trusteed estate." By that provision the testator intended to direct *equality stirpitally.* Stirpital equality was to exist regardless of the advancements made by the testator to various members of his family to which he refers in Paragraph Sixteenth. It was to exist regardless of the independent means of the appellant, to which the testator refers in the same paragraph. It was to exist notwithstanding one of the residuary legatees was a grandchild while four were the testator's own children. The equality existed also as to income, not only while all six of

the residuary legatees should survive but after the death of any one, for then his or her share of the income was made payable, in the words of the will "to the heirs or to the devisee of such member."

In the case of *In re Smisson,* 79 N. J. Eq. 233, 241, Chancellor Pitney said:

> "Next we come to the clause—'to be distributed among his or her heirs.' The word 'heirs' is used as a substitutionary term, and, when taken in connection with the context, it seems to me to show that *each recurring installment of income when it accrues (from and after the death of any of the three children of the testator) shall be distributed among those who at the time it accrues are appropriately to be described as 'his or her heirs'.* And, of course, where the deceased child of the testator leaves issue living at the time the income accrues, such issue are 'his or her heirs' within the meaning of the clause. * * * I think the word 'heirs', in this instance, means the same as issue." (Italics ours.)

3. In its general usage the word "heirs" does not include the widow of a deceased person. At common law the widow was not an heir; she was not of the blood, nor did she take as heir any right in her husband's real property. To conclude that the testator, because he employed this term of technical significance, must be deemed to have used it in the technical sense attributed to it in such cases as *Meeker* v. *Forbes,* 84 N. J. Eq., 271, aff'd. 86 N. J. Eq. 255, is to assume that the testator knew the technical meaning adopted in the reported cases, and used "heirs" accordingly, "albeit, he was as ignorant of it as at birth" (*Barrett* v. *Egbertson,* 92 N. J. Eq. 118). It is no less reasonable to assume that the testator was familiar with the word

"heirs" in its general, or common law, significance. The rule exemplified by *Meeker* v. *Forbes* must be conceded to be artificial, and inapplicable when from a reading of the entire will it is apparent that the testator intended to name as his beneficiaries only those of his own blood.

POINT IV.

If the remainders were vested, the remainder to Isabel Morgan McMillin was divested in favor of her issue.

If the remainders should be regarded as vested the one-sixth share of the *corpus* to which the testator's widow, Isabel Morgan McMillan, would have been entitled if she had been "living" at the time of the division directed by the will, must, within the principle of the following cases be regarded as having been divested in favor of her "heirs" (which we have argued means "issue").

Cody v. *Bunn,* 46 N. J. Eq. 131;
Dawson v. *Schaefer,* 52 N. J. Eq. 341, aff'd on opinion below 53 N. J. Eq. 238;
Cook v. *McDowell,* 52 N. J. Eq. 351;
Security Trust Co. v. *Lovett,* 78 N. J. Eq. 445;
Schmieder v. *Meyer,* 97 N. J. Eq. 335.

Vice Chancellor Backes, in his opinion below, in fact holds that both the widow's remainder and the remainder to the testator's son, Marion, were divested by their respective deaths and, to use his language, "vested in the substituted donee in his or her stead" (case page 91, line 10). Citing *Crane* v.

Bolles, 49 N. J. Eq. 373. If so, the meaning of "or their heir or heirs" is unaltered and the issue of Isabel Morgan McMillin take. We respectfully differ, however, with Vice Chancellor Backes' ruling as to the identity of the substituted donees.

The learned Vice-Chancellor assigns to the whole phrase "or to their heir or heirs or to the devisee of any deceased member or members" the meaning that the widow's and Marion's shares "pass to those who would inherit from them." In our next point we indicate the great uncertainty of the meaning of "devisee." Whatever its meaning, we submit that there is no justification for the position that the testator "conceived that 'devisee' supplanted 'heirs' and meant that the devisees (*sic*) should take to the exclusion of heirs, if there was a will." That overlooks the order of phrases (*Pennsylvania Company* v. *Riley,* 89 N. J. Eq. 252, 257) and that *blood comes first* throughout Emerson McMillin's will.

The order of the substitutionary gifts is but another example of the testator's care to place his blood first. The ruling that "devisee" displaced or "supplanted" the testator's own blood, "his heir or heirs", flies in the face of the dominant intention of the testator manifested throughout the will. No authority is cited to justify the transposition of the substitutionary gifts and we respectfully submit that it is unsupported by reason. Both substitutionary clauses are in the disjunctive: "*or* to their heir or heirs *or* to the devisee of any deceased member or members." The first disjunctive, "or their heirs" was employed in Paragraphs Fifth to Tenth, inclusive, admittedly as substitutionary for what preceded and to take effect only if the earlier-mentioned estate failed to vest. That emphasizes the *addition* of the further alternative gift to the

devisee in the Twenty-first paragraph, repeated in the same sequence in the Twenty-second paragraph. Assume a gift "to A, if living, or B or C." A being deceased, it would not be supposed that C's title would vest in preference to B's, if B were alive to take at the appropriate time. The testator would more naturally anticipate that his remaindermen would die testate, than that they would die intestate. If he intended that any persons named in the wills of his remaindermen, whether as residuary legatees, residuary devisees, appointees or otherwise, were to become *his* substituted remaindermen, and that "heirs" of his remaindermen were to be substituted only in the case of an intestacy of a particular remainderman, he would have said "to their devisee or to the heir or heirs of any deceased member or members."

POINT V.

The meaning of "or to the devisee" and the immateriality of the meaning.

It must be conceded that the force to be attributed to those words, employed as substitutionary for the "heir or heirs" of the primary remaindermen, is difficult of ascertainment. By force of the decree the word, "devisee" has been given the meaning "residuary legatees" of the primary remainderman, Isabel Morgan McMillin. We think it as reasonable to speculate that the testator intended to create a power of appointment. If so, it was not exercised by the terms of the widow's will and the son died intestate. But the effect of the Vice Chancellor's ruling is the same as if a power of appoint-

ment had been given her, unconditioned upon a failure of her "heirs", and as if that power could be regarded as exercised by the residuary clause of her will, contrary to authority. *Lippincott* v. *Haviland,* 93 N. J. Eq., 585. It may also be argued with force that devisee includes legatee and embraces the plural as well as the singular. But, if so, what legatee or legatees? Why the residuary legatees? The testator was well conversed with the meaning of "residuary legatees" and correctly employed the expression repeatedly to describe his own. What justification is there for assuming that he intended to employ another inapt word as a synonym when referring to the residuary legatees of other persons? Perhaps other more or less reasonable conjectures could be indulged as to the possible intent of the testator in the peculiar use of the word, "devisee." No suggestion has been made, however, that appears to us to have the support of a forceful manifestation of a defined intent upon his part.

It is unnecessary to fix his intent because the order of the substitutionary gifts may not be disregarded. Hence, in the case of the widow's share, her heirs, i. e., her issue, and not her residuary legatees, take. In the case of the son's share it is not suggested that the word, "devisee" can have any effect in view of his intestacy.

POINT VI.

The decree errs in adjudging that the share of *corpus* which would have gone to Marion McMillin if he had been living at the time of division shall be paid to his widow, Jane M. McMillin, regardless of whether the remaindermen took in severalty or as a class.

The case of *Dildine* v. *Dildine,* 32 N. J. Eq., 78, is cited in the opinion below to support the view that, the remainders having been given to the remaindermen by name, the gift was to them severally and not as a class. In the cited case it was held that the gift to a remainderman, being several, lapsed and that the testator therefore died intestate in respect of one-half of the property under consideration. We have shown that Marion McMillin received only a contingent remainder and as he died intestate and without issue the substitutionary remainders both failed. Applying the doctrine of *Dildine* v. *Dildine,* Emerson McMillin died intestate as to the *corpus* of one-sixth of his residuary estate and the decree of the Court of Chancery should have adjudged that so much of said one-sixth share as was real estate is payable to the testator's heirs at law and so much of said share as was personalty is payable to his next of kin. (See Point VII, *infra.*) While the law looks with disfavor upon a construction resulting in even partial intestacy, where as here a testator gives a remainder to one beneficiary, if living, to the issue of that beneficiary, if deceased, and, failing such issue, to the devisee of the beneficiary, whatever meaning he assigned to that word,

it cannot be presumed that he contemplated a failure of all three remainders and, ergo, that he intended that the first remainder should be vested. In the absence of the reason for the presumption against intestacy, there is no room for the application of the rule. Furthermore, in *Dildine* v. *Dildine,* the Court was careful to point out that while gifts to named individuals are presumed to be to them as individuals, "if it appears by other parts of the will that it was the testator's intention that the persons so named should take as a class and not as individuals, the will will be construed accordingly." In *Security Trust Co.* v. *Lovett,* 78 N. J. Eq., 445, 452, Vice Chancellor Leaming thought it apparent that notwithstanding the naming of certain remaindermen it was the intention of the testator to give to them as a class. He said:

> "This general plan discloses a purpose on the part of testator to dispose of his entire estate and to dispose of it in equal shares in such manner that the children of his deceased daughter should represent their mother and take their mother's share. The mere fact that the children of his deceased daughter were mentioned by name should not, I am convinced, be considered sufficient to overcome the intent which seems otherwise apparent."

We have already argued that the testator intended a lineal *stirpital* distribution of the *corpus* of his residuary estate. Upon the death of one of his children without issue we think it more probable that he intended that such child's share should "fall in", with a resulting division of the *corpus* among the five remaining *stirpes,* as in the case last cited, than to conclude that he died intestate as to one-sixth, as in the *Dildine* case.

Whether the *corpus* was given to the remainderman severally or as a class, the decree should be reversed. Upon neither hypothesis would Marion McMillin's widow take, if, as we have argued, the remainder to Marion was contingent and the word, "heirs" is confined to persons of the testator's blood.

POINT VII.

It is immaterial that there was an equitable conversion of the testator's real estate.

We do not dispute that for the purposes of the will the testator's real estate was equitably converted. However, it is a well settled rule that conversion is deemed to be for the purposes of the will only, and if those purposes fail the property is considered to have retained its character as realty.

> *Roy* v. *Monroe,* 47 N. J. Eq., 356
> *Canfield* v. *Canfield,* 62 N. J. Eq., 578,
> *Moore* v. *Robbins,* 53 N. J. Eq., 137
> *Tichenor* v. *Mechanics & Metals Bank,* 96 N. J. Eq., 560.

If upon the authority of *Dildine* v. *Dildine, supra,* it be held that the testator died intestate as to the one-sixth of the *corpus* which Marion McMillin would have taken if he had survived the time of division, then the testator's real estate retains its character as such, although converted into personalty for the purposes of the will.

CONCLUSIONS.

In conclusion, we respectfully submit that the decree of the Court of Chancery should be reversed, for the reasons that:

A. As to the widow's share, her issue and not her residuary legatees take, and that regardless of whether the remainder to her was vested or contingent;

B. As to Marion McMillin's share, the same is distributable among the other remaindermen, *per stirpes,* because his remainder was contingent and he died before it vested, without issue and intestate; or, in the alternative, his share lapsed and passes as intestate property of the testator, Emerson McMillin,—the personalty to the latter's next of kin under the statute of distributions and the realty to his heirs at law under the statute of descent.

Respectfully submitted,

PITNEY, HARDIN & SKINNER,
Solicitors for the appellant,
Helen Isabel McMillin.

SHELTON PITNEY,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

Ubaldo Traverso, Paul McMillin Butterworth and Bankers Trust Company, Trustees under the last will and testament of Emerson McMillin, deceased,
Complainants-Respondents,

and

Estelle McMillin Traverso and others,
Defendants-Respondents,

Hleln Isabel McMillin,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF OF BANKERS TRUST COMPANY AS ONE OF THE EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF ISABEL MORGAN McMILLIN, DECEASED, DEFENDANT-RESPONDENT.

Statement of Facts.

The bill of complaint in this cause was filed to secure a judicial construction of the last will and testament of Emerson McMillin, deceased, and particularly of the sixteenth to the twenty-second paragraphs, inclusive (Case, pp. 28-33).

In the sixteenth paragraph the testator provides in part as follows (italics ours):

> "My direct heirs at law, members of my family and residuary legatees of the Estate

> Trusteed in Section Seventeen, *and all of whom are to be equal in every respect as to his or her interest in the Trusteed Estate* are: my wife, Isabel Morgan McMillin, now of Darlington, Mahwah, New Jersey; my daughters, Mary McMillin Norton, wife of Oliver D. Norton, now of Santa Barbara, California; Estelle McMillin Traverso, wife of Ubaldo Traverso, now of Florence, Italy; Maude McMillin (unmarried) of Darlington, Mahwah, New Jersey; my son, Marion McMillin, of Darlington, Mahwah, New Jersey; and my granddaughter, Helen Isabel McMillin (only child of my deceased son, Emerson McMillin, Jr.), now of Darlington, Mahwah, New Jersey."

After stating that he had previously made ample provision for all of the persons named and that his granddaughter, Helen Isabel, had inherited liberal sums from her father and from her mother, he provided further as follows:

> "To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington Estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin."

The seventeenth paragraph provides in part as follows (italics ours):

> "SEVENTEENTH: *I give, devise and bequeath unto my Trustees* to be hereinafter named, and their succesors, *in trust however, for the persons named in Section Sixteen, all the residue of my Estate,* including &c. * * * The Trustees shall permit the Darlington Estate with all its comprehends to be used free of all rent and with absolute control by the family, with power, through my son, Marion, or other chosen head of the family, to

operate the Farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees."

By the eighteenth paragraph he provided that all income of every kind, except the income from the Darlington Estate during its retention by the family, should be paid to and received by the trustees for the benefit of the trust estate and power was given to the trustees to sell, dispose of, convey and give title to any kind of property, real and personal, at any and all times when deemed advisable by them *"except as to the disposition and sale of the Darlington Estate during the life of my wife."*

By the nineteen paragraph the testator directed that from the income of the trust estate the trustee should pay to his wife, Isabel Morgan McMillin and to his son, Marion McMillin jointly the sum of $50,000. per year, payable quarterly, for the maintenance of the family at Darlington and the upkeep and improvement of the Darlington Estate; that if his wife should predecease him then the $50,000. should be paid to his son alone for such purpose. In this paragraph he also provided that if the family should desire to retain Darlington after the decease of both his wife and his son they should designate a head of the family in a manner that should be satisfactory to the trustees and the person so designated should receive and disburse the Darlington Estate Annuity. He also directed that if any of the persons named as his direct heirs and members of his family should prefer not to make their home at Darlington then such person or persons should each receive $2500.

per year in quarterly payments to be taken by the trustees from the Darlington Estate fund of $50,000. per year.

By the twentieth paragraph the testator provided that from the income of the trust estate, after deducting the Darlington Estate Annuity of $50,000. per year the trustees should pay "to each of my direct heirs (and persons designated as members of the family and legatees of the Trust Estate), that is to say,—pay to Isabel Morgan McMillin, my wife, to Mary McMillin Norton, to Estelle McMillin Traverso, to Maud McMillin, to Marion McMillin and to Helen Isabel McMillin, or in the event of the decease of any of the above named members of the family, then to the heirs or to the devisee of such member, the sum of fifty thousand dollars per year, payable quarterly."

He further provided that if the income of the trust estate together with any accumulated income from previous years should be insufficient to pay $50,000. for the maintenance of the family and the upkeep of the Darlington Estate and $50,000. to each beneficiary named in such Section then the sum of annual payments to the Darlington fund and to each individual named should be reduced pro rata and that on the other hand, the annual payments might be increased pro rata if the excess of annual income or of accumulations should, in the judgment of the trustees, warrant such increase, stating that it was not his intent that the Trustees should strive to increase the total value of the estate but that they should be liberal in their distributions.

The twenty-first and twenty-second paragraphs are as follows:

> "TWENTY-FIRST: Upon the decease of both my wife and my son, the Trust shall,—except

as hereinafter provided, cease, and determine, through the Trustees disposing by sale of all the undivisable property (excepting only my Mausoleum in Woodland Cemetery in the City of New York, which Mausoleum is to be and remain the property of my family, as designated in Section Sixteen of this instrument and to their heirs, and to be used for the purpose for which it was constructed); and (after paying cost of administration) by making an equal division of all the assets between the persons named (in Section Sixteen) as direct heirs and members of the family and who are named as residuary legatees, if then living, share and share alike, or to their heir or heirs or to the devisee of any deceased member or members. Provided, however, that so long as a majority in number of the surviving members of the family, (as named in Section Sixteen), so desire the Trust shall be continued.

TWENTY-SECOND: After the decease of my wife and before the decease of my son, if such be the order of their decease, the Darlington home may be disposed of by sale, if two Trustees shall,—for financial reasons,—deem it advisable. Or if a majority of the remaining or surviving direct heirs and members of the family shall formerly request the Trustees to dispose by sale of the said Darlington Estate, it shall be disposed of accordingly, and the annual payment for its maintenance shall cease. Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the Trustees to promptly divide up the divisable assets, sell the remainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees.''

The will was executed on August 29, 1916. The testator died on May 31, 1922, and his will was probated before the Surrogate of the County of

Bergen on June 12, 1922. All of the persons named as direct heirs and members of the family of the testator survived him. These persons were in fact his only heirs at law and next of kin. His wife, Isabel Morgan McMillin, died on the 5th day of October, 1922, a little over four months after the testator's death, leaving a last will and testament executed on the 7th day of April, 1922, which was probated on the 27th day of November in that year.

The testator's son, Marion, died intestate and without issue, on the 25th day of January, 1924, leaving him surviving his widow, Jane M. McMillin, who has been appointed his administratrix.

Upon the death of Marion McMillin the surviving members of the family referred to in the 21st paragraph of the will, did not exercise the option to retain the Darlington Estate as a family residence but desired that the trust be terminated and the corpus distributed to the persons entitled thereto.

The only real property of which the testator died seized was the Darlington Estate at Mahwah and about three hundred acres of pine scrub land in Michigan worth about $300. The trustees have sold the Darlington Estate with the personal property appurtenant thereto and are ready to distribute the residuary estate.

A copy of the will of Isabel Morgan McMillin is annexed to the bill of complaint (Case, p. 35). This will, after providing for several money legacies of comparatively small value, provided that the residue should be divided into four equal parts, one of which parts she gave to her daughter, Estelle Marie Traverso, another to her daughter, Maude McMillin, and another to her son, Marion M. McMillin. The other fourth part she gave to her trustees in trust to hold for the benefit of her

grandchildren, Emerson McMillin Stewart, Helen Isabel McMillin, and her step grandchild, Margaret Clark McMillin, in equal shares providing that the net income of said fourth part should be paid quarterly in equal shares to such beneficiaries during their minority. She further provided that when each of such beneficiaries should reach the age of twenty-one years and at any time thereafter until such beneficiaries should reach the age of thirty years the trustees should pay and distribute to such beneficiary so reaching his or her majority, one-third of the principal of said fourth part if, in the opinion of such trustees, it should be to the best interest of such beneficiary to then receive his or her share of the principal but that such distribution should be made at all events when such beneficiary should reach the age of thirty years; that in case any said beneficiaries should die either before or after her death before the period when said one-third part of said principal should be payable to him, leaving issue, the share of such beneficiary should go to his issue, but in case he should leave no issue the share of such beneficiary so dying should go to the survivor or survivors of them in equal shares.

The controversy involves the disposition of the one-sixth share of the corpus of the trust fund which was bequeathed to the testator's widow, Isabel Morgan McMillin, and of the one-sixth share of such corpus bequeathed to the testator's son, Marion McMillin.

In the court below, counsel for the Bankers Trust Company, as one of the executors and trustees under the will of Isabel Morgan McMillin, deceased, contended that the respective one-sixth shares bequeathed by the testator to the persons designated as his direct heirs at law and members of his family vested in each of them respectively

at the testator's death and were not subject to be divested by the death of any of them prior to the termination of the trust and that, therefore, the one-sixth share bequeathed to the testator's widow should be paid to her executors.

Counsel for Helen Isabel McMillin, the appellant, contended that the shares did not vest until the termination of the trust and that if they did so vest they were subject to be divested by the death of any beneficiary during the continuance of the trust in favor of the issue of such beneficiary, if any, and if such beneficiary died without issue then in favor of his devisees.

The Court of Chancery found that the shares vested upon testator's death, but that upon the death of the widow and of Marion, their shares were divested; that the widow's share passed under the will to the residuary legatees named in the widow's will and that Marion's share passed to his widow, she being the person who was entitled under the Statute of Distributions to his estate and therefore being his heir within the meaning of the word as used in the provisions of the will in question. The opinion of Vice-Chancellor Backes, who heard the case, appears on pages 83 to 96 of the State of the Case.

ARGUMENT

POINT I.

The direct heirs and residuary legatees mentioned in the sixteenth paragraph of the will each took a vested interest in the corpus of the residuary estate upon the testator's death.

We submit that it clearly appears from a reading of the will that the interest of the beneficiaries named as direct heirs and members of the testator's family vested upon the testator's death. This view is supported by the following facts:

(a) The testator made an express and immediate gift to the trustees in trust "for the persons named in Section Sixteen" of the will.

(b) Both the income and the corpus were given to or for the benefit of the same persons in the same proportions and the enjoyment of the income by such persons commenced at testator's death.

(c) The postponement of the distribution of the corpus was solely for the purpose of providing a fund for the maintenance of Darlington as a home for the beneficiaries.

These reasons will be considered in the order in which they have been stated.

(a) *The testator made an express and immediate gift to trustees in trust "for the persons named in Section Sixteen" of the will.*

This gift appears in the beginning of the Seventeenth paragraph. It is as follows:

> "*I give, devise and bequeath* unto my Trustees to be hereinafter named, and their suc-

> cessors, *in trust, however, for the persons named in Section Sixteen, all the residue of my Estate.*"

This is an immediate gift to trustees in trust for the six direct heirs and residuary legatees named in the Sixteenth paragraph of the will, and for no one else, and is equivalent to a direct gift to those persons.

In *Neilson* v. *Bishop,* 45 N. J. E. 473, Vice Chancellor Van Fleet said, at page 476:

> "The gift under consideration was not made directly to the legatees, but to trustees, for the sole use and benefit of the legatees. The gift to the trustees is absolute. They held the $12,000. by as perfect a title as could be made. They held it, however, not for their own benefit, but for the benefit of their *cestuis que trust.* The terms of the trust were, that they were to hold and invest the money, for the benefit of their *cestuis que trust,* until the youngest of the two became of lawful age, and then the fund, principal and interest, was to be paid to the *cestuis que trust,* share and share alike. A gift in this form is in equity equivalent, in all respects, to a direct gift to the *cestuis que trust.* They are in fact the legatees. *Cushing* v. *Blake,* 3 Stew. Eq. 689, 695."

See also

Booraem's Case (N. J. Prerogative Court, 1897), 55 N. J. Eq. 759.

In *Fidelity Union Trust Co.* v. *Rowland, et al.,* 4 Adv. Rep. 603, Vice Chancellor Backes said:

> "A gift to the trustee is regarded in equity as a gift to the legatee and as the fund vested in the trustee at the death of the testator so it vested in the legatee with the immediate use in him of the income, the enjoyment of the principal being postponed until his thirtieth year."

Where a will contains words of present gift and no contingency is annexed thereto the legacy will vest.

> *Cushing* v. *Blake* (Court of Errors and Appeals, 1879) 30 N. J. E. 689;
> *Neilson* v. *Bishop* (Court of Chancery, 1889) 45 N. J. E. 473;
> *Booraem's Case,* (N. J. Prerogative Court, 1897) 55 N. J. E. 759;
> *Miller* v. *Worrall* (Court of Chancery, 1899) 59 N. J. E. 134;
> *Fidelity Union Trust Co.* v. *Rowland,* 4 Adv. Rep. 603;
> *Kimble* v. *White* (Court of Chancery, 1892) 50 N. J. E. 28, affirmed on opinion below, 51 N. J. E. 638.

In *Miller* v. *Worrall, supra,* the testator gave all his property, real and personal, to his executors in trust (*inter alia*) to pay to his wife during her life for the support of herself and his maiden daughters, such amounts, not exceeding the net income of his estate, as she might request. By a codicil he directed his executors, upon the death of his wife, to settle and close up his estate with all convenient speed,

> "and divide the entire amount thereof equally between my children, share and share alike, to whom I do hereby give, devise and bequeath the same, their heirs and assigns forever, the children of any deceased child to have the share of his, her or their parent."

Speaking of this bequest, Vice Chancellor Stevens said at page 135:

> "That such a gift vests at the death of testator, has been settled in this state by the cases of *Howell's Executors* v. *Green,* 2 Vr. 570, and *Post* v. *Herbert's Executors,* 12 C.

> E. Gr. 542. The case at bar is rather stronger than either of those cases, for in the first the provision was '*after her* (i. e., the life tenant's) *decease,* I give and bequeath,' and in the second, the gift was found only in the direction to divide, while here, the gift is both express and immediate, 'I do hereby give, devise and bequeath,' the direction to divide being superadded."

This case was reversed on another ground in 62 N. J. E. 776. Justice Fort, speaking for this court said:

> "We agree with the conclusions reached by the learned vice-chancellor in the case, in so far as they relate to the construction of the last will of John Jelliff, where he holds that, under said will and codicils thereto annexed, his children living at his death took a vested interest in his estate, and that nothing occurred prior to the death of his daughter, Caroline A. Riggs, by which she was divested of her interest."

In *Burroughs* v. *Jamieson* (Court of Chancery of N. J., 1902), 62 N. J. E. 651, at page 654, Vice Chancellor Grey said:

> "The words of the nineteenth item giving the legacy are words of present gift. The time of enjoyment only is postponed. Thomas survived the testator. The legacy vested in Thomas on the testator's death. It then became an asset of Thomas Downing. The words giving this legacy are within the settled rule that where the words of gift are *in praesenti,* and the time of enjoyment only is postponed, the legacy vests immediately upon the death of the testator. *Gifford* v. *Thorn,* 1 Stock. 705 (Court of Appeals)."

(b) *Both the income and the corpus were given to or for the benefit of the same persons in the*

same proportions and the enjoyment of the income by such persons commenced at testator's death.

The testator provided, in the 19th Section of his will for the payment of $50,000. from the income of his residuary estate to his wife and his son jointly for the maintenance of the family (meaning thereby the persons designated in Section 16 as members of his family) at Darlington and the upkeep and improvement of the Darlington Estate.

In the 20th Section the testator provided that an annuity of $50,000. per year should be payable to each of the persons designated as direct heirs and members of his family and legatees of the trust estate naming them. In this paragraph he stated that if the trust estate should not produce in any year an income sufficient together with any accumulated income from previous years, to pay the Darlington Estate annuity and $50,000. to each beneficiary then the annual payments to the Darlington fund and to each individual should be reduced *pro rata* and that on the other hand, the trustees might increase the several annual payments *pro rata* whenever, in their judgment, the excess of annual income or excess of accumulations should warrant such increase. He stated that it was not his intent that the trustees should strive to increase the total value of the estate but that they should be liberal in their distribution. Provision was made for the payment, out of the Darlington Estate fund, of $2,500. per year to any beneficiary who did not desire to live at Darlington.

It thus appears that it was the intent of the testator that substantially the entire income of his residuary estate should be distributed equally

among the persons named as beneficiaries or else expended for their maintenance at the Darlington Estate so that the will contains not only a direct and immediate gift of the entire residuary estate to the named beneficiaries but also a provision for the immediate enjoyment by them of the income therefrom.

The authorities all hold that where, as in this case, a legacy is given to trustees for the exclusive benefit of the legatee until the happening of an event upon which the payment of the corpus of the fund to him is made to depend, the legacy is vested. Some of the English cases have gone so far as to hold that where there is a gift of a legacy or residue upon marriage with direction to pay the income thereof to the legatee until marriage the legacy vests at the testator's death because of the direction to pay income.

Booth v. *Booth,* (Eng. 1799) 4 Vesey Jr.'s Rep. 399;
Vize v. *Stoney,* (Eng. 1841) 2 Drury & Walsh's Rep. 659;
In Re Wrey, (Eng. 1885) 30 Ch. Div. 507.

Jarman, on Wills, Vol. 1, page 816, comments upon these cases as follows:

> "So where a testator bequeathed to each of his daughters 1,800£, to be paid upon their respective days of marriage, subject to certain conditions in the will mentioned, together with interest from the time of his decease; Lord Glare, G. Ir., held that the legacies were vested and in *Vize* v. *Stoney,* Sir E. Sugden, C. Ir., so decided the same point. 'A legacy,' he said, 'cannot be more or less contingent; the law recognizes nothing between a contingent and a vested legacy.' Therefore, whatever the nature of the event, a gift of the intermediate interest has always the same effect. So also in *Re Wrey Stuart* v. *Wrey,*

> where a testatrix after certain specific bequests gave all the rest of her stocks and shares to her executors, 'upon trust to pay the dividends and interest thereof to my greatnephew G. until his marriage, and at the time of his marriage to hand over the stocks and shares to the said G.;' it was held by Kay, J., that this legacy was vested, and that G., who had attained twenty-one years but was unmarried, was entitled to have the stocks and shares comprised in the gift transferred to him."

This doctrine has been recognized in a long line of decisions in this State, among which are:

> *Fisher* v. *Johnson* (Ct. of Chan. 1884), 38 N. J. E. 46, 47;
> *Post* v. *Rivers* (Court of Chancery 1885), 40 N. J. E. 21;
> *Parker* v. *Glover* (Court of Chancery 1887), 42 N. J. E. 559;
> *Neilson* v. *Bishop* (Court of Chancery 1889), 45 N. J. E. 473;
> *Dusenberry* v. *Johnson* (N. J. Ct. of Chan. 1900), 59 N. J. E. 338.

In *Parker* v. *Glover, supra,* 42 N. J. E. 559, Chancellor Runyon said:

> "The gift in remainder is of the rents, interest, dividends and profits until the youngest of the children shall come of age, when the *corpus* is to be divided among them, share and share alike. The gift in remainder vested at the same time as the life interest—at the death of the testator."

In *Dusenberry* v. *Johnson, supra,* 59 N. J. E. 336, Vice Chancellor Pitney said:

> "I think it quite clear that the legacy vested in the two grandchildren, subject to be de-

vested in favor of their father in case they both died before attaining twenty-one years. The giving of the interest to the grandchildren during their minority shows that the testator, to use the language of Lord Mansfield in *Goss* v. *Nelson,* 1 Burr. 227, attached the contingency to the *time* of the payment, and not to the *substance* of the gift."

See also

Roper on Legacies, Vol. 1, page 572;
Hanson v. *Graham* (Eng. Chan. 1801), 6 Vesey 239.

(c) *The postponement of the distribution of the corpus was solely for the purpose of providing a fund for the maintenance of Darlington as a home for the beneficiaries.*

It clearly appears from the provisions of the 16th, 17th, 18th, 19th, 21st and 22nd sections of the will that the sole purpose which led the testator to postpone the distribution of the corpus of his residuary estate was to provide a fund for the upkeep and maintenance of Darlington as a residence for the persons to whom the residue of his estate was given. In the latter part of the 16th section he says:

"To the above named direct heirs, residuary legatees, and designated members of my family, I express my earnest desire that the Darlington Estate shall remain intact in the family and I stipulate that this must be so during the life of my wife, Isabel Morgan McMillin."

In the 17th Section he provides:

"The Trustees shall permit the Darlington Estate with all its comprehends to be used free of all rent and with absolute control by

> the family, with power, through my son, Marion, or other chosen head of the family, to operate the Farm, to purchase machinery and supplies, to buy and sell farm products, including live stock of all kinds, but not to convey real estate, nor to sell any objects of art or household furniture except with the approval of the Trustees.''

In the 18th Section he confers a power of sale upon his trustees expressly excluding therefrom the Darlington Estate during the life of his wife.

In the 19th Section he provides for the payment to his wife and his son Marion, of the sum of $50,000. per year for the maintenance of the family at Darlington to which reference has been made under the preceding Point.

In the 21st Section he provides that upon the decease of both his wife and his son the trust shall, except as hereinafter provided, cease and determine; that the trustees shall dispose by sale of all the undivisible property and make an equal division of all the assets between the beneficiaries named in Section 16 with the proviso ''that so long as a majority in number of the surviving members of the family (as named in Section 16) so desire the trust shall be continued.''

In the 22nd Section he provides that Darlington may be sold after the decease of his wife and before the decease of his son if such be the order of their decease if two trustees shall, for financial reasons, deem it advisable or if a majority of the remaining or surviving direct heirs and members of the family shall formally request the trustees to dispose by sale of the Darlington Estate. The last sentence of this Section is as follows:

> ''Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the Trustees to promptly divide up the divisible assets, sell the

remainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or devisees."

No doubt can be entertained but that the testator's sole purpose in postponing the distribution of the corpus was to provide for the upkeep and maintenance of Darlington. So long as Darlington was retained the trust was to continue. When Darlington should be sold the trust was to be terminated and the trust fund distributed.

The rule is well settled in this State that where the distribution is postponed to let in some other interest or for the benefit of the estate the gift will vest even though the will contains no words of gift except a direction to pay or to pay and divide. This rule applies with even greater force where the will contains words of immediate gift.

See

Post v. *Herbert's Executors* (Court of Errors and Appeals, 1876), 27 N. J. E. 540;

Howell v. *Gifford* (Court of Chancery, 1903), 64 N. J. E. 180;

Potter v. *Nixon* (Court of Chancery, 1913), 81 N. J. E. 338, 341, affirmed on opinion below, 82 N. J. E. 661;

Trenton Trust and Safe Dep. Co. v. *Moore* (Court of Chancery, 1914), 83 N. J. E. 584, 585, affirmed on opinion below, 84 N. J. E. 194;

Freund v. *Freund* (Court of Errors & Appeals, 1919), 91 N. J. E. 80;

Redmond v. *Gummer* (Court of Errors & Appeals, 1922, adopting opinion of Vice Chancellor Buchanan), 94 N. J. E. 216, 217.

The rule is well stated by Chief Justice Beasley, speaking for this court, in *Post* v. *Herbert's Executors,* 27 N. J. E. 540, at page 544.

> "But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested, notwithstanding, although the enjoyment is postponed.
>
> Now in the present case, it seems to me that the purpose of the testator in deferring the payment to the children of these legacies until the youngest should come of age, is perfectly manifest. It was to keep the family together and provide a home for all the children until the period of distribution. I am at a loss to perceive any other motive for this provision. The payment most evidently was not postponed on account of anything personal to the legatees. There were six children, and the eldest was over twenty-one and the youngest under six years of age when the testator died; so that the coming of age of the youngest was, as to the class, a disconnected event, which could not confer a personal qualification on them as individual legatees. Without looking for the intention in other parts of the will, I think, from this clause alone, the purpose to postpone the payment of these legacies, solely for the convenience of the estate, and to let in the interest deposited in the son-in-law, is unmistakably shown. It is seldom, indeed, that among the cases which have been adjudged, such intent has been so manifest. A large number of cases which exemplify this subject will be found in the ordinary text writers. *1 Roper on Leg.* 572; *Hawkins on Wills* 232; *1 Jarman on Wills* 763."

The learned Vice Chancellor, in holding that the estate was vested, relied on all three of the reasons above mentioned and also upon the provision of

paragraph 16 of the will that the interest which each of the "direct heirs" should take in the trusteed estate should be in all respects equal. He said: (Case, pp. 90, 91)

> "The estate was given, in language of express and immediate gift, to the trustees 'for the persons named in Section Sixteen,' and in equity the gift is deemed to be to the *cestui que* trust as though it had been made directly to them. *Neilson* v. *Bishop,* 45 N. J. Eq. 473; *Miller* v. *Worrall,* 59 N. J. Eq. 134. The postponement of the enjoyment of the corpus was not because of anything personal to the legatees. The intervention of the legal estate in the trustees was merely for the convenience of the estate, *i.e.,* for more advantageously handling the interests pending the trust, and the legacies vested at the death of the testator. *Post* v. *Herbert,* 27 N. J. Eq. 540. * * * The gift of the income in equal shares to the legatees until they should come into the principal in equal shares also marks the vesting of the estate. *Dusenberry* v. *Johnson,* 59 N. J. Eq. 336; *Fidelity-Union Trust Co.* v. *Rowland,* 4 Adv. Rep. 603. Another strong indication that the estate vested is the gift of an undivided sixth interest to the widow, though the testator knew she could not live to come into possession of the corpus. She would have been let in but for the trust for the maintenance of 'Darlington,' or had the trust been destructible in her life-time."

Counsel for the appellant insists that the gift was contingent because, as he says, it was conditioned upon the survival of the beneficiaries until the termination of the trust. He overlooks the fact, however, that the gift itself is absolute and that the provision for distribution to the heirs or devisees is found only in the testator's directions to the trustees with regard to the distribution of

the fund. Speaking of this portion of the will the learned Vice Chancellor said (Case, p. 92):

> "Here the testator dealt with the distribution of the corpus, not with the substance of the gift. * * * The testator intended, and it is clear, that the shares to the members of his family who could not or would not come into possession should pass to those who would *inherit* from them."

The cases cited by the appellant are readily distinguishable.

In *Teets* v. *Weise,* 47 N. J. L. 154, 156, the contingency was clearly a part of the gift itself, the language of the will being as follows:

> "and at her death I give and devise the same to her children * * * that may be living at the time of her death to the use and benefit of my said daughter during her natural life and from and after the decease of my said daughter Julian I do give and devise said farm to all her children * * * that may be living at her decease."

Under the facts present in *Hutchinson* v. *Exton,* 53 N. J. Eq. 688, it was unnecessary to decide whether the interest was vested or contingent as in either event the issue of the deceased child was entitled to the share of such child. It may be assumed, however, from the fact that the court stated that the case was governed by *Crane* v. *Bolles,* 4 Dick. Ch. Rep. 378, that the court was of the opinion that the interest was vested but subject to be divested by death before the period of distribution.

Appellant's whole argument rests upon the assumption that the contingency in the case at bar was annexed to the gift itself. We submit that the assumption cannot be supported and that the

claim that the gift was contingent, therefore, must fail.

The other bequests in the will shed no light on the meaning of the bequests under consideration.

Appellant's counsel also seeks to support his claim that the gift was contingent by reference to testator's bequests to collaterals which are found in the 2nd to 10th paragraphs of his will and to the spouses of his children and to his grandchildren which are found in the 13th and 14th paragraphs thereof. He argues that these bequests show that the testator intended to prefer those of his blood. We submit that none of these bequests shed any light upon the meaning of the portion of the will under construction.

Mr. Jarman's twenty-second general rule of construction, *2 Jarman on Wills,* 5th Edition, page 773, is as follows:

> "XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them."

This rule was cited with approval and followed by Chitty, J., in *Johnston* v. *Cockerill,* 26 L. R. Chan. Div. (1884) p. 545.

It is, we believe, apparent that there is nothing in common between the bequests above mentioned and the bequest of the residue. The former bequests are insignificant in amount as compared with the latter. The relationship of the beneficiaries thereof to the testator is more remote and of a different character but if this were

not true there is nothing in these bequests which supports counsel's argument, for it appears therefrom that the testator intended the bequests to take effect absolutely if the legatees were living at the time of his death. It cannot be inferred, from the fact that he expressed his purpose that the bequests should not take effect in the case of legatees who predeceased him, that he did not intend that this gift of the residue to his widow and children should not be effective unless they survived until the termination of the trust. This is particularly true since the testator made an immediately unconditional gift of the whole residue to them in trust, providing for the immediate payment of the income to them and only postponing the division of the corpus for the purpose of providing a home for them during the period prescribed by the will.

Furthermore, the fact that testator provided that the share of a beneficiary dying prior to the period of distribution should be paid to his heirs *or devisees* is a strong indication that the testator contemplated that such share might pass to persons not of his blood.

It so clearly appears from the will itself that the shares of the beneficiaries vested at testator's death that it seems unnecessary to refer to the rule of interpretation which is applicable in doubtful cases. This rule is stated by Chancellor Green in *Van Dyke's adm'r* v. *Vanderpool's adm'r,* (Court of Chancery, 1862), 14 N. J. Eq. 198, at page 207 as follows:

> "The general policy of the law and the rules of interpretation require that legacies in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent."

See also the following cases, which affirm the same rule:

Neilson v. *Bishop,* (Court of Chancery, 1889) 45 N. J. E. 473 at page 475;
Keen v. *Plume,* (Court of Chancery, 1913) 82 N. J. E. 526;
In Re Buzby, (Court of Errors and Appeals, 1922) 94 N. J. E. 151;
Kimble v. *White, supra,* (Court of Chancery, 1892) 50 N. J. E. 28, 31, affirmed on opinion below, 51 N. J. E. 638.

In the case last cited it is stated that this rule is particularly applicable to residuary bequests.

We respectfully submit that the learned Vice Chancellor properly held that the interest of the beneficiaries in the residuary estate vested upon the death of testator.

POINT II.

The Court of Chancery properly determined that the widow's share was payable to her residuary legatees.

The 22nd paragraph of the will, after providing that the Darlington Estate may be sold after the decease of the testator's widow and before the death of his son if two trustees shall for financial reasons deem it advisable or if a majority of the remaining or surviving direct heirs and members of the family shall so request, provides that

> "Upon the sale and disposition of the Darlington Estate, from, or for, whatever reason, it shall be the duty of the trustees to promptly divide up the divisable assets, sell the re-

> mainder and divide equally all the assets between the residuary legatees, share and share alike, or, if any be deceased, then to their heirs or divisees."

The 21st paragraph provides that the trust shall terminate upon the decease of both the testator's widow and his son Marion; that the trustees shall sell all the undivisable property except the testator's mausoleum, which the testator provides shall be and remain the property of his family as designated in Section Sixteen "and to their heirs" and shall make an equal division of all the assets between the persons named in Section Sixteen as direct heirs and members of the family if then living, share and share alike or to their heir or heirs or to the devisee of any deceased member or members. It also contains a provision that so long as a majority in number of the surviving members of the family so desire the trust shall be continued.

The Court of Chancery determined that the interest of a member who died during the continuance of the trust was divested but that it was intended to pass under the will to the persons to whom it would have gone had such member died seized and possessed of such interest. He held that the testator intended that devisees should take to the exclusion of heirs and that by the word "heirs" the testator intended the persons who would succeed to the estate of a person dying intestate. In reaching this result he relied in part upon the direction contained in the 16th paragraph of the will that all of the direct heirs are to be equal in every respect as to his or her interest in the trusteed estate. He said (Case, p. 92, l. 24, *et seq.*):

> "The testator's widow obviously could not, and his son Marion did not live to come

> into the enjoyment of the corpus, and their shares consequently devolve upon those who would take as 'devisees' under their last wills and testaments, or, in default of a will, to their 'heirs' by operation of law as though they had died possessed. The testator intended, and it is clear, that the shares to the members of his family who could not or would not come into possession should pass to those who would *inherit* from them. He conceived that 'devisees' supplanted 'heirs' and meant that the devisees should take to the exclusion of heirs, if there was a will, if not, the heirs were to take; not, as has been argued, that it was given without choice to either the one class or the other. This applies also to the income given to the heirs or devisees of a deceased legatee, consistent with the testator's intention that the share of each member of his family in the residuary estate should be equal to the share of the others."

The view expressed by the learned Vice Chancellor that the word "heirs" as used in the paragraph of the will in question includes distributees under the Statute of Distributions is well supported by authority.

See

Meeker v. *Forbes,* 84 N. J. Eq. 271, affirmed 86 N. J. Eq. 255;
Leavitt v. *Dunn,* 56 N. J. L. 309.

The word "heirs" as used in the 16th to 22nd paragraphs inclusive does not mean "issue."

Counsel for the appellant insists that the word "heirs" as used in the portion of the will under construction means "issue." He attempts to support his claim in this respect by reference to the 11th paragraph of the will in which the testator, after providing in the 5th to 10th paragraphs,

inclusive, for bequests to the children (or their heirs) of his brothers and sisters, states:

> "Gifts to the children (or their heirs) means to the direct issue of my brothers' or sisters' children, and not to issue beyond the second generation, or to others who by adoption or otherwise might be heirs at law, except" etc.

The contention is made that the above recited provision shows that the testator used the word "heirs" wherever it appears in his will as meaning "issue". We submit, however, that the only inference which can be drawn from this provision is exactly the contrary of that contended for by counsel. The provision of the eleventh paragraph above quoted shows that the testator understood the difference between "issue" and "heirs", and realized that when he used the word "heirs" as meaning "issue" it was necessary to so define it. It is significant, however, that he expressly restricted the arbitrary definition of the word "heirs" given in the eleventh paragraph of his will to the gifts to the children or their heirs made in the preceding paragraphs. The inference is irresistible that when he used the word "heirs" in other paragraphs he did not intend that the arbitrary definition contained in the eleventh paragraph should apply thereto.

The cases cited by appellant's counsel under Point III of his brief in support of the proposition that the same words employed in a particular sense in one part of a will must be held to have been used in the same sense in all other parts of the will, very properly restrict this rule to cases where there is nothing in the will which indicates a contrary intention. A contrary intention is clearly indicated in the will now under consideration, because the testator expressly re-

stricted the arbitrary definition to certain bequests in the will and showed by his language in that definition that he understood the difference between the word "issue" and the word "heirs" and recognized that the word "heirs" when not defined to mean "issue" had a different signification. Since he expressly provided that gifts to his brothers' and sisters' children or their heirs should not include any heirs except issue and should not include issue beyond the second generation and did not so limit the meaning of the word "heirs" as it elsewhere occurs in the will, we submit that he did not intend that it should be so limited.

We submit, therefore, that the testator, when he used the word "heirs" in paragraphs twentieth, twenty-first and twenty-second, did not mean issue but intended the persons who succeed to the property of a person dying intestate. It is significant that in the sixteenth paragraph, where he designates his direct heirs at law, he includes in that designation all of the persons who would have taken an interest in his estate had he died intestate.

Counsel suggests that the testator realized the incongruity in designating these persons as heirs because his wife, who was not an heir, was included and that he therefor further designated them as members of his family and residuary legatees. It is apparent, however, from the will that each of the designations "heirs at law," "members of my family" and "residuary legatees" applies to each of the persons therein named. To say that he would simply have designated them as heirs had his wife not been included, is to indulge in idle speculation not supported by anything contained in the will.

Counsel cites a number of cases in which the word "heirs" occurring in a will has been construed to mean "issue" or "children." These cases, however, are readily distinguishable because in every instance in which the word "heirs" was so construed the context clearly required such construction.

For example, in *Baldwin* v. *Taylor,* 37 N. J. E. 78, cited by appellant, the will provided:

> "In relation to the several gifts and devises to my children, in this, my last will and testament, it is my will, and I do direct, that if any of them shall die leaving heirs, their portion shall go to such heirs, if not, it shall be divided equally among my surviving children."

which clearly showed that the testator did not intend heirs at law, which would of course have included the brothers and sisters of the child so dying had he died without issue.

A similar devise was construed in *Dean* v. *Nutley,* 70 N. J. L. 217, which was in this language:

> "If my said daughter Elizabeth should die without lawful heirs, then her share to be equally divided between her brother and two sisters or their surviving heirs."

In *In Re Smisson,* 79 N. J. E. 233, the question as to what was meant in the will by the word "heirs" was not actually involved, for in that case the issue were in fact the heirs at law.

We submit that the true rule is that the court will not restrict the meaning of the word "heirs" to children or issue unless this is required by the will.

This rule is stated by Vice Chancellor Leaming in *Pennsylvania Company, &c.* v. *Riley,* 89 N. J. E. 252, at page 256, as follows:

> "Testatrix may have intended by the word 'heirs' to refer to issue or descendants, and in that manner may have sought to provide that in the event of the death of a residuary legatee, without issue, before the period for distribution, his or her share should be paid to the then survivors; but that construction of the language used by testatrix would attribute an artificial meaning to the word 'heirs' and would be essentially conjectural and without the support of substantial evidence of such actual intent."

The construction insisted upon by the appellant frustrates the testator's intention that each beneficiary should have an equal interest in the fund.

As is suggested in the appellant's brief, the testator evidently drew his own will without the assistance of counsel. It is inevitable that in a complicated will so drawn technical terms should be misused. In the 2nd and 9th paragraphs he uses the word "devise" as referring to a gift of personalty. In other parts of the will he uses the terms "devisees" and "legatees" interchangeably. In the 16th paragraph of his will, however, he clearly directed that all of his direct heirs, members of his family and residuary legatees "*are to be equal in every respect as to his or her interest in the Trusteed Estate.*" The meaning of this provision is clear and unequivocal and is not obscured by the use of any technical terms which the testator may have imperfectly understood. Any construction of the will which gives to these beneficiaries interests which are unequal is clearly contrary to the testator's expressed intentions.

The testator, at the time he drew his will, knew that his widow could not survive until the period of distribution. He also knew that his son Marion probably would not survive until such period and

he must have had in mind the possibility that others of his beneficiaries might also die during the continuance of the trust. Notwithstanding this he required that the interest of each of his beneficiaries in the trusteed estate should be equal in every respect to that of each other beneficiary.

Under the construction of the will contended for by the appellant both the widow and Marion would receive no interest in the trust estate and the respective interests of the other beneficiaries would likewise be unequal, for the appellant contends that the widow's share should be divided among Mrs. Traverso, Miss Maud McMillin and the appellant, thus excluding Marion, who survived the widow, and Mrs. Norton, one of the direct heirs, who is a daughter of the testator by a former marriage. If Marion be included in the division of the widow's share the inequality still remains even among the survivors for Mrs. Norton is still excluded.

Appellant's counsel argues that the testator intended to direct " equality stirpitally". In view of the fact that one of the beneficiaries was the testator's widow and the others were his children and that each was to be equal in every respect to the others, we feel assured that the testator had in mind individual equality rather than "equality stirpitally" but, as has above been seen, not even stirpital equality would occur under the will as construed by counsel for the appellant, for the children of the widow would each secure a larger share than Mrs. Norton.

If, as determined by the Court of Chancery, the testator intended that the interest of any beneficiary who should die prior to the period of distribution should pass to the persons who would have taken it had the beneficiary died possessed thereof it is obvious that the testator's require-

ment of equality is substantially complied with. Certainly the testator did not intend that the widow should take no share in the corpus of the trust estate and that her share should be divided among her three surviving children and the appellant. We think it equally certain that he did not intend that Marion should take no share in the corpus of the trust estate unless Darlington should be sold in his lifetime either by action of a majority of the trustees or a majority of the beneficiaries. If this be conceded it is dispositive of the construction contended for by the appellant.

POINT III.

The will may be construed so as not to divest the interest of any beneficiary dying prior to the period of distribution.

While, as has above been stated, the construction adopted by the Vice Chancellor carries out substantially the intent of the testator as to equality of interest among the beneficiaries of the residuary trust, it is not the only construction which meets with this requirement.

We submit that the will may be construed as vesting an absolute equal interest in each of the six beneficiaries at the date of testator's death which was not subject to be divested by the death of such beneficiaries prior to the period of distribution. Such a construction would produce not only substantial but absolute equality among all the beneficiaries. This is the construction which would undoubtedly have been adopted but for the provision in the will that the share of any deceased beneficiary should be distributed to his heirs or devisees.

The testator, who apparently drew his own will without the aid of counsel, evidently had in mind the layman's view that it would be a physical impossibility to pay income or distribute corpus to a deceased person. He knew that the property of a deceased person necessarily passes to his heirs or devisees, construing "heirs" to include next of kin and "devisees" to include legatees. The testator then having in mind that he had made an absolute and indefeasible gift both of income and corpus to each beneficiary, provided, in effect, that in the event of the death of any beneficiary prior to the period of distribution both income and corpus should be disposed of in the same manner as other property of which the deceased beneficiary died seized or possessed. The direction to pay to heirs or devisees may, therefore, be considered as having been added by the testator in order to make certain that each beneficiary should take an absolute interest in *praesenti* which, upon his death prior to the termination of the trust, should pass through him to the persons who would be entitled to his property whether he died testate or intestate.

In *Chasy* v. *Gowdy,* (Court of Chancery, 1887) 43 N. J. E. 95, the testator devised land to his wife for life and after her death to C and J *or their legal representatives.* It was held that the words "legal representatives" were words of limitation and that C and J took vested interests not subject to be divested. The court said at page 96:

> "I conclude that Clementine and John took the remainder, in fee, upon the death of their father, and that it is not liable to be divested upon the death of both or either prior 'to the death of the life-tenant.' In other words, I do not think the vesting of an absolute estate was at all dependent upon their surviving the

mother. I cannot suppose that the testator intended to limit the estate by the addition of the words 'or their legal representatives.' It certainly cannot be said that the testator meant to substitute for his children whomsoever, perchance, should be made the executor or administrator of their estates. No case has gone in that direction. Doubtless the testator used the words 'or to their legal representatives' in the sense of 'heirs'. The law seems to be settled to this effect.

In *Corbyn* v. *French,* 4 Ves. 418, there was a bequest to A for life, and after her death legacies were given to B or her proper representative, and to four other persons or their representatives or representative; one of the four died in the lifetime of the testator, and another survived him, but died during the lifetime of A. It was held that the former lapsed, but that the latter vested.

In the matter of *Porter's Trust,* 4 K. & J. 188, Vice-Chancellor Wood decided that, where there is a bequest to A for life and after his decease to B or 'his executors,' or to B or 'his personal representatives,' or a bequest to B, to be paid, so many months after the testator's decease, to him or 'his personal representatives,' it is simply another way of giving a vested interest to B upon the testator's own death; and if B die before the testator, the bequest shall lapse. Id. 197. Under this rule, both Clementine and John surviving the testator, the addition of the words 'or their legal representatives' to the gift cannot prevent its vesting.''

In *Corbyn* v. *French,* 4 Vesey 418, cited in *Chasy* v. *Gowdy,* the residue of testator's estate was bequeathed to testator's widow for her life and after her death part of it was given to Elizabeth Cooper or to her proper representative in case she should not be living at the widow's decease and other equal parts were given to John

Barker and three others or their representative or representatives. John Barker died in the testator's lifetime and Christopher Barker, one of the three others, survived the testator but predeceased the life tenant. The question was raised as to whom their legacies were payable. The court said:

> "I am very clearly of opinion, the legacy to Christopher Barker is good. This is stronger than the common case of a legacy to A. and his representatives. There those words are surplusage; for if the legatee dies before the day of payment, it would go to his representatives. But in this case there is a reason for inserting them. This is not an immediate legacy, but after the death of another person. There is therefor an interval in which the legatee might die; and though it vested, he might not live to receive it. That addition might be inserted to put it out of doubt; and must mean in case they die in the life of the testator's wife. I desire to be understood to determine it upon that circumstance, that there is a life intervening.
>
> As to the legacy to John Barker, I think, the question can hardly be raised upon this will; for see the preceding legacy to Elizabeth Cooper; would not that have lapsed, if Elizabeth Cooper had died in the life of the testator? Beyond all question it would. It is nothing more than saying, it shall go to her representatives, if she dies before his wife. As to the others, I am of opinion, it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial interest to them; and must as such vest in them, before it could be transmissible."

In *Re Porter's Trust,* 4 K. & J. 188, cited in *Chasy* v. *Gowdy,* the testator gave the residue of his estate to S for life and at his death gave a

legacy of £1,000 to S.P., or his heirs. S.P. died in the lifetime of the testator. It was held that the gift to the heirs was a substitutionary gift and that it did not lapse. The court, after citing a number of cases, including *Corbyn* v. *French,* said (italics ours):

> "So far the law is perfectly clear but the difficulty in the present case, and the same difficulty arose in *Corbyn* v. *French,* 4 Vesey 418, and in *Tidwell* v. *Ariel,* 3 Madd. 403, as well as in *Bone* v. *Cook* consists in determining whether the clause 'or his heirs' was intended as a class of substitution, whether by that clause the testatrix intended to substitute in the room of the legatee some other persons called 'his heirs' *or simply to denote that the legatee was to take a vested and transmissible interest in the legacy. The words 'or his heirs', superfluous in themselves being added by the testatrix ex abundanti cantela and as 'an anxious expression' as Chief Baron Alexander described it that the legatee was to take a transmissible interest if he survived her.*"

In *Tidwell* v. *Ariel,* 3 Madd. 403, an absolute bequest was made to testator's daughter, Dorothy, followed by other legacies to other persons, then a direction that all of the legacies should be paid at the end of a year after testator's decease "or to their several and respective heirs." Dorothy died in the lifetime of the testator and the bill was filed by the son and heir and by Dorothy's husband, the son contending that the legacy vested in him as heir and persona designata (not as next of kin or under the statute). The husband contended that the legacy to Dorothy, his late wife, vested in him as her administrator and personal representative. The Vice Chancellor said:

> "The legacy of £600 is in the first place given to Dorothy *simplicitor* as a mere per-

> sonal legacy failing by her death before the testator. The testator afterwards directs that his representative legacies shall be paid by his trustees at the end of one whole year next after his decease or to their several or respective heirs. It is said that this direction is inconsistent with a mere personal gift to Dorothy and is, therefore, the substitution of a new legatee in the event of her dying before the testator. If the direction had been that the respective legacies should at his death, be paid to the legatees or their respective heirs the inconsistency contended for would have existed: but the payment to a representative at the end of the year after the testator's death if the legatee be not then living, is not inconsistent with a personal gift to the legatee."

The bequest in this case to Dorothy was treated as an absolute bequest and it was held that it lapsed because of her death during the lifetime of the testator.

In *Bone* v. *Cook,* McCle. 168, 148 Eng. Reprint p. 70, testatrix gave the residue of her estate to trustees upon trust to pay the income to S. J. for life and after her decease to pay certain pecuniary legacies and then to pay the remaining corpus to certain persons in certain proportions and added

> "and in case of the death of any of said legatees before their legacies should become payable the legacy of each of them so dying should go to and be paid amongst his, her or their children and in case of such decease of any of such legatees without having a child the legacy should go to his or her executors or administrators as part of his or her personal estate."

One of the legatees predeceased the testatrix without issue. It was held that the legacy lapsed.

Alexander, L.C.B., speaking of the limitation over to the executors and administrators, said (italics ours):

> "I look upon this as nothing more than a legacy to a legatee *with an anxious expression that she should have it if she survived the* testatrix and if she should have children and should die before the testatrix that they should take it and if that conditional limitation (if I may use the expression on this occasion) does not happen, that is, if there are no children *that the case is to be considered the same as if there were no conditional limitation and that not happening here I consider the effect the same as if the legacy had been to a person and in case of his or her dying before it should become payable then to his or her executors or administrators.*"

It is submitted that the provision in this case that the share of income or corpus of any beneficiary who died before the period of distribution arrived should go to his heirs or devisees was to use the language of Lord Chief Baron Alexander in *Bone* v. *Clark, supra,* "added as an anxious expression" to indicate and make certain that the interest which these beneficiaries took in both income and corpus was a transmissible interest which, upon their death prior to the period of distribution would pass through them as their other property passed to their heirs or devisees.

As has above been suggested, this construction, which is in line with the principle underlying the decisions above cited, would result in absolute equality among the beneficiaries because each of them, from the date of the death of the testator, acquired an absolute interest in one-sixth of the residue which was not defeated or divested by the death of any of them prior to the time of distribution.

POINT IV.

If the provision for payment to heirs or devisees is not construed either as the Court of Chancery construed it or as suggested under Point III, it is void for uncertainty and each beneficiary takes an absolute interest.

In view of the care with which the will was drawn it must, we believe, be assumed that the testator, when he provided that the distributive share of a beneficiary dying during the continuance of the trust, should pass to his heirs or devisees, had in mind a very definite disposition of such share.

As stated by the learned Vice Chancellor

> "The will is evidently the product of a straight thinking mind, of unequivocal purpose, and whatever may be the primary legal import of the variety of expressions used, the testator's meaning is not obscure from the lay viewpoint, nor from the judicial standpoint if we apply the rules of construction to the development of his intention rather than try to square the will with the rules."

If he did not intend either that each beneficiary should take a vested interest in the trust estate which should not divest by the death of such beneficiary before the termination of the trust or that the interest of each beneficiary who should die during the continuance of the trust should pass to the persons to whom the property of such beneficiary would pass under his will or under the intestate laws then the testator failed to adequately express his purpose in the direction that the property should pass to the heirs or devisees for he did not state whether heirs should take in

preference to devisees or whether devisees should take in preference to heirs or whether all of the beneficiary's devisees should take equally or whether his residuary devisees should take to the exclusion of other devisees.

Counsel for the appellant concedes the difficulty of determining, under the construction which he seeks to place upon the will, what the testator intended by the use of this language. He contents himself with insisting that it is unnecessary to determine what was meant by the word "devisees" because Marion died intestate and the widow left issue her surviving. The difficulty, however, with this suggestion is that it ignores a fundamental rule for the construction of wills which is that every word must be considered and given some effect if possible. The will is to be construed in the light of the situation which the testator contemplated, not in the light of what actually transpired. There is no warrant for the assumption that heirs take in preference to devisees. In fact, as found by the Vice Chancellor, we believe that it was the testator's intention that devisees should take in preference to heirs but if this construction cannot be adopted and the direction that payment should be made to heirs or devisees is regarded as a substitutionary bequest, then we submit it is void for uncertainty. If the gift were to heirs only and its meaning were not controlled by other provisions in the will (as we believe it is) it might be held, as was decided in *In Re Porter's Trust,* 4 K. & J., 188, *supra,* that the testator intended heirs at law as to real estate, if any, and next of kin as to personality. The gift, however, if it is a substitionary gift, is not to the *heirs alone* of the beneficiary but to *his heirs or devisees,* and unless either the construction placed upon the will by the Court of

Chancery or the construction suggested under Point III hereof is adopted there is nothing to indicate whether heirs or devisees shall take.

In *Zabriskie* v. *Huyler,* 62 N. J. Eq. 697, the testatrix gave and devised the residue of her estate to her husband "to have and to hold the same unto him and to his heirs, executors, administrators and assigns forever." Vice Chancellor Stevenson, after stating that the words "heirs, executors, administrators and assigns" were words of limitation and were used to define the title and tenure of the devisees, said:

> "If the words to be construed were a part of the language employed to effect the devise and legacy instead of being a part of the language employed to define the title and tenure of the devisee and legatee, and we might substitute the word 'or' for the word 'and' at will, still it would seem that the gift over would be void for uncertainty. *Waite* v. *Templer,* 2 Sim. 525; *Gittings* v. *McDermott, supra; Kimble* v. *Story, supra.*
>
> This uncertainty is so apparent that it creates a very high degree of improbability that a testator could have any donative purpose beyond the legatee whom he names when he employs such language."

In *Pennsylvania Company, &c.* v. *Riley, supra,* the testatrix directed that a fund should be held in trust by her executor and the income therefrom equally divided between her two children, naming them, and that after their death the principal should be divided equally between her nine grandchildren, naming them, "or the survivors or heirs of them." The Court of Chancery held that the nine grandchildren took an absolute vested interest in the fund at the death of the testatrix, and that the words "or the survivors or heirs of

them" were so indefinite and uncertain in their meaning that they could not operate to prevent the interest from vesting absolutely in the grandchildren at testatrix's death. The court said in part:

> "Perhaps other more or less reasonable conjectures could be indulged as to the possible intent of testatrix in the use of this peculiar and almost meaningless language selected by her; but no suggestion has been made that appears to have the support of a forceful manifestation of a defined intent upon her part. In such circumstances the conclusion appears to be impelled that the language here under consideration cannot be properly given any defined force, which shall be operative to so restrict the several reversionary gifts that they may not be regarded as vested in right at the death of the testatrix."

In *Waite* v. *Templer, supra* (2 Sim. 525), testator gave a legacy to T or to his heirs, executors, administrators or assigns. T died in the testator's lifetime. It was held that the bequest over was void for uncertainty. The court, after citing cases, said:

> "These cases show that the word 'heir' when used in bequeathing personal estate may mean *persona designata* as heir, or that it may not mean so. But here there are four descriptions of persons mentioned. When the testator used the word 'assigns' he contemplated some person who might derive title by an act of the legatee; and when he used the word 'heir' he described a person who could not take by the act of the legatee. And to these two words the testator has added 'executors and administrators.' My opinion therefore is that the bequest over is totally void for uncertainty."

In *Kimball* v. *Story,* 108 Mass. 382, a testatrix disposed of the residue of her estate as follows:

> "All the rest of my estate, real, personal or mixed, of which I shall die seised and possessed, I give, devise and bequeath to my son, William B. F. Johnson, his heirs, executors, administrators and assigns."

William B. F. Johnson, the legatee, although mentioned in the will as the son of testatrix, was in fact her stepson. He predeceased the testatrix, and the question was whether his heirs, executors, administrators or assigns or any of them took the legacy as substituted legatees. The court by Gray, J., said in part: (Italics ours.)

> "The general rule, prevailing in equity as at law, that if a legatee dies after the making of the will and before the death of the testator, the legacy lapses, is not affected by the insertion, after the name of the legatee, of the words 'his heirs, executors, administrators and assigns,' unless a declaration that the legacy shall not lapse is superadded; for those words, according to their uniform and well established interpretation, only express the intention of the testator to pass the absolute property in the estate, real or personal, to the legatee; 'heirs, executors and administrators,' taking by representation only, cannot be entitled to anything to which the person whom they represent never had any title; *and when the word 'assigns' is also used, any other construction would make the bequest inconsistent and uncertain, inasmuch as 'assigns' could only be those to whom the legatee had conveyed in his lifetime, while 'heirs, executors and administrators' could take only by succession by reason of his death. Sibley* v. *Cook,* 3 Atk. 572. *Maybank* v. *Brooks,* 1 Bro. Ch. 84, *Gittings* v. *McDermott,* 2 Myl. & K. 69. *Shuttleworth* v. *Greaves,* 4 Myl. & Cr. 35. *In re Porter's Trust,* 4 Kay &

Johns. 188. *Ballard* v. *Ballard,* 18 Pick. 41. *Dickinson* v. *Purvis,* 8 S. & R. 71. *Wright* v. *Trustees of Methodist Episcopal Church,* Hoffm. Ch. 202. *Davis* v. *Taul,* 6 Dana, 51."

If, therefore, the provision that if any of the beneficiaries be deceased at the termination of the trust can be regarded as a gift over to heirs and devisees the gift fails for uncertainty and the first taker has an absolute fee.

Dusenberry v. *Johnson,* 59 N. J. E. 337, 339;
Drummond's Exr. v. *Drummond,* 26 N. J. E. 234, 237 and 238, bottom of page.
Graves v. *Cox,* 11 Vr. 40, 45;
Brazzalle v. *Diehm,* 86 N. J. L. 276, 280;
Michael v. *Minchin,* 90 N. J. L. 603;
McGill v. *Trust Co. of N. J.,* 94 N. J. E. 675.
1 Jarman on Wills, 783.

POINT V.

The intention of the testator that all of his beneficiaries are to be equal in every respect as to his or her interest in the trusteed estate is controlling.

It will, we believe, be conceded that the primary purpose in construing a will is to discover and give effect to the testator's intent. In the will under discussion it is clear, as has above been argued, that the testator intended that each of his legatees mentioned in the sixteenth paragraph should have an interest in the trust fund which would be equal in every respect to the interest of

each of the other of such legatees. This intention is so clearly expressed that there is no room for a difference of opinion concerning the testator's intent in this respect. It, therefore, constitutes a test for the soundness of any suggested construction of the will. If, under any such construction, the interest taken by the legatees in the trust fund is unequal, it is clear that such construction is not in accordance with the testators' intention as expressed in his will. The inequality which would arise under the construction contended for by appellant was not only inevitable but apparent at the time the will was executed.

The construction placed upon the will by the Court of Chancery accomplishes substantial equality and the construction suggested under Point III leads to absolute equality.

Both of these constructions of the will are in accord not only with the direction that the share of each should be equal to that of the other but with the immediate gift made in trust for the benefit of the "direct heirs" contained in the 17th paragraph of the will and also with the reason which led the testator to postpone the distribution of the corpus. As has above been suggested, the words "if then living" appearing in the twenty-first and twenty-second paragraphs of the will are not inconsistent with this view, for they refer merely to the physical act of dividing the corpus of the trust fund among the persons to whom it had been previously given and the trustees are directed to deliver the shares of deceased legattees to the persons who, in the laymen's view, would be entitled to the property of such deceased legatees, namely, their heirs or devisees.

As was suggested by Vice Chancellor Stevenson in *Hewitt* v. *Green,* 77 N. J. E. 345, the intention

of the testator should not be frustrated by giving to technical terms their technical meaning when it is evident that the testator did not so use them.

As was said by Chancellor McGill in *Dutton* v. *Pugh,* 45 N. J. E. 426, 431, affirmed on opinion below 46 N. J. E. 554:

> "The cardinal rule of testamentary construction is, that the testator's real intention, gathered from the entire will, shall govern the interpretation of that instrument, and all subordinate rules, which fix a meaning to forms of expression, must yield to that intention.
>
> "In *Post* v. *Herbert,* 12 C. E. Gr. 540, 543, Chief Justice Beasley, in speaking of such a subordinate rule of construction, says, that it is a 'mere judicial exposition of the natural meaning of a certain form of expression. It is not an artificial contrivance, which, when present, is to have a supreme effect, but is a rule simply because the phrases in question, considered intrinsically, and without qualification *ab extra,* import a definite testamentary purpose. The phraseology has received its accepted interpretation, because it is supposed that such interpretation will carry out the view of the testator. The consequence is, the rule is always subject to be modified or abrogated by the conditions of the case to which it is applied.' "

We respectfully submit that the clearly expressed intention of the testator to give to each of the persons named in paragraph 16 of the will an equal interest in the trust fund should not be overridden by any assumed desire on his part to prevent his residuary estate from ultimately going to those not of his blood or by any rigid adherence to the construction placed upon technical terms as used in other wills. We submit that this

intention will be frustrated unless the will is construed as the Court of Chancery construed it or as suggested under Point III hereof.

We respectfully submit that the decree of the Court of Chancery should be affirmed.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,
Solicitors for Bankers Trust Company, as one of the Executors of Isabel Morgan McMillin, Deceased.

JOSIAH STRYKER,
Of Counsel.

New Jersey Court of Errors and Appeals

Between UBALDO TRAVERSO, *et als.*, Complainants, and ESTELLE MCMILLIN TRAVERSO, *et als.*, Defendants.	On appeal from Chancery.

Brief on Behalf of Jane M. McMillin, Administratrix, &c., of Marion McMillin, and Jane M. McMillin, individually, and Margaret Clark McMillin, daughter of Jane M. McMillin and step-daughter of Marion McMillin.

There is no controversy concerning the facts.

They are set out in the Vice Chancellor's opinion (Case, p. 89). The litigation involves the true meaning of Sections 16 to 22 inclusive, of the will of Emerson McMillin, who died May 31, 1922, a resident of Mahwah, Bergen County. The Trustees under the will sought the guidance of the Court as to the disposition to be made of the shares given to the widow and Marion, the son.

The questions were:

First Question.

Was the gift to the widow vested absolutely, and is it payable to her executors, or it payable to her heirs-at-law, or next of kin, or to the residuary legatees under her will?

The Court of Chancery held the gift vested absolutely and should be distributed under the will of testator:

One-fourth to Estelle M. Traverso (daughter);

One-fourth to Maude McMillin (daughter);

One-fourth to Jane M. McMillin, administratrix of estate of deceased son, Marion (testator's son's widow);

One-fourth to trustees under will of testator's widow (Decree, p. 106).

Second Question.

Was the gift to testator's son Marion (who died after testator) vested absolutely, and is it payable to his widow and administratrix, or is it payable to his heirs-at-law, and next of kin?

The Court of Chancery held the gift vested absolutely, and should be paid to Jane M. McMillin, widow of Marion McMillin (Decree, p. 106).

Third Question.

Are the proceeds of sales of land to be treated as realty or personalty?

"Personalty" answered the Chancery Court (Case, p. 92, line 1).

By the construction adopted by the Court of Chancery, the six interests listed by testator in the Sixteenth Article of his will go as follows:

The widow's one-sixth share goes in accordance with her will.

The daughter Mary Norton's one-sixth share goes to her sons.

The daughter Estelle Traverso's one-sixth share goes to her.

The daughter Maude's one-sixth share goes to her.

The son Marion's one-sixth share goes to his widow.

The granddaughter Helen Isabel's one-sixth share goes to her.

By the construction contended for by the appellant granddaughter, the share of the widow would not go in accordance with her will, and the share of testator's son, Marion, would not go to his widow, but would be divided between the "issue" of testator.

The other persons who would profit by the contention of the appellant were not active in supporting her contention. (See Mr. Harding's statement, bottom of p. 75, and Mr. Hart's statement, top of p. 76).

POINT I.

The testator's intention was that the members of his family should be equal in every respect as to their several interests in the trust estate.

He says so specifically in the 16th Article of the will where he sets out by name those persons he denominates as his direct heirs-at-law and members of his family. The scheme of the trust is very simple. The will indicates that it was not prepared by a lawyer. It impresses one as the product of a vigorous, confident mind.

The opinion of the Vice Chancellor says (line 38, p. 89, to line 18, p. 90):

> "The testator evidently drew his own will, embodying a comprehensive and well rounded scheme of testamentary disposition, and no doubt felt that he had set down his wishes in such plain fashion that there could be no

> two notions as to its meaning. And were it not for the inept use of technical terms, of which, it seems, he had a conversational familiarity, much confusion would have been spared. The will is evidently the product of a straight thinking mind, of unequivocal purpose, and whatever may be the primary legal import of the variety of expressions used, the testator's meaning is not obscure from the lay viewpoint, nor from the judicial standpoint if we apply the rules of construction to the development of his intention rather than try to square the will with the rules. The cardinal rule is, the real intention of the testator, in whatever form it finds expression."

His purposes were perfectly clear. They are—to make equal division among the members of his family and next to hold the family together at Darlington as long as the family desired to remain together.

In the 16th Article he provided definitely that the Darlington Estate should remain intact in the family during the life of his wife, Isabel. The statement in brief for appellant, Point II, that words "if then living" occur in the 16th Article of the will is an error.

In the 21st Article he provided that the trust should cease on the death of his wife and son through "the trustees disposing by sale of all the indivisible property," provided, however, that so long as the majority of the surviving members of the family listed in Section 16, as he calls it, so desire, the trust should be continued. The Darlington Estate has been sold (Par. 13 of the Bill of Complaint).

In the 22nd Article he says that upon the sale and disposition of the Darlington Estate from or for whatever reason, it shall be the duty of the trustees to promptly divide up the divisible assets, sell the remainder and divide equally all the

assets between the residuary legatees share and share alike, or if any be deceased, then to their heirs or devisees. (Sic.) He did not know accurately the legal significance of the word "devisee" for example,—in the 11th Article of the will he speaks of "sums devised to the children."

Again, in the 20th Article he uses the word "devisee" although he is dealing with the division of income.

In Article 21 he uses the word "devisee" in the singular. No importance attaches to his use of the word "devisee" sometimes in the singular and again in the plural. The plain meaning of the phrases in which the words "devisee" or "devisees" occur is that deceased members' shares, if they died intestate, were to go in accordance with the laws affecting intestate estates, and that if they died testate in accordance with their wills. On what possible theory would this testator, penetrated as he was by the desire to perpetuate the family home, at least during the lives of his wife and son, and to deal equally with the members of his family, have been so indifferent as to the identity of the devisee and so solicitous that there should be only one devisee?

It is a strained construction, when viewed from the angle of testator's intention, which would cut off the widow of his son Marion in favor, for example, of his granddaughter, Helen Isabel, who, he points out in the 16th Article, inherited liberal sums from her father and from her mother.

By the 13th Article of his will he gave to Mrs. Jane M. McMillin $10,000, and to Margaret Clark McMillin, step-daughter of his son Marion, $10,000 also. One will search the will in vain to find any suggestion in its language or in its scheme of the desire to deprive the widow of Marion of Marion's share of the trust fund.

POINT II.

One-sixth of the trust estate (Article 21) upon Marion's death (January 25, 1924), intestate and without issue, went to his wife, Jane, as substituted donee by virtue of the will of Emerson McMillin.

The Court of Chancery held that upon the death of a legatee it vested in the substituted donee in his or her stead, citing *Crane* v. *Bolles* (Case, p. 91, lines 9-12).

In *Crane* v. *Bolles,* 49 N. J. Eq. 373, the testator directed divisions of money among his children from time to time after his death, provided that the issue of any child who might thereafter decease should receive the share to which its parent would be entitled if living, and the Court held that the parents respectively took vested estates in each of the sums to be divided subject to being defeated by their dying before distribution or payment of the respective sums, and upon the death of a parent his issue took by substitution for him a vested estate.

In citing *Meeker* v. *Forbes,* 84 N. J. Eq. 271-274, the Court of Chancery said (Case, p. 93, lines 20-27):

> "In Meeker *v.* Forbes, 84 N. J. Eq. 271, aff'd 86 N. J. Eq. 255, Vice Chancellor Stevens held that a substitutionary gift of personal property to the 'heirs at law' of a legatee who died before distribution without issue passed to his widow, and the ruling is dispositive of the claim of Marion's widow."

The third headnote of that decision is as follows:

> "3. Testator gave the income of his residuary estate to his wife for life and after her death in trust to divide the same between his nephews and nieces, and declared that in case

> any nephew or niece should die before the death of himself or wife the share of the deceased niece or nephew should be divided among his or her heirs-at-law, the same as would have been done if the niece or nephew had been paid his or her share from the estate. *Held* that, on the death of a niece in the lifetime of the wife, her heirs-at-law took under the will and not from the niece."

A later case on the same point is *Redmond* v. *Gummere*, 94 N. J. Eq. 216, where the Court of Errors affirmed on the opinion of Buchanan, V. C.

POINT III.

By reason of the testator's imperative direction to sell the Darlington Estate (Article 21) and distribute the assets, the Darlington Estate is considered, for the purposes of the succession, as personal property.

The Court of Chancery said as to this (Case, line 35, p. 91, to line 3, p. 92):

> "The testator's idea was that the division of the corpus should be in liquid assets, and to that end directed that all his real estate be sold for the purpose of distribution, and under well recognized principles the proceeds are deemed to be personal property. Cook's Exrs. *v.* Cook's Admrs., 20 N. J. Eq. 375; Baldwin *v.* Taylor, 37 N. J. Eq. 78."

Paragraph 13 of the bill (Case, p. 16) shows that the Darlington Estate was actually sold for $285,000 cash and $400,000 purchase money mortgage.

Article 22 of the will provides that upon sale of the Darlington property, the trustees *shall* divide up the divisible assets, sell the remainder, and divide the assets equally between the residuary legatees. If any be deceased, then to their heirs

or devisees (sic). This is an imperative direction to convert—not a discretionary authority.

Stevens, V. C., in *Meeker* v. *Forbes,* 84 N. J. Eq. 271, at page 276, quotes as follows:

> " 'Whenever,' says Chancellor Zabriskie, in *Wurts' Executors* v. *Paige,* 19 N. J. Eq. 375, '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 where he simply authorizes and empowers his executors to do so, 'the real property could not be considered as converted into personal property until actually sold.' "

See also,

> *Aitken* v. *Sharp,* 93 N. J. Eq. 336-346;
> *Welsh* v. *Crater,* 32 N. J. Eq. 177-179;
> *Fidelity Union Trust Co.* v. *Queen,* 131 Atl. Rep. 208;
> *Lippincott* v. *Purtell,* 131 Atl. Rep. 210.

POINT IV.

The words "or their heir or heirs and to the devisees of any deceased member" (Article 21) should be construed in this case as applicable to the widow of Marion.

As to this the Court below said (Case, p. 93, line 10 to line 35):

> "The subject-matter of the gift being personal property the word 'devisees' is referable to 'legatees,' and 'heirs' to those who take under the statute of distribution. The word 'heirs' when applied to the disposition of personal property has been uniformly held in this State to indicate distributees under the statute. In Leavitt *v.* Dunn, 56 N. J. L. 309, an insurance policy payable to the 'heirs' of the insured was held by the Court of Appeals to

include the widow. In Meeker *v.* Forbes, 84 N. J. Eq. 271, aff'd 86 N. J. Eq. 255, Vice Chancellor Stevens held that a substitutionary gift of personal property to the 'heirs-at-law' of a legatee who died before distribution without issue passed to his widow, and the ruling is dispositive of the claim of Marion's widow.

"The doctrine of these authorities is not criticised, but it is contended that the word 'heirs' was used in the sense of issue. This is based on the testator's supposed love of kin or 'pride of blood' and is said to be indicated in other parts of the will. The fact that he gave the share of his widow to her 'devisees' without restrictions as to kinship is a forceful denial."

In *Meeker* v. *Forbes,* 84 N. J. Eq. 271 (affirmed 86 Eq. 255), at p. 273, STEVENS, V. C., says:

"It is well settled that when the words 'heirs-at-law' are used by a testator in respect of personal property, they mean next of kin (Trenton Trust and Safe Deposit Co. *v.* Donnelly, 65 N. J. Eq. 120); not next of kin in the technical sense of nearest kinsmen, but in the sense of distributees under the statute of distributions, thus including the widow. Welsh *v.* Crater, 32 N. J. Eq. 180; on appeal 33 N. J. Eq. 362; Reen *v.* Wagner, 51 N. J. Eq. 1; Leavitt *v.* Dunn, 56 N. J. Law 310."

See also:

Throp v. *Throp,* 69 N. J. Eq. 530-532;
Edwards v. *Stults,* 128 Atl. Rep. 609;
Leavitt v. *Dunn,* 56 N. J. Law 309;
Barrett v. *Egbertson,* 92 N. J. Eq. 118, at p. 120.

Vice Chancellor BACKES said:

"In the last cited case (Leavitt *v.* Dunn), Mr. Justice DIXON pointed out the reason in the opinions delivered in these cases the phrase

> next of kin is frequently used by the judges as their synonym for the word 'heirs' in the disposition of personal property; but what they mean by the phrase is not merely the nearest kinsmen but the distributees under the statute including both the widow and those who by the statute may represent deceased kinsmen. This appears from the language of the learned Chancellors in the earliest and the latest of these decisions, that the 'next of kin are entitled to claim under such description (heirs) as the persons appointed by law to succeed to the personal property,' thus basing their title not on kinship but on the statute."

The statute of distribution in force at the time of the death of Emerson McMillin and his son, Marion, was as follows:

> "The whole surplusage of the goods, chattels and personal estate of which any person shall die intestate, shall be distributed in the manner following, that is to say:
>
> "II. In case there be no children nor any legal representative of them, then the whole of said estate shall be allotted to the husband or widow as the case may be, of the said intestate."
>
> Page 2629 Cum. Supp. Comp. Stat.,
> Subject No. 146-169.

Brief for appellant (p. 18, Paragraph 2) says the doctrine of the cases in which "heirs" has been construed to mean next of kin entitled to take under the statute, is not criticised. The argument is that in this will "heirs" means "issue" because

(a) that meaning can be gathered from the entire context of the will;

(b) testator has defined the meaning of "heirs" within the four corners of the will;

(c) his dominant purpose was to benefit only those of his blood.

(a) and (b) are general statements. We submit that the contrary is true.

(c) is clearly inaccurate unless the word "dominant" be justified by the fact that the $50,000 he gave to persons not of his own blood (*i. e.*, to the widow of Marion $10,000 and to Marion's step-daughter $10,000, etc., under the Thirteenth Clause of his will), was relatively not a great part of his estate. In other words, this dominant purpose is spelled out on the basis of the relation of $50,000 to the value of the entire estate, not on anything that the testator said in his will.

We submit that this conclusion of the Court below accords better with the disclosed purposes of the will, viz., that "the subject-matter of the gift being personal property, the word 'devisees' is referable to 'legatees' and 'heirs' to those who take under the statute of distribution."

The Vice-Chancellor also says (Case, p. 93, line 33): "The fact that he gave the share of his widow to her 'devisees' without restriction as to kinship, is a forceful denial to the theory of testator's 'pride of blood,' being a dominant purpose."

POINT V.

Those persons characterized as devisees in the will of testator's wife, Isabel, took a vested interest in one-sixth of the trust estate (Article 21) as substituted donees by virtue of the will of her husband, Emerson McMillin.

Margaret Clark McMillin, daughter of Mrs. Jane M. McMillin and step-daughter of Marion McMillin, and one of the residuary legatees and devisees of

Isabel McMillin under the fourth Article of her will, is such a substituted donee by virtue of the will of testator, Emerson McMillin.

The cases under Point II, as to substituted donee are applicable here.

POINT VI.

Testator's widow Isabel and son Marion took vested interests immediately upon the death of testator, Emerson.

The Court below said (Case, p. 90, line 33 to line 24, p. 91):

> "The estate was given, in language of express and immediate gift, to the trustees 'for the persons named in Section Sixteen,' and in equity the gift is deemed to be to the *cestui que* trust as though it had been made directly to them. Neilson *v.* Bishop, 45 N. J. Eq. 473; Miller *v.* Worrall, 59 N. J. Eq. 134. The postponement of the enjoyment of the corpus was not because of anything personal to the legatees. The intervention of the legal estate in the trustees was merely for the convenience of the estate, *i. e.*, for more advantageously handling the interests pending the trust, and the legacies vested at the death of the testator. Post *v.* Herbert, 27 N. J. Eq. 540. And upon the death of a legatee it vested in the substituted donee in his or her stead. Crane *v.* Bolles, 49 N. J. Eq. 373. The gift of the income in equal shares to the legatees until they should come into the principal in equal shares also marks the vesting of the estate. Dusenberry *v.* Johnson, 59 N. J. Eq. 336; Fidelity-Union Trust Co. *v.* Rowland, 4 Adv. Rep. 603. Another strong indication that the estate vested is the gift of an undivided sixth interest to the widow, though the testator knew she could not live to come into possession of the corpus. She would have been let in but for the trust for the maintenance of 'Darlington,' or had the trust been destructible in her lifetime."

In *Redmond* v. *Gummere,* 94 E. 216 (1922), the Court of Errors and Appeals said, at page 217:

> "The only words of gift to the five named as 'equitable remaindermen' are in the direction to pay and divide. Ordinarily the vesting of such gift would not take place until the arrival of the time for distribution, but where the time of payment is postponed only for the purpose of letting in a life interest, the remainder interests vest immediately on the death of the testator. Post *v.* Herbert, 27 N. J. Eq. 540; followed by a long line of subsequent cases, among the more recent of which may be mentioned Cranstoun *v.* Westendorf, *supra,* 91 N. J. Eq. at page 37; Freund *v.* Freund, 91 N. J. Eq. 80; Shepherd *v.* Davis, 91 N. J. Eq. 468, 471."

POINT VII.

The decree below should be affirmed.

Respectfully submitted,

ALBERT C. WALL,
Of Counsel with Jane M. McMillin, Administratrix, &c., and individually, and Margaret Clark McMillin.